IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-28

MICHAEL CAMPBELL
Appellant,

v.

STATE OF FLORIDA
Appellee

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA: CASE NO. 99CF9147NC
AND SECOND DISTRICT COURT OF APPEAL: CASE NO. 2D11-805

APPELLANT, MICHAEL CAMPBELL'S INITIAL BRIEF ON THE MERITS

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ISSUE ON APPEAL

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.

PREFACE

1. Appellant, Michael Campbell is referred to as "Campbell."

2. Appellee, State of Florida is referred to as "State."

3. Appendix

   i. TAB A: Campbell v. Florida, 75 So. 3d 757 (Fla. 2d DCA 2011).

   ii. TAB B: Transcript of Hearing, pp. 16-22 (Nov. 30, 1999).

STATEMENT OF THE CASE AND FACTS

A. Nature of Case.

On November 30, 2009, Campbell's counsel indicated that Campbell wished to plead "no contest" in open court to the following charges: four counts of attempted sexual battery by an adult, victim less than twelve; one count of lewd and lascivious conduct, victim less than sixteen; and one count of sexual battery by a person in familial or custodial authority. (R. 16). After entering into a plea colloquy with Campbell, the trial judge stated "[a]t this point then I'll find the plea is voluntary." (R. 22). The trial court never formally accepted the plea. The court advised him that his minimum exposure was 32.25 years and the maximum exposure was life. (R. 22). Thereafter, on February 11, 2000, Campbell was sentenced to a total of forty-five years' imprisonment. (R. 66).

B. Procedural Background.

On January 24, 2011, Campbell filed a Motion to Withdraw Plea. (R. 3-28). In his Motion, Campbell argued that he was entitled to withdraw his plea because the trial court failed to formally accept his plea during the plea colloquy as required pursuant to Fla. R. Crim. P. 3.172(g). Id.

C. Disposition of Lower Tribunal.

The trial court found that Rule 3.172(g) applies "only before sentencing," and ruled that the trial judge's inadvertent failure to formally accept the plea did not entitle Campbell to withdraw his plea nearly eleven years after the sentence had been imposed. (R. 29-31). On February 15, 2011, Campbell timely appealed the decision of the trial court. (R. 32). The Second District relied on Demartine v. State, 647 So. 2d 900 (Fla. 4th DCA 1994) and Harrell v. State, 894 So. 2d 935 (Fla. 2005), and concluded that Rule 3.172 "simply codified in greater detail the requirements for acceptance of the plea," and thus, held that both Rules 3.172 and 3.170(f) apply before sentencing. (R. 67-69). The court acknowledged that State v. Partlow, 840 So. 2d 1040, 1042 (Fla. 2003) held that in order for a defendant to withdraw his plea after sentencing, he must demonstrate a manifest injustice. (R. 69). On October 28, 2011, the Second District affirmed, certifying conflict with Cox v. State, 35 So. 3d 47 (Fla. 1st DCA 2010). (R. 65-69). Campbell filed a Motion for Rehearing and/or Clarification and an Amended Motion for Rehearing and Clarification, which the Second District denied on December 9, 2011. (R. 70-76, 80-85).

Campbell timely filed his Jurisdictional Brief on January 5, 2012, and this Court granted jurisdiction on May 15, 2012.

SUMMARY OF ARGUMENT

The Second District erred in holding that Rule 3.172(g) applies only ***before sentencing***. Rule 3.172(g) contains no such language. Rather, it expressly states that "until that time" when the judge accepts the plea, it is not "binding" and allows a defendant to withdraw the plea without "justification." Under the canon of *expressio unius est exclusio alterius*, the phrase "before sentencing" in Rule 3.170(f) implies the intentional exclusion of that phrase in Rule 3.172(g). The ABA Rule 2.1 Standards of Criminal Justice adopted in Williams v. State, 316 So. 2d 267, 273-74 (Fla. 1975) likewise supports this interpretation.

