

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEROME SAFFOLD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC23-1749

Fourth District Court of Appeal Case No. 4D22-2399

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

 I. A MOTION TO WITHDRAW PLEA FILED UNDER RULE 3.170(F)
 SHOULD NOT BE CONSIDERED PRIOR TO RESENTENCING. 4

 1. Standard of Review 5

 2. Framework for Interpretation 5

 3. Dictionary Definition 7

 4. Contextual Clues in Rule 8

 5. Broader Context of Rules on Pleas 17

 II. EVEN IF PETITIONER’S MOTION TO WITHDRAW PLEA WAS
 TIMELY, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
 IN FINDING A LACK OF GOOD CAUSE..... 27

 III. ALTERNATIVELY, PETITIONER WAS BEFORE THE TRIAL
 COURT FOR A LIMITED RESENTENCING AND, AT MOST, COULD
 SEEK TO WITHDRAW ONLY PART OF HIS PLEA. 31

CONCLUSION 35

CERTIFICATE OF SERVICE..... 37

CERTIFICATE OF COMPLIANCE 37

TABLE OF AUTHORITIES

Cases

Altersberger, 216 So. 3d 621 (Fla. 2017)..... 12

Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d
1103 (Fla. 1996) 11

Bautista v. State, 863 So. 2d 1180 (Fla. 2003) 9

Bellamy v. State, 199 So. 3d 480 (Fla. 4th DCA 2016) 33

Boykin v. Alabama, 395 U.S. 238 (1969) 21

Camacho v. State, 164 So. 3d 45 (Fla. 2d DCA 2015)..... 34

Campbell v. State, 125 So. 3d 733 (Fla. 2013).. 5, 11, 12, 18, 19, 20,
23, 24, 26

Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) 29

Chipman v. State, 285 So. 3d 1005 (Fla. 2d DCA 2019) 16

Com. v. Muntz, 630 A. 2d 51 (Pa. Super. 1993) 25

Conage, 346 So. 2d 7

Conoge v. United States, 346 So. 3d 594 (Fla. 2022) 6

Denson v. State, 775 So. 2d 288 (Fla. 2000)..... 14

Ellis v. State, 816 So. 2d 759 (Fla. 4th DCA 2002) 33

Everett v. State, 54 So. 3d 464 (Fla. 2010) 22

Finch v. U.S., 433 U.S. 676 (1977) 21

| | |
|---|--------|
| <i>Garren v. State</i> , 976 So. 2d 1159 (Fla.5th DCA 2008) | 29 |
| <i>Golden v. State</i> , 84 So. 3d 396 (Fla. 1st DCA 2012) | 13 |
| <i>Griffin v. State</i> , 114 So. 3d 890 (Fla. 2013) | 12, 15 |
| <i>Grimmett v. State</i> , 152 P. 3d 306 (Utah 2007) | 14 |
| <i>Hampton v. State</i> , 299 So. 3d 617 (Fla. 1st DCA 2020) | 13 |
| <i>Harrell v. State</i> , 894 So. 2d 935 (Fla. 2005) | 19 |
| <i>Harrell v. State</i> , 895 So. 2d 935 (Fla. 2005) | 12 |
| <i>Hines v. State</i> , 817 So. 2d 964 (Fla. 2d DCA 2002) | 33 |
| <i>Hoskin v. State</i> , 341 So. 3d 443 (Fla. 3d DCA 2022) | 13 |
| <i>Humphrey v. State</i> , 329 So. 3d 160 (Fla. 4th DCA 2021)..... | 13 |
| <i>Hypes v. State</i> , 163 So. 3d 745 (Fla. 1st DCA 2015) | 27 |
| <i>Interest of K.M.</i> , 381 So. 3d 638 (Fla. 2d DCA 2024) | 11 |
| <i>Johnson v. State</i> , 834 So. 2d 384 (Fla. 2d DCA 2003) | 15 |
| <i>Jones v. State</i> , 966 So. 2d 319 (Fla. 2007) | 7 |
| <i>Lukehart v. State</i> , 70 So. 3d 503 (Fla. 2011) | 5 |
| <i>M.K. v. Department of Children & Families</i> , 380 So. 3d 469 (Fla. 4th DCA 2023)..... | 10 |
| <i>Maxwell v. State</i> , 383 So. 3d 892 (Fla. 1st DCA 2024) | 17 |
| <i>McCrae v. State</i> , 395 So. 2d 1145 (Fla. 1980)..... | 20 |
| <i>McInturff v. State</i> , 111 So. 3d 296 (Fla. 5th DCA 2013)..... | 12 |

| | |
|--|------------------|
| <i>North Carolina v. Alford</i> , 400 U.S. 25 (1970) | 21 |
| <i>Passino v. State</i> , 174 So. 3d 1055 (Fla. 4th DCA 2015)..... | 16, 17 |
| <i>Pierce v. State</i> , 875 So. 2d 726 (Fla. 4th DCA 2004)..... | 17 |
| <i>Reyes v. Kelly</i> , 224 So. 2d 303 (Fla. 1969)..... | 21 |
| <i>Richardson v. State</i> , 246 So. 2d 771 (Fla. 1971)..... | 11 |
| <i>Riddle v State</i> , 212 So. 2d 122 (Fla. 2d DCA 1968) | 9 |
| <i>Ripple v. CBS Corporation</i> , 2024 WL 2066 (Fla)..... | 6 |
| <i>Robinson v State</i> , 761 So. 2d 269 (Fla. 1999)..... | 28 |
| <i>Saffold v. State</i> , 310 So. 3d 55 (Fla. 4th DCA 2021)..... | 31, 32 |
| <i>Saffold v. State</i> , 374 So. 3d (Fla. 4th DCA 2023)..... | 4, 5, 22, 23, 31 |
| <i>Scott v. State</i> , 102 So. 3d 676 (Fla. 5th DCA 2012) | 23, 24 |
| <i>Scott v. State</i> , 331 So. 3d 297 (Fla. 2d DCA 2021)..... | 2, 4, 5 |
| <i>Shuler v. State</i> , 947 So. 2d 1259 (Fla. 5th DCA 2007) | 33, 34 |
| <i>Small v. State</i> , 144 So. 3d 656 (Fla. 2d DCA 2014) | 20 |
| <i>Snipes v. State</i> , 843 So. 2d 1043 (Fla. 2d DCA 2003)..... | 17 |
| <i>Somers v. United States</i> , 355 So. 3d 887..... | 8 |
| <i>State v. Collins</i> , 985 So. 2d 985 (Fla. 2008)..... | 22 |
| <i>State v. Frechette</i> , 687 A. 2d 628 (Maine 1996) | 14 |
| <i>State v. Grappin</i> , 472 So. 2d 760 (Fla. 1983)..... | 10 |
| <i>State v. Johnson</i> , 483 So. 2d 420 (Fla. 1986) | 20 |

