IN THE SUPREME COURT OF FLORIDA

WILFRID METELLUS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC02-1494

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Although the six appellate cases were consolidated for briefing, six separate appellate records were prepared. The records on appeal will be referred to by the appellate case number followed by "R" followed by the volume number, a colon, and then the appropriate page number. Example: (5D01-1044 R2: 98). The one supplemental volume will be referred to by the symbol "SV" instead of "R".

All of the transcripts contained in the records were prepared in all upper case letters. All quotations to the transcripts contained herein have been adjusted to reflect both upper and lower case letters.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially accurate for the purpose of this appeal, with the following additions and corrections:

Petitioner's codefendant in these cases is Jonel Ocer. He received a sentence of life imprisonment for his participation in these crimes. (5D01-1253 R1: 7) On October 10, 2000, the Fifth District Court of Appeal affirmed Ocer's conviction and sentence without opinion in Case No. 5D00-0710. The decision may be found at **Ocer v. State**, 770 So. 2d 1242 (Fla. 5th DCA 2000).

STATEMENT OF THE FACTS

Petitioner's brief contains no statement of the underlying facts of these heinous crimes. Moreover, the recitation of procedural facts contained in Petitioner's brief is incomplete. The completed facts are as follows:

A. Facts of the underlying crimes:

CR98-14790 (5D01-1254):

On October 22, 1998, Petitioner was parked in the driver's seat of a car near a dumpster in a convenience store with his lights off. A law enforcement officer made contact with him. There was a loaded .357 firearm in the rear driver's side floorboard. Petitioner later admitted asking a

codefendant to put it under the seat. Two black ski masks were also found in the vehicle. Also present in the car were Kareem Forbes and Donia Kindell. (5D01-1253 R2: 80)(5D01-1254 R2: 96)

CR99-43 (5D01-1044):

This crime occurred on January 1, 1999. (5D01-1044 R2: 96-97) Petitioner was the passenger in a car pulled over by a police officer. (5D01-1044 R2: 96-97) A consent search revealed a handgun underneath the front passenger seat where Tony Elozar was seated. (5D01-1044 R2: 97) A second gun was found in the center console in the back seat where Petitioner was sitting. (5D01-1044 R2: 97) Post-Miranda Petitioner admitted that he had handled the firearm. There was also a ski mask in the rear consol. Petitioner was found to have over $1,000 in cash on his person. (5D01-1044 R2: 97)

CR99-1254 (5D01-1249):

This crime occurred on January 8, 1999. The victims were Velez, Singh, Rachel Reyes and Antoinette Reyes. (5D01-1249 R2: 96) "The individuals show up at the door, knocked at the door. Three black men wearing ski masks walk in with [] guns, [] and ordered drugs, money, et cetera. They scared the heck out of the individuals inside. [] Miss Reyes was put on the ground, Mr. Velez taken into the bedroom." (5D01-1253 R2: 87)

CR99-699 (5D01-1253):

This crime occurred on January 9, 1999 against victim Michelet Placide. (5D01-1253 R2: 41) This crime was committed by Petitioner, Tony Elozar, Jonel Ocer, and someone named Coulou. (5D01-1253 R2: 42)(5D01-1253 R2: 45, 47) Petitioner and the three codefendants entered the victim's residence by forcing open a window. (5D01-1253 R2: 41, 88) Three of the four perpetrators were wearing masks. (5D01-1253 R2: 41) They were all armed with firearms. (5D01-1253 R2: 41-42) The victim was tied up with a phone cord and beaten. (5D01-1253 R2: 42, 88) They stole jewelry, clothing, a television and a VCR. (5D01-1253 R2: 41)

CR99-1907 (5D01-1250):

This crime was committed on January 12, 1999. (5D01-1253 R2: 43) Three juvenile witnesses knocked on the front door of victim Nelson and her mother victim Deronvil. As the front door was opened by Nelson, Petitioner and Ocer jumped out of Nelson's pick-up truck parked in the driveway. They were wearing masks and were armed with handguns. They forced their way into the residence. The three juveniles fled. The perpetrators made the two victims lie on the floor at gunpoint and demanded money. The victims had no money, and the perpetrators fled with nothing. (5D01-1253 R2: 43)(5D01-1250 R2: 96-97)

