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 REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The express language of Rule 3.172(g) contains no "manifest injustice" or "prejudice" standard. To the contrary, Rule 3.172(g) allows a defendant to withdraw a plea "without justification."

In addition, Rule 3.172(g) contains no express limitation requiring the withdrawal of a plea before sentencing. Rather, this historical adoption of Rule 3.192(g) in Williams v. State, which cited ABA Standard 2.1, supports the conclusion that a party is entitled to withdraw the plea after sentencing. Both Rule 3.170(f) and ABA Standard 2.1 expressly requires such withdrawals to be made "before sentencing." To the contrary, Rule 3.172(g) contains no limitation, and thus, under the canon of *expressio unius est exclusio alterius*, Rule 3.172(g) must apply after sentencing.

Construing the express language of Rule 3.172(g) requires the Court to hold that Campbell is entitled to withdraw his plea after sentencing without justification because the Court failed to state in open court that it accepted the plea. The State's attempts to rewrite Rule 3.172(g) should be rejected.

The State's argument that Rule 3.172(g) does not apply after a plea is made is unconvincing, and in direct conflict with well-settled law. Moreover, there is no other way to construe Campbell's plea as an "offer" or "negotiation" because under Rule

3.172(g), Campbell's plea never became binding.

Last, the State inappropriately attempts to re-litigate jurisdiction, which has already been fully briefed accepted by this Court. Moreover, the decision in Cannon v. State did not clarify that there was no conflict between Cox and Campbell. To the contrary, the First District in Cannon erroneously failed to recognize that the decision in Cox expressly applied after sentencing, which is in direct conflict with the Second District's decision in Campbell.

For these reasons, the Court should reverse and remand.

ARGUMENT

I.

IT IS WELL-SETTLED THAT A PLEA IS NOT BINDING UNTIL THE COURT STATES IN OPEN COURT THAT IT ACCEPTS THE PLEA

The issue on this appeal is a narrow one. The State erroneously argues that:

> 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." [Ans., p. 23].
>
> Petitioner's interpretation of Rule 3.172 . . . permit a defendant, "without any necessary justification" [stet] withdraw his plea on a mere defect in the form of the court's acceptance of the plea. [Ans., p. 26]

Not only does the State argue in direct contradiction to the express language of Rule 3.172(g), that issue has already been well settled by this Court:

> 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.") As this Court held:

> 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.

Harrell v. State, 894 So. 2d 935 (Fla. 2005) (quoting Bass, 541 at 1338)(e.s.). The State inappropriately attempts to re-litigate well-settled law.

II.

THE EXPRESS LANGUAGE OF RULE 3.172(g) CONTAINS NO "MANIFEST INJUSTICE" OR "PREJUDICE" STANDARD

The express language of 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)(e.s.).

The State **agrees** that there is no "manifest injustice" or "prejudice" standard included in Rule 3.172(g). [Ans. Br., p. 20]. The State further **agrees** that the language of the statute or rule must be enforced to its plain meaning. [Ans. Br., p. 22].

Nevertheless, the State strains all credibility to explain away the absence of this language by submitting to this Court that it should clarify that Rule 3.172 does govern

withdrawal of pleas, but only that of plea offers and negotiations. Construing Rule 3.172(g) as governing plea *offers and negotiations* as opposed to pleas, does not support the State's position. The reality is that Rule 3.172(g) governs a plea "offer" or "negotiation" because the plea itself is not binding until formal acceptance of the Court. See supra, Part I. The State's position, suggesting that a plea itself may not be withdrawn would render Rule 3.172(g) completely superfluous, and is contrary to Harrell v. State, 894 So. 2d 935, 938 (Fla. 2005) (e.s.) ("This rule permits a defendant to withdraw a **plea** at any time before the court formally accepts it.") and Bass v. State, 541 So. 2d 1336, 1337 (Fla. 4th DCA. 1989). See also, ABA Standard 2.1 (e.s.) ("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.")

Ironically, the State never explains why this Court should write in "manifest injustice" or "prejudice" standards into the Rule 3.172(g). To the contrary, Rule 3.172(g) allows for withdrawal "without any necessary justification."

III.

THE EXPRESS LANGUAGE OF RULE 3.172(g) CONTAINS NO PRE-SENTENCING LANGUAGE

The express language of 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)(e.s.). Rule 3.172(g) expressly states that a plea may be withdrawn "until it is accepted by the trial judge formally." This Court has construed Rule 3.172(g) as requiring formal acceptance and not implicit acceptance. Harrell v. State, 894 So. 2d 935 (Fla. 2005) (quoting Bass, 541 at 1338)(e.s.). There is no dispute that here the trial judge never formally accepted the plea in accordance with the standard required in Harrell v. State, 894 So. 2d 935, 938 (Fla. 2005).