| | |
|---|--------|
| <i>State v. Partlow</i> , 840 So. 2d 1040 (Fla. 2003) | 12 |
| <i>Steiger v. State</i> , 328 So. 3d 926 (Fla. 2021) | 22 |
| <i>Stewart v. State</i> , 315 So. 3d 756 (Fla. 4th DCA 2021)..... | 29 |
| <i>Tanzi v. State</i> , 964 So. 2d 106 (Fla. 2007)..... | 28 |
| <i>U.S. v. Baez</i> , 87 F. 3d (6th Cir. 1996) | 26 |
| <i>U.S. v. Barker</i> , 514 F. 2d 208 (D.C. 1975)..... | 26 |
| <i>U.S. v. Doyle</i> , 981 F. 2d 591 (5th Cir. 1992)..... | 26, 27 |
| <i>U.S. v. Navarro-Flores</i> , 628 F. 2d 1178 (9th Cir. 1980)..... | 26 |
| <i>Williams v. State</i> , 316 So. 2d 267 (Fla. 1975)..... | 11 |
| <i>Winters v. State</i> , 347 So. 3d 526 (Fla. 5th DCA 2022) | 23 |
| <i>Witt v. State</i> , 387 So. 2d 922 (Fla. 1980)..... | 19 |
| <i>Woodly v. State</i> , 937 So. 2d 193 (Fla. 1st DCA 2018)..... | 29 |
| <i>Zamora v. State</i> , 737 So. 2d 1165 (Fla. 2d DCA 1999) | 20 |

Statutes

| | |
|--|----|
| Section 909.13, Florida Statutes | 9 |
| Section 921.0021(2), Florida Statutes..... | 17 |

Rules

| | |
|---|--------------------------------|
| Rule 3.170(f), Florida Rules of Criminal Procedure | 7, 8, 9, 10, 11, 12, 14, 15 |
| Rule 3.170(l), Florida Rules of Criminal Procedure | 10, 11, 12, 13, 15, 16 |
| Rule 3.172(g), Florida Rules of Criminal Procedure..... | 19 |
| Rule 3.700(a), Florida Rules of Criminal Procedure | 18 |
| Rule 3.701(d)(2), Florida Rules of Criminal Procedure..... | 17 |
| Rule 3.850(a)(5), (b), Florida Rules of Criminal Procedure..... | 13 |
| Rule 9.140(b), Florida Rules of Appellate Procedure..... | 10, 11 |
| Rule 11(e), Federal Rules of Criminal Procedure | 26 |
| Other Authorities | |
| Standard 14-21, Pleas of Guilty, American Bar Association | |
| Standards for Criminal Justice (1997) | 24 |

PRELIMINARY STATEMENT

This brief will refer to Petitioner as such and to Respondent as such or as the State. The following symbols will be used: IB = Petitioner's Initial Brief on the Merits; AR = Appellate Record; TR = Trial Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's statements of the case and facts but make the following clarifications and additions:

The State in its sentencing memorandum before the original sentencing agreed that even if the trial court sentenced Petitioner to the life sentence that the State was seeking the minimum mandatory term should be twenty-five years (IB. 3; TR. 301). The trial court sentenced Petitioner to a twenty-five-year mandatory term as a Dangerous Sexual Felony Offender on Count I both in the original sentence and on remand (TR. 267-269, 681-683).

During the discussion on the motion to withdraw plea, Petitioner agreed that he chose to enter the plea, on which a twenty-five-year minimum mandatory term was stipulated and entered, because he thought the minimum mandatory term was supposed to be twenty-five years, but contended that he would not

have entered that plea if he had known that it was actually supposed to have been fifty years (TR. 766-767). The trial court rejected Petitioner's asserted reason for moving to withdraw his plea (TR. 765-767).

The trial court stated that it was not addressing the timeliness of the motion (TR. 770). However, on appeal, the Fourth District considered Petitioner's claim, relying on *Scott v. State*, 331 So. 3d 297, 302 (Fla. 2d DCA 2021), that the motion was properly filed (AR. 98-101). It concluded that Petitioner was not entitled to bring a motion to withdraw plea pursuant to rule 3.170(f) prior to court-ordered resentencing (AR. 101).

SUMMARY OF ARGUMENT

I. The Fourth District correctly determined that Petitioner could not bring a motion to withdraw plea pursuant to rule 3.170(f) before the court prior to resentencing. The term "a sentence" in rule 3.170(f) does not apply to resentencing. The rule does not indicate the possibility of resentencing within its scope. The placement of the rule in the rules of procedure evinces that it anticipates the original sentence.

The different standard of consideration set out in rule 3.170(1), guiding the withdraw of plea after sentencing, as well as the time limit of that rule, also suggest that the original sentence is the point of finality, as this Court has previously recognized. Petitioner's reading of the rule would lead to absurd results in which the prosecution might be prejudiced in its ability to prosecute a criminal trial because of the passing of time and loss of evidence. A defendant should not be permitted to delay a claim of good cause.

