IN THE SUPREME COURT OF FLORIDA

CASE NO.83-013

Dist. Court Csae No.93-2146

FREDERICK E. MELVIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

FREDERICK E. MELVIN,Pro-se
Glades Correctional Instution
500 Orange Avenue Circle
Belle Glade, Florida 33430

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OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

In the States Respondent's Brief at (3-5) The State leads this court to believe that the petitioner is appealing a denial from the United States Court of Appeals for the Eleventh Circuit, according to the state said appeal was denited December 23, 1993. This is totally incorrect!

The petitioner's appeal in the Eleventh Circuit Court of Appeals was never denited on December 23, 1993. The only document that has been denied is a MOTION FOR SANCTIONS ,December 15,1993,which the petitioner had filed in the 11th CIRCUIT , U.S. COURT OF APPEALS. See Exhibit (F) As is now evident, the state's position therein is frivalous and no denial of appeal exists realistically as stated by the state and misleading this honorable court.

However, petition was filed to this court for a WRIT OF HABEAS CORPUS, pursuant to Rule 9.030 F.R.A.P. Grounds for relief were challenging the illegality of the charging document or information. (11th JUDICIAL CIRCUIT OF FLORIDA, DADE COUNTY, FLORIDA. Petitioner asserted the information violated ART I sec.15 (a) , and the SIXTH Amendment ,FOURTEENTH Amendment of the U.S.C.A. ,United States Constitution.

II. The Circuit Court of the 11th Judicial Circuit of Florida , had no jurisdiction regarding said indictment or information as it was facially deficient,i.e. it was signed by an Assistant State Attorney contrary to Florida Law. FLORIDA STATE CONSTITUTION ART I sec 15(a) in addition to the SIXTH AND FOURTEENTH Amendments of the U.S. CONSTITUTION.

III. On June 14,1990, a Judgment was entered against the petitioner pursuant to the indictment aforementioned(an illegal document) which is in fact direct "fundamental error" thus the Judgment and Sentence subsequent to that prosecution must be vacated "in the interest of justice and jurisprudence" Petition for WRIT OF HABEAS CORPUS was denied without statement of any authority by this court on November 19,1990.

On January 14,1991, a petition was filed with the U.S. Supreme Court for a writ of certiorari. The grounds raised were as follows;

1. WHETHER THE INFORMATION SIGNED BY THE ASSISTANT STATE ATTORNEY IN VIOLATION OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION COULD STAND?

2. WHETHER THE SUPREME COURT OF FLORIDA COULD HAVE OR SHOULD HAVE DENIED THE PETITIONERS WRIT WITHOUT OPINION FILED OR SUPPORTIVE AUTHORITY STATED.

This writ of certiorari was also denied by the U.S. Supreme Court on February 19,1991, without stating any authority or opinion filed.

Petitioner sought relief through the District CVurts pursuant to 28 USC 2254, in th SOUTHERN DISTRICT OF FLORIDA. The HABEAS PETITIONED THE EXACT SAME ISSUES AS THE PREVIOUS WRITS.

1. On NOVEMBER 26,1991 the Magistrate's Report recommended independant review of the issues and the file of the case sub judice, and denied Jan.8,1992.

2. On January 22,1992, petitioner filed Motion for Rehearing which was denied and/or failed to be ruled upon by the District Court.

3. On September 9,1992, petitioner filed a petition for writ of mandamus. The Southern District COurt denied the Motion for rehearing.

4. Petitioner appealed to the 11th CIRCUIT COURT OF APPEALS OF THE UNITED STATES.

The state would lead this honorable court to believe otherwise , a non factual account has been proffered by the state in the eventes of the case sub judice.

1.Petitioner did not take direct appeal.

2.The petitioner has discovered the plea of no contest entered is attackable as it was an involuntary plea and seeks relief from this court in his quest for justice and excersize of his Constitutionally Protected Right to a fair and impartial trial in the case at bar.

3. Petitioner asserts ineffective assistance of counsel claim and seeks relief.

On April 2, 1993 petitioner filed petition for WRIT OF HABEAS CORPUS pursuant to Rule 9.030 F.R.A.P. ART V sec 3-4-5 (B) of the Constitution of FLORIDA. This was filed in the 11th Judicial Circuit Court in and for DADE COUNTY, FLORIDA.

