IN THE SUPREME COURT OF FLORIDA

MICHAEL CAMPBELL

Petitioner,

v. CASE NO. SC12-28

STATE OF FLORIDA,

Respondent.

_____/

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On November 30, 1999, Petitioner pled *nolo contendere* on four counts of attempted sexual battery by an adult on a victim under twelve, one count of lewd and lascivious conduct on a victim under sixteen, and one count of sexual battery by a person in familial or custodial authority. *Campbell v. State*, 75 So. 3d 757, 757 (Fla. 2d DCA 2011). On February 11, 2000, the trial court sentenced Petitioner to a total of 45 years in prison on the offenses. *Id*.

Almost eleven years later, on January 24, 2011, Petitioner filed a motion to withdraw his plea, citing Florida Rule of Criminal Procedure 3.172(g). Petitioner asserted that he was entitled to withdraw his plea after he was sentenced, and without any justification, "simply because the trial court failed to formally accept his plea during the plea colloquy." *Id*., at 757-58.

The postconviction court denied Petitioner's claim, finding that Rule 3.172(g) allows the withdrawal of pleas "only before sentencing." *Id.* Relying on *Harrell v. State*, 894 So. 2d 935, 939 (Fla. 2005), the postconviction court ruled that the trial court's inadvertent failure to formally accept Petitioner's plea did not entitle him to withdraw his plea almost eleven years after the sentence was imposed. *Id*.

On appeal to the Second District, Petitioner argued that the postconviction court erred in failing to follow the First District's ruling in *Cox v. State*, 35 So. 3d 47 (Fla. 1st DCA 2010), which he asserted was controlling. *Id*. "In *Cox*, the First District, apparently relying on *Harrell*, reluctantly held that the defendant should be allowed to withdraw his plea more than two years after sentencing because the trial court failed to formally accept the plea." *Campbell*, 75 So. 3d at 758, *citing Cox*, 35 So. 3d at 48-49. The Second District disagreed with the First District's interpretation of *Harrell* and held that Rule 3.172(g) applies only before sentencing. *Id*.

In so doing, the Second District opined:

> The supreme court [in *Harrell*] explained that rule 3.170(f) limits the opportunity for a defendant to withdraw his plea to the period of time *before* sentencing, noting that motions to withdraw plea after sentencing are clearly governed by "rule 3.170(*l*), which allows withdrawal of a plea only for the specific reasons listed in Florida Rule of Appellate Procedure 9.140(b)." *Harrell*, 894 So. 2d at 939 n. 2. The court acknowledged that while rule 3.172[(g)] contains no period of limitation, it indicates that the criminal rules establish sentencing as a critical juncture in a defendant's ability to withdraw a plea. To support this proposition, the court cited its own case, *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003), which held that in order for a defendant to withdraw his plea after sentencing, he must demonstrate a manifest injustice.

Campbell, 75 So. 3d at 759. (Emphasis in original).

The Second District concluded that the Court in *Harrell* "clearly agreed" with the Fourth District's determination in

Demartine v. State, 647 So. 2d 900 (Fla. 4th DCA 1994), that Rule 3.172(g) "applies only before sentencing and not after sentencing." *Campbell*, 75 So. 3d at 759, *citing Harrell*, 894 So. 2d at 939.

The Second District affirmed the postconviction court's denial of Petitioner's motion and certified conflict with the First District's opinion in *Cox*, 35 So. 3d at 47.

On May 15, 2012, this Court accepted jurisdiction based upon express and direct conflict with the First District's decision in *Cox v. State*, 35 So. 2d 47 (Fla. 1st DCA 2010).

Thereafter, on July 16, 2012, the First District issued an opinion in *Cannon v. State*, ___ So. 3d ___, WL 2874244 (Fla. 1st DCA July 16, 2012), in which the court opined:

> We conclude that *Cox* should be read consistently with the holding in *Campbell* – the rule providing that a plea may be withdrawn without any justification until it is formally accepted by the trial judge only applies *prior* to sentencing. *Cox* does not stand for the proposition that a defendant has a unilateral right to withdraw from a plea years after he has been sentenced in accordance with that plea, if the trial court failed to formally accept it. Any other interpretation of *Cox* and Rules 3.170 and 3.172(g) leads to irrational results of pleas being vacated years or decades after a defendant began serving a sentence.