II. But even if Petitioner's motion to withdraw plea was timely, the trial court determined that Petitioner had failed to show good cause. It rejected Petitioner's claim that he would not have entered the plea had he known that the minimum mandatory term was fifty years. The record of the plea colloquy and subsequent sentencing supports this finding. The trial court did not abuse its discretion.

III. Finally, Petitioner would not have been permitted to withdraw his plea on all counts except for two. The Fourth District only remanded two counts for resentencing. Thus, should Petitioner be correct that Rule 3.170(f) authorized a motion to withdraw plea, it did so at most as to the counts for which he was being resentenced and not the others.

ARGUMENT

I. A MOTION TO WITHDRAW PLEA FILED UNDER RULE 3.170(F) SHOULD NOT BE CONSIDERED PRIOR TO RESENTENCING.

Petitioner argues that this Court should reject the Fourth District's analysis in *Saffold v. State*, 374 So. 3d at 836 (Fla. 4th DCA 2023)(*Saffold II*), finding that rule 3.170(f) does not permit a defendant to withdraw a plea prior to resentencing, and instead accept the reasoning in *Scott v. State*, 331 So. 3d 297, 301 (Fla. 2^d DCA 2021) that a resentence is a sentence under the rule. Respondent asserts that the Fourth District correctly rejected the reasoning in *Scott* and applied the rule in the manner contemplated by the rule.

The Fourth District rejected Petitioner's argument that the trial court erred in denying his motion to withdraw plea that he presented prior to resentencing because he should have been permitted to do so under rule 3.170(f) on motions filed any time before "a sentence." *Saffold II*, 374 So. 3d at 839. It disagreed with *Scott* that the use of the nonexclusive article "a" was meant to mean "any" because, it reasoned, if the drafter meant "any," then it should have used "any." *Id.*, citing *Scott*, 331 So. 3d at 301. It also

stressed the different standard and burden of proof used to address a motion to withdraw plea filed after sentencing under rule 3.170(l). *Id.* It pointed out that when a defendant is being resentenced, the defendant already knows the sentence he or she has received, placing the defendant in a different position than one who seeks withdrawal prior to sentencing *Id.*

The Fourth District also advanced that the *Scott* interpretation would likely prejudice the State because witnesses may not be available years after the original proceeding has concluded, noting that the motion in *Scott* was ten years after the original proceeding. *Id.* at 840. It emphasized the principle of finality recognized by this Court in *Campbell v. State*, 125 So. 3d 733 (Fla. 2013). *Id.*

1. Standard of Review

This Court reviews the construction of a procedural rule under the *de novo* standard. *See Lukehart v. State*, 70 So. 3d 503, 516 (Fla. 2011).

2. Framework for Interpretation

This Court has directed, “[w]e recently clarified that “[t]he plainness or ambiguity of statutory language is determined by

reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.” *Ripple v. CBS Corporation*, 2024 WL 2066 708 *4 (Fla), quoting *Conoge v. United States*, 346 So. 3d 594, 598 (Fla. 2022). In *Conoge*, this Court explained that courts must “exhaust ‘all the textual and structural clues’” that bear on the meaning of a disputed text. *Conoge*, 346 So. 3d at 598. This court expanded:

Viewed properly as rules of thumb or guides to interpretation, rather than inflexible rules, the traditional canons of statutory interpretation can aid the interpretive process from beginning to end (recognizing that some canons, like the rule of lenity, by their own terms come into play only after other interpretive tools have been exhausted). It would be a mistake to think that our law of statutory interpretation requires interpreters to make a threshold determination of whether a term has a “plain” or “clear” meaning in isolation, without considering the statutory context and without the aid of whatever canons might shed light on the interpretive issues in dispute.

Id.

In *Conoge*, this Court, in construing “purchase” in section 893.135(1), first looked at the meaning of the word “purchase” in the dictionary, followed by how the court had defined “sale” in the same chapter, and then considered how the remainder of the statute read. *Id.* at 600. Respondent follows this framework in its brief.

3. Dictionary Definition

The first step in determining the meaning of a statute is to examine its plain language. *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007). This Court typically looks at dictionaries for the best evidence of ordinary meaning. *Conage*, 346 So. 2d at 599.

Rule 3.170(f), Florida Rules of Criminal Procedure, on withdrawal of pleas, provides in pertinent part: “The court may in its discretion, and shall on good cause, at any time before *a sentence*, permit a plea of guilty or no contest to be withdrawn....” (emphasis supplied). This Court must consider what “a sentence” entails.

Merriam-Webster.com defines the transitive verb “sentence” to mean “to impose a sentence,” and in turn defines the noun “sentence” as a “judgment” “formally pronounced by a court or judge in a criminal proceeding and specifying the punishment to be inflicted upon the convict.” It separately defines the transitive verb “resentence” “as to impose a *new or revisited* sentence or punishment on (*someone who has already been sentenced for a crime*).” (emphasis supplied).

This Court has referred to Black’s Law Dictionary for guidance on how to interpret a term. *See Somers v. United States*, 355 So. 3d 887, 892 (Fla. 2022)(consulting the definition of “threat” in Black’s Law Dictionary). Black’s Law Dictionary, Tenth Edition, defines the noun “sentence” as “[t]he judgment that a court formally pronounces after finding a criminal defendant guilty.” It defines the noun “resentencing” as “[t]he act or an instance of imposing a *new or revised* sentence” and gives a derivation date for the term of 1878. (emphasis supplied).

From the review of dictionary-definitions, it is clear that “resentence” is defined separately from “sentence” and has been since before the time that rule 3.170 was adopted in 1968. Resentencing is a type of sentencing because it is a pronouncement, but it is different than an original sentencing in that it is new or revised. The use of “sentence” in rule 3.170(f) does not clearly include resentencing.

4. Contextual Clues in Rule

a. The use of articles preceding “sentence” do not suggest more than one sentencing or resentencing

The article “a” preceding the word “sentence” does not necessarily have any precise meaning in the rule. While this Court in *Bautista v. State*, 863 So. 2d 1180, 1188 n.9 (Fla. 2003) remarked that only when the article “a” is used in a statute is the statute unambiguous as to the unit of prosecution, as opposed to when the term “any” is used and an ambiguity of legislative intent arises, the rule at issue does not deal with units of prosecution.