Further, Rule 3.172 cannot be read in *pari materia* with Rule 3.170 because the standards for withdrawal of a sentence are substantially different -- Rule 3.172(g) contains a mandatory plea withdrawal whereas Rule 3.170(f) provides the court with discretion. Moreover, if the Court were to determine that Rule 3.172(g) only applies after sentencing, then it significantly limits enforcement of Rule 3.172 to appealing pleas that are "involuntary" under Rules 3.170(l) and 3.850, ignoring other important elements of Rule 3.172.

Next, requiring a showing of "manifest injustice" to withdraw a plea under Rule 3.172(g) after sentencing is simply wrong. Manifest injustice originated out of ABA Rule 2.1 Standards of Criminal Justice, which applies only after the judge formal

accepts a plea, not after sentencing. This Court did not adopt the "manifest injustice" standard in 1977 when it enacted Rule 3.172(g) after Williams v. State, 316 So. 2d 267, 275 (Fla. 1975). Rather, it adopted a "prejudice" standard under Rule 3.172(j) that deems the plea "void" for failure "to follow any of the procedures." The prejudice standard in Rule 3.172(j) cannot and does not contemplate Rule 3.172(g) because they are inapposite – Rule 3.172(g) expressly allows withdrawal **without** "justification." Moreover, a plea first must be "binding" before it is necessary to apply the prejudice standard in Rule 3.172(j) to "void" a plea.

In addition, plea agreements are contracts, and Rule 3.172 demarks the time when a plea becomes binding – after formal acceptance by the trial judge. The bottom line is this plea was never binding, and is unenforceable.

Last, the entire purpose of Rule 3.172 is to safeguard a defendant's constitutional rights, and establish formal procedures to protect a defendant from an involuntary and/or non-binding plea. The Court should not rewrite Rule 3.172(g) to include the phrases "before sentencing" and "manifest injustice" or "prejudice." To do so would run afoul of the intent of Rule 3.172, and limit its application and enforcement. To the extent the Court deems an amendment to the rule should be enacted, the Court should apply any such rule prospectively, and not retroactively.

For these reasons, the Court should reverse and remand.

STANDARD OF REVIEW

This case involves interpretation of the express language of Rule 3.172 of the Florida Rules of Criminal Procedure, which is a legal issue that requires application of the *de novo* standard of review. Martin Daytona Corp. v. Strickland Const. Services, 941 So. 2d 1220, 1223 (Fla. 5th DCA 2006)(citing See Gosselin v. Gosselin, 869 So. 2d 667, 668 (Fla. 4th DCA 2004)).

ARGUMENT

I.

RULE 3.172(g) IS MANDATORY AND ALLOWS A DEFENDANT TO WITHDRAW A PLEA "WITHOUT ANY NECESSARY JUSTIFICATION" ANY TIME BEFORE THE JUDGE ACCEPTS THE PLEA

Courts have held that 3.172(g) grants a criminal defendant the substantive right to unilaterally withdraw a plea without any justification when a judge fails to formally accept the plea in open court. Rule 3.172(g) of the Florida Rules of Criminal Procedure 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.[1]

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1 This rule was adopted in 1977 after Williams v. State, 316 So. 2d 267, 274 (Fla. 1975), where the Court acknowledged that the criminal rules should be rewritten to adopt Standard 2.1, Pleas of Guilty, American Bar Association Standards of Criminal

In Harrell v. State, 894 So. 2d 935 (Fla. 2005) this Court expressly held that "[t]his rule permits a defendant to withdraw a plea ***at any time*** before the court formally accepts it. A trial court's failure to grant a motion to withdraw raising this claim constitutes reversible error." Id. at 938 (e.s.)(citing Bass v. State, 541 So. 2d 1336 (Fla. 4th DCA 1989).[2] This Court adopted the Fourth District holding in Bass as follows:

> It is not easy for us to conclude that the trial court did not formally accept the plea herein because we feel confident the trial judge intended to, and probably felt he had. This formal omission is easily understood considering the volume of cases proceeding through the court and the absence of any ostensible contest over the proceeding. **Nevertheless when push comes to shove, we are obliged to follow the rule as written and construed by the cases.** No formal acceptance by the court, not bar to withdrawal by any of the triumvirate-state defendant or the court.

