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IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC2023-1749
LOWER COURT CASE NO.: 4D2022-2399

JEROMEE SAFFOLD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review From a Decision
of the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

Petitioner Jeromee Saffold was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, and the appellant in the Fourth District Court of Appeal. Respondent, the State of Florida, was the appellee.

The following symbols will be used in this brief:

- “TR” will refer to the trial record on appeal, followed by the appropriate page number.
- “AR” will refer to the appellate record on appeal, followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Before this Court is an issue involving Florida Rule of Criminal Procedure 3.170(f), which governs motions to withdraw plea prior to sentencing:

> 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in its discretion, and shall on good cause, at any time before a sentence, permit a plea of guilty or no contest to be withdrawn and, if judgment of conviction has been entered thereon, set aside the judgment and allow a plea of not guilty[.]

The issue is whether such motions may be filed prior to a resentencing hearing, where a defendant's sentence was reversed on appeal or vacated following a post-conviction motion. The Fourth District Court of Appeal certified conflict with the Second District Court of Appeal and held that rule 3.170(f) only applies if the motion is filed before the original sentencing hearing and not any subsequent resentencing hearing.

Petitioner requests that this Court disapprove the Fourth District's decision in this case for three reasons: (1) the plain language of rule 3.170(f) dictates that the motion may be filed any time before sentence is imposed; (2) caselaw supports Petitioner's position; and (3) the principle of finality will not be violated.

Lower Court Proceedings

- First sentencing hearing

In 2019, Petitioner entered an open plea to five counts of armed sexual battery, one count of kidnapping, and one count of aggravated battery with a deadly weapon. (TR. 55-58, 229-30). During the plea colloquy, the trial court informed Petitioner that the "minimum mandatory" sentence was 25 years in prison. (TR. 516, 524-25).

Counsel for Petitioner filed a motion for downward departure, asking for a 25-year "minimum" sentence. (TR. 250-53). The State filed a sentencing memorandum, noting that Petitioner was incorrectly told that the mandatory minimum sentence was 25 years in prison. (TR. 300). As a "Dangerous Sexual Felony Offender," Petitioner was actually subject to a 50-year mandatory minimum sentence. (TR. 300). To resolve this error, the State offered to "stipulate" to a 25-year mandatory minimum sentence should the motion for downward departure be granted. (TR. 300-01).

At the sentencing hearing, the State asked for a life sentence with a 25-year mandatory minimum sentence as a Dangerous Sexual Felony Offender. (TR. 334-35). Counsel for Petitioner asked for a 25-year mandatory minimum sentence followed by sex offender probation. (TR. 490-91).

The trial court declared that Petitioner qualified as a dangerous sexual felony offender on the first count, and sentenced him to life in prison

with a 25-year mandatory minimum sentence. (TR. 493). The trial court pronounced life sentences and the statutory maximum sentence on the remaining counts. (TR. 493).

- Second sentencing hearing and motion to withdraw plea

Petitioner appealed and the Fourth District Court of Appeal reversed. (TR. 552); *Saffold v. State,* 310 So. 3d 55 (Fla. 4th DCA 2021) (*Saffold I*). The Fourth District held that several scoresheet errors warranted resentencing on some counts. *Id*. at 58. Moreover, the Fourth District reversed the "denial of the motion for reconsideration of the downward departure motion" because the trial court made erroneous legal and factual findings. *Id*.

Following the mandate, the trial court[1] entered an order correcting the sentencing documents and set the matter for a resentencing hearing. (TR. 560). Prior to resentencing, Petitioner filed a motion to withdraw his plea, arguing that under Florida Rule of Criminal Procedure 3.170(f), he had good cause to withdraw his plea because he would never have entered the plea knowing he was actually subject to a 50-year mandatory minimum sentence. (TR. 597, 601-02). Petitioner argued that the State could not

[1] The same judge presided over the original sentencing hearing and the resentencing.

stipulate to a 25-year mandatory minimum sentence; regardless, Petitioner argued, the trial court may have been dissuaded from granting a downward departure since the trial court knew the correct mandatory minimum sentence was 50 years. (TR. 597, 601). As a result, Petitioner argued that he was misled regarding the consequences of taking a plea, rendering his plea involuntary. (TR. 597).

At a hearing, Petitioner orally argued his motion. (TR. 763). The trial court questioned why Petitioner would challenge the 25-year mandatory minimum when he could have faced a 50-year mandatory minimum. (TR. 766). Petitioner reiterated that he was under the false impression that he was facing a 25-year mandatory minimum sentence and the State cannot agree to lower the mandatory minimum. (TR. 766-67). Moreover, Petitioner argued that since the trial court knew that the true mandatory minimum was 50 years, the trial court may have overcorrected and denied the motion for downward departure based on the error. (TR. 766).

The trial court denied the motion, stating that Petitioner's reasoning was not a basis to vacate his plea. (TR. 593, 766-67, 771). At the resentencing hearing, the trial court denied Petitioner's motion for downward departure and resentenced Petitioner to the same sentence he

received originally, with slight modifications relating to the Fourth District's mandate. (TR. 891-93).

The Fourth District Court of Appeal's Decision

On his second appeal, Petitioner argued that the trial court erred by denying the motion to withdraw plea because Petitioner established good cause. (AR. 9). Petitioner argued that because he was being resentenced, the pre-sentence standard under Florida Rule of Criminal Procedure 3.170(f) should apply, as opposed to the post-sentence standard under Florida Rule of Criminal Procedure 3.170(l). (AR. 53). Petitioner cited *Scott v. State*, 331 So. 3d 297 (Fla. 2d DCA 2021), which held that rule 3.170(f) applied to resentencing hearings. (AR. 53).

Scott involved a defendant who was sentenced as a juvenile and filed a post-conviction motion ten years after his sentence. *Id*. at 299. The State agreed that Scott was entitled to resentencing based on changes in the juvenile sentencing laws. *Id*. The post-conviction court vacated his sentence and ordered resentencing. *Id*. Prior to resentencing, Scott moved to withdraw his plea. *Id*. The post-conviction court denied the motion as untimely because Scott did not file his motion within 30 days of his original sentence under rule 3.170(l). *Id*.