Nonetheless, the Committee Notes indicate that when rule 3.170(f) was adopted in 1968 it was essentially the same as the language in section 909.13, Florida Statutes. The pertinent language in section 909.13, repealed in 1970, read the same as rule 3.170(f) except for its not including an article but instead providing, “The court may in its discretion, and shall on good cause, at any time before *sentence*...” (emphasis supplied). See *Riddle v State*, 212 So. 2d 122, 123 (Fla. 2d DCA 1968)(setting out the text of section 909.13). If anything, therefore, the inclusion of the article “a” in rule 3.170(f) limited the scope of “sentence” to a single event.

Regardless, had this Court intended for “a sentence” to include more than one sentence, such as a resentence, then it would have likely chosen the article “any.” The article “any,” unlike the article

“a,” does not necessarily exclude any part of plural activity. See *State v. Grappin*, 472 So. 2d 760, 763 (Fla. 1983).

The article “a” in the rule is not specific in its meaning. As such, it is not clear whether the use of “a sentence,” the pronouncement of punishment, refers only to the original pronouncement or if it encompasses new or revisited dispositions. What is clear is that sentence has a separate definition from resentence, and this court did not use “any” to define sentence, or include resentence along with sentence, in adopting the rule.

Rule 3.170(f) precedes the subsection on the withdraw of pleas after sentencing in the rule. Rule 3.170(l), Florida Rules of Criminal Procedure, on motions to withdraw plea after sentencing, reads: “A defendant who pleads guilty or nolo contendere without expressly reserving the right to appeal a legally dispositive issue may file a motion to withdraw plea within thirty days after rendition of *the sentence*, but only upon the grounds specified in Rule of Appellate Procedure 9.140(b)(92)(A)(ii)(a)-(e) except as provided by law.” (emphasis supplied).

“The” is a definitive article that gives meaning to a provision. See *M.K. v. Department of Children & Families*, 380 So. 3d 469, 473

(Fla. 4th DCA 2023)(concluding that a person who files for termination for parental rights is not a party to another petition filed by another person or agency because the controlling statute defines a “party” as “the petitioner”); *Interest of K.M.*, 381 So. 3d 638, 643 (Fla. 2d DCA 2024). The placement of “the” before “sentence” in subsection 3.170(l) suggests that it is referring to the sentence that was referenced by rule 3.170(f). Respondent maintains that “the sentence” in rule 3.170(l) refers to the original sentence anticipated by the plea and by rule 3.170(f).

b. Rule 3.170 sets out different standards for consideration depending on whether the motion is filed before or after the original sentence.

Rule 3.170(l) was added to rule 3.170 in 1997. See *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1105 (Fla. 1996). Although this subsection does not set out the standard of review on a motion to withdraw plea filed after sentencing, the requirement of manifest injustice or prejudice has been set forth in case law. See *Campbell*, 125 So. 3d 733, 735-736 (Fla. 2013), citing *Williams v. State*, 316 So. 2d 267, 275 (Fla. 1975) and *Richardson v. State*, 246 So. 2d 771, 774 (Fla. 1971). The reasons listed in rule 9.140(b), Florida Rules of Appellate Procedure,

are all that allow the granting of a motion to withdraw plea that is filed after sentencing. See Rule 3.170(1), Florida Rules of Criminal Procedure; *Harrell v. State*, 895 So. 2d 935, 939 n.2 (Fla. 2005).

On a motion to withdraw plea before a sentence, under rule 3.170(f), however, the trial court has broad discretion to permit withdrawal upon a showing of “good cause.” *Altersberger*, 216 So. 3d 621, 626-27 (Fla. 2017), citing *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003). Why, then, would a defendant be given a second chance to make a showing on a lesser standard on a resentencing?

c. Rule 3.170 sets out a distinct jurisdictional time-limit for filing a motion to withdraw plea after the original sentence.

A motion to withdraw plea prior to sentencing can be made at any time prior to the sentencing. See Rule 3.170(f), Florida Rules of Criminal Procedure; *McInturff v. State*, 111 So. 3d 296, 297 (Fla. 5th DCA 2013). Rule 3.170(l), though, only provides the defendant with a limited timeframe, thirty days, within which to seek a withdrawal of the plea. *Campbell*, 125 So. 3d at 740.

The failure to file a motion under rule 3.170(1) within the thirty days allowed waives any issue for appellate review, and the defendant is limited to post-conviction review. *Griffin v. State*, 114

So. 3d 890, 899 (Fla. 2013): *Golden v. State*, 84 So. 3d 396, 398 (Fla. 1st DCA 2012)(holding that the thirty-day limit under rule 3.170(1) is jurisdictional in nature). A defendant may then file a post-conviction motion within two years from the time that the judgment and sentence became final on a claim that his plea was involuntary. See Rule 3.850(a)(5), (b), Florida Rules of Criminal Procedure; *Hoskin v. State*, 341 So. 3d 443, 444 (Fla. 3d DCA 2022).

Why then would a defendant previously foreclosed from seeking to withdraw a plea after rendition of “the sentence” be permitted to seek to withdraw the plea simply because resentencing was ordered? Significantly, a resentencing after collateral proceedings does not “restart the clock” to raise new claims in a 3.850 motion about the original trial proceedings. See *Humphrey v. State*, 329 So. 3d 160 (Fla. 4th DCA 2021), relying on *Hampton v. State*, 299 So. 3d 617, 618 (Fla. 1st DCA 2020).

Should a defendant be able to resurrect the time-period before sentencing on resentencing, at least where the resentencing is before a new trial judge, the defendant might even attempt to restate claims already rejected in a motion to withdraw plea prior to

the original sentencing because Petitioner’s reading of the rule would not necessarily preclude successive claims. It is unlikely that this Court would have envisioned such a windfall when adopting rule 3.170. *See Denson v. State*, 775 So. 2d 288, 290 (Fla. 2000)(stating that fundamental error is not intended to circumvent the procedural bar of *res judicata*).