On JULY 22,1993, the court denied the petition as entertained under 3.850 F.R.C.P.

On AUGUST 9,1993 petitioner filed NOTICE OF APPEAL of that ORDER.

On OCTOBER 26,1993 the court upheld the decision od the DCA per curiam affirmed. The court (DCA) cited as follows; NOVATON V STATE 610 So 2d 726 (Fla 3rd DCA-1992) review granted Case No 81-183 (Fla July14,1993)

On OCTOBER 29,1993, petitioner certified to the 3rd DCA the following question pursuant to rule 9.030 F.R.A.P. as a"QUESTION OF GREAT PUBLIC IMPORTANCE"

" DOES A DEFENDANT WHO KNOWINGLY ENTERED A PLEA AGREEMENT WAIVE AN OTHERWISE VIABLE ,,,,,, DOUBLE JEOPARDY CLAIM?"

Wherefore, the states Respondent's Brief at (3-5) is viod because it has no merits what so ever concerning petitioner's case which is now at bar before this court.

IN THE SUPREME COURT OF FLORIDA

Case No.83-013

Dist. Court Case No.93-2146

FREDERICK E. MELVIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

(I)

PETITIONER'S PLEA OF NO CONTEST WAS NOT ENTERED VOLUNTARILY AND WITH A FULL UNDERSTANDING OF THE CONSEQUENCES.

The State argues that the petitioner's plea was knowingly and voluntarily entered upon the advice of effective counsel.

In the case at bar, the petitioner plea could not have been entered voluntarily and with a full understanding of the consequences because neither the trial court, nor defense counsel, nor the State Attorney advised petitioner of the maximum possible sentence that he could be sentenced to for each offense,nor did they inform

petitioner of the elements of the crimes with which he was charged whether the facts of his case fits those elements, or whether the state had reasonable proof to obtain a conviction based on those elements at trial. Consequently, according to the state, a review of the plea colloquy in this case would refute each of petitioner's claims. (Respondent's Brief at 10-12). But, the case law,however, rebuts the state's arguement that the plea colloquy in this case would refute each of petitioner's claims. See United States V. Malcolm, 432 F.2d 809 (2d Cir. 1970), quoting Johnson V. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938): If a defendant's plea is not entered voluntarily and knowingly, it is a due process violation and the plea is void. McCarthy V. United States,394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed. 418 (1969). A plea which is a product of a defendant's incomprehension is void. Boykin V. Alabama,395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969).

Wherefore, for the reasons herein stated and in light of law the petitioner plea was not entered voluntarily and with a full understanding of the consequences and petitioner should be allowed to withdraw his plea and the parties placed in the positions they occupied immediately prior to the entry of the plea.

Petitioner requests to invoke his right to trial by jury.

INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL LEVEL

Petitioner asserts that the state has rather effectively presented "his" case for him.

In the state's response brief ,at page 10, referrence to HILL V. LOCKHART, 474 US 52, 106 S Ct 366, 88 LEd 2d 203(1985) adopting the STRICKLAND test, the petitioner states;

1. Counsel fell below the norm of professional standard by his failure to object to the "DOUBLE JEOPARDY" issue. Counsel knew the state had offered 15 years as a plea. Due to conflict of interest the plea was no longer available to the defendant/petitioner.

   The state renewed the plea offer at 30 years w/ 3years as a minimum mandatory sentence.

   Counsel advised that if the plea were not accepted the state would seek the death penalty.

   Such advice is error and should have been detected by a lawyer of counsel's alleged experience.

3. 701 F.R.C.P. (j) provides in part;
   "No plea of guilty ...shall be accepted by the court without first determining... the circumstances surrounding the plea reflect a full understanding of the significance of the plea and it's voluntariness".

Additionally the petitioner requested that trial counsel withdraw from the case because of his conflicts and question of mis dvice.

Petitioner asserts that an evidentiary hearing will bring forth this and other issues regarding ineffective assistance. If not for the erroneous advice of counsel the petitioner would NOT have pled.

EADY V STATE 604 So 2d 559(18 F Law Weekly D-1623

It would appear that the state would have this court believe that counsel has a lesser duty to the defendant than to one who enters a plea.