SUMMARY OF THE ARGUMENT

No conflict exists between the Second District's holding in *Campbell* and the First District's opinion in *Cox*. The First District's subsequent opinion in *Cannon* clarified that *Cox* should be interpreted consistently with *Campbell* in that Rule 3.172(g) allows a defendant to withdraw his plea without any justification only prior to sentencing if the trial court has not formally accepted the plea.

Should the Court decide to consider the merits, the ruling of the Second District Court should be approved and the question presented in the issue answered in the negative. The Second District's ruling is consistent with this Court's holding in *Harrell v. State*, 894 So. 2d 935 (Fla. 2005).

Furthermore, the plain language of Rule 3.172(g) indicates that it governs plea *offers* and plea *negotiations*, not the plea itself. The "formal" acceptance required by Rule 3.172(g) refers to the plea offer or negotiation, not to the plea itself. Withdrawal of already-entered pleas is governed by Rules 3.170(f) and (*l*).

ARGUMENT

ISSUE

WHETHER A DEFENDANT IS ENTITLED TO WITHDRAW A PLEA OF GUILTY OR NOLO CONTENDERE AFTER CONVICTION BASED SOLELY ON THE TRIAL COURT'S FAILURE TO FORMALLY ACCEPT THE PLEA AS SET FORTH IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.172(g) ABSENT THE SHOWING OF MANIFEST INJUSTICE OR PREJUDICE?

There is no conflict between the First and Second Districts as to the interpretation of Rule 3.172(g). As the First District recently made clear, "We conclude that *Cox* should be read consistently with the holding in *Campbell* – the rule providing that a plea may be withdrawn without any justification until it is formally accepted by the trial judge only applies *prior* to sentencing." *Cannon v. State*, ___ So. 3d ___, 2012 WL 2874244 (Fla. 1st DCA July 16, 2012).

Should this Court consider the merits, the ruling of the Second District Court should be approved and the question presented in the issue answered in the negative. The Second District's ruling is consistent with this Court's holding in *Harrell v. State*, 894 So. 2d 935 (Fla. 2005).

Furthermore, the plain language of Rule 3.172(g) indicates that it governs plea *offers* and plea *negotiations*, not the plea itself. The "formal" acceptance required by Rule 3.172(g) refers to the plea offer or negotiation, not to the plea itself. Under Rule 3.172(g), either party may withdraw from a plea offer

or negotiation without any justification until such offer or negotiation is formally accepted by the trial court.

A defendant's ability to withdraw the plea itself is governed by Rules 3.170(f) and (*l*), and whether or not the defendant has already been sentenced controls the standard to be applied to the motion to withdraw plea. Rule 3.170(f) allows a defendant to withdraw his plea before sentencing upon a showing of "good cause." When a motion to withdraw plea is filed after sentencing, the defendant must establish that a manifest injustice has occurred. *LeDuc v. State*, 415 So. 2d 721, 761 (Fla. 1982).

Jurisdiction

This Court accepted jurisdiction to resolve an express and direct conflict in *Campbell v. State*, 75 So. 3d 757 (Fla. 2d DCA 2011), with the First District's decision in *Cox v. State*, 35 So. 3d 47 (Fla. 1st DCA 2010). Art. V, § 3(b)(3), Fla. Const. After this Court accepted jurisdiction, the First District issued its opinion in *Cannon v. State*, ___ So. 3d ___, WL 2874244 (Fla. 1st DCA July 16, 2012), in which it clarified that there was no conflict between its holding in *Cox* and the Second District's opinion in *Campbell*.

Standard of Review

The issue in this case involves an interpretation of this Court's rules of procedure and is a question of law subject to

de novo review. *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006).

The Is No Conflict Between *Campbell* and *Cox*

This Court initially accepted jurisdiction based on the Second District's certification of conflict between its decision in *Campbell*, 75 So. 2d 757, and the First District's ruling in *Cox*, 35 So. 3d 47. Subsequent to this Court's May 15, 2012, order accepting jurisdiction based upon conflict, the First District issued its decision in *Cannon*, ___ So. 3d ___, 2012 WL 2874244.