The Utah Supreme Court held that the resentencing did not reopen the filing window for a pre-sentence motion to withdraw plea. *Grimmett v. State*, 152 P. 3d 306, 311 (Utah 2007). The relevant provision, section 77-13-6(2)(b), Utah Code of Criminal Procedure, provides, in pertinent part, that a request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion “before sentence is announced.” *Id.* at 309.

The term “sentence” in the Utah statute, although without an article modifying it, is similar to the term “a sentence” in rule 3.170(f). The application of 3.170(f) should not extend beyond the original sentence. *See generally State v. Frechette*, 687 A. 2d 628, 629 (Maine 1996)(holding that the trial court appropriately denied the motion to withdraw filed before resentencing as untimely).

d. The only case cited by Petitioner to allow a motion to withdraw plea after resentencing dealt with a time-period within Petitioner's ability to seek post-conviction review under the same standard.

Contrary to Petitioner's assertion, this court in *Griffin v. State*, 114 So. 3d 890 (Fla. 2013) did not expressly or implicitly indicate that a defendant may file a motion to withdraw plea prior to resentencing under rule 3.170(f). Rather, this court distinguished *Johnson v. State*, 834 So. 2d 384 (Fla. 2d DCA 2003), on which the defendant relied in advancing that he should be permitted to have his motion to withdraw plea, filed years after sentencing, heard.

This Court in *Griffin* pointed out that the court in *Johnson* did not rely on the same provision that *Griffin* did because the court in *Johnson* appeared to have considered rule 3.170(f) whereas *Griffin* was relying on rule 3.170(1). *Griffin*, 114 So. 3d at 897-98. This Court did not consider the analysis in *Johnson* or address the merits of the *Johnson* court's conclusion. This Court in *Griffin* instead held that the trial court did not abuse its discretion in denying the 3.170(1) motion because it was filed beyond 30-days from the original sentence. *Id.* at 899.

The Second District in *Chipman v. State*, 285 So. 3d 1005 (Fla. 2d DCA 2019) also did not address the propriety of the motion to withdraw plea. Instead, it considered a jurisdictional issue. The defendant in *Chipman* was resentenced after a ruling that he did not qualify as a violent career criminal. The district court found that because the motion to withdraw plea filed pursuant to rule 3.170(l) was timely filed in the trial court, the trial court erred in dismissing the motion for lack of jurisdiction due to the appeal having been filed because the appeal should have been held in abeyance. *Chipman*, 285 So. 3d at 1007.

Respondent agrees that in *Passino v. State*, 174 So. 3d 1055 (Fla. 4th DCA 2015) the court passed on the issue of whether the motion under rule 3.170(1) could be heard after resentencing. However, the *Passino* court did not set out any analysis on how it arrived at this conclusion or on the meaning of “the sentence” under the rule.

The court in *Passino* was aware that the defendant still had time to seek post-conviction relief under the same post-sentencing standard of manifest injustice. The trial court in *Passino* had granted the defendant’s 3.800(b) motion asserting that his sentence

exceeded the statutory maximum. *Passino*, 174 So. 3d at 1056. The two-year limitations period for filing post-conviction begins to run when both the conviction and sentence become final. *Pierce v. State*, 875 So. 2d 726 (Fla. 4th DCA 2004), agreeing with *Snipes v. State*, 843 So. 2d 1043, 1043-44 (Fla. 2d DCA 2003).

5. Broader Context of Rules on Pleas

a. Rule 3.170 sets out pre-sentencing procedure.

Rule 3.170 is placed in the procedural rules in Section IV on “Arrest and Pleas,” between the sections “Preliminary Proceedings” and “Pretrial Motions and Defenses.” As such, rule 3.170 falls well before the sections on judgments and sentences, and, therefore, anticipates the original sentencing upon adjudication.

The plea process takes place at the beginning of a criminal matter, typically at an arraignment, but always before trial and preceding conviction. *Maxwell v. State*, 383 So. 3d 892, 895-96 (Fla. 1st DCA 2024). A judgment of conviction is entered on the plea. *Id.* at 896 (citing section 921.0021(2), Florida Statutes, on the definition of conviction). See also Rule 3.701(d)(2), Florida Rules of

Criminal Procedure (defining “conviction” under the sentencing guidelines as “a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of the sentence was suspended”).

The only rule defining “sentence” is contained within Section XVI of the rules and preceding the sections on execution of the sentence and post-conviction relief. Rule 3.700(a), Florida Rules of Criminal Procedure, provides that the term “sentence” means “the pronouncement by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty.”

b. Sentencing marks the point of finality in the plea process.

The rules on withdrawing a plea establish the original sentencing as the point in which the defendant is no longer allowed to withdraw a plea on a showing of good cause. After sentencing, the defendant is only permitted to withdraw a plea on a heightened standard of manifest injustice within a fixed period of time. In *Campbell*, this Court held that, if not previously formally accepted, as required under rule 3.172(g), sentencing results in the formal acceptance of the plea. *Campbell*, 125 So. 3d at 740-742. More significantly, this Court stated, “[f]urther, actual sentencing

adequately evidences the finality in the proceedings, the point at which litigation comes to an end and the right to withdraw a plea is revoked.” *Id.* at 742.

In *Campbell*, this Court considered whether a defendant may withdraw a guilty or nolo contendere plea after sentencing based solely on a trial court’s failure to formally accept the plea as set forth in rule 3.172(g), Florida Rules of Criminal Procedure, without showing manifest injustice or clear prejudice. *Campbell*, 125 So. 3d at 734. It decided that a defendant may not withdraw a plea under the pre-sentencing standard after sentencing. *Id.* at 742.

