IN THE SUPREME COURT OF FLORIDA

J. PATRICK SWETT

Petitioner,

v. **CASE NO.: SC01-1**

STATE OF FLORIDA,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

MR. SWETT'S INITIAL BRIEF ON THE MERITS

TERRENCE E. KEHOE
Florida Bar No. 330868
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (fax)

DONALD R. WEST
Florida Bar No. 315941
626 West Yale Street
Orlando, Florida 32804
407-425-9710
407-425-8287 (fax)

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PRELIMINARY STATEMENT

In this brief the Petitioner, J. PATRICK SWETT, will be referred to as "Mr. Swett." The Respondent, the STATE OF FLORIDA, will be referred to as "the state."

The record on appeal to the Fifth District consisted of three volumes. That record will be referred to by the number of the volume, followed by a slash, followed by the appropriate page reference therein. There is also a one volume record from the Fifth District itself.

STATEMENT OF THE CASE AND FACTS

This case involves a final appeal from an order modifying a criminal sentence entered in the Circuit Court, Ninth Judicial Circuit, Orange County, Florida ("trial court").

A. Trial Court Proceedings and Facts:

Mr. Swett was originally charged with first degree murder, armed robbery, armed burglary, and aggravated assault. He entered a plea to second degree murder, along with armed robbery, armed burglary, and aggravated assault (3/323-24). In paragraph 5, in bold letters, the written plea states in pertinent part: "**No one has promised me anything to get me to enter the plea(s) except as stated herein. The prosecutor has recommended the following: sentencing range 35-55 yrs;**

sentence imposed to be greater than co-defendant's sentence. The Judge has promised: [this was left blank]." (3/323-24.) That plea was signed by Mr. Swett. The written plea contained a certificate of defense counsel that no promises had been made other than as set forth in the plea or on the record. The prosecutor signed a statement that he consented to the plea on the lesser charge (applicable to Count One), and confirmed the representations in paragraph 5.

The written plea did not mention Fla.R.Crim.P. 3.800. It did not state that Mr. Swett was giving up his right to seek any future modification of his sentence.

At the change of plea (2/115-32), defense counsel represented:

> Pursuant to negotiations with the state, . . ., Mr. Swett will be sentenced within the range of 35 to 55 years and that sentence imposed in his case would be greater than that received by the co-defendant Richard Midkiff who previously pled. (2/116-17).

The trial court inquired if anyone had promised Mr. Swett anything other than what was represented in open court, to which Mr. Swett answered in the negative (2/120). The prosecutor said only that the "agreement" reached had been done with the consent of the victim's family (2/123). The trial court accepted "the written plea document" (and signed it on the bottom) (2/123; 3/324).

Mr. Swett was sentenced to 38.5 years in prison (6 months more than his co-defendant), plus 15 years probation. His appeal of the sentence was affirmed. Swett

v. State, 743 So.2d 1103 (Fla. 5th DCA 1999).[1/] The mandate issued on October 15, 1999.

On November 3, 1999, Mr. Swett filed his motion to modify the 1998 sentences (3/330-32). The state conceded the motion was timely (1/89).

On December 13, 1999, the trial court held a hearing on Mr. Swett's motion to modify (1/1-114). At that hearing Mr. Swett's father testified that he had contacted the Department of Corrections (1/5). Due to Patrick's age and the length of his sentence, he was ineligible for most programs (1/5). However, Patrick undertook to voluntarily tutor inmates in DOC in reading and writing (1/6). His father talked of the impact of Patrick's correspondence on Patrick's two brothers still living at home (1/7). This correspondence advised the boys to stay away from drugs, out of trouble, and not to make the same mistakes (1/7). He considered these letters to be a positive influence on both brothers (1/7). From what he could see, the lithium had made Patrick more stable (1/7-8). Since he had been returned to the Orange County jail for this hearing, Patrick had been voluntarily tutoring youths at the Orange County jail (1/9).

John Ritcher is with the youthful offender program at Orange County jail (1/14). He testified that Patrick had received his GED, and had helped other inmates with

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1/ In this appeal, Mr. Swett argued that the addition of the term of probation violated the plea.

school and reading (1/14-16). Patrick was able to teach adults to read and write, a difficult situation but one which he was doing successfully (1/43). These sessions were very helpful, because there were no formal programs in Patrick's unit, and they reduced the tension and stress in the unit (1/17). A letter from an inmate, attesting to Patrick's great help with reading, writing, and math, was admitted (1/28-29).