The Second District Court of Appeal reversed, holding that "the use of the nonexclusive 'a' [in rule 3.170(f)] suggests that it applies to any sentencing proceeding, whether that be the initial sentencing or a subsequent resentencing." *Scott*, 331 So. 3d at 302. Additionally, the Second District held that because resentencing is a de novo proceeding, "the rule entitled the defendant to seek withdrawal of his plea, as the motion was made before a sentence, namely the sentence imposed on resentencing." *Id*. at 301. The Second District also noted that courts have allowed rule 3.170(l) motions to be brought within thirty days of resentencing; as such, the Second District saw no reason why a defendant's "plea-withdrawal rights" should be treated differently under rule 3.170(f) pending a resentencing hearing. *Id*. In other words, "if 'the sentence,' as it is called in rule 3.170(l), includes a new sentence imposed after resentencing, we see no reason why such a new sentence would not also qualify as 'a sentence' under rule 3.170(f)." *Id*.

On the merits of Petitioner's second appeal, Petitioner argued that he established good cause based on being misinformed about the mandatory minimum sentence. (AR. 53-54). Petitioner cited to numerous cases where being misled about the sentencing consequences constituted good cause. (AR. 54); *Rappaport v. State*, 24 So. 3d 1211 (Fla. 4th DCA 2009);

Johnson v. State, 834 So. 2d 384 (Fla. 2d DCA 2003); *Hypes v. State*, 163 So. 3d 745 (Fla. 1st DCA 2015).

The State argued that *Scott* should not apply because "it is the act of sentencing, and not 'a sentence' that controls when the rules on withdrawing a plea apply." (AR. 70). As such, the State contended that once "there has been a sentencing, then the plea has been formally accepted, so that rule 3.170(f) no longer applies." (AR. 70). Moreover, the State asserted that the reasoning in *Scott* "would lead to absurd results," where defendants would be allowed to withdraw their pleas for good cause "many years later." (AR. 70).

The Fourth District affirmed Petitioner's conviction and sentence in a written opinion. (AR. 96); *Saffold v. State*, 374 So. 3d 836 (Fla. 4th DCA 2023) (*Saffold II*). The Fourth District disagreed with the analysis in *Scott* and held that Petitioner was not entitled to withdraw his plea pursuant to rule 3.170(f). *Id*. at 837.

The Fourth District disagreed with *Scott* for several reasons. First, the Fourth District contended that if "a sentence" meant "any sentencing proceeding," as asserted in *Scott*, the rule could have used the article "any" instead of "a"; the Fourth District believed this made the rule's language ambiguous. *Id*. at 839.

Second, the Fourth District disagreed that rule 3.170(f) relief should be available to defendants being resentenced just because rule 3.170(l) was available to such defendants. *Id*. The Fourth District noted that the two sections "differ in the application of the burden of proof in withdrawing the plea." *Id*. As such, the reason for the pre-sentence standard was because "the law favors a trial on the merits." *Id*. The Fourth District reasoned that a defendant at resentencing knows the sentence he or she received and thus is in the same position as a defendant filing a post-sentence motion to withdraw plea under rule 3.170(l). *Id*. The Fourth District noted a difference between a resentencing and "an original sentence"; while a resentencing is treated "as a new sentencing proceeding," it did not negate the fact that "the defendant already had a sentence imposed" and could allow defendants to have a "swift change of heart" that the law discourages. *Id.*

Finally, the Fourth District cited to the potential prejudice facing the State should a defendant be allowed to withdraw his plea under rule 3.170(f). *Id.* The Fourth District noted that witnesses may not be available "years after the original proceeding has concluded" like in *Scott*, where the defendant moved to withdraw his plea 10 years after the original sentence. *Id*. This situation "conflicts with the principle of finality" discussed in *Campbell v. State*, 125 So. 3d 733 (Fla. 2013). *Id*. at 840. That case

interpreted Florida Rule of Criminal Procedure 3.172(g), which allows a defendant to withdraw a plea any time prior to acceptance by the trial court. *Id*. The Fourth District compared Petitioner's situation to the defendant in *Campbell*, who moved to withdraw his plea 11 years later because the trial court failed to formally announce that it accepted the plea. *Id*. As such, the Fourth District noted that a "literal reading of the rule would lead to an absurd result and would be contrary to the interests of finality in judicial proceedings." *Id*.

Finally, the Fourth District noted that Petitioner was only resentenced on two counts because the mandate in *Saffold I* merely ordered the trial court to "rehear the motion for reconsideration of the downward departure" for the remaining counts; according to the Fourth District, Petitioner still had a life sentence on the first count. *Id*.

After the Fourth District affirmed and certified conflict with *Scott*, Petitioner timely invoked this Court's discretionary jurisdiction, leading to the present case.

SUMMARY OF THE ARGUMENT

Florida Rule of Criminal Procedure 3.170(f) plainly states: "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[.]" There are three reasons this rule applies to defendants moving to withdraw a plea prior to a resentencing hearing. First, the plain language of the rule permits it. Second, caselaw suggests that the rule permits it. Third, it would not disrupt the principle of finality.

ARGUMENT

The pre-sentence standard to withdraw a plea under Florida Rule of Criminal Procedure 3.170(f) should apply to defendants at a resentencing hearing

As background, Florida Rule of Criminal Procedure 3.170 governs pleas in criminal cases. The standard upon whether a motion to withdraw a plea should be granted depends on whether the motion was made pre-sentence or post-sentence.

Rule 3.170(f) allows a defendant to withdraw a plea at any time before a sentence is imposed:

> 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 and, if judgment of conviction has been entered thereon, set aside the judgment and allow a plea of not guilty[.]

This Court has said this rule "should be liberally construed in favor of the defendant … The law inclines toward a trial on the merits; and where it appears that the interests of justice would be served, the defendant should be permitted to withdraw his plea." *Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999).

On the other hand, rule 3.170(l) allows a defendant to withdraw a plea up to 30 days after the rendition of the sentence. This post-sentence standard is more limited, allowing withdrawal of the plea only upon grounds specified in Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)(a)-(e), or

as otherwise provided by law. *See* Fla. R. Crim. P. 3.170(l); *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003) ("[O]nce sentence has been imposed, to withdraw a plea a defendant must demonstrate a manifest injustice requiring correction.").

The question is whether a defendant may file a pre-sentence motion to withdraw plea under rule 3.170(f) where a defendant's original sentence was reversed or vacated (by an appellate or post-conviction court) but before a new sentence has been imposed.