In *Cannon*, the First District opined that there was no conflict with the Second District in its interpretation of Rule 3.172(g). In *Cannon*, the defendant pled to charge of attempted second-degree murder and was sentenced to 15 years in prison. *Id*. Several months after his sentence was imposed, Cannon filed a motion for postconviction relief. As one of his grounds, Cannon, citing to *Cox*, argued that he was entitled to withdraw from his plea because it was not formally accepted by the trial court. *Id.* In rejecting Cannon's claim, the First District concluded:

> We hold that *Cox* is distinguishable from this case and that the Second District's *Campbell* decision interprets *Cox*'s holding too broadly. The decision in *Cox* did not specify whether the defendant in that case moved to withdraw his plea before or after sentencing. We conclude that *Cox* should be read consistently with the holding in *Campbell* – the rule providing that a

> plea may be withdrawn without any justification until it is formally accepted by the trial judge only applies *prior* to sentencing. *Cox* does not stand for the proposition that a defendant has a unilateral right to withdraw from a plea years after he has been sentenced in accordance with that plea, if the trial court failed to formally accept it. Any other interpretation of *Cox* and rules 3.170 and 3.172(g) leads to irrational results of pleas being vacated years or decades after a defendant began serving a sentence.

Cannon v State, ___ So. 3d ___, 2012 WL 2874244 (Fla. 1st DCA July 16, 2012).

As this Court initially accepted jurisdiction based upon a conflict between the First and Second Districts, the State submits that it is now clear that no such conflict exists and this Court should dismiss the instant Petition.

The Merits: This Court's *Harrell* Decision

Turning to the merits, in *Harrell v. State*, 894 So. 2d 935 (Fla. 2005), this Court considered the question of "whether a motion to withdraw a plea that fails to allege that the trial court did not formally accept the plea nevertheless preserves that issue for review." In that case, the Court resolved the conflict between the First District's decision in *Harrell v. State*, 826 So. 2d 1059 (Fla. 1st DCA 2002) (hereafter, *Harrell* I), and the Fourth District's ruling in *Miller v. State*, 775 So. 2d 394 (Fla. 4th DCA 2000).

Background: *Miller* and *Harrell* I

In *Miller*, the defendant entered into a substantial assistance agreement with the State in which he agreed not to withdraw his plea. *Miller*, 775 So. 2d at 394. The trial court sealed the file and set sentencing off for 90 days pursuant to the agreement, but never formally accepted the defendant's guilty plea. *Id.*, at 395. Prior to sentencing, the defendant was arrested on a new charge. At the sentencing hearing, the prosecution determined that the defendant had violated the agreement and the prosecution would not certify substantial assistance. *Id.* Sentencing was deferred again, and the defendant then moved to withdraw his plea. The trial court denied the motion. On appeal, the Fourth District reasoned that the defendant had "sufficiently preserved" an argument based on Rule 3.172(g) even though he did not raise it below. The court reversed because the trial court did not "formally accept" the defendant's plea by affirmatively stating to the parties that it accepted the plea. *Id.*

In *Harrell* I, the defendant and the State entered into a negotiated plea and, following a lengthy plea colloquy, the trial court set the case off for sentencing on a later date. *Harrell* I, 826 So. 2d at 1060. Thereafter, the defendant filed a motion to withdraw plea without raising an argument that the trial court had not formally accepted his plea under Rule 3.172(g). *Id.* The trial court denied the defendant's motion,

rejecting the grounds that he raised. *Id.* In *Harrell* I, the appellate court affirmed because the defendant did not preserve any argument based on Rule 3.172(g). *Id*. The court certified conflict with *Miller*, and this Court accepted jurisdiction to resolve the conflict.

This Court resolved the conflict by approving the decision in *Harrell* I. This Court stated that Rule 3.172(g) "permits a defendant to withdraw a plea at any time before the court formally accepts it," and that a "trial court's failure to grant a motion to withdraw raising this claim constitutes reversible error." *Harrell*, 894 So. 2d at 938.

This Court stated that Rule 3.170(f) also governs pleas and allows a defendant to withdraw a plea based upon a showing of good cause. This Court agreed with the Fourth District's reasoning in *Demartine v. State*, 647 So. 2d 900 (Fla. 4th DCA 1994) that Rules 3.710(f) and 3.172(g) should be read *in pari materia* and concluded that both provisions "apply only *before* sentencing." *Harrell*, 894 So. 2d at 939. (Emphasis in original). "The criminal rules establish sentencing as a critical juncture in a defendant's ability to withdraw a plea." *Id.* This Court determined:

> 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. (Emphasis in original).

This Court concluded that, because Harrell had not specifically invoked Rule 3.172(g) in his motion to withdraw plea, he had not preserved the issue for appellate review.

