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IN THE SUPREME COURT OF FLORIDA
CASE NO. 68,711
THE STATE OF FLORIDA,
Petitioner,
vs.
EUSEBIO ACOSTA,

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RESPONDENT'S BRIEF ON THE MERITS

BRAVERMAN & HOLMES
Attorneys for Appellant
625 Northeast 3rd Avenue
Fort Lauderdale, FL 33304
(305) 524-0505

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents.....	i
Table of Citations.....	ii-iii
Preliminary Statement.....	1
Statement of the Case and Facts.....	2-9
Summary of Argument.....	10-13
Argument	
Point I.....	14-19
DEFENDANT'S SENTENCE IS ILLEGAL AND IN VIOLATION OF HIS DOUBLE JEOPARDY RIGHTS WHERE THE TRIAL JUDGE ARBI- TRARILY AND IMPROPERLY VACATED DEFENDANT'S PRIOR JUDGEMENT AND SEN- TENCE WITH NO EVIDENTIARY FOUNDA- TION.	
Point II.....	20-33
A TRIAL COURT MAY NOT VACATE A DEFENDANT'S PLEA AND INCREASE HIS SENTENCE AFTER SENTENCE HAS BEEN RENDERED AND THE DEFENDANT HAS BEGUN SERVING THAT SENTENCE, EVEN WHERE THE DEFENDANT FAILS TO PERFORM A CONDITION OF HIS PLEA BARGAIN.	
Conclusion.....	34
Certificate of Service.....	35

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Brown v. State,</u> 367 So2d 616 (Fla. 1979).....	8,28,29, 31,32
<u>Cherry v. State,</u> 439 So2d 998 (Fla. 4 DCA 1983).....	8,23,26
<u>Cooper v. State,</u> 465 So2d 1334 (Fla. 4 DCA 1985).....	19
<u>Ex parte Lange,</u> 18 Wall. 163, 21 L.Ed. 872 (1874).....	20,22,28
<u>Farber v. State,</u> 409 So2d 71 (Fla. 3 DCA 1982).....	26
<u>Flewellyn v. State,</u> 308 So2d 46 (Fla. 3 DCA 1975).....	17
<u>Hadley v. Hadley,</u> 140 So2d 326 (Fla. 3 DCA 1962).....	31
<u>Katz v. State,</u> 335 So2d 608 (Fla. 2 DCA 1976).....	24
<u>Lerman v. Cornelius,</u> 423 So2d 437 (Fla. 5 DCA 1982).....	8,31
<u>Miller v. Swanson,</u> 411 So2d 875 (Fla. 2 DCA 1981).....	8,31
<u>Negron v. State,</u> 306 So2d 104 (Fla. 1974).....	14
<u>North Carolina v. Pearce,</u> 395 US 711 (1969).....	20
<u>Pittman v. State,</u> 478 So2d 1193 (Fla. 3 DCA 1985).....	25
<u>Pooly v. State,</u> 403 So2d 593 (Fla. 1 DCA 1981).....	24
<u>Robinson v. State,</u> 373 So2d 898 (Fla. 1979).....	19

<u>Savoie v. State,</u> 422 So2d 308 (Fla. 1982).....	14
<u>Scott V. State,</u> 419 So2d 1178 (Fla. 3 DCA 1982).....	25,26,30
<u>State v. C. C.,</u> 476 So2d 144 (Fla. 1985).....	30
<u>State ex rel. Wilhoit v. Wells,</u> 356 So2d 817 (Fla. 1 DCA 1978).....	18
<u>State v. Johnson,</u> 483 So2d420 (Fla. 1986).....	18
<u>Troupe v. Rowe,</u> 283 So2d 857 (1973).....	8,22,29, 32
<u>Trushin v. State,</u> 425 So2d 1126 (Fla. 1982).....	14
<u>United States v. Benz,</u> 282 US 304 (1931).....	20,21,22
<u>United States v. DiFrancesco,</u> 449 US117 (1980).....	20,27,28
<u>United States v. Naas,</u> 755 F2d 1133 (5th Circuit 1985).....	28
<u>United States v. Wingender,</u> 711 F2d 869 (9th Circuit 1983).....	28

Other Authorities

Section 893.135(2), Fla.Stat. (1983).....	27
Section 893.135(3), Fla.Stat. (1983).....	2,15,23, 26

PRELIMINARY STATEMENT

Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellee in the Fourth District Court of Appeal.

Respondent was the Defendant in the trial court and the Appellant in the Appellate court.