> In order to obtain relief"counsel" must show that there is a reasonable probability that he would not have pled guilty but for counsel's erroneous advice". HILL V. LOCKHART, supra

Obviously counsel never had to plea!Neither could he misadvise himself. The petitioner,however, asserts that he would have gone to trial and had stated his desire to do so ...to counsel.Coercion and threats of the death penalty were the factors used to coerce the plea.

Neither that standard nor the standard of Boykin v. Alabama, 395 U.S. 238, 242 - 43, 89 S.Ct. 1709, 23 L.ed.2d 274 (1969) was met in the present case. Florida Rules of Criminal Procedure 3.170(j) . As the court in Boykin pointed out, a guilty plea is not just a confession but is itself is a conviction. " Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."Id. 395 U.S. at 242 - 43. Therefore, a plea which is a product of a defendant's incomprehension is void. Eady, suprs, Montgomery v. State, 615 So.2d 226 (5 DCA). Such is the case [sub judice] and exactly on all fours. (Fear, Terror, inducements, subtle or blatant threats, etc.). Counsel informed petitioner that he, counsel new of the 15 years that the state had offered petitioner but do to conflict of interest in the case the 15 years was no longer available to petitioner and if petitioner wish to plead the offer was 30 years with a 3 year minimum mandatory, and if petitioner did not accept the state's offer of 30 years with a 3 year minimum mandatory the state would up grade petitioner's charge from second degree murder to first degree murder with the state's right to seek the imposition of the death penalty.

Robinson v. State, 373 So.2d 898 (Fla. 1979)

Lundqren v. State, 581 So.2d 206 (1 DCA 1991)

Bell v. State, 602 So.2d 693 (2 DCA 1992)

Middleton v. State, 603 So.2d 46 (1 DCA 1992)

Simmons v. State, 489 So.2d 43, 44 (4 DCA 1986)

Muschette v. State, 609 So.2d 630 (4 DCA 1992)

Perez v. State, 605 So.2d 163 (2 DCA 1992)

Colon v. State, 586 So.2d 1305 (2 DCA 1991)

In fear, the petitioner submitted and plead involuntarily as result.

Showing how a defendant was prejudiced or how the case would have turned out differently is usually a feat requiring extrasensory capabilities.

> **We do not think it is a sufficient showing of lack of prejudice that a defendant cannot prove in retrospect that, had he been properly advised, he would not have entered the plea. Such a burden, involving speculation after the fact by the defendant, the Rule 3.172 or the case law requires. The question is whether the defendant has been prejudiced in fact because the required information was erroneous.**
> Simmons v. State, 489 So.2d 43, 44 (4 DCA 1986).

2.) To demonstrate a reasonable probability that, but for counsel's errors (overt ommissions), the result would have been different is a misleading proffer by the state.

The petitioner, only need to show a likelihood of a different out come. Knight v. State, 394 So.2d 997 (Fla. 1981).

It is demonstrated in the states respondent's Brief at (11), citing Wofford v. Wainwright, 748 F.2d 1505, 1508 (11 Cir. 1984); and Walker v. Caldwell, 476 F.2d 213, 218 (5 Cir. 1973).

3. The trial court determined the plea to have been freely and voluntarily entered. In EDWARDS V GARRISON 529 F 2d 1374, it was held that ordinarily a defendant will not be permitted to deny the statement at time of entering a plea, unless he gives a reasonable explanation. CRAWFORD V U.S. 519 F2d 347,350,brought about the recognition that there may be confusion in the mind of a defendant's(statement) , when asked about a plea.(SEE EDWARDS at 1377) The defendant/appellants statement should not be held as a factor to deny the withdrawal of the plea in the case sub judice. Counsel's erroneous advice was the factor for which the defendant was coerced to answer in fear of a possible death penalty sanction.CORBITT V STATE 584 So 2d 213 (Fla 5th DCA 1991)

4. In WALTERS V. HARRIS, 460 F 2d 988 (4th CIR 1972) the Fourth Circuit Court of Appeals held and recognized as follows;

> Examination of the defendant alone will not always bring into the open a promise that has induced his guilty plea. It is well known that a defendant will sometimes deny the presence or existance of a bargain that has in fact occured. (Cites Omitted) out of fear that the truthful response would jeopardize the plea bargain".