Standard of review

"[A]ppellate courts apply a de novo standard of review when the construction of a procedural rule ... is at issue." *Lukehart v. State*, 70 So. 3d 503, 516 (Fla. 2011) (citing *Barco v. School Bd. of Pinellas Cnty.*, 975 So. 2d 1116, 1121 (Fla. 2008)).

Argument

This Court should disapprove of the Fourth District Court of Appeal's decision below and hold that defendants may file a motion to withdraw plea pursuant to Florida Rule of Criminal Procedure 3.170(f) prior to a resentencing hearing. The language of the rule and caselaw supports the argument that the pre-sentence standard provided by rule 3.170(f) should be available to defendants upon resentencing.

- The plain language of the rule

Florida Rule of Criminal Procedure 3.020 outlines the purpose and construction for the criminal rules of procedure:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure and fairness in administration.

Additionally, "[o]ur courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules." *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998) (citing cases); *Rowe v. State*, 394 So. 2d 1059, 1059 (Fla. 1st DCA 1981).

"Where the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning." *Rowe*, 394 So. 2d at 1059. "This Court has held from time immemorial that we must primarily determine the effect and purpose of statutes and rules of court by first examining the actual words used in the statute or rule and determine the plain meaning of those words." *Calabro v. State*, 995 So. 2d 307, 314 (Fla. 2008) (citing cases).

The relevant portion of rule 3.170(f) states the following:

> 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 and, if judgment of conviction has been entered thereon, set aside the judgment and allow a plea of not guilty[.]

The Fourth District reasoned that because rule 3.170(f) said "a sentence" rather than "any sentence," the rule likely referred to the "original sentence" rather than a sentence pronounced at a subsequent resentencing. That cannot be true.

Florida Rule of Criminal Procedure 3.700 defines what a "sentence" is:

> 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.

This means there can only be one sentence for every criminal offense. Nothing in the rules or statutes indicate that a sentence received at a resentencing hearing should be treated differently than one pronounced at the original sentencing hearing.

A sentence imposed following a resentencing is still "a sentence." Thus, "any sentence" or "a sentence" must only refer to one thing: the pronounced sentence. The language from the rule means exactly what it says and courts must follow it:

> As our Court has previously stated, we should declare words that the Florida Supreme Court has chosen when establishing rules of procedure to mean exactly what those words usually mean and that plain or usual meaning can be derived from an "accepted dictionary."

State v. Rosario, 303 So. 3d 555, 560 (Fla. 5th DCA 2020) (citing *Williams v. State*, 378 So. 2d 902, 903 (Fla. 5th DCA 1980)).

This notion is supported by the fact that criminal statutes refer to "a sentence" throughout the Criminal Punishment Code. *See* §§ 921.002-921.0024, Fla. Stat. (referring to "a sentence" several times in the Criminal Punishment Code). Neither this Court nor the Legislature intended for a sentence received after resentencing to be treated differently than an original sentence.

It is also supported by the fact that—as the Fourth District admitted—a resentencing hearing proceeds as an entirely new hearing. *Saffold II*, 374 So. 3d at 839; *State v. Collins*, 985 So. 2d 985, 989 (Fla. 2008) ("[R]esentencing entitles the defendant to a de novo sentencing hearing with the full array of due process rights."); *Galindez v. State*, 955 So. 2d 517, 525-26 (Fla. 2007) (Cantero, J., specially concurring)) ("[R]esentencing proceedings must be a clean slate, [], meaning that the defendant's vacated sentence becomes a nullity and his resentencing should proceed de novo on all issues bearing on the proper sentence.").

Therefore, "a sentence" and "any sentence" is a distinction without a difference. For example, rule 3.170(l)—the post-sentence standard to withdraw a plea—refers to "the sentence" rather than "a sentence." Again,

there can only be one sentence for every offense, so there is no meaningful difference between "a sentence" and "the sentence." The focus on the articles "a," "any," or "the" is irrelevant since they all refer to the same thing.

Because the language of the rule is clear and unambiguous, rules of statutory construction are not required. *See Mitchell v. State*, 911 So. 2d 1211, 1214 (Fla. 2005) ("If the language of a statute or rule is plain and unambiguous, it must be enforced according to its plain meaning."). Nevertheless, even if the language of the rule was ambiguous as the Fourth District's opinion claims, basic principles of statutory interpretation support Petitioner's argument.

"It is a basic tenet of interpretation of the rules of court, just as it is for statutes, that a rule should be interpreted wherever possible to give effect to every subdivision and clause in it, in order to accord meaning and harmony to all of its parts." *Alonso v. State*, 17 So. 3d 806, 808 (Fla. 3d DCA 2009) (citing cases). Moreover, "statutory phrases are not to be read in isolation, but rather within the context of the entire section." *Id*.

Here, nothing in the Florida Rules of Criminal Procedure outline different procedures for the resentencing process. This suggests that the term "a sentence" and "the sentence" apply to resentencing hearings. Otherwise, the rules would have outlined different definitions or procedures

for resentencing hearings. As the Second District noted in *Scott*, a resentencing is essentially treated the same as the original sentencing hearing. *Scott*, 331 So. 3d at 301.

Creating arbitrary distinctions between an original sentencing hearing and a resentencing hearing is confusing, nonsensical, and contrary to Florida Rule of Criminal Procedure 3.020, which dictates that the rules "shall be construed to secure simplicity in procedure and fairness in administration." Such arbitrary distinctions would call into question which rules are triggered by an original sentencing hearing versus a resentencing. It would also obscure what rules control during a resentencing hearing and what procedural rights are afforded to the parties.

Moreover, *Saffold II* fails to analyze the language of the rule other than to suggest that it could have been written clearer. However, the notion that "a sentence" does not apply to a sentence pronounced at resentencing has no basis. If the rule was intended for defendants whol file motions to withdraw plea under rule 3.170(f) at the original sentencing and not upon resentencing, the rule could have said so. The rule also could have required defendants to file a motion to withdraw plea a certain amount of time after the **plea** was accepted, making the plea the triggering event

rather than the rendition of sentence. However, the rule requires neither of those things.

Therefore, the term "a sentence" under rule 3.170(f) must also apply to resentencing hearings.

- The caselaw supporting the use of rule 3.170(f) at resentencing

There are three lines of authority that support Petitioner's argument that rule 3.170(f) applies to resentencing hearings. First, this Court's language in *Griffin v. State*, 114 So. 3d 890, 898 (Fla. 2013). Second, caselaw holding that a resentencing proceeding must be treated as a de novo proceeding. Third, caselaw holding that defendants may file motions to withdraw plea under rule 3.170(l) after a resentencing hearing.