Id. (quoting Bass, 541 at 1338)(e.s.). See also, Turner v. State, 616 So. 2d 194, 194 (Fla. 3d DCA 1993)(holding that "[u]nder these circumstances, the defendant had an

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Justice, which sets forth the standard for plea withdrawal ***both before and after sentencing***.

2 Although in Harrell v. State, 894 So. 2d 935 (2005), the Court held that the defendant did not preserve the claim, it was because Harrell failed to invoke Rule 3.172(f) by motion, and instead only invoked 3.170(g), and this issue did not meet the high standard of "fundamental error." Id. at 940. Here, Campbell has invoked Rule 3.172(g).

absolute right to withdraw his plea prior to sentencing 'without any necessary justification.")

Relying on Harrell, in Cox v. State, 35 So. 3d 47 (Fla. 1st DCA 2010), the First District likewise held that a defendant had a right to withdraw his plea when the judge failed to formally accept the plea. As in Bass and Turner, there, during the plea colloquy the judge questioned the defendant extensively regarding his plea to determine whether his plea was "freely and voluntarily entered, with a full understanding of the nature and consequences" of the plea. Id. at 48. However, the trial judge never formally accepted the plea. Id. Relying on Harrell and Howard v. State, 516 So. 2d 31, 32 (Fla. 1st DCA 1987), the First District held that a defendant has a right to withdraw the plea ***even two years after conviction*** because the express language of Rule 3.172(g) requires the judge to formally accept the plea. Id. at 48.

Here, the facts are ironically similar. The trial court questioned Campbell, but never accepted the plea, and thus, Campbell should be allowed to withdraw his plea pursuant to the express language of Rule 3.172(g).

II.

THE PLEA IS NOT "BINDING" UNDER FLA. R. CRIM. P. 3.172 UNTIL FORMAL ACCEPTANCE, WHICH DOES NOT OCCUR UNTIL THE TRIAL JUDGE EXPRESSLY, AND NOT IMPLICITLY, STATES IT ACCEPTS THE PLEA IN OPEN COURT

As indicated by the Fifth Circuit, a plea is not "binding" unless the court formally accepts a plea:

> Unless formally accepted by a court, the terms of a plea agreement are not binding on anyone. E.g., Mackey v. State, 743 So.2d 1117, 1118 (Fla. 2d DCA 1999). Formal acceptance of a plea occurs when the court affirmatively states to the parties, in open court and for the record, that the court accepts the plea. E.g., Harden v. State, 453 So. 2d 550 (Fla. 4th DCA 1984). A trial court's failure to grant a motion to withdraw a plea where the court has not formerly accepted the plea constitutes reversible error. See, e.g., Bass v. State, 541 So. 2d 1336 (Fla. 4th DCA 1989).

Collucci v. State, 903 So. 2d 333, 334 (Fla. 5th DCA 2005). See also, State v. Parisi, 660 So. 2d 372, 373 (Fla. 4th DCA 1995)("No plea offer or negotiation is binding until the trial court accepts it in open court.")

It is well-settled that implied or subjective acceptance of the plea does not meet the standard of Rule 3.172(g), and that a court must formally accept the plea in open court. In Harrell v. State, 894 So. 2d 935 (Fla. 2005) this Court adopted the holding in Bass as follows:

> It is not easy for us to conclude that the trial court did not formally accept the plea herein because we feel confident the trial judge intended to, and probably felt he had. This formal omission is easily understood considering the volume of cases proceeding through the court and the

> absence of any ostensible contest over the proceeding. **Nevertheless when push comes to shove, we are obliged to follow the rule as written and construed by the cases.** No formal acceptance by the court, not bar to withdrawal by any of the triumvirate-state defendant or the court.

Id. (quoting Bass, 541 at 1338)(e.s.).

Likewise, in Harden v. State, 453 So. 2d 550 (Fla. 4th DCA 1984), the Fourth District considered whether the plea was accepted when the State presented the factual basis of the charges, the court ordered a predisposition report and a presentence investigation, and also caused to be filed in the record of each case a document called "Deferred Adjudication and Sentence." The Fourth District held that "**until formal acceptance has occurred the plea binds no one: not the defendant, the prosecutor, or the court.**" Id. (e.s.) Furthermore, the Fourth District said:

> Since the ability of all parties to repudiate a negotiated plea hinges upon acceptance of the plea by the court, **the rule wisely requires formal acceptance of that plea, rather than subjective or implied acceptance.** We therefore hold that **formal acceptance of a plea occurs when the trial court affirmatively states to the parties, in open court and for the record, that the court accepts the plea.**

Id. at 551 (e.s.). See also, State v. Sanchez, 537 So. 2d 1115, 1116 (Fla. 4th DCA 1989)(plea not binding where no formal acceptance occurred).