The State requests this Court to construe Rule 3.172(g) to include the phrase "prior to sentencing." The Rule contains no language, and thus, this Court should reject such an interpretation.

Applying Rule 3.172(g) to allow withdrawal of pleas post-sentencing is consistent with Williams v. State, 316 So. 2d 267, 274 (Fla. 1975), Rule 3.170(f) and the ABA Standard 2.1, which was cited in Williams. Rule 3.1709f) provides:

> 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.).
>
> ABA Standard 2.1 likewise provides:
>
> (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.

Even Rule 3.170(f) and ABA Standard 2.1 above expressly condition the grounds for withdrawal of a plea "before sentencing," and the withdrawal of a plea prior to acceptance of a court in Standard 2.1 contains no such language to limit withdrawal of such pleas prior to sentencing. Under the canon of *expressio unius est exclusio alterius,* i.e., "the expression of one thing implies the exclusion of another," "before sentencing" is intentionally excluded from governing plea withdrawals prior to the court's acceptance. See Fla. Right to Life, Inc. v. Lamar, 273 F.3d 1318, 1327 (11th Cir. 2001). The reasoning is simple – the plea is not binding, and thus, may be withdrawn at any time. To adopt the State's position, the Court would have to rewrite the rule to state that the plea becomes binding upon sentencing.

Contrary to the State's suggestion, in State v. Bowland, 604 So. 2d 556 (Fla. 2d DCA 1992), the Second District did rely on Rule 3.172(f) in reversing a plea post-conviction. There, the State challenged the downward departure sentence. The Second District recognized that the trial court erred in accepting the plea over the state's objection. ***After sentencing***, the Court reversed, stating that the:

> **defendant must be allowed an opportunity to withdraw his plea.** If the defendant does not withdraw his plea, then the lower court will resentence him with no possibility of departure from the guidelines.

State v. Bowland, 604 So. 2d 556, 557 (Fla. 2d DCA 1992)(e.s.). Therefore, because there was no proper formal acceptance of the plea by the state, Rule 3.172(f) provides that ***either party***, including the defendant, has a right to withdraw a plea post-sentencing under Rule 3.172.

Similarly, in Jefferson v. State, 515 So. 2d 407, 408, citing Rule 3.172(g), the First District stated:

> If the trial court does not concur in a tendered plea arising out of the negotiations, the plea may be withdrawn. Rule 3.172(g), Fla.R.Crim.P.
>
> . . .
>
> On remand, the trial court shall either sentence the appellant to the agreed upon sentence of three to seven years' incarceration, **or allow the appellant the option of withdrawing his plea.**

Jefferson v. State, 515 So. 2d 407, 408 (Fla. 1st DCA 1987). Therefore, when a judge has departed from the plea agreement in sentencing, the First District has indicated that

a Rule 3.172 withdrawal of the plea is proper. See also, State v. Green, 421 So. 2d 508 (Fla. 1982) and Harvey v. State, 399 So. 2d 1134, 1135 (Fla. 1st DCA 1981).

IV.

THE COURT IS BOUND TO THE EXPRESS LANGUAGE OF RULE 3.172(g) AND SHOULD RE-WRITE IN THE TERMS TO RULE 3.172(g)

This Court is obliged to follow the rule as written. As this Court has stated in interpreting Rule 3.172(g):

> 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.

Harrell v. State, 894 So. 2d 935 (Fla. 2005) (quoting Bass, 541 at 1338)(e.s.). As indicated above, the State agrees that there is no "manifest injustice" or "prejudice" standard included in Rule 3.172(g), and there is no time limit in Rule 3.172(g) requiring a party to withdraw the plea prior to sentencing. Indeed, the State agrees that the language of the statute or rule must be enforced to its plain meaning. [Ans. Br., p. 22]. Unfortunately, the State ignores the plain language and urges this Court to adopt an interpretation that is contrary to the express terms. Such an approach must be rejected.

V.

THE STATE HAS WAIVED ITS RIGHT TO CHALLENGE WHETHER OR NOT CAMPBELL HAS PRESERVED HIS RIGHT TO APPEAL

The Second District classified this appeal based on Rule 9.141(b)(2) as a summary appeal from the denial of a Rule 3.172(g) motion to withdraw his plea. The State erroneously suggests that Campbell was required to make an express reservation of the right to appeal pursuant to Section 924.06(3) of the Florida Statutes. Ironically, the State never raised this issue in the Second District and that is not the basis of the conflict jurisdiction before this Court, and thus, the State is barred from raising this issue now for the first time in its Answer Brief. Moreover, both the First District in Cox v. State, 35 So. 3d 47, 48-49 (Fla. 1st DCA 2010), reh'g denied (May 12, 2010), review denied, 37 So. 3d 849 (Fla. 2010)(e.s.) and Second District in Campbell v. Florida, 75 So. 3d 757 (Fla. 2d DCA 2011) have determined that Campbell had a right to appeal by analyzing Rule 3.172 on the merits post-sentencing context.