CR99-736 (5D01-1251):

This crime occurred on January 13, 1999. (5D01-1253 R2: 42) This was another home invasion which was committed by Petitioner, Elozar, Ocer, and possibly a fourth perpetrator. (5D01-1253 R2: 42, 47-49) Victim Yvanie LaPointe was walking home from work when she was forced into her house at gunpoint. (5D01-1253 R2: 88) Other victims were present in the residence. (5D01-1253 R2: 88) One of the perpetrators put his gun in the back of LaPointe's head and demanded money. She stated that she had left the money at her shop. (5D01-1253 R2: 88-89)(5D01-1251 R2: 96) The perpetrator then put his gun in LaPointe's mouth and told her he was going to kill her if he didn't get the money. He took the victim's purse and removed $30 and the keys to her shop. (5D01-1253 R2: 89)(5D01-1251 R2: 96) LaPointe asked the perpetrator not to kill her because she has a baby. One of the perpetrators answered, "I will shoot your baby." He took $80 in cash from the victim's pants pocket. (5D01-1251 R2: 96) They also took a Sony Playstation with games before leaving the residence. (5D01-1251 R2: 97)

Petitioner, Elozar and Jonel were arrested the following day. (5D01-1253 R2: 88) When law enforcement attempted to arrest Petitioner, he ran into Elozar's apartment. He obtained a shotgun and put it in the attic, where he attempted to hide. Law enforcement retrieved both Petitioner and the shotgun from the attic. (5D01-1253 R2: 89) Inside of a

vehicle at the residence were found ski masks, a gun, and ties. (5D01-1253 R2: 89)

B. <u>Facts pertaining to the denial of the motion to correct illegal sentence</u>:

Upon his arrest, Petitioner gave a complete and full statement to Detective Parks Duncan regarding his involvement and the involvement of his codefendants, Jonel Ocer and Tony Elozar. (5D01-1253 R1: 14) Ocer also gave a full confession. Elozar was the only one of the three defendants who did not confess. (5D01-1253 R1: 23)

On November 3, 1999, Petitioner elected to enter a plea of guilty to one count each in five of the six cases. In CR99-43 Petitioner pled to carrying a concealed firearm; in CR99-699 Petitioner pled to home invasion robbery with a firearm, a minimum mandatory offense; in CR99-736 Petitioner pled to home invasion robbery with a firearm, a minimum mandatory offense; in CR99-1254 Petitioner pled to home invasion robbery with a firearm, a minimum mandatory offense; and in CR99-1907, Petitioner pled to armed burglary of a dwelling with a firearm. (5D01-1253 R2: 35-37) The State agreed to nol pros all other counts in those cases. In exchange, as defense counsel repeatedly stated during the plea hearing:

> [DEFENSE COUNSEL]: He'll also be required to testify truthfully against the co-defendant in this case, and that would be Mr. Ocer if there

> are any remaining Ocer trials after today and also Ocer [sic] trials, if Mr. Elozar proceeds forward. (5D01-1253 R2: 36)
>
> * * *
>
> [DEFENSE COUNSEL]: Again, this will be sentenced following the PSI and his testimony against any co-defendant who proceeds to trial. (5D01-1253 R2: 36-37)
>
> * * *
>
> [DEFENSE COUNSEL]: He'll be, again, set off for sentencing, and he will be required to testify truthfully against any codefendants who proceed to trial. (5D01-1253 R2: 37)
>
> * * *
>
> [DEFENSE COUNSEL]: He will testify truthfully against any codefendant who proceeds to trial. (5D01-1253 R2: 37)

Before the plea was accepted the following exchange occurred:

> [PROSECUTOR]: [Petitioner], it's my understanding that you are willing to testify truthfully in any future trials of Mr. Ocer or Mr. Elozar, is that correct?
>
> [PETITIONER]: Tony Elozar?
>
> [PROSECUTOR]: Yes.
>
> [PETITIONER]: Yes. (5D01-1253 R2: 44)

Petitioner stated that he recalled giving a statement to Detective Parks Duncan. The prosecutor handed him a transcript of that statement. Petitioner stated that he had seen the transcript before, and *everything he had stated in the transcript was the truth*. (5D01-1253 R2: 44-45)

Petitioner reiterated at this plea hearing that Elozar had participated in the January 10, 1999 home invasion and the January 13, 1999 robbery. (5D01-1253 R2: 45-49) The prosecutor showed Petitioner a photograph, which Petitioner positively identified as the same Elozar who had participated in the crimes. (5D01-1253 R2: 49) *Petitioner claimed that all of these things he was saying at the plea hearing were "the truth".* (5D01-1253 R2: 49) The trial court accepted the plea and ordered that Petitioner be held separate from Ocer and Elozar at the jail. (5D01-1253 R2: 50-51)

Elozar then fled the jurisdiction and became a fugitive. Rather than hold Petitioner's sentence in abeyance indefinitely while law enforcement searched for Elozar, a sentencing hearing was scheduled. (5D01-1253 R2: 84)

On February 24, 2000, Petitioner's sentencing hearing was held. (5D01-1253 R2: 56) Before Petitioner was sentenced the following exchange occurred:

> [PROSECUTOR]: [Petitioner], we asked you questions previously at your plea. Do you remember when we talked about all the different events and the home invasion, et cetera?
>
> [PETITIONER]: Yes, Ma'am.
>
> [PROSECUTOR]: Okay. *Is everything that you told me, is that still true today?*
>
> [PETITIONER]: *Oh, yeah.*
>
> [PROSECUTOR]: *And is everything that you told the detectives in reference to these home*

> *invasions, [] was that all true?*
>
> [PETITIONER]: *Yes, Ma'am*. [Emphasis added]. (5D01-1253 R2: 75-76)

Petitioner again reiterated that the two individuals who committed these offenses with him were Tony Elozar and Jonel Ocer. (5D01-1253 R2: 76) The exchange with the prosecutor continued:

> [PROSECUTOR]: All right. And as part of your sentence, we've taken into consideration the fact that you have been cooperative and you have represented that you will be cooperative, should you be called at any trial against either of those individuals. Is that still your position?
>
> [PETITIONER]: Um my deal was that you was gonna make me testify on Tony Elozar.
>
> [PROSECUTOR]: *If you were called to testify against anyone, would you testify truthfully*?
>
> [PETITIONER]: *Yes, Ma'am*. [Emphasis added]. (5D01-1253 R2: 76-77)

The court noted that one of the six cases had been overlooked at the previous plea hearing, Case No. CR99-14790. (5D01-1253 R2: 78) Petitioner then entered a plea of guilty to the single count charged in that case, carrying a concealed firearm. (5D01-1253 R2: 78-81) Defense counsel explained that this case was part of the same deal as the other five cases. (5D01-1253 R2: 79)

Defense counsel asked for a Youthful Offender sentence followed by a lengthy probation. One of the bases of this request, according to defense counsel, was that "[Petitioner],

when questioned about it, gave a detailed statement. He basically fessed up and accepted the responsibility." (5D01-1253 R2: 83-84) "He is responsible and recognizes and has taken part in the responsibility. I think that's one thing you need to give him credit for. And taking responsibility, by giving statements, when he didn't necessarily have to do that[.]" (5D01-1253 R2: 85)

In response, the prosecutor explained that a Youthful Offender sentence was never contemplated during plea negotiations. It was the State's understanding that Petitioner would be sentenced to the minimum guidelines sentence of 16 years up to a cap of 30 years. (5D01-1253 R2: 86)