Likewise, the First District stated in Muse v. State:

> The fundamental defect in the proceedings above was the trial court's **failure to express its acceptance of appellant's plea; the ordering of a presentence investigation is not sufficient in this respect.** As the plea

> agreement **is no longer binding** on appellant, however, the State may reinstate the count of false imprisonment and proceed to trial on all of the original charges.

23 So. 3d 763, 764 (Fla. 1st DCA 2009)(citation omitted)(e.s.).

Florida cases demonstrate that implied approval by the trial judge is not sufficient because the express language of the Rule requires formal acceptance. Likewise, here, the trial judge failed to expressly accept the plea, and thus, the plea never became binding on Campbell.

III.

RULE 3.172(g) PROVIDES A DEFENDANT A RIGHT TO WITHDRAW A PLEA BOTH BEFORE AND AFTER SENTENCING

The express language of Rule 3.172 contains ***no time limit*** for withdrawing a plea. Rather, it expressly hinges on acceptance by the trial judge as a basis for repudiating a plea by ***any party***, and states that "***until that time***" a party may withdraw the plea. The express language of the rule must be upheld.

This Court in Harrell v. State, 894 So. 2d 935, 939 (Fla. 2005) suggested in dicta that both Rule 3.170(f) and Rule 3.172(g) apply to the withdrawal of pleas only "before sentencing." Under the canon of *expressio unius est exclusio alterius,* i.e., "the expression of one thing implies the exclusion of another," the contrary is true. See Fla. Right to Life, Inc. v. Lamar, 273 F.3d 1318, 1327 (11th Cir. 2001). The express language of Rule 3.172(g) does not provide any time limit of withdrawing the plea, but

rather modifies the term "binding" and states that "until that time" a defendant can withdraw the plea. On the other hand, Fla. R. Crim. P 3.170 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 a sentence***, permit a plea of guilty or no contest to be withdrawn and, if judgment of conviction has been entered thereon, set aside the judgment and allow a plea of not guilty, 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. The fact that a defendant may have entered a plea of guilty or no contest and later withdrawn the plea may not be used against the defendant in a trial of that cause.

Fla. R. Crim P. 3.170(f)(e.s.). Under the *expressio unius* canon, the phrase "before a sentence" in Rule 3.170(f) implies that it is intentionally excluded from Rule 3.172(g). Thus, Rule 3.172(g) applies both before and after sentencing. See also, infra, Part IV.

Further, the Court should not limit any remedy under Rule 3.172(g) after sentencing to Rule 3.170(l) because the rules cannot be read in *pari materia.* 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. 3.170(e.s.). If we were to construe Rule 3.170(l) to govern any remedy under Rule 3.172(g) after sentencing, then it would require a defendant to file a

motion to withdraw the plea within 30 days after rendition of the sentence. Second, Rule 9.140(b)(2)(A)(ii)(a)-(e) allows a party to withdraw a plea based on the following:

> (ii) Appeals Otherwise Allowed. A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
> 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
> e. as otherwise provided by law.

The rule by its express language cannot be read in *pari materia* with Rule 3.172(g) because it contains no right to appeal a **non-binding** plea for lack of formal acceptance by the judge as expressly provided in Rule 3.172(g).

Further, if the Court adopted such a standard, there can be no explanation why Rule 3.170 and Rule 3.172 have their own separate standards for withdrawal before sentencing, yet both rely on the same standard in Rule 3.170(l) for any appeal after sentencing. This Court has clearly recognized that there is a distinction in withdrawing a plea under Rule 3.170(f) and Rule 3.172(g) before sentencing – Rule 3.170(f) gives the court broad **discretion** to withdraw, while Rule 3.172(g) requires **mandatory** withdrawal of the plea without proof of any **justification**. Harrell v. State, 894 So. 2d 935, 939 (Fla. 2005). Even if this Court adopted the Second District's approach, it is

unreasonable to conclude that different standards apply in withdrawing a plea under Rules 3.170(f) and 3.172(g) before sentencing, but not after sentencing.