The first and best authority supporting Petitioner's position is this Court's own language in *Griffin*, 114 So. 3d 890, which said that motions to withdraw plea under rule 3.170(f) could be filed before a resentencing hearing. In *Griffin*, the defendant filed a motion to withdraw plea pursuant to rule 3.170(l), which the trial court dismissed because it was filed nine years after his sentence was rendered. *Id*. at 897. The defendant argued that the 30-day time limit was not jurisdictional and that other courts have granted motions to withdraw that were filed outside the rule's time limit; the defendant cited to several cases, including *Johnson v. State*, 834 So. 2d

384 (Fla. 2d DCA 2003). *Id*. This Court rejected the defendant's arguments and concluded that *Johnson* did not apply. *Id*.

In *Johnson*, the defendant's sentence was remanded for resentencing following several appeals related to his Prison Releasee Reoffender (PRR) sentences. *Johnson*, 834 So. 2d at 385. On remand and prior to resentencing, the trial court denied the defendant's attempt to withdraw his plea. *Id*. After taking another appeal, the Second District concluded that Johnson "should have been permitted to withdraw his plea because it was based on a misapprehension as to the sentences that the trial court could impose." *Id*.

In *Griffin*, this Court held that *Johnson* did not apply because Johnson was before the trial court for resentencing:

> However, because Johnson's case was remanded by this Court for *resentencing* under the Act, Johnson sought to withdraw his plea before his sentencing, which would have been pursuant to rule 3.170(f) rather than rule 3.170(l) as in the instant case.

Griffin, 114 So. 3d at 898.[2] (emphasis in original).

Griffin directly addresses the issue in this case and its language should be controlling. As this Court plainly stated, a motion to withdraw

[2] This Court acknowledged that while the *Johnson* opinion did not expressly state under which rule relief was sought, it was likely rule 3.170(f) because the Second District cited to and relied on the standards set forth by rule 3.170(f) and its related caselaw. *Griffin*, 114 So. 3d at 898 n.3.

plea prior to resentencing "**would have been pursuant to rule 3.170(f)** rather than rule 3.170(l)." *Id*. (emphasis added). The Second District's opinion in *Scott* cites to this Court's language in *Griffin* as support. *Scott*, 331 So. 3d at 301. Through *Griffin* (which *Saffold II* did not address) this Court approved the rationale behind the *Scott* decision over 10 years ago. As such, this Court should approve *Scott* and disapprove of the Fourth District's opinion in *Saffold II*.

The second line of authority that supports Petitioner's argument is the one noted by the Second District in *Scott*: "[I]t is well established that when a defendant is granted resentencing, the original sentence is rendered a nullity and the sentencing process begins anew." *Scott*, 331 So. 3d at 301. In death penalty cases, the "basic premise of sentencing procedure is that the sentencer is to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine appropriate punishment." *Id*. (quoting *Wike v. State*, 698 So. 2d 817, 821 (Fla. 1997)). Similarly, in non-capital cases, "resentencing entitles the defendant to a de novo sentencing hearing with the full array of due process rights." *Id*. (quoting *Trotter v. State*, 825 So. 2d 362, 367–68 (Fla. 2002)).

As Justice Cantero explained in his special concurrence in *Galindez v. State*, 955 So. 2d 517, 525 (Fla. 2007) (citations omitted):

> We have consistently held that resentencing proceedings must be a "clean slate," [] meaning that the defendant's vacated sentence becomes a "nullity" and his "resentencing should proceed de novo on all issues bearing on the proper sentence." [] This means that the trial court must extend to the defendant the "full panoply" of existing procedural protections, [] including any new constitutional protections that have been recognized since the defendant's original sentencing.

Because a resentencing hearing is an entirely new proceeding, with all the same rules and procedural rights available to a defendant from the original sentencing hearing, rule 3.170(f) should be available as well.

While *Saffold II* acknowledges that a resentencing is treated as a new sentencing proceeding, it fails to explain why every other procedural right or rule would be available to a defendant prior to resentencing except for rule 3.170(f). The only rationale *Saffold II* offers is that the two sections "differ in the application of the burden of proof in withdrawing the plea." *Saffold II*, 374 So. 3d at 839. The Fourth District reasoned that a defendant at resentencing "already knows the sentence he/she has received" and thus is in the same position as a defendant filing a post-sentence motion to withdraw plea. *Id*. Therefore, since "the defendant already had a sentence imposed" and knows "what sentence may likely be imposed," the Fourth District determined that permitting motions under rule 3.170(f) would allow defendants at resentencing to have a "swift change of heart" that the law discourages. *Id*.

This rationale is flawed for several reasons. First and foremost, a defendant at a resentencing hearing does not know the sentence that he or she will receive because a de novo resentencing proceeding generally benefits a defendant. *See State v. Collins*, 985 So. 2d 985, 989 (Fla. 2008) ("The principle of de novo sentencing often *benefits* the defendant."); *Forman v. State*, 312 So. 3d 141, 144 (Fla. 2d DCA 2020) ("The resentencing court is not simply permitted to reweigh existing evidence at resentencing" and is "precluded from relying upon the prior evidence admitted at the original sentencing hearing.").

Additionally, because a resentencing is a new proceeding, "the court is not limited by the evidence originally presented." *Collins*, 985 So. 2d at 989; *Branton v. State*, 187 So. 3d 382, 385 (Fla. 5th DCA 2016) (holding defendant was "entitled to produce additional evidence at this hearing not presented at his earlier sentencing, [] and the resentencing court was not limited to the evidence presented, or not presented, at the original sentencing"). If these two statements are true, then a defendant at a resentencing hearing cannot know the sentence he or she is going to receive. A resentencing hearing is a new proceeding and thus "the sentencing process starts afresh." *Fox v. State*, 166 So. 3d 894, 896 (Fla.

4th DCA 2015) (holding motion to mitigate was not a rendition of sentence under rule 3.170(l), unlike a resentencing hearing).

Simply because a defendant was given a sentence at the original sentencing hearing does not mean he or she will receive the same sentence upon resentencing. In fact, a case reversed for resentencing **necessarily means** that a sentence may not be the same. A reversal means an appellate court legally determined there was a fair likelihood the sentence would be different. As this Court stated in *Maddox v. State*, 760 So. 2d 89, 99–100 (Fla. 2000), regarding the fundamental error standard for sentencing matters:

> [I]n order to be considered fundamental, an error must be serious. In determining the seriousness of an error, the inquiry must focus on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence. [] **In most cases, a fundamental sentencing error will be one that affects the determination of the length of the sentence** such that the interests of justice will not be served if the error remains uncorrected.