Maureen Bravo, one of Patrick's prior teachers, testified as to the letters she received from him. He seemed more mature and very remorseful (1/21).

Patrick's brother Joseph, and his sister Heather, testified as to the letters received from Patrick (1/31-32, 36). Joseph testified that the letters were supportive and advised him to do well in school (1/31). Other letters had been sent to Patrick's teachers at Bishop Moore High School, to share with students and warn them of traveling down the wrong road (1/24).

Patrick himself testified (1/38-62). He testified to the number of letters he had sent to his teacher and his family (1/39-41). He was a volunteer teacher (1/42), and was tutoring at the Orange County jail (1/43-44). Patrick testified of his deep remorse for the killing, which he said was not intentional (1/50-55). Because of the taking of lithium, he considered himself emotionally stable now (1/55).

The trial court heard testimony of Patrick's use of medication since an early age, and his present stable status under proper medication (1/11-12, 23, 45-47, 55).

The trial court recognized that this testimony was an expansion upon testimony presented at the original sentencing hearing (1/109). There, the court had heard testimony concerning Patrick's bipolar disorder, his use of illegal drugs and not the proper prescribed drugs at or about the time of the incident, and how a proper medical regimen would greatly help Patrick (2/188-200; 3/201-95). Witness after witness had testified that Patrick was worth saving (2/200; 3/203, 207, 212, 218).

On one hand, the state argued that the trial court could not reduce the sentence because it was entered pursuant to a plea bargain (1/89). On the other hand, the state specifically asked the trial court to exercise its discretion and deny the motion (1/94).

The trial court understood it was exercising discretion, and could rule either way (1/104). It granted the motion, reducing the time of incarceration to 21 years.[2/3/]

B. Fifth District's Opinion:

The Fifth District reversed. State v. Swett, 772 So.2d 48 (Fla. 5th DCA 2000). The court first held that an order granting a motion to modify was reviewable by the state because the sentence constituted a downward departure. Id. at 51. It further

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2/ Whether this is a downward departure sentence is of no import. The state did not argue its appeal to the Fifth District on that basis. There was absolutely no mention, much less any complaint, of a "downward departure" anywhere in its Initial Brief to the Fifth District.

3/ Although the documents are not in the record, the co-defendant also filed a Rule 3.800(c) motion to modify his sentence, which was denied (1/107).

held that where a sentence was imposed pursuant to a plea agreement, the trial court could not grant a motion to reduce the incarcerative portion of the sentence. Id. at 51-52. The crux of the Fifth District's decision was as follows:

> In the instant case, the plea was part of a deal whereby the prosecutor reduced the murder charge to second degree murder in exchange for the plea. The sentence was part of a quid pro quo and the defendant cannot accept the benefit of the bargain without accepting its burden. [State v.] Warner [, 767 So.2d 507 (Fla. 2000)] does not control. Moreover, to permit the evasion of negotiated pleas and sentences by utilization of a Rule 3.800 motion in mitigation would discourage the state from entering into plea bargains in the future.

Id. at 52. Mr. Swett's motion for rehearing, rehearing en banc, or certification to this Court was denied on November 27, 2000.

On December 27, 2000, Mr. Swett filed his timely notice to invoke the discretionary jurisdiction of this Court. By order dated September 7, 2001, this Court accepted jurisdiction, ordered briefing on the merits, and dispensed with oral argument.

SUMMARY OF THE ARGUMENTS

I. THE FIFTH DISTRICT'S OPINION MUST BE REVERSED BECAUSE THE TRIAL COURT'S DISCRETIONARY ORDER WAS NOT REVIEWABLE

The Fifth District's opinion must be vacated because an order granting a motion to modify a sentence pursuant to Fla.R.Crim.P. 3.800(c) is not appealable by the state and is not reviewable by certiorari.

II. ORDER GRANTING MOTION TO MODIFY SENTENCE PURSUANT TO FLA.R.CRIM.P. 3.800(c) CONSTITUTED A PROPER EXERCISE OF A TRIAL COURT'S DISCRETION

Despite the plea recommendation the trial court could entertain the motion to mitigate. It properly acted within its discretion to grant the motion to modify.

ARGUMENTS

I. THE FIFTH DISTRICT'S OPINION MUST BE REVERSED BECAUSE THE TRIAL COURT'S DISCRETIONARY ORDER WAS NOT REVIEWABLE

A. Introduction

This Court must reverse the Fifth District's opinion for several reasons. The first is that the Fifth District lacked jurisdiction to consider the state's appeal. The Fifth District's opinion cannot be squared with those of other courts which have held that an order on a Rule 3.800(c) motion is not appealable. Also, such an order

is not reviewable by certiorari.