Moreover, in addition to Cox, several courts have held that Rule 3.172 applies after sentencing. For example, in State v. Bowland, 604 So. 2d 556 (Fla. 2d DCA 1992), the defendant was charged with three counts of sexual activity by a person in a familial or custodial authority, and one count of lewd, lascivious or indecent assault. Id. The trial judge accepted the *nolo contendre* plea agreement over the state's objection, which sentenced the defendant to a suspended 15 year sentence, and defendant was placed on community control for two years to be followed by thirteen years of probation. Id. at 557. There, the Second District first stated that trial court erred in applying a downward departure of the permitted guideline range of sentencing. Id. Next, relying on Rule 3.172(f), the Second District indicated that any party may withdraw the plea without justification until the trial judge formally accepts the plea. Id. Accordingly, the court reversed and remanded for **resentencing**, but stated that "defendant **must be allowed the opportunity to withdraw the plea**." Id. (e.s.)

Similarly, other courts have allowed for a withdrawal of the plea after sentencing through Rule 3.850, which provides:

> (a) Grounds for Motion. The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida:

(1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.
(2) The court did not have jurisdiction to enter the judgment.
(3) The court did not have jurisdiction to impose the sentence.
(4) The sentence exceeded the maximum authorized by law.
(5) The plea was involuntary.
(6) The judgment or sentence is otherwise subject to collateral attack.

See State v. Green, 944 So. 2d 208, 218 (Fla. 2006)(indicating that defendant may proceed with 3.172(c)(8) violation as long as he meets time limit proscribed under 3.850(b)(1)); Eggers v. State, 624 So. 2d 336, 337-38 (Fla. 1st DCA 1993)(failure of trial court to trial court must apprise the defendant that the period of incarceration, including probation, pursuant to 3.172(c)(7) requires remand for resentencing within the terms of the plea agreement or option to withdraw plea); State v. Green, 421 So. 2d 508 (Fla. 1982)(failure to advise defendant of direct consequences of plea prohibits him from rendering a truly voluntary and knowledgeable waiver of his constitutional rights); Jefferson v. State, 515 So. 2d 407, 408 (Fla. 1st DCA 1987)(where sentence exceeds negotiated plea agreement, the issue should be remanded for resentencing or option to withdraw plea). See also, Harvey v. State, 399 So. 2d 1134 (Fla. 1st DCA 1981), rev. denied, 411 So.2d 382 (Fla.1981) (if appellant was unaware of greater penalty to which he was exposed at the time of the entry of the plea, his sentence must be either reduced, or he must be allowed to withdraw his plea).

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." For example, such a rule would give limited application to Rules 3.172(d) and 3.172(e), requiring DNA evidence inquiry and acknowledgement of guilt by the defendant or that the plea is in his best interests while maintaining innocence. As Justice Cantero cautioned when different standards apply for withdrawal of the plea before and after sentencing, in a concurring opinion in State v. Partlow:

> The problem arises when, as often happens, a defendant is sentenced immediately after the plea. In such cases, the "right of reflection" under rule 3.170(f) is illusory. The right is snatched away almost immediately after it is given. On the other hand, in some cases many days, or weeks, may pass between the date of the plea and the sentence. Thus, whether a defendant retains the right of reflection, as the rule allows, depends on the rather arbitrary circumstance of whether the particular judge decides to sentence immediately or wait until another day. In this case, Partlow was sentenced immediately after he entered his plea. Although only about twenty days elapsed between the plea and his motion to withdraw it, he still had to *1045 demonstrate manifest injustice. Had Partlow been able to file his motion before he was sentenced, I believe his motion could have demonstrated good cause to withdraw the plea, or at least sufficient circumstances to justify the judge, in his discretion, permitting him to do so.

State v. Partlow, 840 So. 2d 1040, 1044 (Fla. 2003)(J. Cantero, concurring).