The jurisdiction of this Court has been invoked pursuant to this Court's jurisdiction over questions certified by the Appellate Court, pursuant to Fla.R.App.Pro. 9.030(a)(2)(a)(vi).

In this brief, the parties will be referred to as the State and Defendant. The symbol "R" in this brief will connote references to the Record on Appeal, and the symbol "PA" in this brief will connote references to Petitioner's Appendix.

All emphasis in this brief is supplied by the writer unless otherwise indicated.

4 4

STATEMENT OF THE CASE AND FACTS

The Fourth District of Court of Appeal reversed Defendant's sentence, and certified the following question for resolution by this Honorable Court:

WHERE A DEFENDANT FAILS TO PERFORM A
CONDITION OF HIS PLEA BARGAIN, MAY A
TRIAL COURT, AFTER SENTENCE HAS BEEN
RENDERED AND THE DEFENDANT HAS BEGUN
SERVING THAT SENTENCE, VACATE THE
DEFENDANT'S PLEA AND INCREASE HIS
SENTENCE?

Defendant had been charged with trafficking in cocaine and conspiracy to traffic in cocaine, with these counts carrying a mandatory minimum sentence of fifteen years (R 31, 32, 53). Defendant entered a plea of not guilty.

On May 29, 1984, change of plea proceedings took place. Defendant was to plead guilty to one count and the State would be nolle prosequing the other count. The State would be moving to reduce the mandatory minimum portion of the sentence, pursuant to Section 893.135(3), Fla.Stat.(1983), and Defendant would be sentenced to seven years mandatory minimum. There was a condition subsequent, that Defendant give a statement to the Assistant State Attorney. (R 3, 4, 8, 9). At one point, the trial judge noted that the statement had already been given (R 8).

A factual basis was recited for the trial judge (R 6-7). The essence of the factual basis was that the co-defendant met a

lady detective (undercover) and became infatuated with her. Their conversations eventually led to a discussion about cocaine. Later, the co-defendant introduced the detective and a second undercover detective to Defendant. Various phone calls were made between all the parties with an idea toward purchase by the detectives of a large quantity of cocaine. The conversations eventually resulted in Defendant giving the detectives a quantity of cocaine in excess of 400 grams.

The trial judge accepted the plea, adjudicated the Defendant guilty and, pursuant to State's Motion to Reduce, sentenced Defendant to seven years imprisonment (R 8-9). The State nolle prossed the second count (R 9). Defendant was fingerprinted and began serving his sentence (R 9). Three days later, the State brought Defendant in to take a statement, and the following took place:

Q. Mr. Acosta, you received a lenient sentence May 29, two days ago. The deal was that you tell the police where you got the cocaine.

A. I wasn't told--

Q. Oh, really?

A. I wasn't told nothing in court, but I'm going to testify, what happened.

Q. Okay. You tell us what happened.

A. At that time, I was working for Kentucky Fried Chicken. When I got off from work, around the Young Circle in Hollywood, I found a package with five pair of pants,

\$350.00, and the coke for which they arrested me.

Because of my need--

Q. What?

A. Due to -- Because of my need of money to pay my rent, I told Jorge, the guy who was with me --

Q. Let's stop right there. This is a crock; this is a lie. If you don't tell the truth to me --

A. He said, "I never been in that kind of problem."

Q. Listen to me. I am going back before Judge Shahood and tell him I am not satisfied, all deals are off. I'm going to try and get you thirty years in prison.

A. Why do you want me to say --

Q. If you think I believe that you found this cocaine, you are sadly mistaken. Don't even mention it to me again; you are wasting me (sic) time. You will have thirty years to think about it.

That's all. (R 51-52).

On June 12, 1984, the parties came before the Court pursuant to the State's motion to set aside the previously imposed adjudication and sentence. The prosecutor noted:

He was brought to my office. The transcript is accurate and I was there. Detective Sands was there. He told me this fairy tale about finding cocaine in the middle of the street in a pair of pants. That is absolutely not acceptable. (R 12).

Defense Counsel noted that while he was not present during the statement, the transcript shows that the Defendant uttered but four lines' worth before the State abruptly cut him off (R 14). Defense Counsel requested an opportunity to speak with Defendant regarding the situation (R 14). The trial judge granted the request, but stated:

THE COURT: My inclination is to grant the Motion. You know, nobody likes to be made a fool of and, frankly it infuriates me to be made a fool of, absolutely infuriates me. So that is my inclination. If you want me to defer ruling, I will. (R 14-15).