> [PROSECUTOR]: [Petitioner] was cooperative and agreed that he would testify against Mr. Elozar. He did give his statement to the police and we've taken that into account, which is why the other counts were dropped. And that's why we agreed to a cap on his sentence of 30 years. (5D01-1253 R2: 86)
>
> * * *
>
> [PROSECUTOR]: I have to assume that [Petitioner] would have testified truthfully or will testify truthfully in the future. So I'm not saying to give him the high end because he's been uncooperative. He appears to be cooperative at the moment. We have to give him the benefit of the doubt on that. (5D01-1253 R2: 90)

The trial court characterized Petitioner's crimes as "horrendous". (5D01-1253 R2: 91) The court declined to

sentence Petitioner at the high end of the sentencing range because*, inter alia*, "I do anticipate, at some point, Mr. Elozar will resurface and be a defendant in this courtroom under no bond, and that [Petitioner] will be called to testify against him." (5D01-1253 R2: 92) The trial court then imposed a sentence of 14 years incarceration on all counts except the two counts of carrying a concealed firearm, for which the court imposed a sentence of five years each. All sentences were ordered to run concurrently. (5D01-1253 R2: 92-94)

On August 17, 2000, Petitioner was called to the stand to testify as a State witness in Elozar's trial. (5D01-1253 R1: 6) Moments before he was to take the stand, Petitioner asked to speak to the prosecutor saying he "wanted a better deal." (5D01-1253 R1: 7) He told her he wanted four years instead of fourteen in order to testify against Elozar. (5D01-1253 R1: 22) The prosecutor told Petitioner that no negotiation was going to take place, that he was about to be called as a witness against Elozar, and that he would be sworn to tell the truth. (5D01-1253 R2: 138)

When Petitioner was put on the stand he initially stated, "I just told you I don't want to answer any more questions; [] I already made up my mind I was not going to answer any questions." (5D01-1253 R1: 25, 138) When ordered by the court to answer the questions and confronted with his confession

statement to Detective Duncan, Petitioner stated, “I made a mistake, Tony [Elozar] wasn’t there[.]” (5D01-1253 R1: 25, R2: 138) Petitioner claimed that he had only implicated Elozar in his confession statement “because I thought I was never going to face him again.” (5D01-1253 R1: 25) “I lied because they made a lot of promises, and I ain’t never seen the promises they [] made to me.” (5D01-1253 R1: 25)

Because Petitioner refused to testify truthfully against Elozar in accordance with the prior statements and assurances he had previously sworn to be the “truth”, the State was unable to proceed against Elozar and the case was dismissed. (5D01-1253 R1: 12-13, 23)

On October 30, 2000, the State filed a motion to vacate Petitioner’s sentence. (5D01-1253 R2: 137-39) The motion stated that at the time the court had imposed Petitioner’s sentence, the court as well as the State believed that Petitioner was proffering the “truth” and that he would assist in the prosecution of Elozar by testifying “truthfully”. (5D01-1253 R2: 138)

On March 8, 2001, a hearing was held on the State’s motion to vacate sentence. (5D01-1253 R1: 2) The prosecutor pointed out that during the plea hearing when she had given the factual basis for all of Petitioner’s crimes, she had included the fact that Ocer and Elozar had done the crimes

with him. (5D01-1253 R1: 4) The prosecutor continued:

> Also prior to the plea being accepted the State did inquire specifically of the defendant to make sure that he did in fact have something to assist in the State's prosecution of Mr. Elozar. *I wanted to elicit what he meant by truthful testimony.* There's a questioning and answering that went back and forth between [Petitioner] and I. *I had presented [Petitioner] with a copy of the statement he gave to Detective Parks Duncan* that was presented to him during his plea in open court. *He confirmed on the record that everything contained in the statement was the truth.* [Emphasis added]. (5D01-1253 R1: 4-5)

The prosecutor argued that Petitioner had, at the very least, committed a fraud on the court during his plea hearing. (5D01-1253 R1: 7) She asked for a sentence of 30 years incarceration. (5D01-1253 R1: 8)

Defense counsel stated clearly that Petitioner was not seeking to vacate his plea in this case. (5D01-1253 R1: 8) Defense counsel also made the following statement:

> [DEFENSE COUNSEL]: It's clear that [Petitioner] did not live up to one of the most important parts of the agreement, which was to testify against Mr. Elozar. (5D01-1253 R1: 9)

Defense counsel pointed out that when Petitioner was brought to the courthouse from the jail to testify against Elozar, the two men had been inadvertently placed in the same holding cell. (5D01-1253 R1: 10) Defense counsel claimed that Elozar had made threats to Petitioner and his family at that time. (5D01-1253 R1: 10) But defense counsel had to admit:

> [DEFENSE COUNSEL]: [Petitioner] did what he

> did, and therefore he's going to have to pay the consequences for that. (5D01-1253 R1: 11)

Petitioner testified at the hearing on the motion to vacate that prior to the time he was taken to court to testify against Elozar, he had called his sister and been told that she had received a call telling her that if Petitioner testified against Elozar, "they would come and do stuff to my family." (5D01-1253 R1: 16) He claimed that he had not taken the alleged threat seriously until he was brought to court on August 17, 2000 when he was placed in the same holding cell with Elozar. (5D01-1253 R1: 17) According to Petitioner, Elozar had asked Petitioner if he was going to testify against Elozar. Petitioner had responded, "yeah, based with the plea." (5D01-1253 R1: 17) Elozar had responded, "I don't think that would be a good idea because something will happen if you [sic] do get found guilty." (5D01-1253 R1: 17) Petitioner claimed that at that point he took the threat seriously. (5D01-1253 R1: 17)

Petitioner claimed that he had then told the prosecutor that he did not think it was a good idea if he testified against Elozar, but the prosecutor had told him he had no choice. Petitioner claimed that he had not had a chance to explain to her that Elozar had threatened him. (5D01-1253 R1: 19) *Petitioner never claimed at this hearing that he had testified truthfully at trial*. Rather, his entire testimony

addressed why he had failed to testify in accordance with his previous statements, which he had already previously characterized as truthful.

In response, the prosecutor advised the court that "[d]espite the court order to keep them apart, all efforts I made to keep them apart in the transportation, there was contact [between Petitioner and Elozar] during the lunch hour" on the second day of trial. (5D01-1253 R1: 21) The prosecutor's statement continued:

> As soon as we learned, I went down to [Petitioner]. [] And I had a conversation with [Petitioner][.] [] I spoke with [Petitioner], asked him was there any problem in the contact he had with Mr. Elozar he needed to tell me about. *Nothing was brought to my attention at that time.* [] This is the first I've heard of any allegations of his [] family getting threats. [] Up until the last, the visit with him, he told me he was going to testify, as he always had, to the truth. The first time that it was indicated to me he was going to testify differently was literally thirty 30 seconds before he got on the stand when he was up here in the holding cell.
>
> * * *
>
> [Petitioner] has basically come up with a version that that's why he didn't testify truthfully. [Emphasis added]. (5D01-1253 R1: 21-22)

The court stated that the fact that Petitioner had agreed to testify against Elozar had been one of the lynchpins behind the court's decision to impose a lesser sentence. (5D01-1253 R1: 24) The court also put on the record that as soon as the

prosecutor had learned that Petitioner and Elozar had briefly been in the same holding cell together, the prosecutor had notified the court. (5D01-1253 R1: 24) He further pointed out that since the Elozar jury had not been sworn at the time of the contact between Elozar and Petitioner in the holding cell, a continuance could have been called if Petitioner had truly been threatened and had advised the prosecutor of such. (5D01-1253 R1: 25)

The court reviewed the statements Petitioner had made on the stand at the Elozar trial. (5D01-1253 R1: 25-26) The court then stated, "your sentence was predicated upon your telling the truth. [] We counted on you to tell the truth and hold up your end of the bargain." (5D01-1253 R1: 26) Even so, the court declined to imposed the 30-year maximum sentence capped under the plea agreement because "there may have been some coercion during the brief period you were [in the holding cell with Elozar]." But "to come back and say you would do it but for that just isn't going to wash." (5D01-1253 R1: 28)

The court vacated Petitioner's previously imposed 14-year sentences. (5D01-1253 R1: 26-27) The court then resentenced Petitioner on the home invasion and armed burglary of a dwelling counts to 29 years incarceration. These sentences also carried a three-year minimum-mandatory term. On the two carrying a concealed firearm counts, the court allowed the

five-year sentences to stand. All sentences were ordered to run concurrently. (5D01-1253 R1: 27-31)

Significantly, defense counsel made no objection to the sentence imposed.