(emphasis added); *see also Jackson v. State*, 983 So. 2d 562, 576 (Fla. 2008) ("By its very nature, fundamental error has to be considered harmful. [] Thus, for error to meet [the fundamental error] standard, it must follow that the error prejudiced the defendant.").

This is also consistent with this Court's harmless error test for scoresheet errors, which focuses on the possible effect the error had on the sentence:

> The would-have-been-imposed test applies this standard to scoresheet error. **It requires an examination of the record for conclusive proof that the scoresheet error did not affect or contribute to the sentencing decision**. If the reviewing court cannot determine conclusively from the record that the trial court would have imposed the same sentence despite the erroneous scoresheet, remand for resentencing is required.

State v. Anderson, 905 So. 2d 111, 116 (Fla. 2005) (emphasis added).

Similarly, in the post-conviction context like in *Scott*, the granting of a post-conviction motion necessarily means that the original sentence may not stand. *See* Fla. R. Crim. P. 3.850(a).

Contrary to the reasoning in *Saffold II*, a defendant at resentencing cannot be in the same position as a defendant filing a post-sentence motion to withdraw plea. The Fourth District's rationale erroneously relies on the assumption that a defendant at resentencing will receive the same sentence from the first sentencing hearing and thus may have a "swift change of heart" prior to resentencing. This is faulty not only because the defendant would not have been granted resentencing unless there was a prejudicial error that warranted a reversal on appeal or the granting of a post-conviction motion, but also because the sentencing judge must treat

the resentencing hearing de novo and review all the new evidence and submissions in crafting the new sentence.

The third line of authority supporting Petitioner's position is caselaw permitting defendants at resentencing to move to withdraw pleas under rule 3.170(l). *See Chipman v. State*, 285 So. 3d 1005, 1006 (Fla. 2d DCA 2019) (finding rule 3.170(l) motion may be timely filed following resentencing); *Passino v. State*, 174 So. 3d 1055, 1056–57 (Fla. 4th DCA 2015) (finding motion to withdraw plea made within thirty days of resentencing was timely under rule 3.170(l)). On this basis, the Second District's rationale in *Scott* is well-reasoned:

> [I]f "the sentence," as it is called in rule 3.170(l), includes a new sentence imposed after resentencing, we see no reason why such a new sentence would not also qualify as "a sentence" under rule 3.170(f).

Scott, 331 So. 3d at 301. Therefore, if a defendant may move to withdraw his plea following a resentencing hearing under rule 3.170(l), "the revocation of a defendant's original sentence should likewise grant the defendant the same presentencing plea-withdrawal rights he enjoyed before." *Id*.

In *Saffold II*, the Fourth District disagreed that rule 3.170(f) relief should be available to defendants being resentenced just because rule 3.170(l) was available to such defendants. 374 So. 3d at 839. The Fourth

District noted that the pre-sentence standard exists because "the law favors a trial on the merits." *Id*. The Fourth District also noted that the two sections "differ in the application of the burden of proof in withdrawing the plea." *Id*.

Similar to the reasons discussed above, there are no separate procedural rules governing resentencing hearings. There shouldn't be since "resentencing constitutes, for all intents and purposes, the 'rendition' of a new sentence." *Fox v. State*, 166 So. 3d 894, 896 (Fla. 4th DCA 2015). Since there are no separate rules for resentencing hearings, neither should there be separate rules for motions to withdraw plea.

The Fourth District's rationale fails to justify why a defendant at resentencing is treated differently under the two rules governing motions to withdraw plea. Nor does the rationale explain how the different purpose of the rules could not be achieved prior to resentencing. If the trial court must truly treat resentencing hearings de novo, then the court must also treat a defendant as though he has not yet been sentenced. In that situation, without a sentence in place, the law still favors a trial on the merits.

Moreover, "good cause" under rule 3.170(f) is still "good cause" prior to a resentencing hearing. The fact that a defendant's original sentence was reversed or vacated did not lessen the burden he or she had to demonstrate under rule 3.170(f). While establishing "good cause" under

rule 3.170(f) is a lesser burden than the one required under rule 3.170(l), relief is not automatic under either rule. The defendant not only has the burden to establish good cause, the allegations must be specific and substantiated. *See Nicol v. State*, 892 So. 2d 1169, 1171 (Fla. 5th DCA 2005) ("Good cause exists in situations where the defendant demonstrates that his guilty plea was infected by misapprehension, undue persuasion, ignorance, was entered by one not competent to know its consequence, the ends of justice would be served by withdrawal of such plea or that it was otherwise involuntary."); *Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999) ("In order to show cause why the plea should be withdrawn, mere allegations are not enough; the defense must offer proof that the plea was not voluntarily and intelligently entered."); *Onnestad v. State*, 404 So. 2d 403, 405 (Fla. 5th DCA 1981) (holding that vague allegations, unsupported by any proof, could not be a basis to withdraw guilty plea).

If "good cause" was established and a sentence was not yet rendered, the purpose of rule 3.170(f) is still achieved even prior to a resentencing hearing. *Saffold II* erroneously focuses on the time that has passed rather than the posture of the case. Rule 3.170(f) has no time limits and nothing about a resentencing hearing changes the spirit of the rule.

- <u>The principle of finality</u>

Finally, *Saffold II* cited to the potential prejudice facing the State should a defendant be allowed to withdraw his plea under rule 3.170(f) prior to resentencing. 374 So. 3d at 839. The Fourth District noted that witnesses may not be available "years after the original proceeding has concluded" like in *Scott*, where the defendant moved to withdraw his plea ten years after the original sentence. *Id*.

Saffold II noted that this situation "conflicts with the principle of finality" discussed in *Campbell v. State*, 125 So. 3d 733 (Fla. 2013). *Id*. In *Campbell*, this Court interpreted Florida Rule of Criminal Procedure 3.172(g), which allows a defendant to withdraw a plea any time prior to acceptance by the trial court. *Id*. at 734. Campbell moved to withdraw his plea 11 years later because the trial court failed to formally announce that it accepted the plea. *Id*.