The Instant Case

The Second District's decision in this matter is consistent with this Court's holding in *Harrell*. Petitioner in this case was convicted on November 30, 1999, pursuant to a plea of *nolo contendere* of a total of six offenses. *Campbell v. State*, 75 So. 3d 757, 757 (Fla. 2d DCA 2011). On February 11, 2000, the trial court sentenced him. On January 24, 2011, Petitioner filed his motion pursuant to Rule 3.172(g), arguing that "he was entitled to withdraw his plea even after he was sentenced, without a showing of any justification, simply because the trial court failed to formally accept his plea during the plea colloquy." *Id*. at 758.

Relying on this Court's reasoning in *Harrell*, the Second District held that Rule 3.172(g) applies only before sentencing. The court stated:

> The supreme court in *Harrell* appears to agree with the reasoning in *Demartine [v. State*, 647 So. 2d 900 (Fla.

> 4th DCA 1994)]. The supreme court explained that rule 3.170[(g)] limits the opportunity for a defendant to withdraw his plea to the period of time *before* sentencing, noting that motions to withdraw plea after sentencing are clearly governed by "rule 3.170(*l*), which allows withdrawal of a plea only for the specific reasons listed in Florida Rule of Appellate Procedure 9.140(b)." *Harrell*, 894 So. 2d at 939 n. 2. The court acknowledged that while rule 3.172[(g)] contains no period of limitation, it indicates that the criminal rules establish sentencing as a critical juncture in a defendant's ability to withdraw a plea. To support this proposition, the court cited its own case, *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003), which held that in order for a defendant to withdraw his plea after sentencing, he must demonstrate manifest injustice.
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> Even though it did not directly answer the certified question, it is evident that the supreme court agreed with *Demartine* that rule 3.172[(g)] applies only before sentencing and not after sentencing. The court stated the following: "Accordingly, the [*Demartine*] court held that both [rule 3.172 and rule 3.170(f)] apply only *before* sentencing. We agree." *Harrell*, 894 So. 2d at 939. Thus, based on the supreme court's approval of *Demartine*, we conclude that rule 3.172(g) only applies prior to sentencing.

Campbell, 75 So. 3d at 759.

The Second District certified conflict with the First District's holding in *Cox v. State*, 35 So. 2d 47 (Fla. 1st DCA 2010). In that case, the defendant was charged with two counts of trafficking in cocaine. He pled guilty and "[d]ue to unintentional error, the trial court apparently overlooked the requirement to state that the court 'accepted the plea.'" *Id.*, at 47. The case was removed from the trial docket, Cox and the

prosecution agreed to confidential terms regarding substantial assistance, and the trial court sealed the plea agreement. *Id.*

As part of the plea agreement, Cox and the State agreed to a 90% reduction of Cox's bond. This allowed Cox to remain free to perform his obligations under the agreement. The State agreed to a sentencing range that allowed Cox to avoid a life sentence as an habitual felony offender. *Id.*, at 48.

Two years later at Cox's sentencing, the trial court complied with the plea agreement and sentenced Cox to 30 years in prison, and Cox moved to withdraw his plea. *Id.* Noting that the State had not failed to perform its part of the plea agreement, the First District ruled nevertheless that Cox must be permitted to withdraw his plea pursuant to Rule 3.172(g) merely because the trial court inadvertently neglected to state that it has "accepted the plea." *Id.*, at 48-49.

In *Cannon v. State*, ___ So. 3d ___, 2012WL2874244 (Fla. 1st DCA July 16, 2012), the First District clarified its decision in *Cox*. In *Cannon*, the defendant entered a plea to the charge of attempted second-degree murder and was sentenced to 15 years' imprisonment. Approximately eight months later, Cannon filed a motion for postconviction relief arguing *inter alia* that he was entitled to withdraw his plea because it was never formally accepted by the trial court. In his argument, Cannon relied on the court's decision in *Cox*. *Id.* The First District rejected

Cannon's argument and affirmed the denial of his postconviction motion. Noting that the *Cox* decision did not specify whether the defendant had moved to withdraw his plea before or after sentencing, the court opined:

> We conclude that *Cox* should be read consistently with the holding in *Campbell [v. State*, 75 So. 3d 757 (Fla. 2d DCA 2011)] – the rule providing that a plea may be withdrawn without any justification until it is formally accepted by the trial judge only applies *prior* to sentencing. *Cox* does not stand for the proposition that a defendant has a unilateral right to withdraw from a plea years after he has been sentenced in accordance with that plea, if the trial court failed to formally accept it. Any other interpretation of *Cox* and Rules 3.170 and 3.172(g) leads to irrational results of pleas being vacated years or decades after a defendant began serving a sentence.