Long after the notice of appeal had been filed, on July 10, 2001 Petitioner filed a motion to correct sentencing error pursuant to **Fla. R. Crim. P. 3.800 (b) (2)**. (5D01-1044 SV: 156-57) The motion asserted that when a plea agreement only requires a defendant to testify truthfully, the agreement is not violated by the defendant's failure to testify in accordance with his prior testimony. The motion also argued alternatively that the State's motion to vacate plea had been untimely filed pursuant to **Fla. R. Crim. P. 3.170 (g)**.

A hearing on the motion was held on September 10, 2001. The trial court reserved ruling. (5D01-1044 SV: 161) Petitioner has failed to include a transcript of this hearing in the appellate record.

SUMMARY OF THE ARGUMENT

Issue I: The Fifth District Court of Appeal properly affirmed the vacation of Petitioner's sentence and the imposition of a new sentence, by holding that **Fla. R. Crim. P. 3.170(g)(2)(A)** is not jurisdictional in nature. The cases upon which Petitioner relies are factually distinguishable, thus depriving this Court of jurisdiction to consider this appeal.

Issue II: The trial court's vacation of Petitioner's sentence and resentencing him to a longer term did not violate double jeopardy. Double jeopardy is no bar to reopening a case after sentencing where a condition of the plea is not performed by a defendant. And Petitioner did indeed violate the terms of his plea agreement.

ARGUMENT

ISSUE I

THE FIFTH DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE VACATION OF PETITIONER'S SENTENCE AND THE IMPOSITION OF A NEW SENTENCE BY HOLDING THAT FLA. R. CRIM. P. 3.170 (g)(2)(A) IS NOT JURISDICTIONAL IN NATURE. (Restated).

A. The failure to make a contemporaneous objection:

Petitioner alleges that the trial court erred in resentencing him to a longer term of incarceration because the State failed to file its motion to vacate sentence within 60 days of Petitioner's non-compliance. However, defense counsel never objected to Petitioner's new sentence on that ground or any other ground during the sentencing hearing.

Petitioner has waived appellate review of this issue. **§90.104(1)(a), Fla. Stat. (2000)** requires a timely objection in order to preserve a point for appeal. *See* **Holley v. State**, 523 So. 2d 688 (Fla. 1st DCA 1988). Objections which are not timely made are waived. *See* **Roundtree v. State**, 362 So. 2d 1347 (Fla. 1978), **cert. denied**, 350 So. 2d 1293 (Fla. 3d DCA 1978).

Petitioner's filing of a **Rule 3.800 (b)** motion prior to filing his initial brief on direct appeal was not a contemporaneous objection, and therefore did not preserve this issue for review.

B. Fla. R. Crim. P. 3.170(g)(2)(A) is not jurisdictional:

Petitioner claims on page 21 of his brief that a court's

lack of jurisdiction is fundamental error which may be raised for the first time on appeal. However, the Fifth District Court of Appeal's holding below that the rule is not jurisdictional is the correct interpretation of this Court's intent.

Rule 3.170(g)(2)(A) provides:

> (2) ***Unless otherwise stated at the time the plea is entered***:
>
> (A) The state may move to vacate a plea and sentence within 60 days of the defendant's non-compliance with the specific terms of a plea agreement. [Emphasis added].

The highlighted provision of the rule clearly indicates that the 60-day time limit may be changed by consent of the parties and incorporated into the terms of a plea agreement.