Rule 3.800(c), in pertinent part, states:

> **Rule 3.800. Correction, Reduction, and Modification of Sentences**
>
> * * *
>
> **(c) Reduction and Modification**. A court may reduce or modify to include any of the provisions of chapter 948, Florida Statutes, a legal sentence imposed by it * * * within 60 days after receipt by the court of a mandate issued by the appellate court on affirmance of the judgment and/or sentence on an original appeal, * * *. This subdivision of the rule shall not, however, be applicable to those cases in which the death sentence is imposed or those cases in which the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion.

B. Order Granting Motion to Modify Sentence Pursuant to Fla.R.Crim.P. 3.800(c) Was Not Appealable by State

In its opinion, the Fifth District notes that the denial of a motion to reduce a legal sentence, filed under Rule 3.800(c), is not reviewable by a defendant because the trial court's ruling is purely discretionary. 772 So.2d at 50. Nonetheless, the Fifth District held that the trial court's order granting the motion to reduce a legal sentence was reviewable by the state. Id. at 50-51 and n. 3. That decision expressly and directly conflicts with other appellate decisions.

No statute or rule, and certainly not Rule 3.800(c), provides any basis for a state

appeal. The reason a Rule 3.800(c) motion is not reviewable by the defendant is not because it was denied, but rather because it is completely within the discretion of the trial court. As stated by the Second District in Nixon v. State, 658 So.2d 1180 (Fla. 2d DCA 1995):

> We note at the outset that motions brought under Florida Rule of Criminal Procedure 3.800(b) [now (c)] are largely within the discretion of the trial court and are non-appealable.

Additionally, the First District, in Daniels v. State, 568 So.2d 63 (Fla. 1st DCA 1990), stated that when a motion for a reduction of sentence is made pursuant to Rule 3.800(b)[now (c)], it is addressed to the discretion of the court. "This court therefore has no jurisdiction to review the correctness of the trial court's disposition of the motion." Id. at 64 (emphasis added). Accord, Leonard v. State, 785 So.2d 599 (Fla. 1st DCA 2001); Scott v. State, 767 So.2d 559 (Fla. 1st DCA 2000); Frazier v. State, 766 So.2d 459 (Fla. 1st DCA 2000); Davis v. State, 745 So.2d 499 (Fla. 1st DCA 1999).

The Fifth District's decision directly and expressly conflicts with these opinions on the issue of reviewability. It would be both a violation of state and federal guarantees of due process and equal protection to allow the state to appeal from a certain type of sentencing order, but not the defendant. However, in this case,

because it is clear that the rationale for the non-appealability rule is due to the purely discretionary ruling of the trial court, that rationale is as equally applicable to a defendant's motion that is granted as to one where a defendant's motion is denied.

C. Order Granting Motion to Modify Sentence Pursuant to Fla.R.Crim.P. 3.800(c) Was Not Appealable as a Downward Departure Sentence

The Fifth District stated that the sentence imposed by the trial court was a downward departure sentence. It did not state that it was basing its appellate jurisdiction on that basis. In fact, the court specifically ignored the issue of whether the sentence was a valid downward departure sentence. "That a downward departure may or may not be justified in this case is not the appellate issue." 772 So.2d at 51. The reason for this is that the state never argued to the Fifth District Court Appeal that it had jurisdiction based on the fact that Mr. Swett's 1999 sentence constituted a downward departure.[4/] In its initial (and only) brief to the Fifth District, the state never mentioned the words "downward departure," much less made any argument that a downward departure sentence ensued or was illegal. Having failed to make that argument to the Fifth District, it was error for the Fifth District to justify its ruling, in any part, on a downward departure basis. See M.W. v. Davis, 756 So.2d 90, 97 n.

4/ The state's sole argument was that the entry of the order violated the terms of the plea agreement.

17 (Fla. 2000); City of Miami v. Steckloff, 111 So.2d 446, 447 (Fla. 1959) (assigned error will be deemed to be abandoned, and will not be considered, when it is completely omitted from briefs); Greenfield v. Manor Care, Inc., 705 So.2d 926, 927 (Fla. 4th DCA 1997), review denied, 717 So.2d 534 (Fla. 1998); Cohen v. American Legion, 546 So.2d 46, 47 (Fla. 4th DCA 1989).