5. Relying upon 3.171 (c) (2) F.R.C.P. the petitioner asserts that he was not advised of "all pertainent matters"Defendant's counsel had not ,in fact, performed or discharged his duty to client in the case sub judice and the plea should be withdrawn .

6. A knowing and voluntary plea is under mined by the ineffective assistance of counsel, because the plea " would not represent an informal waiver of the defendant's constitutional rights".BRADBURY V. WAINWRIGHT, 653 F 2d 1083,1087(5th CIR 1981), cited in ROGERS V. MAGGIO, 714 F 2d 35,37 (5th CIR 1983).

> The court in BRADBURY further stated;
> "When a guilty plea is entered it is defense counsel's duty to assist actually substantially, the defendant whether to plead guilty and.. to ascertain whether the plea is entered knowingly and voluntarily. Counsel must be familiar with the facts and the law in order to advise the defendant meaningfully of the options available....."

7. The district court, per curiam affirmed, the conviction and sentence in the case sub judice on the authority of Novaton V. State,610 So.2d 726 (Fla, 3d DCA 1992). Unlike NOVATON the petitionerin the case at bar did not waive the double jeopardy issues at the time of the plea.

Factually, the petitionerwas not even aware of double jeopardy issues as couhsel had failed to advise accordingly.

8. Id. See also HERRING V. ESTELLE,491 F.2d 125,128 (5th Cir.1974) ("And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimal level").

9. A defendant's allegation that his attorney misrepresented the consequences of a plea constitutes a sufficient ineffective assistance of counsel claim, if the defendant also alleges that the guilty plea would not have been entered but for his attorney's advise. RAMSEY V. STATE, 408 So.2d 675 (Fla. 1st DCA 1990); rev. den., 415 So.2d 1361 (Fla.1980); See: McCOY V. STATE, 598 So.2d 169(Fla.1st DCA 1992); SHAFFNER V. STATE,562 So.2d 430(Fla.1st DCA 1990); POPE V. STATE, 56 Fla. 81,47 So. 487 (1908). As noted by the late Honorable Justice Terrell:

> Under our form of government a supreme value is attached to human life. The law rightly prescribes exacting and sometimes tedious requirements to deprive one of it. There is a sound reason and a pertinent history behind all these requirements, and the fact that one whose life society is exacting has committed a heinous crime in no sense warrants any court in over-looking the laws mandate. If it may be overlooked in one case,it may be the case to windward in another, and then it ceases to perform the function for which created.

CASEY V. STATE, 116 Fla. 3, 156 So. 282,283(1934)."A judge should be liberal in the exercise of his discretion and allow withdraw of a plea of guilty where it is shown that the plea was based on a failure of communication or misunderstanding of the facts". BROWN V. STATE,245 So.2d 41(Fla.1971);EADY V. STATE, 604 So.2d 559(Fla.1st DCA 1992)

after remand (18 Fla. law Weekly D1623); BOYKIN V. ALABAMA, 395 U.S. 283, 242-43, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969); MUSCHETT V. STATE, 609 So.2d 630 (Fla. 4th DCA 1992); LUNDGREN V. STATE, 581 So.2d 206 (Fla. 1st DCA 1991); MIDDLETON V. STATE, 603 So.2d 46 (Fla. 1st DCA 1992).

In the context now presented before this honorable court the petitioner prays for relief in the speific request to be allowed to "withdraw his plea" as it was made involuntarily and without full and intelligent understanding of the consequences that were possibly to manifest as a result of his entering the plea at the time it was entered.

III

DOUBLE JEOPARDY

In the case at bar the petitioner could not have been charged with the two counts of unlawful possession of a firearm while engaged in a criminal offense, because he was also charged with second degree murder with a firearm in case No.90-3133, and in case No. 89-46022 petitioner was charged with attempted first degree murder with a firearm, to do so violates the Double Jeopardy clause of the United State Constitution and the State Constitution.See CLEVELAND V. STATE, 587 So. 2d 1145; CRUZ V. STATE, 593 So.2d 312,313(Fla.3d DCA 1992); DAVIS V. STATE, 590 So.2d 496 (Fla. 3d DCA 1991); McGAHEE V. STATE, 600 So.2d 9 (Fla. 3d DCA 1992); MULKEY V. STATE, 602 So.2d 991 (Fla.3d DCA 1992); FOSTER V. STATE, 596 So.2d 1099(Fla.5th DCA 1992); STATE V. McKINNON, 540 So.2d 111 (Fla.1989); BROWN V. STATE, 617 So.2d 744 (Fla.1st DCA 1993) and STATE V. BROWN, 19 Fla. Law Weekly S129 Supreme Court. Opinion filed March 17,1994.