Petitioner disputes this construction of the plain language of the rule, arguing on page 23 of his brief:

> If under Rule 3.170(g)(2)(A), the parties choose to modify the time limit to vacate the plea and sentence, then the parties are merely exercising an option conferred on them by this Honorable Court. Jurisdiction is not created by the agreement of the parties, their agreement would be meaningless, but for the jurisdiction created in the rule. It is this Honorable Court, via this rule, that confers jurisdiction. Therefore, despite the provision that allows for the modification of the time limit, Rule 3.170(g)(2)(A) is jurisdictional.

Respectfully, this argument makes no logical sense. If Petitioner's reasoning were to control, then *every* time limit contained in *every* rule of procedure of this Court would be

jurisdictional in nature, simply because it is contained within a rule of this Honorable Court. Obviously such is not the case.

As the Fifth District reasoned in its decision below, the provision of the rule which allows modification of the 60-day time limit is significant, because courts have consistently held that jurisdiction, where it does not otherwise exist, may not be conferred on the court by agreement or consent of the parties. Hence, if the rule at issue is indeed jurisdictional, the parties would not be able to agree on a longer period, and the provision of the rule would be meaningless. "In construing legislation, courts should not assume that the legislature acted pointlessly." **Sharer v. Hotel Corp. of America**, 144 So. 2d 813, 817 (Fla. 1962). The same maxim of statutory construction applies to the interpretation of rules of court. This Court does not include meaningless provisions in the rules of procedure it adopts.

As the Fifth District explained in its decision, construing **Rule 3.170 (g)** to be non-jurisdictional is logically the correct interpretation:

> [T]o conclude that rule 3.170(g)(2)(a) is jurisdictional may provide an incentive to defendants who enter conditional plea agreements to breach the conditions with which they do not want to comply, secure in the knowledge that if the state does not discover the breach and file the motion within the sixty-day time period, they will be forever relieved of their

> obligation under the agreement. [] Furthermore, if the rule is held to be jurisdictional, the restrictive sixty-day time limit may act as a disincentive to the state to enter into conditional pleas in light of the fact that the rule specifically provides that the sixty-day period starts to run from the time the defendant commits the breach rather than from the time the state knew or should have known of the breach.

Metellus v. State, 817 So. 2d 1009 (Fla. 5th DCA 2002).

C. The distinguishment of possible conflicting authority:

The two cases upon which Petitioner relies are distinguishable. In **Joslin v. State**, 27 Fla. L. Weekly D686 (Fla. 2d DCA March 22, 2002) and **Robie v. State**, 807 So. 2d 781 (Fla. 2d DCA 2002), the defendants entered pleas and requested that they be furloughed for a brief period of time before their incarceration. The trial court told each defendant that if he failed to report to prison on time, he would be subject to a harsher sentence. Each defendant failed to comply with his report date and each was eventually taken into custody and resentenced by the trial court to a more severe prison sentence.[1]

Significantly, in **Joslin** "the State took no action" whatsoever when the defendant failed to report as ordered. And in **Robie**, "[n]o action was taken by the State until Robie was arrested three years later." The **Robie** opinion fails to

[1]Petitioner's statement on page 24 of his brief that defendant Robie was resentenced by the Second District Court of Appeal is incorrect.

indicate what "action" the State took upon Robie's arrest.

Rule 3.170 (g)(2)(A) provides that "[u]nless otherwise stated at the time the plea is entered[, ***t]he state may move to vacate a plea and sentence*** within 60 days of the defendant's non-compliance with the specific terms of a plea agreement." [Emphasis added]. In other words, the rule requires the State to move to vacate the plea and sentence in order to trigger the trial court's authority to resentence the defendant. There is no indication in either **Joslin** or **Robie** that the State filed the required motion. In contrast, in the instant case the State properly filed a motion to vacate plea and sentence to obtain relief under the rule. Since **Joslin** and **Robie** are factually distinguishable, they do not expressly and directly conflict with the decision of the Fifth District Court of Appeal on the same point of law. Respondent urges, therefore, that this Court is without jurisdiction to even entertain this appeal, and it should be dismissed. *See* **Robinson v. State**, 770 So. 2d 1167 (Fla. 2000)(Supreme court lacked jurisdiction over conflict as to proper role of appellate courts in evaluating weight and sufficiency of newly discovered evidence, where District Courts of Appeal decisions involved factually distinguishable cases, and there was no conflict); **Goins v. State**, 672 So. 2d 30, 33 (Fla. 1996)("Finally, there is no conflict jurisdiction here since

the cases discussed are factually distinguishable.”)