The Fifth District relied in part on State v. Stalvey, ___ So.2d ___ (Fla. 1st DCA 4/12/00)[25 Fla. L. Weekly D961]. 772 So.2d at 51. On August 15, 2001, this Court entered an unpublished order quashing the First District's opinion and remanding the matter. Stalvey v. State, Case No. SC00-823. Pursuant to that order, on September 28, 2001, the First District issued an order setting aside its April 12, 2000, opinion. State v. Stalvey, Case No. 1D99-2219 (unpublished order). Having been vacated, the First District's Stalvey opinion has no legal precedence. Also, it does not appear that the issue of appealability was raised in Stalvey, and it was certainly not discussed anywhere in the opinion.

D. Order Granting Motion to Modify Sentence Pursuant to Fla.R.Crim.P. 3.800(c) Not Subject to Review by Certiorari

It is unclear whether the Fifth District rendered its decision based upon its certiorari jurisdiction, rather than on its appellate jurisdiction. It does not state that it treated the case as a petition for writ of certiorari, rather than an appeal. Neither did

it discuss the applicable certiorari standard of review, and state that was what was being applied. However, the Fifth District did state that a circuit court order on mitigation of a sentence which determines an issue not wholly within the court's discretion may be reviewable by certiorari. 772 So.2d at 50-51 n. 3. For that proposition it cited Knafel v. State, 714 So.2d 1195 (Fla. 2d DCA 1998). Knafel is not a case in which the state appealed the granting of a 3.800(c) motion. No court has held that such a motion is reviewable by certiorari. As to the certiorari issue, the Fifth District's opinion again expressly and directly conflicts with the cases cited above.

Recently, the Third District addressed a similar situation in State v. Jordan, 783 So.2d 1179 (Fla. 3d DCA 2001) (en banc). In Jordan, the Third District concluded it had no jurisdiction to consider a state appeal from a final sentencing order which departed from the terms of a substantial assistance agreement. Additionally, the court ruled that such an order was not reviewable by way of certiorari. The court recognized the well-established case law of this state which has unequivocally provided that the state cannot circumvent the absence of a statutory right of appeal from a final order through a petition for certiorari. See also, State v. Jones, 767 So.2d 1279 (Fla. 1st DCA 2000). Thus, the Fifth District did not possess jurisdiction to consider the state's appeal via its certiorari jurisdiction.

II. ORDER GRANTING MOTION TO MODIFY SENTENCE PURSUANT TO FLA.R.CRIM.P. 3.800(c) CONSTITUTED A PROPER EXERCISE OF A TRIAL COURT'S DISCRETION

The trial court acted within its discretion to grant the motion to modify. Contrary to the process which puts the rulemaking power in this Court, the Fifth District's decision in effect creates a new exception to Rule 3.800(c).

A. 1998 Sentence Fully Complied With Plea Recommendation

At the sentencing hearing on December 18, 1998, the trial court had the discretion to accept the plea recommendation or not. It chose to do so, as was its right. It then fully complied with the plea recommendation. It sentenced Mr. Swett to 38 ½ years in prison, which was within the recommended range. That sentence was greater (by six months) than the sentence of the co-defendant. In fact, the sentence gave the state even more than it asked for, in that it placed an additional fifteen year term of probation on the back of Mr. Swett's jail sentence. Therefore, the state certainly received what it sought at sentencing in 1998.

This is correct even though the scoresheet used contained an error in the state's favor. As pointed out at the December 13 hearing, the first "additional offense" listed, a category 9 offense, was scored at 92 points instead of 46. Fla.R.Crim.P. 3.991(a). Had the error been corrected, that would have reduced the "state prison months" by

46 points to 429 (1/74). The resulting range would have been from 321.75 to 536.25 months (1/74-75).

Of course, this case in now complicated by the fact that the Court has ruled that Chapter 95-184, which contained the 1995 sentencing guidelines, is unconstitutional. Heggs v. State, 759 So.2d 620 (Fla. 2000). For defendants who fall within the October 1, 1995 to October 1, 1996 window found applicable in Heggs, such as Mr. Swett, this is fundamental error.[5/] Mr. Swett's 1999 sentence of 21 years, or 252 months, fell within the sentencing range available under the 1994 sentencing guidelines found in Fla.R.Crim.P. 3.990(a) of 176.7 to 294.5 months. But see Latiif v. State, 787 So.2d 834 (Fla. 2001), and p. 26, infra.