Cannon, ___ So. 3d at ___, 2012 WL2874244.

Thus, the rule requiring the trial court to allow a defendant to withdraw a plea based on the trial court's failure to formally accept the plea applies only before sentencing. *Mackey v. State*, 743 So. 2d 1117 (Fla. 2d DCA 1999)(holding that the defendant had a right to withdraw his plea before sentencing where trial court did not formally accept plea); *Harrell v. State*, 894 So. 2d 935 (Fla. 2005).

Petitioner cites to several cases that he claims provide support for the proposition that Rule 3.172(g) applies after sentencing. (Initial Brief: 14). The cited cases, however, do not support Petitioner's position that Rule 3.172(g) permits a

court to allow a defendant to withdraw his plea after sentencing on the basis that the court failed to formally accept his or her plea. *State v. Bowland*, 604 So. 2d 556 (Fla. 2d DCA 1992), was an appeal by the State of Florida, not an appeal following the denial of a motion to withdraw plea by a defendant. In that case, the Second District reversed because the trial court accepted the defendant's plea over the State's objection and imposed a sentence outside the permitted range without delineating the reasons for the departure. *Id.*, at 557. In reversing, the appellate court noted that the State was "not a party to the . . . sentencing agreement." *Id.*

In *Eggers v. State*, 624 So. 2d 336 (Fla. 1st DCA 1993), the defendant appealed from the denial of his Rule 3.850 motion. In his motion, he alleged that the trial court failed to honor the written plea agreement by imposing a period of probation in addition to his prison sentence. *Id.*, at 337. The appellate court noted that, because the defendant did not move to withdraw his plea, he could not raise the matter on direct appeal and therefore the issue was properly before the court on a postconviction motion. *Id.* Because there was no reference to probation in either the written plea agreement or the plea transcript, the appellate court reversed the summary denial of the defendant's motion and remanded with instructions to either

resentence the defendant within the agreed-upon plea agreement or to permit the defendant to withdraw his plea. *Id.*, at 338.

In *State v. Green*, 421 So. 2d 508 (Fla. 1982), the defendant filed a motion to vacate or set aside his sentence, arguing that the trial court, in accepting his plea, failed to advise him that it could retain jurisdiction over part of his sentence, thereby potentially affecting his parole. *Id.*, at 509. This Court ruled that the defendant's plea was involuntary because he was not advised of this consequence of his plea. *Id.*, at 510. This Court concluded that "the trial court must choose between retaining jurisdiction and allowing Green to withdraw his plea." *Id.*

In *Jefferson v. State*, 515 So. 2d 407, 408 (Fla. 1st DCA 1987), the court reversed the denial of the defendant's Rule 3.850 motion because "the sentence entered was in excess of the agreed upon plea bargain."

Harvey v. State, 399 So. 2d 1134, 1135 (Fla. 1st DCA 1981), was a direct appeal in which the defendant challenged, *inter alia*, the imposition of a six-year term of imprisonment under the Youthful Offender Act. The appellate court held, "If appellant was unaware of the greater penalty to which he was actually exposed at the time of the entry of his plea, his sentence must either be reduced to not more than five years or he must be allowed to withdraw his plea." *Id.*

None of the cases cited by Petitioner support his contention that Florida courts "have held that Rule 3.172 applies after sentencing." (Initial Brief: 14).

Petitioner further asserts, "If this Court were to determine that the right to withdraw a plea under Rule 3.172(g) does not exist after sentencing, and that a defendant may only rely on Rules 3.170(*l*) and 3.850, then the defendant would not have grounds to appeal for any reason other than the plea was not 'voluntary.'" (Initial Brief: 16). The fact is, under Florida law, a defendant who enters a plea has a limited ability to appeal.

Under §924.06(3), Florida Statutes (2012), "A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue, or a defendant who pleads *nolo contendere* with no express reservation of the right to appeal a legally dispositive issue, shall have no right to a direct appeal."

A defendant who pleads guilty or *nolo contendere* without having expressly reserved the right to appeal a prior dispositive order of the lower tribunal may directly appeal only on the bases set forth in Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii): "a. the lower tribunal's lack of subject matter jurisdiction; b. a violation of the plea agreement, if preserved by a motion to withdraw plea; c. an involuntary plea,

if preserved by a motion to withdraw plea; d. a sentencing error, if preserved; or c. as otherwise provided by law."