In so doing, this Court set out its discussion in *Harrell v. State*, 894 So. 2d 935 (Fla. 2005), in which it articulated, “[t]he criminal rules establish sentencing as a critical juncture in a defendant’s ability to withdraw a plea.” *Campbell*, 125 So. 3d at 739, quoting *Harrell*, 894 So. 2d at 938-39. This Court noted that in *Harrell* it had agreed that rule 3.172(g) and rule 3.170(f) only apply before sentencing. *Id.*

This Court noted its long-standing interest in finality in criminal proceedings and cited its discussion in *Witt v. State*, 387

So. 2d 922, 925 (Fla. 1980) on the pursuit of ending litigation. *Id.* at 742. It stated:

To allow the defendant to reverse the entire process that he knowingly and voluntarily agreed to eleven years earlier solely based on the trial judge's inadvertent failure to utter a simple phrase would seem to "cast a cloud of tentativeness over the criminal justice system." [citation omitted]. It also appears that reversing the Second District's holding would possibly cause substantial prejudice to the State in the consequent trial of the defendant, due to the expected decaying of evidence over time, along with the possible memory lapse of potential witnesses.

Campbell, 125 So. 3d at 742.

"[J]eopardy attaches once a trial court accepts a defendant's plea." *Small v. State*, 144 So. 3d 656, 657-58 (Fla. 2d DCA 2014)(quoting *Zamora v. State*, 737 So. 2d 1165, 1166 (Fla. 2d DCA 1999) and holding that the trial court erred in insisting on withdrawing the defendant's plea over the defendant's objection after the plea had been accepted by the court). *See also State v. Johnson*, 483 So. 2d 420, 422 (Fla. 1986)(recognizing concession that jeopardy attaches when the trial judge accepts a plea of nolo contendere). Once the trial court accepts the plea of guilty, the only remaining step is the formal entry of judgment and sentence. *McCrae v. State*, 395 So. 2d 1145, 1154 (Fla. 1980).

This Court has referred to a plea of guilty as having the effect of a jury verdict. *Reyes v. Kelly*, 224 So. 2d 303, 306 (Fla. 1969)(holding that the state attorney did not have the power to enter a nolle prosequi and present the murder charge anew to the grand jury after the trial court acted in acceptance of the defendant's plea). The acceptance of the plea places the defendant in jeopardy. *Id.* A plea of guilty is itself a conviction. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). *See also Finch v. U.S.*, 433 U.S. 676, 677 (1977)("Absent a plea of guilty or nolo contendere [citation omitted], a verdict or general finding of guilty by the trial court is a necessary predicate to conviction."). As far as punishment is concerned, a plea of nolo contendere is the same as a plea of guilty as it represents consent to be punished. *North Carolina v. Alford*, 400 U.S. 25, 35-36 n.8 (1970).

Significantly, a defendant is not permitted a new trial as part of the resentencing process. Why, then, would a defendant be permitted to withdraw a plea on which conviction is based as part of the resentencing?

Petitioner's emphases on the lack of finality in a conviction and sentence until after the direct appeal process is concluded, and

on the resentencing constituting an entirely new proceeding, miss the point of this Court's observation in *Campbell* on the need to end litigation. The fact of the conviction remains untouched when a defendant proceeds back to the trial court only on an order of resentencing.

Additionally, although the resentencing is a *de novo* proceeding, see *State v. Collins*, 985 So. 2d 985 (Fla. 2008), the procedural history still includes a prior, original sentencing. As the Fourth District noted in *Saffold II*, Petitioner could have raised the very same claim before and after the original sentencing. *Saffold II*, 374 So. 3d 838 n.1.

Under other circumstances, when a defendant has had an opportunity to raise an issue but did not, then the defendant waived that issue. See, e.g., *Steiger v. State*, 328 So. 3d 926, 928-929 (Fla. 2021)(recognizing that the failure to move for a judgment of acquittal waived the issue in the case and holding that the any claim of ineffective assistance of counsel was waived because it was not previously asserted); *Everett v. State*, 54 So. 3d 464, 488 (Fla. 2010)(stating that a defendant may not raise a claim in a postconviction motion that could have, and should have, been

raised on direct appeal or in a prior postconviction motion); *Winters v. State*, 347 So. 3d 526, 527 (Fla. 5th DCA 2022)(holding in an appeal from the denial of a post-conviction relief motion that the issue could have been raised on direct appeal and, therefore, was procedurally barred); *Scott v. State*, 102 So. 3d 676, 678 (Fla. 5th DCA 2012)(holding that the failure to file a motion to dismiss the information filed by the statewide prosecutor as without authority waive the issue). Although manifest injustice might be an exception to waiver, Petitioner’s claim is that he should have been given a second opportunity to show good cause.

On its decision that the sentencing marks the point of finality, this Court reasoned in *Campbell* that to hold otherwise would lead to absurd results if the State or the tribunal sought to withdraw after the defendant had already partially performed his or her duties under a plea agreement. *Campbell*, 125 So. 3d at 741. As noted in *Saffold II*, it would also lead to absurd results should the State suddenly be forced to prosecute a case years after the plea was accepted.

Under Petitioner’s broad interpretation of the word “sentence” in rule 3.170, a defendant could conceivably have his or her

sentence vacated for resentencing on a rule 3.800(a) motion, or on a 3.850 motion based on newly discovered evidence or a change in law, like in *Scott*, years after the original plea and sentence. Witnesses might not be available any longer or able to remember details, and evidence might be destroyed.

Courts have an interest in considering possible prejudice to the State. Standard 14-21, Pleas of Guilty, American Bar Association Standards for Criminal Justice (1997), includes consideration of whether there is any prejudice to the prosecution caused by reliance on the defendant's plea for a withdrawal prior to sentencing and on whether a motion was filed with the exercise of due diligence for motions filed after sentencing.

This Court in *Campbell* pointed to the standard in the approved American Bar Association draft in 1968, which read in part, “[b]efore sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.” *Campbell*, 125 So. 3d at 736 n.6.

c. Courts are concerned with delay in the defendant's pursuing a motion to withdraw plea.