ISSUE II

THE TRIAL COURT'S VACATION OF PETITIONER'S SENTENCE AND RESENTENCING HIM TO A LONGER TERM DID NOT VIOLATE DOUBLE JEOPARDY.

A. There was no double jeopardy violation:

Petitioner alleges that the trial court's modification of the sentence in accordance with the terms of the plea agreement constituted a double jeopardy violation. However, double jeopardy is no bar to reopening a case after sentencing where a condition of the plea is not performed by a defendant. *See* **Lerman v. Corneilus**, 423 So. 2d 437 (Fla. 5th DCA 1982).

B. Petitioner violated the terms of his plea agreement:

Petitioner argues that, pursuant to **McCoy v. State**, 599 So. 2d 645 (Fla. 1992), the fact that he did not testify as the State expected did not constitute non-compliance with the plea agreement because the written agreement only required him to testify "truthfully". It did not require him to testify that Elozar had committed the offenses. In **McCoy**, this Court held that where the agreement calls only for a defendant to testify truthfully without specifying the testimony the State expects to elicit, there is no basis to vacate the plea where the testimony at trial is not what the State expected. This Court then went on to instruct prosecutors how to secure a plea agreement that may be vacated based on substantial non-compliance by a defendant:

> [W]hen entering into a plea agreement, the State must make sure that the specific terms of the agreement are made a part of the plea agreement and the record. [] *[I]t would have been adequate if it had been stated, as part of the plea agreement, that McCoy would testify truthfully [] against her supplier in accordance with identified statements that she had previously given to law enforcement officials.* [Emphasis added].

Id. at 649.

In the instant case, while Petitioner's *written* plea agreement only required him to testify "truthfully", the *testimony Petitioner proffered at the plea hearings* established that "truthfully" meant as Petitioner had previously stated in his account of the events to the police. This distinguishes the instant case from **McCoy**, where the defendant's plea agreement was only that she would testify truthfully, and there was no clarification during the plea colloquy of what the testimony would be. Moreover, this Court in **McCoy** noted that "[n]one of the terms of the written plea agreement *or statements made during the plea colloquy* were violated by McCoy's failure to testify against her supplier." **Id.** [Emphasis added]. As the Fifth District concluded below, a discussion or proffer of the expected testimony during the plea colloquy, as was done in the instant case, is sufficient. The testimony need not be included in the *written* plea agreement. *See also* **Amador v. State**, 732 So. 2d 404, 404-05 (Fla. 2d DCA 1999)("In order to ensure that there are no

misunderstandings between the parties, the terms of the agreement should be clearly set forth in the contract *or discussed at the plea hearing."* [Emphasis added]); **Mason v. State**, 646 So. 2d 295 (Fla. 5th DCA 1994)(Substantial assistance agreement was enforceable, notwithstanding that it was not made a part of the written plea agreement, where the plea colloquy revealed that the plea expressly required compliance with a substantial assistance agreement that had been executed by both parties. "The **McCoy** court plainly intended that the terms of the substantial assistance agreement be certain and ascertainable as of the time of the plea, *not necessarily that they physically be a part of the plea."* [Emphasis added]), **appeal after remand**, 677 So. 2d 100 (Fla. 5th DCA 1996).

In sum, no double jeopardy violation occurred when the trial court resentenced Petitioner in accordance with **Rule 3.170 (g)** for non-compliance with his plea agreement.

CONCLUSION

Petitioner's conviction and sentence should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Meghan Ann Collins, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114-4347, this 13th day of September, 2002.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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