Petitioner never should have been charged with these charges, the fact that trial counsel failed to object or move for dismissal on the grounds of double jeopardy (re:underlying offense etc) this further supports the petitioner's position in the fore going ineffective assistance of counsel claim.

The prohibition against double jeopardy applies where a defendant is charged twice for the same offense U.S.C.A. Amend (5), HUDGINGS V. WAINWRIGHT, 530 F. Supp. 944. This is to stop the state from making repeated attempts to convict an individual for an alleged offense, thereby subjecting him to live in a continuing state of anxiety. It also gives the state an opportunity to rehearse its presentation of proof and increases the risk of an erroneous conviction for one or more of the offense charged. GRADY V. CORBIN, 110 S.Ct. 2084.

In the case, sub judice, the petitioner was denied a fair impartial trial as a result of the use of this double jeopardy issue as man, pulative and coercive.

(1) It increased the risk of conviction (2) It increased the Guidlines Scoresheet total. (3) Violated bouble jeopardy clause and was use coercively by the state, with the manipulation of defense counsel's failure to note the issue and act, to intimidate and harass the petitioner to a state of anxiety and fear where upon he plea.(4) As result of this abuse of discretion by the state and the proseatual misconduct the

petitioner is now serving a disproportionate sentence. (5) Guidlines totals would differ drasticdly. (6) Sentence would be less punitive.

Wherefore, for the reasons herein stated and in light of the law the petitioner should be allowed to withdraw his plea and the multiplicitous convictions and sentences must be vacated.

IV

A PLEA OF GUILTY DOES NOT WAIVE THE DOUBLE JEOPARDY VIOLATION OF IMPOSING MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE, WHERE THE VIOLATION IS APPARENT ON THE FACE OF THE RECORD.

The state argues that the federal courts recognize only one exception to the rule that constitutional claims are waived by a plea of guilty, namely, when the claim challenges the state's power to bring the charge. Consequently, according to the state, the only double jeopardy claim which could be raised after a guilty plea is one involving an apparent successive prosecution. (Respondent's Brief at 12-16). The case law, however, is to the contrary. See United States v. Kaiser,893 F.2d 1300, 1302 (11th Cir. 1990); United States v. Pollen, 978 F.2d 78, 84 (3d Cir. 1992), cert. denied, ___U.S.____, 113 S.Ct.2332,124 L.Ed.2d 244(1993).cf.United States v. Broce,488 U.S.563,109 S.Ct.757,102 L.Ed.2d 927(1989).

It is true that Menna v. New York,423 U.S.61,96 S.Ct.241, 46 L.Ed.2d 195(1975), Blackledge v. Perry,417 U.S.21,94 S.Ct.2098, 40 L.Ed.2d 628(1974),and State v. Johnson,483 So.2d 420 (Fla.1986), involved claims challenging the government's right to prosecute the charge. However, the exception to the rule barring challenges to a conviction entered pursuant to a guilty plea is broader than that. As stated in United States v. Broce, "(t)here are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence".Broce,488 U.S.at 569,109 S.Ct.at 762.See also Bridges v. State,376 So.2d 233,233-34(Fla.1979).

Broce itself involved the double jeopardy protection against multiple punishments, and implicitly recognized that where a violation of that protection is apparent from the record existing to the time of the plea, that violation can be challenged despite the plea. In Broce, the Court found the particular double jeopardy claim raised in that case to be barred. However, this was not because the double jeopardy claim was one of multiple punishment, rather than of successive prosecutions. It was because, unlike in Blackledge and Menna,the claim could not be proved by relying on the indictments and the existing record,and required further evidentiary proceedings.Broce,488 U.S. at 575-76,109 S.Ct.at 765-66.