In *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003), this Court observed:

> Florida Rule of Criminal Procedure 3.170 governs the circumstances under which a defendant may withdraw a plea. Subdivision (f) of that rule states that a "court may in its discretion, and shall on good cause, *at any time before a sentence*, permit a plea of guilty to be withdrawn." Fla. R. Crim. P. 3.170(f)(emphasis added). Under this provision, a trial court plainly has broad discretion in determining motions to withdraw a plea.
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> ***
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> Rule 3.170(*l*) applies to motions to withdraw filed *after* sentencing. In contrast to subdivision (f), this provision allows withdrawal of a plea only on the limited grounds listed in Florida Rule of Appellate Procedure 9.140(b). Such grounds include lack of subject matter jurisdiction, violation of the plea agreement, and involuntariness of the plea. Moreover, once sentence has been imposed, to withdraw a plea a defendant must demonstrate a manifest injustice requiring correction.

(Citations and footnote omitted).

Florida law therefore *already* limits a defendant's ability to appeal once he or she has entered a guilty or *nolo contendere* plea. Petitioner is, in effect, asking this Court to expand the bases on which such a defendant may appeal or otherwise attack his conviction, contrary to what the legislature plainly set forth in §924.06(3).

Moreover, the structure of the Florida Rules of Criminal Procedure indicate that matters pertaining pleas and the withdrawal of pleas are placed in Section IV, which includes Rule 3.172. Matters dealing with postconviction relief are contained in Section XVII. If the language at issue in Rule 3.172(g) had been intended to apply after the finality of the conviction and sentence, it would have been placed in Part XVII, governing postconviction relief. *See also Eggers*, 624 So. 2d at 337 (claim that trial court failed to honor the written plea agreement was properly before the court on a motion for postconviction relief to vacate sentence where defendant did not move the trial court to withdraw the plea and thus could not raise the issue on direct appeal).

In *Roy v. Wainwright*, 151 So. 2d 825 (Fla. 1963), this Court discussed then newly-created Rule 1, the predecessor to Florida Rule of Criminal Procedure 3.850. This Court referred to the rule as "a *complete* and efficacious post-conviction remedy to correct convictions on any ground which subjects them to collateral attack." *Id.*, at 828. (Emphasis added). As this Court held in *Baker v. State*, 878 So. 2d 1236, 1241 (Fla. 2004), even the writ of habeas corpus is no longer available as a post-conviction remedy. Certainly, a procedural rule enumerated elsewhere than in the collateral review section of the rules of procedure is unavailable as a means of collateral attack.

By Its Plain Language, Rule 3.172(g) Does Not Govern Withdrawal of Pleas

Petitioner points out that the "manifest injustice" and "prejudice" standards are not included in the language of Rule 3.172(g). On this narrow point, Petitioner is correct. There is no language referring to "manifest injustice" or "prejudice" in Rule 3.172(g). Respondent submits that this is because Rule 3.172 does not govern the withdrawal of *pleas* at all. Rather, Rule 3.172 governs the plea process. Withdrawal of pleas is governed by Rule 3.170(f) and (*l*).

Rule 3.172 was adopted in response to this Court's ruling in *Williams v. State*, 316 So. 2d 267 (Fla. 1975). Following this Court's ruling in *Williams*, former Rule 3.170(j) was expanded and became separate Rule 3.172. Former Rule 3.170(j) provided:

> Responsibility of Court on Pleas. No plea of guilty or nolo contendere shall by accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.
>
> A complete record of the proceedings at which a defendant pleads shall be kept by the court.

Williams, 316 So. 2d at 270.

The language from former Rule 3.170(j) clearly shows that the matter governed by then newly-created Rule 3.172 was the plea *process*.

Petitioner correctly notes that, at the time *Williams* was decided, there was no mechanism for a defendant to withdraw a plea after sentencing; however, Rule 3.172 did not create that mechanism. Rather, subdivision 3.170(*l*) was adopted in 1997. *See Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1105 (Fla. 1996)("Consistent with the legislature's philosophy of attempting to resolve more issues at the trial court level, we are also promulgating Florida Rule of Criminal Procedure 3.170(*l*), which authorizes the filing of a motion to withdraw plea after sentencing within thirty days from the rendition of the sentence, but only upon the grounds recognized by *Robinson [v. State*, 373 So. 2d 898 (Fla. 1979)] or otherwise provided by law."); *see also Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253, 1254 (Fla. 1996)("In order to accomplish the objectives outlined in our opinion amending the Florida Rules of Appellate Procedure . . . , we have . . . added new subdivision (*l*) to rule 3.170.").