This Court should not rewrite Rule 3.172(g) by adding the terms "before sentencing." To do so would erode the purpose of Rule 3.172, and the critical function of the trial judge in safeguarding the constitutional rights of the defendant. Each rule – 3.170, 3.172, and 3.850 – expressly provides separate relief under different grounds. See Dooley v. State, 789 So. 2d 1082 (Fla. 1st DCA 2001)(rejecting state's position that defendant must file a motion under 3.170(l) to preserve an involuntary claim under Rule 3.850). Rule 3.172(g) provides relief from a plea that is not "binding." Accordingly, this Court should uphold the express language of Rule 3.172(g), and find that the "time" is when a plea becomes "binding," which is upon "formal acceptance" by the court.[3] Sentencing does not change that result.

IV.

THE "MANIFEST INJUSTICE" OR "PREJUDICE" STANDARD DOES NOT APPLY TO WITHDRAWAL OF A PLEA UNDER RULE 3.172(g) AFTER SENTENCING

The "manifest injustice" standard is not expressly included in Rule 3.172. In Williams v. State, 316 So. 2d 267, 274 (Fla. 1975), the Court specifically

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3 Even if the Court determines that Rule 3.172(g) should be amended to bar withdrawal of a plea after sentencing, the Court should not act in rewriting the Florida Rules of Criminal Procedure absent appointment of a Committee and allowing comments from interested persons. (Fla. Sup. Ct. I.O.P., Section F.3). Any amendment needs to give due consideration to the intent of all the provisions of 3.172 and should fully preserve the rights in which a defendant should be allowed to

acknowledged that, at that time, Florida had no criminal rules for withdrawing pleas ***after sentencing***, and accordingly, adopted Standard 2.1, Pleas of Guilty, American Bar Association Standards of Criminal Justice, which contains "requirements for a plea withdrawal **subsequent to sentence**." Id. at 273. (e.s.) One core purpose of adopting Standard 2.1, and the subsequent enactment of Rule 3.172 in 1977, was to adopt criminal rules governing withdrawals of pleas **after sentencing**. As stated in Williams, Standard 2.1 provides:

> (i) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, *274 **and is not necessarily barred because made subsequent to judgment or sentence.**
>
> . . .
>
> (b) In the absence of a showing that withdrawal is necessary to correct a **manifest injustice**, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right **once the plea has been accepted by the court. Before sentence**, the court in its discretion may allow the defendant to withdraw his plea **for any fair and just reason** unless the prosecution has been substantially **prejudiced** by reliance upon the defendant's plea.

First, the "manifest injustice" standard in the ABA Standard 2.1 above only applies ***after a court has formally accepted the plea*** – not after sentencing.

Second, the ABA Standard 2.1 expressly states that a motion for withdrawal is ***not barred because of a subsequent judgment or sentence.*** The ABA Standard 2.1

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withdraw after sentencing under Rules 3.172, 3.170(l) and 3.850. Further, any such amendment should only be applied prospectively.

also contains a different standard for withdrawing a plea "before sentencing," which is similar to the discretionary withdrawal rule in Rule 3.170(f), and the phrase "before sentencing" is specifically excluded from the mandatory right to withdraw a plea before acceptance by the court. The ABA rules contemplate a (1) "manifest injustice" plea withdrawal including an involuntary plea,[4] (2) a mandatory withdrawal of the plea anytime before a judge accepts the plea, and (3) a discretionary withdrawal of the plea before sentencing. Therefore, under ABA Standard 2.1 supports Campbell's position that he is entitled to withdraw the plea after sentencing because the judge failed to formally accept the plea. See supra, Part III.

More importantly, in 1977 when the Court adopted Rule 3.172, it did not include the "manifest injustice" standard. Rather, the Court adopted a "prejudice" standard in Rule 3.172(j), as follows:

> **(j) Prejudice.** Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice.

This "prejudice" standard cannot and does not apply to withdrawal of a plea under Rule 3.172(g) because the rule expressly allows for withdrawal of a plea "without any necessary justification." To hold otherwise, would entirely eliminate any relief under Rule 3.172(g), and overrule this Court's holding in Harrell v. State, 894 So. 2d 935

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4 The "manifest injustice" cases in Florida refer to withdrawal of an involuntary plea. State v. Partlow, 840 So. 2d 1040, 1042 (Fla. 2003).