The right to challenge an apparent violation of the prohibition against multiple punishments for the same offense imposed in a single proceeding has been specifically recognized by the federal appellate courts. See United States v. Kaiser, 893 F.2d 1300,1302(11th Cir.1990); United States v. Pollen, 978 F.2d 78,84(3d Cir.1992).

In Kaiser, the defendant pleaded guilty to a four count tax indictment. He argued on appeal that the imposition of consecutive sentences violated the double jeopardy clause. The Eleventh Circuit Court of Appeals initially held that the claim was waived by the guilty plea. United States v. Kaiser,833 F.2d 1019 (11th Cir. 1987).However, the United States Supreme Court vacated that decisiion and remanded for further consideration in light of Broce. Kaiser v. United States, 489 U.S.1002,109 S.Ct. 1105,103 L.Ed.2d 170 (1989). Upon reconsideration, the

circuit court held that the guilty plea did not waive the right to raise the double jeopardy claim, because "(i)n contrast to Broce, the present case does not require this court to rely on evidence outside the guilty plea record to determine that Kaiser's punishment violated the Double Jeopardy Clause." Kaiser, 893 F.2d at 1303. The circuit court specifically noted that the principles involved in Menna and Blackledge were equally applicable to "the third prong of double jeopardy protection, i.e., the protection against multiple punishments for the same offense." Kaiser, 893 F.2d at 1302 n.2. In the court's words:

> We note that both Menna and Blackledge involved attempts by the government to bring a second prosecution against a defendant wao had already been convicted of the same offense. Thus, the language of those cases referred to a prohibition against a second prosecution. The instant case does not involve the double jeopardy protection against a second prosecution; rather, it involves the third prong of double jeopardy protection, i.e., the protection against multiple punishments for the same offense.* * *. However, the principle involved in Menna and Blackledge would seem to be equally applicable to this third prong of double jeopardy protection. Indeed Broce itself also involved the double jeopardy protection against multiple punishments.

Kaiser, 893 F.2d at 1302 n.2.

The Third Circuit Court of Appeals came to the same conclusion in United States V. Pollen, 978 F.2d 78, 84 (3d Cir. 1992). A defendant who pleads guilty to a criminal charge may assert a claim of multiple punishment in violation of the double jeopardy clause, if the violation is apparent on the face of the record existing at the time of the plea. Kaiser; Pollen; cf. Broce.

The state also suggests that this case involves no conflict with Kurtz V.State, 564 So.2d 519 (Fla. 2d DCA 1990), because, as the state correctly points out, the double jeopardy claim addressed in Kurtz was properly reserved for appeal, and the court was not faced with the problem of waiver. What Kurtz held was that a court could not enter an adjudication of guilt when it was barred by boudle jeopardy principles from impsoing a sentence. Kurtz at 521. However--as the Kurtz court recognized in citing Guardado V. State, 562 So.2d 696 (Fla. 3d DCA),review denied, 576 So.2d 287 (Fla.1990), as contrary authority, Kurtz at 521--that holding was directly contrary to the view that while a plea does not preclude a double jeopardy challenge to multiple sentences, it does preclude such challenges to multiple convictions. Under the then-prevailing view that a plea does not waive a double jeopardy challenge to multiple sentences for the same offense,e.g., Dukes V.State,

464 So.2d 582, 583 n.2 (Fla.2d DCA 1985); Guardado, the specific holding of Kurtz, namely, that an adjudication of guilt cannot be entered when a sentence could not be imposed for that offense, Kurtz at 521, necessarily implies that a plea does not waive a double jeopardy challenge to either the sentences or the convictions. This was the conclusion drawn from Kurtz by the Fourth District Court of Appeal in Arnold V. State, 578 So.2d 515 (Fla. 4th DCA 1991).[1]

As the district court of appeal's decision in this case recognizes, both Arnold and Kurtz are contrary to its holding that "a waiver of a Cleveland-violation with respect to multiple convitions takes place when the defendant voluntarily pleads guilty to the allegedly duplicitous charges in question." If Arnold and Kurtz are correct, and the legislature has not authorized courts to convict defendant's of offenses for which no sentence can be imposed, then it must follow that a successful challenge to multiplicitous sentences requires that the multiplicitous convictions be vacated as well.