The principle of finality generally arises in the context of a change in the law that occurred long after a conviction and sentence was final. This Court held that in determining whether a change in law would be deemed retroactive, this Court considers whether the change: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Hughes v. State*, 901 So. 2d 837, 840 (Fla. 2005).

This Court explained the principle in *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (footnote omitted):

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

This Court discussed how post-conviction relief under rule 3.850 "offer an avenue to challenge a once final judgment and sentence in limited instances, and for limited reasons." *Id*. As such, the "law's concern for finality of decisions is in no way diminished by the availability and utilization of a collateral remedy such as Rule 3.850." *Id*. "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Id*.

In the present case, *Saffold II*'s discussion regarding the principle of finality misses the point. This case did not involve a change in the law nor did it involve retroactively applying new caselaw to final cases. The conviction and sentence in this case were not final. Criminal cases are final when the direct appeal process is exhausted, when the time to take an

appeal expires, following the mandate at the conclusion of the appeal, or after seeking discretionary review in a higher court. *See United States v. Johnson*, 457 U.S. 537, 543 n.8 (1982), *abrogated on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987); *Black v. State*, 750 So. 2d 162, 162 (Fla. 3d DCA 2000); *Huff v. State*, 569 So. 2d 1247, 1250 (Fla. 1990).

Even if the principle of finality applied in this situation, the nature of the de novo resentencing process cannot be ignored. At times, the principle of finality has a competing interest with the principles of a de novo resentencing hearing, which this Court acknowledged in *State v. Fleming*, 61 So. 3d 399, 400 (Fla. 2011). There, in between the defendant's multiple appeals and resentencings, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), were decided by the U.S. Supreme Court. *Id*. at 400-01. The defendant filed a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b)(2), claiming that his new sentence violated *Apprendi* and *Blakely*, where his sentence included victim injury points and upward departure reasons not found by a jury. *Id*. at 401.

This Court addressed whether *Apprendi* and *Blakely* applied to "resentencings held after those decisions issued where the conviction was final before they issued." *Id*. at 404. This Court held the following:

> In holding that *Apprendi* and *Blakely* apply to resentencings regardless of the finality of the defendant's conviction before they issued, the First District implicitly followed longstanding precedent of this Court regarding the nature of resentencing. As we explain below, two principles support our holding that these two United States Supreme Court cases apply to all resentencing proceedings held after they issued: (1) resentencing proceedings are de novo; and (2) the decisional law in effect before an appeal is final applies to the proceeding.

Id. at 405. "Because the resentencing is de novo, we have held that both parties may present new evidence bearing on the sentence." *Id*. at 406 (citing cases). "The trial court has discretion at resentencing—within certain constitutional confines—to impose sentence using available factors not previously considered." *Id*. This Court's rationale in *Fleming* should apply to the present case as well.

Additionally, *Saffold II*'s reliance on *Campbell* is misplaced and inapposite to this case. *Campbell* dealt with a case where the defendant moved to withdraw his plea **after** being sentenced. 125 So. 3d at 735. The defendant in *Campbell* filed a motion to withdraw plea pursuant to rule 3.172(g)—a completely different motion from Petitioner's motion. *Id*. at 736. Rule 3.172(g) states that:

> No plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by this rule. Until that time, it may be withdrawn by either party without any necessary justification.

After analyzing what constitutes a "formal acceptance" of a plea by the trial court, this Court rejected the argument that a defendant may move to withdraw a plea "based solely on the trial court's failure to formally accept the plea" on the record, after he had already been sentenced. *Id*. at 742. This Court found that the "actual sentencing of the defendant" was a "sufficient affirmative statement" that the judge formally accepted the plea. *Id*.

Nothing in *Campbell* suggests that its rationale also applied to rule 3.170(f). In fact, *Campbell* even acknowledged that rule 3.170(f) and rule 3.172(g) served different purposes. *Id*. at 738-39 (citing *Harrell v. State*, 894 So. 2d 935 (Fla. 2005)). The Court noted that rule 3.172 "simply codified in greater detail the requirements for acceptance of a plea" in rule 3.170:

> Under the criminal rules, therefore, a defendant's pre-sentencing motion to withdraw may take two distinct tracks. Rule 3.172[(g)] applies when a plea has not been formally accepted. Rule 3.170(f) allows a defendant to seek withdrawal of a plea for any number of reasons. Under rule 3.172[(g)], the court has no discretion. If the court has not formally accepted the plea, it must allow withdrawal. Under 3.170(f), on the other hand, the court has discretion to deny the motion unless the defendant establishes "good cause," in which case the court must grant it.

Id. at 739 (citing *Demartine v. State*, 647 So. 2d 900 (Fla. 4th DCA 1994)).

This Court noted that it would seem "absurd" to undo the entire process due to the trial judge's "inadvertent failure to recite one simple phrase, 'the court accepts the plea,'" especially if the judge or the State can do the same after the defendant already served part of his sentence. *Id*. at 741. This was especially true where rule 3.172(g) provides the trial court with no discretion to deny a party's motion to withdraw plea prior to formal acceptance of the plea. However, unlike rule 3.172(g), motions to withdraw plea under rule 3.170 are not as automatic. A defendant must establish "good cause" or a "manifest injustice or prejudice" under rules 3.170(f) and (l), as opposed to a mere technicality that *Campbell* discussed.

In other words, the absurdity in *Campbell* is that the entire process can be undone simply due to the trial court's failure to utter a simple phrase, especially when it occurs long after the conviction and sentence were final. *Campbell* did not suggest that the absurdity resulted merely from the lengthy passage of time.

Saffold II's primary concern was the passage of time and the potential prejudice the State faces if defendants were allowed to withdraw pleas prior to resentencing. However, the best way to satisfy the principle of finality is to ensure pleas and sentences are done right and accurately so as to not give defendants cause to withdraw their pleas.

Regardless, the passage of time is not a consideration in interpreting procedural rules and principles behind de novo resentencing hearings. Even the principle of finality—where the passage of time is an obvious concern—did not always trump other principles.

Nor is the passage of time a consideration when it comes to a defendant's right to appeal or seek post-conviction relief. Even there, such concerns are resolved through legislation or procedural rules. *See* Art. I, § 16(b)(10)b., Fla. Const. (requiring "[a]ll state-level appeals and collateral attacks on any judgment must be complete within two years from the date of appeal in non-capital cases and within five years from the date of appeal in capital cases"); Fla. R. Crim. P. 3.850(b) (prohibiting motions to vacate filed "more than 2 years after the judgment and sentence become final" with certain exceptions).