(Fla. 2005), which requires formal approval by the judge ***before the plea becomes "binding."***

The "prejudice" standard in Rule 3.172(j) applies in determining when a plea is deemed "void" which is wholly distinct from Rule 3.172(g) that governs when a plea becomes "binding" in the first place. To apply the "prejudice" standard under 3.172(j) to a ***non-binding*** plea puts "the cart before the horse."

V.

THE PLEA IS A CONTRACT AND IS NOT BINDING UNTIL FORMAL ACCEPTANCE BY THE JUDGE

It is well-settled that a plea agreement is a contract. Garcia v. State, 722 So. 2d 905 (Fla. 3d DCA 1998), rev. dismissed, 727 So. 2d 905 (1999). A plea agreement is a rather unusual contract, because the judge plays an active role in reviewing and accepting the agreement, and overseeing the performance of the parties. United States v. Pollard, 959 F.2d 1011, 1022 (D.C. Cir. 1992). In fact, the trial court may decide not to approve the terms of a plea agreement negotiated by the parties. People v. Segura, 188 P.3d 649, 656 (Cal. 2008). See also, Contreras v. State, 658 S.W.2d 334, 338 (Tex. App. 1983)(trial judge's role to accept or reject the plea). As such, before the judge approves of the plea, the contract is not "binding." To hold otherwise, "as a practical matter strips the judge of his authority to approve or disapprove the plea bargain, a role all parties agree he has." State v. Haner, 631 P.2d 381, 385 (Wash.

1981)(en banc). The trial judge's express approval or rejection is a critical function of a plea. In fact, in Florida, a trial judge can reject a plea after tentatively accepting it if he decides not to include the concessions contemplated by the negotiations. Gamble v. State, 449 So. 2d 319, 322 (Fla. 5th DCA 1984).

It is well-settled that before the parties approve of a contract it is not binding. Therefore, this plea agreement never became binding because it was never accepted by the judge. Further, the plea contract itself, embodies the current Rule 3.172 in effect at the time of the plea, as it is an understanding between the parties that the plea may be withdrawn "at any time" before formal approval by the court. Prior to formal acceptance, there is no meeting of the minds, and ***any party*** may withdraw the plea.

Last, because the nature of a plea agreement is a contract it necessarily implicates the statute of frauds[5] when it cannot be performed within one year. See Tydire v. Williams, 2012 WL 2203045 (Fla. 1st DCA 2005)(holding that contract was

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5 No action shall be brought . . . **upon any agreement that is not to be performed within the space of 1 year from the making thereof**, or whereby to charge any health care provider upon any guarantee, warranty, or assurance as to the results of any medical, surgical, or diagnostic procedure performed by any physician licensed under chapter 458, osteopathic physician licensed under chapter 459, chiropractic physician licensed under chapter 460, podiatric physician licensed under chapter 461, or dentist licensed under chapter 466, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized. § 725.01, Fla. Stat.

subject to statute of frauds when agreement between parties intended to extend for longer than a year and thus no action could be brought). Thus, under the statute of frauds, written acceptance of all parties, including the approval by the judge is required when the sentence exceeds one year in order for the plea to be enforceable.

Here, the court never accepted the plea or otherwise entered an order expressly approving of the plea. Thus, the plea never became a binding contract, and the sentence is not enforceable against Campbell.

VI.

EXPRESS APPROVAL BY THE TRIAL JUDGE IS A "SERIOUS AND WEIGHTY RESPONSIBILITY" REQUIRED UNDER RULE 3.172(g) TO SAFEGUARD THE CONSTITUTIONAL PROTECTIONS OF A DEFENDANT

As Justice Cantero stated, in a concurring opinion in Florida, v. Partlow, 840 So.2d 1040 (Fla. 2003):

> . A defendant's constitutional right to a jury trial is sacrosanct. See art. I, § 22, Fla. Const. ("The right of trial by jury shall be secure to all and remain inviolate."); State v. Griffith, 561 So.2d 528, 530 (Fla.1990) (stating that right of trial by jury is "indisputably one of the most basic rights guaranteed by our constitution"); Fischer v. State, 429 So.2d 1309, 1311 (Fla. 1st DCA 1983) ("The right to trial by jury is, of course, one of the most sacred and fundamental rights of our legal system."), review denied, 438 So.2d 834 (Fla.1983). The rules should require that before a defendant waives that important right, the defendant be informed of all important consequences, whether direct or collateral.