Finally,the state requests that this Court reconsider its holding in Cleveland V. State, 587 So.2d 1145 (Fla.1991). (Respondent's Brief at 20-23). The same argument that the state now makes was considered and unanimously rejected in Cleveland. That decision, which put an end to the "enormous confusion" that had previously characterized this area of the law, see Jones V. Singletarry, 18 Fla. L. Weekly D1560 (Fla. 3d DCA July 6,1993), has been relied upon in numerous cases since then, without giving rise to any apparent difficulty, and is consistent with this Court's recent pronouncements in this area[2]. The state's request for reconsideration of Cleveland should be denied.

As set forth at length in petitioner's brief, the patent Cleveland violation in this case was neither waivable nor affirmatively waived, because trial counsel fail below the norm of proessional standard by his failure to object to the "DOUBLE JEOPARDY" issue, and the multiplitous convictions and sentences must be vacated.

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[1]The Arnold decision has been cited by the Second District Court of Appeal, although in the successive prosecution context, for the proposition that "(a) defendant does not waive an argument based on jeopardy, even if he has pled guilty." Watson V. State, 608 So.2d 512,513(Fla.2d DCA 1992).

[2]See State V. Chapman, 18 Fla. L. Weekly S499 (Fla. Sept.23,1993) (1988 amendment to section 775.021(4), Fla. Stat.,was only intended to limit the rule of lenity and overrule Carawan V. State, 515 So.2d 161 (Fla.1987), and did not require overturning this Court's decision in Houser V. State, 474 So.2d 1193 (Fla.1985), Which recognized that although DWI manslaughter and vehicular homicide were two separate crimes, the legislature did not intentd to punish a single homicide under two different statutes).

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

FREDERICK E. MELVIN,	**	
Appellant,	**	
vs.	**	CASE NO. 93-2146
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed October 26, 1993.

An Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court of Dade County, Leslie Rothenberg, Judge.

Frederick E. Melvin, in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before SCHWARTZ, C.J., and HUBBART and COPE, JJ.

PER CURIAM.

Affirmed on the authority of Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), review granted, No. 81,183 (Fla. July 14, 1993).

Exhibit (D)

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

FREDERICK E. MELVIN, **

Appellant, **

vs. ** CASE NO. 93-2146

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed December 14, 1993.

An Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County, Leslie Rothenberg, Judge.

Frederick E. Melvin, in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before SCHWARTZ, C.J., and HUBBART and COPE, JJ.

ON MOTION FOR CERTIFICATION

PER CURIAM.

We hereby certify to the Supreme Court that this case involves the same question, which is of great public importance, as the one involved in Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), review granted, 624 So. 2d 267 (Fla. 1993):

> Does a defendant, who knowingly entered into a plea agreement, thereby waive an otherwise viable double jeopardy claim.

Exhibit (E)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4357

FREDERICK E. MELVIN,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the
Southern District of Florida

O R D E R:

Appellant's motion for sanctions is denied.

UNITED STATES CIRCUIT JUDGE

Exhibit (F)

FREDERICK E. MELVIN,Pro-se
GLADES CORRECTIONAL INSTITUTION
500 ORANGE AVENUE CIRCLE
BELLE GLADE, FLORIDA 33430

SID J. WHITE.,CLERK
SUPREME COURT OF FLORIDA
500 S. DUVAL STREET
TALLAHASSEE, FLORIDA
32399-1927

RE: TO FREDERICK E. MELVIN,Pro-se

vs.
THE STATE OF FLORIDA
CASE NO.83,013

Dear Mr. White, on March 28,1994, petitioner filed his Reply Brief in this court, and on March 30,1994, petitioner received the above attached acknowledgement from this court ordering petitioner to amended his reply brief as the brief can not exceed 15 pages.

Mr. White, on this 8th day of April 1994, petitioner has indeed followed that order from this court,and has improved his reply brief by cuting it down to 15 pages. And have on this 8th, day of April 1994, send to this court the original reply brief of petitioner and 7 copies, and on this same 8th day of April 1994, petitioner send to the Respondent's 1 copy of petitioner's 15 page reply brief.

On this 8th, day of April 1994.

Sincerely Submitted,

Frederick E. Melvin
Frederick E.Melvin, Pro-se
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Belle Glade, Florida 33430