The State's position is contrary to the express language of Rule 3.172, which permits withdrawal of the plea until it is accepted by the trial judge in open court. Fla. R. Cir. P. 3.172(g). Pursuant to the Rule, the plea is **not binding**. A Court lacks authority to convict a defendant pursuant to a non-binding plea.

To adopt the State's position is too broad and would completely prevent a defendant from filing a motion to withdraw a plea post-sentencing under Rule 3.172,

including any bases to appeal under Rule 3.172 when a defendant demonstrates "**manifest injustice.**" State v. Partlow, 840 So.2d 1040, 1042 (Fla.2003); Campbell v. State, 75 So. 3d 757, 759 (Fla. 2d DCA 2011).

VI.

THIS COURT ACCEPTED JURISDICTION TO REVIEW THIS MATTER ON THE MERITS, AND CANNON V. STATE DOES NOT CHANGE THIS COURT'S DETERMINATION

The Respondent submitted its Answer Brief on Jurisdiction on January 24, 2012, and thereafter, on May 15, 2012, this Court accepted jurisdiction. Respondent's attempts to re-litigate jurisdiction are untimely and improper. Moreover, in Cannon v. State, the First District incorrectly concluded that the opinion in Cox v. State "did not specify whether the defendant in that case moved to withdraw his plea before or after sentencing." Cannon v. State, 92 So. 3d 292 (Fla 1st DCA 2012). To the contrary, in Cox v. State, the First District stated:

> At sentencing, the trial court heard evidence regarding Appellant's purported attempts to substantially comply with the agreement. The court complied with the plea agreement and sentenced Appellant to concurrent terms of thirty years in prison.
>
> . . . .
>
> **we must allow Appellant the opportunity to withdraw from his plea contract more than two years later** merely because he would rather choose another option. *Harrell v. State,* 894 So.2d 935, 939 (Fla.2005); *Howard v. State,* 516 So.2d 31, 32 (Fla. 1st DCA 1987). The State will now be required to prosecute Appellant a ***49** second time for crimes that allegedly occurred **almost *four years ago.***

Cox v. State, 35 So. 3d 47, 48-49 (Fla. 1st DCA 2010), reh'g denied (May 12, 2010), review denied, 37 So. 3d 849 (Fla. 2010)(e.s.). Therefore, it is clear that Cox v. State held that a defendant is allowed to withdraw its plea under Rule 3.172 ***after sentencing***, which is expressly and directly conflicts with the Second District's decision in Campbell v. Florida, 75 So. 3d 757 (Fla. 2d DCA 2011).

CONCLUSION

In sum, the Court should reverse. The State agrees that there is no "manifest injustice" or "prejudice" standard in Rule 3.172(g). Indeed, Rule 3.172(g) expressly allows withdrawal "without justification." Likewise, Rule 3.172(g) contains no language allowing withdrawal of pleas "before sentencing." As this Court acknowledged in adopting Bass v. State, 541 So. 2d 1336 (Fla. 4th DCA 1989), "**when push comes to shove, we are obliged to follow the rule as written and construed by the cases.**" The only way the Court can uphold the decision of the Second District is to ignore the express language of the Rule 3.172(g), which would erode construction and application of the rules by courts. 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 Reply 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, C. Suzanne Bechard, Assistant Attorney General Florida, Concourse Center 4, 3507 E. Frontage Road, Suite 200 Tampa, Florida 33607, this 16th day of October, 2012.

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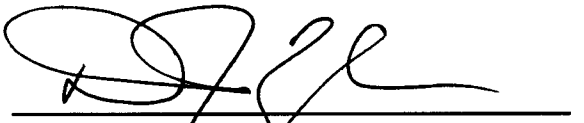

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CERTIFICATE OF COMPLIANCE

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

Dated this 16th day of October, 2012.

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October 16, 2012

VIA FEDERAL EXPRESS
Florida Supreme Court
Attention: Thomas D. Hall
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Re: *Michael Campbell v. State of Florida, in the Supreme Court of Florida, Case No. SC 12-28*

Dear Mr. Hall:

Please find enclosed the following documents for filing in the above-referenced appeal, which are being served on even-date herewith:

- One (1) original plus seven (7) copies of Appellant, Michael Campbell's Reply Brief on the Merits; and
- One (1) original plus one (1) copy of Request for Oral Argument; and
- Self-Addressed Stamped Envelopes to all Counsel.

Should you have any questions, please do not hesitate to contact me.

Best regards.

Sincerely,

ZELMER LAW

Diane J. Zelmer, P.A.

/djz
cc: Mr. Michael Campbell (with enclosure)
Pamela Jo Bondi, Robert J. Krauss, and C. Suzanne Bechard (with enclosure)