No evidence was taken regarding the issue of whether or not the Defendant's statement was true or could be verified. The next day, the parties again came before the Court. The prosecutor indicated that he "can't live with" the statement given (R 18). In response, the defense counsel noted that Defendant never indicated he would make a different statement, and that the State never took a proffer of a different statement from Defendant prior to the plea, adjudication, and imposition of sentence (R 19).

Defense counsel further noted that there was absolutely no indication that the statement given by Defendant was not true. It certainly was not contradictory to, or inconsistent with, the factual basis or the circumstances of Defendant's life style:

... Let me point out something before the Court makes its decision. Mr. Acosta is a poor man. He has ab-

solutely nothing. He is indigent. I was specially appointed. He rides a bike to work at Kentucky Fried Chicken. There is no appearance of him being a drug dealer. He has got absolutely nothing. (R 21).

Defense counsel further noted that,

I had a conversation and a very intense dialogue with Mr. Acosta at the Pompano Detention Center. I was there probably an hour and a half and he was lucid. He understood everything I said and I understood what he said and I explained to him that if in fact he was not telling the facts as they were, that now was the time to come forward because at best we could do something about it for him.

We went over this and over it and over it. I am satisfied, your Honor, or at least convinced. Again, I am an advocate. I am not suggesting the Court -- he has represented to me that he was telling the truth ... (R 20).

Moreover, defense counsel suggested that, at the very minimum, a polygraph examination should be administered to the Defendant under the circumstances, and Defendant would be fully agreeable to taking a polygraph examination:

I went over this with him. I said to him, I said it is very difficult for anybody to believe that you found this stuff. Would you be willing to have this verified through a polygraph knowing full well that if you fail the polygraph, the Court would be able to sentence you to the maximum time. He said absolutely. (R 21)

* * * * *

As clear cut as it may seem, the Court, Mr. McCully [the prosecutor] is making subjective opinion on what Mr. Acosta is saying. There is no basis other than the fact that it is difficult to believe and from a prosecutor's standpoint, I don't fault Mr. McCully for it, but it is a subjective ruling saying no, this is not the way it was. I feel that is subjective and arbitrary and at the very least that the man should be entitled unless there are some glaring obvious reasons or proof that he is lying to at least have the opportunity to a polygraph being afforded him because he never represented anything but this.

Now for Mr. McCully to come to court and say I can't believe this, therefore all deals are off, I don't believe that it is within the State's power to be that arbitrary or within the Court's power to be that arbitrary. There is nothing the Court can say that is going to prove Mr. Acosta is not telling the truth and all I would ask is he be allowed to go forward with a polygraph to prove what he is saying is fact, Judge. (R 22).

The trial judge granted the State's motion, vacated all prior proceedings, including the sentence Defendant had already begun serving, and re-entered a plea of not guilty on behalf of Defendant (R 25).

Thereafter, the State filed an identical information (R 53). On September 11, 1984, change of plea proceedings took place. The prosecutor agreed that the present information was a refile of the prior case and that everything in the prior case

was applicable to this case (R 31, 32). Defendant pled guilty again, and the Court accepted the plea (R 34).

At sentencing, on November 15, 1984, defense counsel discussed with the judge the scenario of the prior proceedings before the Court (as discussed above), and noted that Defendant still had not been afforded the opportunity to take a polygraph examination (R 36-40). Nonetheless, the trial judge sentenced Defendant to 15 years mandatory minimum under the trafficking count. The conspiracy count was nolle prossed (R 46-47,55, 56).

On direct appeal to the Fourth District Court of Appeal, Defendant's sentence was reversed pursuant to the legal principle that a sentence cannot be involuntarily vacated and increased, after it is imposed and the Defendant has started serving it, lest it be in violation of the Defendant's double jeopardy rights. The Fourth District relied upon its opinion in Cherry v. State, 439 So2d 998 (Fla. 4 DCA 1983), and this Court's opinion in Troupe v. Rowe, 283 So2d 857 (1973). This Court's opinion in Brown v. State, 367 So2d 616 (Fla. 1979), was distinguished on the basis that the Defendant in that case had not yet been sentenced when the Court vacated his plea. The Fourth District concluded that the sister appellate court decisions of Miller v. Swanson, 411 So2d 875 (Fla. 2 DCA 1981) and Lerman v. Cornelius, 423 So2d 437 (Fla. 5 DCA 1982), misrelied upon Brown, supra. However, recognizing a potential conflict between the appellate

courts on the issue, the question noted above, was certified for resolution by this Court. (PA).