In *Saffold II*, the Fourth District inserted its judgment that rule 3.170(f) should be time barred at resentencing when the plain language of the rule made no such restriction. Other District Courts have held that such motions can be made at any point prior to imposition of sentence, even during the sentencing hearing. *See McInturff v. State*, 111 So. 3d 296, 297 (Fla. 5th DCA 2013) (finding trial court erred by ruling motion was untimely when raised during sentencing hearing); *Lehmkuhle v. State*, 20 So. 3d 971, 973

(Fla. 2d DCA 2009) (holding defendant entitled to move to withdraw his plea during motion for downward departure).

Additionally, *Saffold II*'s concern about the passage of time is unwarranted. In fact, the State has taken the position that it should be allowed to empanel a jury to make certain factual findings under the juvenile resentencing statutes even after decades have passed. *See State v. Manago*, 375 So. 3d 190, 197 (Fla. 2023) (holding that State was not foreclosed from empaneling jury to make factual findings).

In every criminal prosecution, the possibility that the passage of time may prejudice the parties always exists. However, it's a possibility that exists (and will always exist) whether the prosecution took three months or three years. This possibility does not dictate how our rules should be interpreted nor when the principle of finality applies.

- Resentencing versus reconsideration

Petitioner makes a separate but related argument regarding *Saffold II*'s comments about the remand instructions from the first appeal.

In *Saffold II*, the Fourth District noted that Petitioner's first appeal was not reversed for resentencing on all counts; the mandate only ordered the trial court to "rehear the motion for reconsideration of the downward departure" for the remaining counts. 374 So. 3d at 837. As such, the Fourth

District found that even if Petitioner had been allowed to withdraw his plea, it would only have been for two of the counts. *Id*.

Petitioner contends that *Saffold I* ordered a resentencing on all counts. In *Saffold I*, the Fourth District reversed on several grounds and remanded the case to the trial court with the following instructions:

- "[We] direct the court to correct the scoresheet [and remove 18 firearm points] on remand." *Saffold I*, 310 So. 3d at 57.
- "[W]e direct the court to correct [the dangerous sexual felony offender designation and 25-year mandatory minimum sentence on counts II through V] in the written sentences." *Id*. at 57 n.1.
- "[We] reverse the inclusion of the sexual penetration points on counts IV and V" and "the court must resentence [Petitioner] on these counts." *Id*. at 58.
- "[W]e reverse the court's denial of the motion for reconsideration of the downward departure motion on that ground." *Id*. at 58.

The basis for "reconsideration of the downward departure motion" was because the trial court may have been unaware "of the correct rule about amenability" despite the "uncontroverted evidence" showing Petitioner "acted to obtain treatment before and after the crimes." *Id*.

Neither *Saffold I* nor *Saffold II* addressed whether there's a difference between a "reconsideration" of a downward departure motion and a "resentencing." Petitioner contends that there is no meaningful difference because when *Saffold I* ordered a "reconsideration" of the downward departure motion, it meant that Petitioner was to be resentenced on all counts. Petitioner relies on three reasons.

First, the trial court and the parties below seemingly believed that Petitioner was entitled to resentencing on all counts. For example, after the mandate issued, the trial court entered an order for "resentencing and reconsideration of the downward departure motions." (TR. 560). Since the trial court was ordered to "reconsider his motion for downward departure," the trial court required Petitioner's presence and ordered him transported. (TR. 559). After the resentencing hearing, the trial court entered new sentencing orders on all counts (not just Counts IV and V). (TR. 677-708). Additionally, the State on appeal never argued that a "reconsideration" of the downward departure motion was different from a "resentencing." (AR. 64-76). As such, *Saffold I* suggested Petitioner was entitled to a resentencing on all counts since that is how the trial court, the parties below, and the parties on appeal interpreted the Fourth District's mandate.

Second, caselaw supports Petitioner's position. Several opinions from different District Courts of Appeal have held that when a trial court misapplied the law or misconstrued the facts in a downward departure motion, the proper remedy is to reverse or vacate the sentence, and remand for resentencing to properly consider the motion. For example, in *Hiraldo v. State*, 268 So. 3d 955, 956 (Fla. 2d DCA 2019), the Second District found that the trial court "misconstrued" the downward departure evidence. As such, the Court "**reverse[d] Hiraldo's sentences** and remand[ed] for the trial court to **reconsider** Hiraldo's request for a downward departure." *Id*. (emphasis added).

The Second District consistently applied this remedy in cases where the trial court failed to properly consider a motion for downward departure. *See Daniels v. State*, 884 So. 2d 220, 222 (Fla. 2d DCA 2004) (remanding for "resentencing" where "the trial court must reconsider the motion" for downward departure); *Hines v. State*, 817 So. 2d 964, 965 (Fla. 2d DCA 2002) ("[W]e reverse Hines's sentence and remand for the trial court to reconsider" the sentence); *Knox v. State*, 814 So. 2d 1185, 1187 (Fla. 2d DCA 2002) ("[W]e reverse Knox's sentence and remand for resentencing. On remand the trial court may consider the victim's consent as a basis to impose a downward departure sentence."); *White v. State*, 350 So. 3d 401,

404 (Fla. 2d DCA 2022) (“Because the trial court failed to apply the correct standard in considering Mr. White’s motion for downward departure, we vacate Mr. White’s sentence and remand for resentencing before a different judge.”).

The Fifth District similarly vacated sentences and remanded for resentencing in such situations. The court explicitly stated resentencing was the remedy in *Munoz v. State*, 212 So. 3d 1146, 1148 (Fla. 5th DCA 2017): “When the record suggests, but does not establish, that a trial court misapplied the law when denying a request for a departure sentence, the district court should vacate and remand for re-sentencing.” *See also Shuler v. State*, 947 So. 2d 1259, 1260 (Fla. 5th DCA 2007) (“Accordingly, the defendant’s sentence is vacated and this matter is remanded for reconsideration[.]”).

The Fourth District also held that when a motion for downward departure is erroneously denied, the proper remedy is to vacate the sentence and remand for resentencing. For example, in *Colletta v. State*, 126 So. 3d 1090, 1091 (Fla. 4th DCA 2012), the trial court believed it had no discretion to grant a downward departure based on caselaw at the time of sentencing. When a new opinion receded from the prior caselaw, the

Fourth District reversed and remanded for resentencing for the trial court to consider the motion for downward departure. *Id*.