B. Trial Court Properly Exercised its Discretion

Although the state has never made the agreement that the evidence presented to the trial court did not support mitigation, it is important for this Court to understand that the trial court heard extensive testimony and argument from counsel, understood it possessed the authority under Rule 3.800(c) to deny the motion, or to grant it, and that if granted it had the discretion to change Mr. Swett's sentence either marginally or to a great degree. From the trial court's ruling, it is apparent the judge

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5/ The Court later found the window extended to May 24, 1997. Trapp v. State, 760 So.2d 924, 928 (Fla. 2000).

saw Mr. Swett's potential and determined that while he deserved significant punishment, his life should not be completely destroyed. The trial judge heard the testimony of professional people at the hearing as to Mr. Swett's remorse, his desire to educate and assist other young people who may either be thinking about or actually on a wrong path, and his message to his younger siblings concerning the perils becoming involved with drugs. This was a decision made upon serious reflection, by a trial judge that was well versed in the facts and proceedings in this case. It was the epitome of the exercise of the trial court's discretion, which is the heart and soul of Rule 3.800(c).

C. The Fifth District Improperly Created New Exception to Rule 3.800(c)

The Fifth District held that the trial court did not possess discretion to rule on Mr. Swett's Rule 3.800(c) motion because his case involved a quid pro quo plea agreement. For that proposition, the court cited no other Rule 3.800(c) case. The court's decision expressly and directly conflicts with a) the face of Rule 3.800(c), b) this Court's decision promulgating that rule, The Florida Bar, 343 So.2d 1247, 1263-64 (Fla. 1977), and c) this Court's most recent reiteration of the rule, Amendments to the Florida Rules, etc., 761 So.2d 1015, 1021-22 (Fla. 2000). In those opinions, and by that rule, this Court has stated that a trial court may modify a sentence if a

defendant files a motion to modify sentence within a certain time frame. It is beyond dispute, and the Fifth District conceded, that the trial court had jurisdiction to consider Mr. Swett's motion. Therefore, the trial court could lawfully modify Mr. Swett's sentence.

Rule 3.800(c) sets forth three exceptions for situations in which a defendant is not entitled to file such a motion. None of them were argued by the state, or found by the Fifth District, as being applicable.[6/] Absent Mr. Swett's case falling within one of those exceptions, the rule clearly provides that the trial court may grant a motion filed in any other situation. It is up to the pure discretion of the trial court to grant or deny that motion. The trial court below recognized that fact.

The Fifth District possessed no ability to make or amend the rules of criminal

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6/ It is important to note that the state, in its Initial Brief to the Fifth District, acknowledged that there must be some avenue for mitigation:

> The state acknowledges that its position would limit a defendant's right to seek modification or reduction of a sentence pursuant to Fla.R.Crim.P. 3.800 within sixty days of sentencing. Nevertheless, such a restriction must be placed upon a defendant who assents to a valid plea bargain. Perhaps this restriction could be ameliorated where new evidence or a new basis for mitigation surfaces during said sixty day window, but in this case it is clear that Appellee filed the motion to modify his sentence only because he wanted a better deal and the plea agreement did not expressly prohibit him from doing so. (Initial Brief, p.7).

procedure. It can suggest amendments, comment on rules, express its disagreement with rules, but it possessed no ability to create such rules. Under the constitution, Article V, § (2)(a), that authority rests only with this Court. Yet the Fifth District's decision, in effect, creates a fourth exception to Rule 3.800(c): that the trial court may not entertain such a motion in a case in which the state and defendant have entered into a plea bargain involving a reduced charge.[7/]

Such a plea agreement is not an unusual thing in this state. All plea agreements, by definition, are quid pro quo agreements. If the state had wanted to prevent this situation from occurring, it could have insisted that Mr. Swett not file a Rule 3.800(c) motion as a condition of the plea.[8/] If this Court had wanted Rule 3.800(c) to have

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7/ It is unclear whether the Fifth District would permit a motion to mitigate a sentence in Mr. Swett's case, if the sole extent of the mitigation was to reduce Mr. Swett's sentence from 38.5 years to 38 years and one day (thus still keeping it in excess of the co-defendant's) and/or by reducing or eliminating the 15 year term of probation (which was never part of any recommendation to begin with). In other words, it is unclear whether the Fifth District would permit a trial court to consider a Rule 3.800(c) motion in a quid pro quo plea situation if it perceived that the extent of the mitigation did not violate the plea agreement. It appears that the answer to this would be no, in that the Fifth District apparently has ruled that such a motion could not ever be entertained in a quid pro quo plea case, no matter the extent of the mitigation.