SUMMARY OF ARGUMENT

POINT I

DEFENDANT'S SENTENCE IS ILLEGAL AND IN VIOLATION OF HIS DOUBLE JEOPARDY AND DUE PROCESS RIGHTS WHERE THE TRIAL JUDGE ARBITRARILY AND IMPROPERLY VACATED DEFENDANT'S PRIOR JUDGEMENT AND SENTENCE WITH NO EVIDENTIARY FOUNDATION.

Defendant, charged with trafficking in contraband, entered a plea of guilty, was adjudicated and, pursuant to the State's motion to reduce sentence, was sentenced to seven years mandatory minimum. He began serving that sentence. As a condition subsequent to the plea, Defendant was to give a statement to the prosecutor. Three days into Defendant's sentence, he was called to the prosecutor's office to give his statement. The prosecutor did not like the statement, and moved the trial court to vacate the sentence. The trial judge granted the motion, vacating all prior proceedings, including the sentence that had already begun to be served.

The State had no legal authority to seek a review of a lawfully imposed legal sentence after the Defendant began serving that sentence. Even if there were statutory authority for such review, there was no proper hearing as to the truthfulness of Defendant's statement. The State made no evidentiary showing of its falsity whatsoever. There is nothing of record to contradict the truthfulness of the statement. Consequently, the record

demonstrates that the vacation of Defendant's plea, adjudication, and sentence was arbitrary, subjective, and a violation Defendant's due process and double jeopardy rights.

SUMMARY OF ARGUMENT

POINT II

A TRIAL COURT MAY NOT VACATE A DEFENDANT'S PLEA AND INCREASE HIS SENTENCE AFTER SENTENCE HAS BEEN RENDERED AND THE DEFENDANT HAS BEGUN SERVING THAT SENTENCE, EVEN WHERE THE DEFENDANT FAILS TO PERFORM A CONDITION OF HIS PLEA BARGAIN.

The double jeopardy clause protects against multiple punishments for the same offense. Both Federal and State law are uniform in the well-established doctrine that a trial judge cannot increase a lawfully imposed legal sentence once a defendant has already begun to serve that sentence.

A sentence is complete in itself, and is legally incapable of being subject to a condition subsequent, as was the case here. It could not, therefore be later vacated for an alleged failure to perform a future act in compliance with a plea negotiation agreement. A sentence is final when the sentencing hearing ends. Under the circumstances presented herein, the State had no right of review under Florida law.

The State was negligent in protecting itself, by allowing Defendant to be sentenced before securing even a proffer of what it expected the Defendant to say in his statement. However, the Defendant cannot be made to suffer from the State's negligence by having his rights trampled upon. There were other means available to the State to insure that it received the full

benefit of what it purported to bargain for. Moreover, there are other alternatives, constitutionally permissible, that are available to the State to remedy the situation that the State finds itself in.

In light of the above, Defendant's double jeopardy rights were violated, and his initial sentence should be reinstated.

POINT I

DEFENDANT'S SENTENCE IS ILLEGAL AND IN VIOLATION OF HIS DOUBLE JEOPARDY AND DUE PROCESS RIGHTS WHERE THE TRIAL JUDGE ARBITRARILY AND IMPROPERLY VACATED DEFENDANT'S PRIOR JUDGEMENT AND SENTENCE WITH NO EVIDENTIARY FOUNDATION.

This issue was raised in the trial court, and was Point I on Appeal in the Fourth District Court of Appeal. However, it was not discussed in the Opinion presently under review, nor is it the direct subject of the question certified by the Fourth District Court of Appeal for resolution by this Honorable Court. However, this issue must be resolved in the initial instance, for if this issue is resolved in Defendant's favor, the predicate factual basis supporting the certified question (i.e., that Defendant, in fact, failed to perform a condition of his plea bargain) no longer exists, thereby rendering the certified question moot. Thus, it is necessary for this Honorable Court to resolve this initial issue before the issue presented by the certified question can become ripe for resolution.

Moreover, having accepted jurisdiction over this cause in order to resolve the issue presented by the certified question, this Honorable Court may, in its discretion, consider other issues properly raised and argued. Trushin v. State, 425 So2d 1126 (Fla. 1982); Savoie v. State, 422 So2d 308 (Fla. 1982); Negron v. State, 306 So2d 104 (Fla. 1974). It is submitted that,

under the circumstances as noted herein, it is necessary and appropriate for this Honorable Court to consider and resolve the present issue.