The Fourth District in *Saffold II* recognized that prior to resentencing, a defendant is already aware of the type of sentence that might be imposed on a plea. In *Com. v. Muntz*, 630 A. 2d 51 (Pa. Super. 1993), the court likewise observed, “[h]is delay in presenting his request until after sentence was imposed suggests that appellant was testing the sentencing process.” *Muntz*, 630 A. 2d at 54.

In *Muntz*, the court rejected the defendant’s claim that he should have his motion to withdraw plea filed before resentencing considered under the pre-sentencing standard of “fair and just reason.” *Muntz*, 630 A. 2d at 53-54. The court examined language in the procedural rule that provided, “[a]t any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.” *Id.* at 53 n.4. The court in *Muntz* explained that the defendant’s filing the motion before resentencing did not negate the fact that he failed to move to withdraw his plea prior to the original sentencing. *Id.* at 54.

Federal courts have also placed emphasis on a defendant's delay in seeking withdrawal of a plea.¹ See, e.g., *U.S. v. Baez*, 87 F. 3d 305, 808 (6th Cir. 1996)(stating that in deciding whether to permit a plea, the court may consider the delay in filing the motion to withdraw plea); *U.S. v. Navarro-Flores*, 628 F. 2d 1178, 1184 (9th Cir. 1980)(remarking that the district court may have thought that the defendant sought withdrawal for a purpose other than that avowed because he waited to raise the claim until after learning of his co-defendant's sentence); *U.S. v. Barker*, 514 F. 2d 208, 222 (D.C. 1975)("[I]f the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force."[internal citations omitted]).

In *U.S. v. Doyle*, 981 F. 2d 591 (5th Cir. 1992), the First Circuit observed:

Because the time of a defendant's attempted plea withdrawal is highly probative of motive, close scrutiny of the chronology is important in adjudicating whether

¹ Federal rule 11(e), Federal Rules of Criminal Procedure, expressly states that a plea cannot be withdrawn after sentencing. *Campbell*, 125 So. 3d at 742 n.9. Thus, the federal courts look at concerns such as delay in the presentation of defenses. See, e.g., *U.S. v. Barker*, 514 F. 2d 208, 221 (D.C. 1975)

retraction is fair and just. While an immediate change of heart may well lend considerable force to a plea withdrawal request, a long interval between the plea and the request often weakens any claim that the plea was entered in confusion or under false pretenses. [citations omitted]. Put another way, excessive delay saps strength from any proffered reason for withdrawal. [citation omitted]. Here, appellant's timing [seven-month error] belies his rationale.

Doyle, 981 F. 2d at 595.

Here, Petitioner could have raised the same claim prior to the original sentencing that he did prior to resentencing. The Fourth District appropriately concluded that he should not be able to raise the claim, knowing that he had already received a life sentence with a twenty-five-year minimum mandatory, on a low-level showing of good cause.

II. EVEN IF PETITIONER'S MOTION TO WITHDRAW PLEA WAS TIMELY, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING A LACK OF GOOD CAUSE.

Respondent does not dispute that when a defendant appropriately and timely files a motion to withdraw plea and shows good cause, such as his acting under misapprehension or ignorance of the minimum mandatory to be imposed, that negatively impacted the defendant, then the trial court may grant the motion rather than accept a remedy fashioned by the State. *See Hypes v. State*, 163 So. 3d 745, 747 (Fla. 1st DCA 2015). However, in this case,

unlike *Hypes*, in which the motion was filed prior to the original sentencing, the motion was neither appropriate nor timely filed.

Moreover, Petitioner failed to show good cause. *See Robinson v State*, 761 So. 2d 269, 274 (Fla. 1999)(stating that mere allegations are not enough and that the defense must offer proof that the plea was not voluntarily entered). Despite any mistake by the prosecution in stating the required minimum mandatory term, Appellant never suffered any prejudice because he was originally sentenced to a lower minimum mandatory term and the State agreed on resentencing, prior to the imposition of any higher term, that Appellant should continue to be subject to the lower minimum mandatory term of twenty-five years.

Only when a defendant shows good cause is a trial court required to grant a motion to withdraw a plea filed under rule 3.170(f). *Tanzi v. State*, 964 So. 2d 106, 113-14 (Fla. 2007). A defendant shows good cause to withdraw a guilty plea when he establishes that the plea is infected by misapprehension, undue persuasion, ignorance, or was entered by one not competent to know its consequences or that it was otherwise involuntary, or that

the ends of justice would be served by withdrawal. *Garren v. State*, 976 So. 2d 1159, 1161 (Fla.5th DCA 2008).

A ruling on a motion to withdraw plea is reviewed for an abuse of discretion. *Stewart v. State*, 315 So. 3d 756, 758 (Fla. 4th DCA 2021). Below, the trial court denied Petitioner's motion on the merits and expressly stated that it was not addressing the timeliness of the motion (TR. 770). The trial court's ruling was not an abuse of discretion because it cannot be said that no other reasonable judge would have reached the same conclusion. See *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)(setting out standard for abuse of discretion).

The trial court did not accept Petitioner's claim that if he knew that he was facing a fifty-year minimum mandatory term he would not have entered the plea (TR. 765-767). The trial court's decision is supported by competent, substantial evidence.

The record conclusively refuted Petitioner's claim that he would have gone to trial had he thought that the minimum mandatory term was fifty years in prison. See *Woodly v. State*, 937 So. 2d 193, 196 (Fla. 1st DCA 2018)(court held that no hearing is required where allegations are conclusively refuted by the record).

Petitioner knew that he was facing fifty years at the bottom of the guidelines (TR. 511, 524). In the plea colloquy, the trial court also informed Petitioner that he was facing a twenty-five-year minimum mandatory term, the term to which the State had stipulated (TR. 524).

Petitioner agreed that he had indicated to counsel that he felt that the only chance he had of saving his life was to plea open to the court (TR. 510). He agreed that he had discussed the pros and cons of going to trial with counsel and that he wished to enter the plea (TR. 511).