8/ Under the law, a defendant could waive his right to file a Rule 3.800(c) motion. See generally, Bradley v. State, 727 So.2d 1001 (Fla. 4th DCA 1999) (defendant can waive credit for time served); Garcia v. State, 722 So.2d 905 (Fla. 3d DCA 1998), review dismissed, 727 So.2d 905 (Fla. 1999) (a party may waive any right to which he is legally entitled under the constitution, statute, or contract;

such an exception, it could have provided for it. Or it can provide such an exception in the future. However, at the time Mr. Swett made his motion, he had not waived his right to do so as a condition of his plea, there was no such exception in the Rule, and the Fifth District could not create one.[9/]

Because it created a new exception, the Fifth District's opinion also expressly and directly conflicts with this Court's prior opinions promulgating Rule 3.800(c), as well as the rule itself.

The Fifth District's decision on this point also expressly and directly conflicted with Sanchez v. State, 524 So.2d 704 (Fla. 4th DCA 1988), affirmed, 541 So.2d 1140 (Fla. 1989). In Sanchez, the defendant entered into a plea agreement. Sanchez entered a guilty plea, was adjudicated guilty of trafficking in cannabis, and placed on three

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defendant may agree to forego practice of law); Hedrick v. State, 543 So.2d 873 (Fla. 3d DCA 1989) (in plea agreement, defendant waived right to seek early termination of probation).

9/ Another recurring "plea bargain" scenario is presented in Acosta v. State, 784 So.2d 1137 (Fla. 3d DCA 2000). There the Third District denied a petition for writ of certiorari in a case where the parties had entered into a plea agreement for a specified sentence, and that sentence was imposed. Later the state sought to extend the period of confinement pursuant to the Jimmy Ryce Act. Acosta claimed this violated the plea agreement. The trial court disagreed, and the Third District denied the petition. A concurring judge noted that the Jimmy Ryce Act came into being after Acosta was sentenced, and therefore could not have been something the parties could have negotiated. Id. at 1138. In contrast, Rule 3.800(c) was on the books at the time Mr. Swett was sentenced. It could have been subject of negotiations, had the state so desired.

years probation. The opinion is silent as to whether this plea was pursuant to an agreement with the state, but it must have been. The penalty for trafficking in cannabis, in the mid-1980's, provided for a mandatory minimum term of imprisonment of at least three years. § 893.135(1)(a)1, Florida Statutes (1985). The only way for a trial court to have imposed a sentence of probation (in derogation of the mandatory minimum) would have been pursuant to an agreement with the state. § 893.135(3); § 921.001(5), Florida Statutes (1985). After serving two years of probation, Sanchez moved to mitigate the term of probation and to vacate the adjudication. Id. at 1141. The trial court granted early termination of probation but, believing it had no authority to do so, refused to vacate the adjudication. Id. The district court affirmed that, but certified conflict with a decision of the First District. This Court held that a trial court could withdraw an adjudication of guilt on a timely filed motion to modify. However, because Mr. Sanchez's motion was untimely, he was not entitled to any relief. The existence of a plea agreement in Sanchez did not preclude a future modification of the agreed-upon sentence of probation.

The Fifth District's opinion also expressly and directly conflicted with State v. Cure, 760 So.2d 243 (Fla. 3d DCA 2000), a case acknowledged, but not followed, by the Fifth District. In Cure, the court held that where the trial court ignored a plea agreement, and imposed a lesser sentence, the state could not complain on appeal.

Cure involved a quid pro quo agreement - a plea bargain whereby the defendant received a boot camp sentence, rather than prison, in exchange for a promise of state prison if he violated the boot camp sentence. Yet, contrary to the Fifth District's conclusion in Mr. Swett's case, Cure held the trial court possessed the discretion not to enforce the previously acted upon plea agreement.[10/]

D. Analogous Situation - Motion For Early Termination of Probation

As recognized by the Third District in Ziegler v. State, 380 So.2d 564 (Fla. 3d DCA 1980), a motion for early termination of probation is analogous to a motion to modify a legal sentence. Both are obviously attempts to mitigate a sentence. One primary difference is the time requirement of the motion to modify. Secondly, of course, a motion to modify can be used against a prison or jail term, a fine, or an adjudication, as well as a term of probation or community control.