Respondent respectfully submits that this Court should clarify the interpretation of Rule 3.172(g), as a reading of the plain language of the rule shows that it does not govern the withdrawal of pleas. Rather, the plain language of Rule

3.172(g) reveals that it governs the plea *offers* and plea *negotiations* and the ability of either party to withdraw from such offers and negotiations prior to formal acceptance of any agreement by the trial court.

"'The same principles of construction apply to court rules as apply to statutes.'" *Mitchell v. State*, 911 So. 2d 1211, 1214 (Fla. 2005), *quoting Gervais v. City of Melbourne*, 890 So. 2d 412, 414 (Fla. 5th DCA 2004). "If the language of a statute or rule is plain and unambiguous, it must be enforced according to its plain meaning." *Id.*, *citing Fla. Dept. of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320, 323 (Fla. 2001). "Legislative history is not needed to determine intent when the language is clear." *Id.*, *citing Goldenberg v. Sawczak*, 791 So. 2d 1078, 1083 (Fla. 2001). The intent of the Florida Supreme Court in promulgating the rule, as expressed in the rule itself, governs its interpretation. *D.K.D. v. State*, 470 So. 2d 1387, 1389 (Fla. 1985).

The plain language of Rule 3.172(g) indicates that it applies to plea *offers* and plea *negotiations* and not to the plea itself. Rule 3.172(g) permits either party to unilaterally withdraw a plea offer or to withdraw from a plea negotiation at any time prior to the acceptance of that offer or negotiation by the trial court. Rule 3.170 applies to pleas, including the

withdrawal of a plea; Rule 3.172, by contrast, applies to the plea process ("Acceptance of Guilty or Nolo Contendere Plea").

Rule 3.172(g) provides:

> **(g) Withdrawal of Plea Offer or Negotiation.** 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.

Fla. R. Crim. P. 3.172(g) (emphasis added).

Petitioner suggests that Rule 3.172(g) should be construed to impose a duty upon the trial court to utter some sort of magic incantation when accepting a plea, or else the defendant may unilaterally withdraw his plea – even years after sentencing – for any reason or no reason at all. Petitioner's interpretation is not supported by the language of the rule itself. The plain language of Rules 3.170 and 3.172 reveals that they deal with different aspects of the plea process. The plain language of Rule 3.172 shows that it governs the trial court's obligations during the plea colloquy.

Rule 3.172(g) provides that no plea offer or negotiation is final until accepted by the trial court. This rule clearly does not refer to withdrawal of the plea itself. Rule 3.172(g) would not address withdrawal "by either party" if it governed withdrawal of the actual plea, as the prosecution does not plead. Interpreting the rule as Petitioner urges this Court to

do would render the language referring to a withdrawal of the plea offer or negotiation "by either party" superfluous. *See State v. Goode*, 830 So. 2d 817, 824 (Fla. 2004)("[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.").

Rule 3.172(g) allows the defense *or* the prosecution to withdraw from the proposed terms of an agreement at any time before the trial judge formally accepts the plea. Thus, the rule is intended to allow flexibility in negotiating the terms of a plea deal up until the time the court accepts the deal. Until the plea deal is formally accepted by the judge, the parties are not bound by any of its terms, and either party may withdraw from any tentative agreement. It would not make sense for this Court to include the language "*it may be withdrawn by either party*" were the Court referring to the plea itself.

Furthermore, interpreting Rule 3.172(g) as governing the withdrawal of pleas would lead to an unreasonable or absurd result. "[A]nother applicable maxim of statutory construction is that statutes will not be construed to reach an absurd result." *Village of Doral Place Ass'n., Inc. v. RU4 Real, Inc.*, 22 So. 3d 627, 631 (Fla. 3d DCA 2009), *citing City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1960). If interpreted the way Petitioner suggests, a defendant could enter

a plea and, years or decades later, long after sentence has been imposed and long after memories have faded and witnesses have disappeared or died and "*without any necessary justification*," withdraw his plea simply because the trial court failed to utter magic words. Fla. R. Crim. P. 3.172(g)(emphasis added).

Such an interpretation would undermine confidence in the finality of pleas. *See Gusow v. State*, 6 So. 3d 699, 703 (Fla. 3d DCA 2009)("The legal system places a value on having a case come to an end; it is a serious thing to set aside a plea seven years after the fact. Witnesses disappear, files are lost, and memories fade."). As the United States Supreme Court opined in the federal *habeas corpus* context, the "vast majority of criminal convictions result" from pleas, and "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures . . . and impairs the orderly administration of justice." *United States v. Timmreck*, 441 U.S. 780, 784 (1979)(citation omitted).