Later, at sentencing, Petitioner said that he did not want to proceed to trial because he saw the video² and things clicked in his head and that he was accepting responsibility (TR. 475-476). Petitioner asserted that he did not want to go to trial because he did not want the victim to have to go to trial and be retraumatized (TR. 476).

² Petitioner had used the victim's phone to take twenty-four minutes plus of video while he sexually tormented the victim (TR. 305). In the video, he acknowledged that he had threatened to kill the victim and her family and had ordered the victim to perform sexual acts on him (TR. 305-306).

III. ALTERNATIVELY, PETITIONER WAS BEFORE THE TRIAL COURT FOR A LIMITED RESENTENCING AND, AT MOST, COULD SEEK TO WITHDRAW ONLY PART OF HIS PLEA.

Finally, the Fourth District in *Saffold II* determined that even if Petitioner could have filed the motion to withdraw plea prior to a full resentencing hearing, it had only ordered resentencing on two counts, so that Petitioner would not have been able to withdraw his plea in the other counts. *Saffold II*, 374 So. 3d at 840. Therefore, Petitioner would still be serving a life term with a twenty-five-year minimum mandatory term on Count I, and life terms on other counts.

In *Saffold v. State*, 310 So. 3d 55 (Fla. 4th DCA 2021)(*Saffold I*), the Fourth District found harmless the improper inclusion of firearm points on the scoresheet but directed the trial court to eliminate these eighteen points from the scoresheet on remand. *Saffold I*, 310 So. 3d at 57. It remanded Counts II through VI to correct the imposition of the dangerous sexual felony offender designation and minimum mandatory terms. *Id.* It agreed that sexual penetration points were improperly scored on Counts IV and V and ordered resentencing on those two counts. *Id.* at 58.

Because it was unclear whether the trial court was aware of the correct rule on amenability to treatment on the downward departure reason offered by the defendant, the Fourth District reversed the trial court's denial of the motion for reconsideration of the downward departure sentence on that ground. *Id.* It remanded the case for "further proceedings consistent with this opinion." *Id.*

Petitioner argues that the Fourth ordered resentencing on all of the counts when it reversed the denial of the motion for reconsideration of the downward departure sentence and remanded the case for further proceedings. Respondent maintains that the Fourth District did not order resentencing on all counts. Rather, it ordered resentencing only on Counts IV and V. Petitioner was not in the same position on remand that he was prior to the original sentencing.

If it had wished to direct the trial court to resentence Petitioner on the other counts, the Fourth District would have expressly done so as it did with two of the counts. Even though the parties did not discern the distinction, the trial court understood that it did not have to impose a downward departure sentence.

In *Bellamy v. State*, 199 So. 3d 480, 484 (Fla. 4th DCA 2016), the court similarly reversed and remanded the sentence to the trial court for reconsideration of the downward departure motion where it was not clear whether the trial court used the correct standard and analysis in considering the departure reason. The court in *Bellamy* cited *Ellis v. State*, 816 So. 2d 759, 760 (Fla. 4th DCA 2002), in which the court stated that the trial court may have been under the mistaken impression that it lacked any discretion in the application of the habitual violent felony offender sentence. The court in *Ellis* reversed this issue and remanded it “for the judge to reconsider the matter in light of this opinion,” even though it remanded “for re-sentencing” on the separate issue pertaining to the defendant’s sentence to drug offender probation. *Ellis*, 816 So. 2d at 760, 762. See also *Hines v. State*, 817 So. 2d 964, 965-66 (Fla. 2d DCA 2002)(remanding “for further proceedings” for the trial court to “reconsider the sentence in light of its discretion to depart if the facts so warrant” in a case where the court believed that the trial court may have acted under a misconception).

The court in *Bellamy* also cited *Shuler v. State*, 947 So. 2d 1259 (Fla. 5th DCA 2007) and referenced Judge Thompspon’s

concurrency. In *Shuler*, the court remanded the sentence “for reconsideration and application of the law” as expressed in precedent because the trial court did not seem aware of that precedent in commenting on a requested basis for departure. *Shuler*, 947 So. 2d at 1260. Judge Thompson stated in the concurrence that, but for the trial court’s comment that it could not consider the reason, Judge Thompson would have affirmed, and offered that it appeared that the trial court had applied the factors outlined in the precedent but just had not articulated them. *Id.* at 1261.

In *Camacho v. State*, 164 So. 3d 45 (Fla. 2d DCA 2015), the court specifically ruled that if there was an adequate record on which the trial court on remand could discern whether there was a downward departure basis when it applied the correct standard, then the court could so find, or decide whether another departure hearing was necessary. *Camacho*, 164 So. 3d at 49. In reconsidering, as opposed to resentencing, the trial court could determine, as it did in this case, that under the appropriate standard for consideration departure was not warranted.

The trial court found that there was sufficient evidence to justify departure so that its consideration was whether it should depart (TR. 873, 876, ,890). It concluded, “[h]e decided that he was going to terrorize an innocent young lady, threatened her life, brutally raped her. The brutalization is just incredible, the totality of the circumstances in this case, although I find there is a basis for downward departure, I find that a downward departure is not appropriate in this case.” (TR. 890).

Petitioner cites a number of cases on which he advances that courts ordered reconsideration and resentencing. Respondent does not dispute these cases or that an appellate court may order resentencing when it is not clear whether the trial court abused its discretion. It asserts, however, that the Fourth District in this case did not order resentencing except on two counts.

CONCLUSION

Based on the foregoing arguments and authorities cited herein, Respondent respectfully requests this Honorable Court approve the Fourth District’s opinion in *Saffold II*, disapprove the opinion in *Scott*, and uphold Petitioner’s convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served through the Florida Courts E-Filing Portal on Timothy Wang, Assistant Public Defender, Counsel for Petitioner, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401 at twang@pd15.org and appeals@pd15.org on July 2, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.210(a)(2) and 9.045(e), I hereby certify that this brief was computer generated using 14-point Bookman Old font and complies with the applicable word count.

/s/ Melynda L. Melear
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