Day in and day out in our criminal courts defendants enter into plea agreements with the various state attorney's offices whereby the defendant is sentenced to an agreed upon term of probation. Yet, also, day in and day out in our criminal courts defendants, who have entered into plea agreements with the state and who have

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10/ The Third District has since receded from Cure in State v. Jordan, 783 So.2d 1179 (Fla. 3d DCA 2001) (en banc), on the issue of appealability.

received the "agreed upon" or "bargained for" sentences of probation, move for and are granted early termination of that probation. Theoretically, the state could argue that early termination of the probation is contrary to the plea agreement, since the plea agreement was for a set term of probation. Yet that never occurs. Appellate courts have recognized that the decision on whether or not to grant an early termination of probation is discretionary with the trial judge, but at least the trial judge has the discretion (and clearly the jurisdiction) to grant the early termination. Krug v. State, 689 So.2d 391 (Fla. 3d DCA 1997); Arriaga v. State, 666 So.2d 949 (Fla. 4th DCA 1996); Jones v. State, 666 So.2d 191, 192 (Fla. 2d DCA 1995); Baker v. State, 619 So.2d 411, 412 (Fla. 2d DCA 1993); Ziegler, supra. Most importantly, Florida courts have uniformly held that the decision whether or not to grant an early termination of probation is not reviewable. Burgos v. State, 765 So.2d 967 (Fla. 4th DCA 2000); Ziegler v. State, 380 So.2d 564 (Fla. 3d DCA 1980).[11/] There is no reason to apply any different standard on a motion to modify, even in plea agreement cases.

A trial court either has discretion under Rule 3.800(c) or it does not. Yet on the face of the rule, it has discretion in all cases except for cases falling within the three specified exceptions. Now, the state wants to create a fourth exception and limit that

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11/ Counsel has found no cases where the state has appealed (much less been permitted to appeal) an order granting a motion for early termination of probation.

discretion in plea cases. On the other hand, while arguing for this new restriction, the state even acknowledges that it must provide an outlet for mitigation ". . . where new evidence or a new basis for mitigation surfaces during said sixty day window, . . ." (State's Initial Brief to Fifth District, p. 7). What if Mr. Swett had saved the life of a correctional officer by intervening in a inmate attack during his first year in prison. Such a good deed could be a basis for mitigation. Yet that demonstrates the problem with the state's argument. You cannot have some reasons which would justify a modification of a sentence imposed pursuant to a plea agreement, and yet not others. That is what the provision of discretion to the trial court is all about. As set forth in the statement of the facts above (see pp. 3-5, supra), there was new evidence presented at the motion to modify hearing. Thus, even under the state's apparent proposal for a changed Rule 3.800(c), Mr. Swett's case could qualify for modification, in the discretion of the trial court.

E. Fifth District's Reasoning Was Erroneous

The Fifth District ruled that because this case involves a plea agreement, the trial court could not modify Mr. Swett's sentence. First, it must be noted that that position is at odds with the recognition by the prosecutor below that the judge had the discretion to act on the motion. It is clearly improper for the state to take one position in the trial court, and a second inconsistent position on appeal. Vaprin v. State, 437

So.2d 177, 178 n. 2 (Fla. 3d DCA 1983).

Although the state has argued that this case is governed by contract law surrounding a plea agreement, that argument does not preclude Mr. Swett's motion. First, in writing, the state signed off on a plea which merely made a recommendation to the trial judge. Pursuant to Fla.R.Crim.P. 3.171(b)(1)(A)(ii), a prosecutor may make a request for particular sentence, with the understanding that the recommendation or request shall not be binding on the trial judge. See e.g., State v. Adams, 342 So.2d 818, 819 (Fla. 1977); Peeples v. State, 719 So.2d 352 (Fla. 5th DCA 1998). That is what occurred here. The prosecutor made a recommendation, and the trial court initially followed it. The defense did nothing to violate any agreement when it later sought to modify the sentence imposed, since there was no agreement whatsoever about waiving a motion to modify. The trial court possessed the initial discretion to reject the recommendation; therefore it surely possessed the discretion to modify the sentence imposed.

The state seems to believe that Rule 3.800(c) contained an additional, unwritten exception: that a judge cannot entertain a motion to modify which seeks to modify a sentence entered pursuant to a plea recommendation. First, if the Court wanted to put such an exception into Rule 3.800(c), it could. It added the last sentence providing

for exceptions to this rule for certain explicit situations, none of which apply.[12/] The rule cannot be interpreted as having a fourth exception, one never promulgated by the Court, much less recognized by any Florida appellate court. The rule of lenity, § 775.021(1), Florida Statutes (1999), would also be violated by this Court's imposing a condition on Rule 3.800(c) that does not now exist.

None of the cases cited in the Fifth District's opinion 1) address the specific issue raised in this appeal or 2) would justify the result reached by the Fifth District.