The entire purpose of Rule 3.172 requiring formal court approval before a plea becomes binding is the sensitive nature of protecting fundamental constitutional rights. When a defendant enters into a plea agreement, he waives his right to a jury trial, guaranteed under the Sixth Amendment to the U.S. Constitution. Smith v. State, 197 So. 2d 497 (Fla. 1967)(practical effect of plea of nolo contendere is waiver of trial by jury and placing of defendant at mercy of court).

Courts have held that the granting of a defendant's right to a jury trial, requires approval of the trial judge because it:

> is a "**serious and weighty responsibility**," Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), that requires the exercise of sound discretion by the district judge. As the Supreme Court noted in Patton v. United States, 281 U.S. 276, 312-13, 50 S.Ct. 253, 263, 74 L.Ed. 854 (1930), "the duty of the trial court in that regard **is not to be discharged as a mere matter of rote**, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial."

United States v. Saadya, 750 F.2d 1419, 1421 (9th Cir. 1985)(e.s.). See also, Fla. R. Crim. P. 3.260. Courts have held that silence is not valid waiver of jury trial right. Sansom v. State, 642 So. 2d 631 (Fla. 1st DCA 1994).

Accordingly, trial courts should follow the formal requirements of Rule 3.172 in exercising their serious and weighty responsibility when accepting any plea agreement. When compared to the heightened importance of safeguarding a defendant's constitutional rights, formal acceptance and a strict construction of Rule 3.172 does not

cause harm, expense or delay in requiring courts to simply state in open court or by formal court order that it accepts the defendant's plea, eliminating any confusion about whether the judge deems that it followed the procedures in Rule 3.172, that no issues remain open, and the judge is satisfied that the plea is acceptable and agrees to accept the plea.

CONCLUSION

In sum, the Court should reverse. The plea was not binding because it was never accepted by the trial judge, and Rule 3.172(g) allows for withdrawal of the plea "[u]ntil that time." Moreover, the "manifest injustice" standard was never adopted by in Rule 3.172, and the "prejudice" standard in Rule 3.172(j) does not apply to Rule 3.172(g) because the rule expressly allows withdrawal "without justification." To rewrite Rule 3.172(g) by adding in the phrases "before sentencing" and "manifest injustice" absent an amendment to the rule disregards the strict construction and intent of Rule 3.172(g), eroding the very constitutional safeguards that Rule 3.172 was enacted to protect. Thus, this Court should reverse and remand. To the extent the Court deems an amendment to the rule should be enacted, the Court should apply any such rule prospectively, and not retroactively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of this Initial Brief on the Merits have been delivered via Federal Express to Florida Supreme Court, Attention: Thomas D. Hall, Clerk's Office, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and copy was furnished via U.S. Mail to Pamela Jo Bondi, Attorney General, Robert J. Krauss, Chief-Assistant Attorney General Bureau Chief, Tampa Criminal Appeals, Helene S. Parnes, Assistant Attorney General Florida, Concourse Center 4, 3507 E. Frontage Road, Suite 200 Tampa, Florida 33607, this 26th day of June, 2012.

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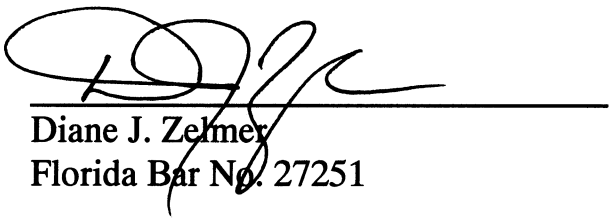

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I certify that this brief complies with the font requirements set forth in Rule Fla. R. App. P. 9.210(a)(2).

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