Recently in *Coto v. State*, 366 So. 3d 1, 2 (Fla. 4th DCA 2023), the Fourth District addressed whether the trial court erred by denying a motion for downward departure where it believed it had no discretion to depart based on comparative fault. Holding that the trial court was permitted to consider comparative fault as a valid downward departure ground, the Fourth District issued the following remedy:

> Accordingly, **we vacate the sentence** imposed by the trial court and remand for a **new sentencing hearing allowing for consideration** of Coto's comparative fault in determining whether a downward departure sentence is appropriate.

Id. at 3 (emphasis added).

In *Bellamy v. State*, 199 So. 3d 480 (Fla. 4th DCA 2016), the Fourth District held that the trial court erred by utilizing the incorrect standard and analysis in denying a motion for downward departure. As a result, the Court reversed with the following instructions:

> Accordingly, we reverse and remand for the trial court to reconsider the motion for downward departure in light of this opinion. *See Ellis v. State*, 816 So. 2d 759 (Fla. 4th DCA 2002) (reversing where the trial court made statements indicating it was aware that sentencing was permissive but also made statements indicating it may have been under the mistaken impression that it lacked discretion); *see also Shuler v. State*, 947 So. 2d 1259 (Fla. 5th DCA 2007) (Thompson, J., concurring).

Id. at 484.

Bellamy and *Saffold I* are similar in the sense that neither opinion explicitly used the terms "reverse sentence," "vacate sentence," or "resentencing" in the remand instructions. However, it was clear in *Bellamy* that the remedy was a resentencing because it cited to two cases (*Ellis* and *Shuler*) where such a remedy was ordered. *See Ellis v. State*, 816 So. 2d 759, 760 (Fla. 4th DCA 2002) ("We affirm Appellant's conviction, but **remand for re-sentencing** and write to address the sentencing issues … **We reverse Appellant's sentence** as a habitual violent felony offender on count II and remand for the trial judge to **reconsider the matter** in light of this opinion.") (emphasis added); *Shuler v. State*, 947 So. 2d 1259, 1260 (Fla. 5th DCA 2007) (Thompson, J., concurring) (agreeing with majority opinion's remand instructions for reconsideration of the motion for downward departure).

Based on the above caselaw, the only remedy for this type of error—where a trial court misunderstood the law or facts during a motion for downward departure—is to reverse the sentence and remand for resentencing. While various opinions have also ordered trial courts to "reconsider" the motion with the proper law or facts, none of those opinions treated "reconsideration" and "resentencing" as separate concepts. That is

because a “reconsideration” is not its own remedy nor a substitute for a resentencing. Instead, the “reconsideration” instruction was always given in conjunction with a reversal of the sentence and/or a “resentencing” instruction.

Third, there are practical concerns with treating “reconsideration” and “resentencing” as different remedies. Namely that there is no good reason to provide two separate remedies for the same judicial error.

Should future cases arise where the trial court misapprehends its discretion or misunderstands the facts, the appropriate remedy (and remand instructions) would constantly be questioned. What remedy should apply to what case? If the mandate only requires “reconsideration” of a motion, does a trial court need to issue a new sentencing order on remand? Would a “reconsideration” prohibit a defendant from appealing the trial court’s subsequent denial of the “reconsidered” motion? Is a defendant entitled to call additional witnesses to support the downward departure motion? Is the State barred from introducing additional evidence on a “reconsideration”?

A trial court cannot correctly follow an appellate mandate upon remand when there are no clear instructions on what a “reconsideration” entails. Nor would there be any uniformity among cases involving the same

sentencing error. On the other hand, a remand instruction for resentencing is clear and guided by caselaw:

> "[W]here a sentence has been reversed or vacated, the resentencings in all criminal proceedings ... are de novo in nature." *State v. Fleming*, 61 So. 3d 399, 406 (Fla. 2011). "This means that when a defendant is resentenced, 'the fully panoply of due process considerations attach.'" *Id*. (quoting *State v. Scott*, 439 So. 2d 219, 220 (Fla. 1983)). "This includes the right to present evidence relevant to the sentence." *Wilson v. State*, 276 So. 3d 454 (Fla. 5th DCA 2019).

Spires v. State, 284 So. 3d 570, 571 (Fla. 4th DCA 2019).

Additionally, treating "reconsideration" as a lesser remedy of a full "resentencing" blurs the distinction between a "ministerial act" (which gives the defendant less rights on remand) and "resentencing" (which would require certain due process rights). *See Jordan v. State*, 143 So. 3d 335, 339 (Fla. 2014) ("Florida's district courts have found that a resentencing in which a trial judge has *discretion* as to the new sentence is *not* a ministerial act and thus requires the defendant's presence.") (emphasis in original); *cf. Lecroy v. State*, 954 So. 2d 747, 748 (Fla. 4th DCA 2007) ("[T]he trial court simply conformed the sentence to the pronouncement of the supreme court. Because it had no jurisdiction to do otherwise, it performed a ministerial act.").

In the present case, the motion for downward departure in *Saffold I* addressed all counts. As such, Petitioner was entitled to a resentencing on

all counts because the trial court misapprehended the facts and, consequently, its discretion to depart. Since the trial court had discretion to grant the downward departure and issue a new sentence, the mandate was not a "ministerial act." Rather, it was a resentencing hearing where Petitioner was entitled to the full panoply of due process rights, such as the right to be present, put on evidence, challenge the State's evidence, etc.

When Petitioner's sentence was reversed in *Saffold I*, Petitioner had no sentence on any counts. Since Petitioner had no sentence at the time of resentencing, Petitioner filed a timely motion to withdraw plea under Florida Rule of Criminal Procedure 3.170(f).

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner requests this Court disapprove of the Fourth District's holding in this case and approve the Second District's holding in *Scott*.

CERTIFICATE OF SERVICE

I certify that this brief was filed with the Court and a copy was served to Assistant Attorney General Melynda L. Melear, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 17th day of June, 2024.

/s/ TIMOTHY WANG
TIMOTHY WANG

CERTIFICATE OF COMPLIANCE

I certify this brief is submitted in Arial 14-point font in compliance with Florida Appellate Rule 9.210(a)(2) and that the word count is 13,000 or less exclusive of the caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block.

/s/ TIMOTHY WANG
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