As stated above a defendant, in a plea agreement, can waive any right he has. By a plea agreement, the defendant has not waived such rights as the right to challenge an illegal sentence, the right to challenge his plea through the Rule 3.850 mechanism, and numerous other rights. Of course, a defendant's waiver of some right must be knowing and voluntary. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct.1019, 82 L.Ed. 1461 (1938). Of primary importance in this case is that Mr. Swett, in his plea agreement, did not waive his right to seek a modification of his sentence pursuant to Rule 3.800(c). Even the state has not made that claim below or on appeal.

The state places a great deal of emphasis on its assertion that the trial court

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12/ The principle of expressio unius est exclusio alterius is a canon of construction holding that to express or include one thing implies the exclusion of the other. Black's Law Dictionary 602 (7th ed. 1999). Having specified three exceptions implies that there is not a fourth.

accepted the plea agreement (IB 7). The written document, signed by the judge, is entitled "plea", not "plea agreement". What the trial court stated it accepted was Mr. Swett's "plea".

> I'll accept your plea as to Count One to the lesser included offense, second degree murder and as charged in Count Two, Three, and Four; robbery, armed burglary and aggravated assault as pled to here today by you.
>
> At this point I'll accept the written plea document and place it into the court file and I'll execute on the bottom below the attorneys' signatures that I have accepted the same for the record. (2/122-23).

It then later entered a sentence in accord with the state's recommendation.

In reaching its decision, the Fifth District cited four cases. It cited Goins v. State, 672 So.2d 30 (Fla. 1996), for the proposition that a trial court's authority to impose a sentence in a plea context is circumscribed. 772 So.2d at 51. Goins involved a situation in which the defendant agreed to plea as charged to two of the three charged counts, with the third being nol prossed. There was an appellate issue as to whether the sentence was an agreed upon sentence or merely a recommendation to the trial court. 672 So.2d at 31. However, Goins was not a Rule 3.800(c) case. Neither was it a case which involved a plea to a lesser included offense. Goins merely discussed a defendant's options when the trial court failed to honor the sentencing agreement, and did not discuss the state's options when it feels its did not receive the

agreement bargained for.

The two Fifth District cases cited by that court, Parker v. State, 767 So.2d 532 (Fla. 5th DCA 2000), and Rickman v. State, 713 So.2d 1115 (Fla. 5th DCA 1998), simply do not support that court's decision. Parker involved a Heggs issue recently resolved by this Court in Latiif v. State, 787 So.2d 834 (Fla. 2001). In Parker (and in Latiif), the court ruled that if a case falls within the Heggs window and involves a plea agreement whereby the state reduced a charge as part of the agreement, and the defendant seeks relief pursuant to Heggs, the state is given the option of either taking the defendant to trial on all original charges or vacating the sentences imposed and re-sentencing under the correct guidelines. Rickman simply involved a plea agreement "based on a fundamental infirmity." 713 So.2d at 1116. The situations in Parker (and Latiif) and Rickman are simply dissimilar to that in Mr. Swett's case.

Similarly, State v. Warner, 762 So.2d 507 (Fla. 2000), is dissimilar in that that it involves a plea as charged, and is not a Rule 3.800(c) case. The Fourth District had also found the reasons for departure invalid. Id. at 509. State v. Cure, 760 So.2d 243 (Fla. 3d DCA 2000), was discussed supra, pp. 19-20.

Jolly v. State, 392 So.2d 54 (Fla. 5th DCA 1981), involved a motion to correct an allegedly illegal sentence under Rule 3.800, not a motion to modify a legal sentence. The bottom line in Jolly was that both sides had erred in believing that a mandatory

minimum was applicable. The majority of the court's opinion is simply dicta concerning what the state's and defendant's remedies were.

As shown, the cases relied upon by the Fifth District simply do not support its decision.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must vacate the Fifth District's decision and reinstate the trial court's December 13, 1999, order.

Respectfully submitted this 2d day of October, 2001.

TERRENCE E. KEHOE
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (fax)

DONALD R. WEST
626 West Yale Street
Orlando, Florida 32804
407-425-9710
407-425-8287 (fax)

TERRENCE E. KEHOE
Florida Bar No. 330868

DONALD R. WEST
Florida Bar No. 315941

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2d day of October, 2001, a true copy of the foregoing was sent by United States mail to Carmen F. Corrente, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118; and the original and 7 copies were sent by United States mail to Thomas D. Hall, Clerk, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927.

DONALD R. WEST
Florida Bar No. 315941

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in 14 point TIMES NEW ROMAN proportional space font.

TERRENCE E. KEHOE
Florida Bar No. 330868