Permitting a defendant to withdraw a plea "without any necessary justification" at any time simply because the trial judge does not "formally" accept the plea – even where, as here, all parties and the judge assumed the judge had indeed accepted the plea -- would elevate form over substance. This interpretation would provide a basis for relief for a mere technical violation of the rule in the absence of any prejudice.

The Florida Rules of Criminal Procedure disfavor the granting of relief based on mere technical violations in the absence of some type of good cause or prejudice. For example, Rule 3.121(b) provides that "[n]o arrest warrant shall be dismissed nor shall any person in custody be discharged because of any defect as to form in the warrant; but the warrant may be amended by the judge to remedy such defect." Rule 3.140(o) dictates that "[n]o indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information . . . unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense." Similarly, Rule 3.570 states that "[n]o irregularity in the recording of a verdict shall affect its validity unless the defendant was in fact prejudiced by the irregularity."

Petitioner's interpretation of Rule 3.172(g) would be inconsistent with these principles and would permit a defendant, "without any necessary justification" with withdraw his plea on a mere defect in the form of the court's acceptance of the plea.

Rule 3.172(g) simply does not address withdrawal of pleas. By its plain language, it governs the withdrawal of plea offers or negotiations. The only reference to withdrawal of the plea itself in Rule 3.172 is contained in Rule 3.172(h). That subdivision provides that "[i]f the trial judge does not concur in a tendered plea of guilty or nolo contere arising from negotiations, the plea may be withdrawn." The phrases "tendered plea" and "arising from negotiations" contained in Rule 3.172(h) logically refer to the plea offers and negotiations addressed in the immediately preceding subdivision.

Petitioner correctly notes that a plea is a contract. Under Rule 3.172(g), the terms of that contract are binding on the parties when they are accepted by the trial court. Until the terms of a plea offer or negotiation are accepted by the trial court, either party may withdraw from them. In fact, it is Rule 3.172(h) that allows withdrawal from the terms of a "*tendered* plea . . . arising from negotiations" where the trial judge does not concur. (Emphasis added). This does not support a conclusion that Rule 3.172(g) allows party to withdraw an already-entered plea.

Rules 3.170(f) and (*l*) address the circumstances under which a defendant may withdraw an *already entered* plea, and the

standards to be shown for such withdrawal.[1] Rule 3.170(f) provides:

> **(f) Withdrawal of Plea of Guilty or No Contest.** The court may in its discretion, and shall on good cause, at any time before 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, or, with the consent of the prosecuting attorney, allow a plea of guilty or no contest of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty or no contest.

Fla. R. Crim. P. 3.172(f).

Rule 3.170(*l*) provides:

> **(*l*) Motion to Withdraw the Plea after Sentencing.** A defendant who pleads guilty or nolo contendere without expressly reserving the right to appeal a legally dispositive issue may file a motion to withdraw the plea within thirty days after rendition of the sentence, but only upon the grounds specified in Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)(a)-(e) except as provided by law.

Fla. R. Crim. P. 3.172(*l*).

Clearly, a plain reading of Rules 3.170 and 3.172 show that Rule 3.170 governs the plea itself (including the circumstances under which a defendant may withdraw a plea), and Rule 3.172 governs the plea process (including when a plea offer or negotiation becomes binding and the circumstances under which either party may withdraw from a tendered plea). This

[1] Rule 3.170(m) also concerns withdrawal of a previously entered plea upon the successful completion of a drug court treatment program. This provision's inclusion under Rule 3.170 is further evidence that Rule 3.170 addresses the plea itself, including the circumstances under which a defendant may withdraw a plea.

interpretation of Rule 3.172(g) is in harmony with this Court's ruling in *Harrell*. Formal acceptance of the plea offer or negotiation occurs when the trial court goes through the process outlined in Rule 3.172. After the trial court sentences the defendant, it is clear it has accepted the terms of the parties' agreement.

CONCLUSION

Respondent respectfully requests that this Court dismiss the instant Petition. Alternatively, Respondent asks this Court to affirm the ruling of the Second District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Diane J. Zelmer, Zelmer Law, 150 North Federal Highway, Ste. 230, Fort Lauderdale, FL 33301 on August _____, 2012.

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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