Defendant entered a plea of guilty, which was accepted by the trial court. The State filed a motion for reduction of sentence pursuant to Section 893.135(3), and Defendant was sentenced to seven years imprisonment. He was fingerprinted and began serving his sentence. As a condition subsequent to the plea, adjudication, and imposition of sentence, Defendant was to give a statement to the prosecutor. Three days into his sentence, Defendant was brought before the prosecutor and gave a statement. The prosecutor did not like the statement. Thus, the prosecutor moved to "undo," not only the previously entered and accepted plea, but also the adjudication and imposition of sentence. No evidentiary hearing was held. The trial judge, after listening to argument regarding the propriety of his next move, simply vacated everything and sent the case back to "square one," entering on the Defendant's behalf a not guilty plea.

There was nothing but arbitrary speculation and action on the part of both the State and the trial judge in disbelieving Defendant. There were no facts or circumstances to support their disbelief. There was no evidence. The known facts (as set forth in the factual basis) were not inconsistent with the statement. Other known facts regarding Defendant's impoverished circumstances were not inconsistent with the statement. Defense

counsel spoke with Defendant for one and one-half hours, and told the trial judge that Defendant sincerely professed the truthfulness of his statement. Defendant offered to submit to a polygraph examination. No polygraph was administered. No evidence was taken. Defendant was not given a chance.

Under the circumstances, the only basis that legitimately appears in this record as to why Defendant's plea, adjudication, and sentence were involuntarily vacated, and a not guilty plea entered on his behalf by the trial judge was that the State and the trial judge simply arbitrarily chose to consider the statement a fairy tale. Moreover, the trial judge felt he had been made a fool of. Such bases are wholly insufficient to justify the wholesale abridgement of Defendant's due process and double jeopardy rights. The record is replete with nothing more than the State's and the trial judge's subjective disbelief of the statement given by the Defendant.

It is to be noted that the State never took a pre-plea, or pre-adjudication, or pre-sentence proffer of what they expected Defendant to say in the statement and, as noted in the opinion under review, had the State taken the expedient measure of protecting itself in this fundamental manner, this problem would not have arisen. The State can only blame itself for this situation, and should not be allowed to trample upon one's basic rights in order to correct its own mistakes.

In Flewellyn v. State, 308 So2d 46 (Fla. 3 DCA 1975), the defendant entered into a plea agreement whereby he was to furnish certain information to police and if that information was false the defendant would be at the mercy of the court. In that case the State protected itself by requiring the defendant to furnish the information before sentencing. As it turned out, the State did not feel that the defendant honored the negotiation, and the State made a motion to vacate the plea. At the hearing on this motion, it was shown that the information given by the defendant was false. Evidence was presented. Testimony was presented. There was an evidentiary basis for the trial court's findings. Such matters were totally neglected in the present case.

Thus, while the trial judge, before adjudication and sentence, properly vacated the plea in Flewellyn, based on evidence and testimony, the trial judge in this case improperly vacated, after adjudication and imposition of sentence, the plea, judgement, and sentence, because there was no evidence, testimony, demonstrations, showings, or anything else that would indicate that Defendant was untruthful in his statement. Not only had the trial judge accepted the plea, but he adjudicated Defendant and sentenced Defendant. Defendant had already begun serving his sentence. Defendant did not accede to the vacation of his judgement and sentence.

What the State did in this case was tantamount to the filing of a motion for post conviction relief. However, the State has no remedy such as this, as does a defendant. The State has no lawful authority to seek a review of a legal sentence, lawfully imposed, at least where a defendant has already begun serving that sentence. If anything, the State's remedy is through contempt proceedings, with its attendant due process requirements. Moreover, the State, if it felt it could prove the same, could file perjury charges.

It cannot be over emphasized that it is the State's indiscretions in bringing this case to a conclusion that has created this situation, and Defendant should not be made to suffer due to the State's errors. Jeopardy attached and, by the subsequent vacation of Defendant's judgement and sentence, his double jeopardy rights were violated. State ex rel. Wilhoit v. Wells, 356 So2d 817 (Fla. 1 DCA 1978). The original judgement and sentence must be reinstated, and the subsequent judgement and sentence must be vacated as having been illegally imposed in violation of Defendant's double jeopardy and due process rights.

Lest it be said that Defendant waived his double jeopardy rights by entry of the subsequent guilty plea, Defendant would note this court's decision in State v. Johnson, 483 So2d 420 (Fla. 1986), wherein this court stated that double jeopardy rights are fundamental in nature and may be raised in any proceeding even following a guilty plea. There are certainly no

facts in this case to indicate one of those limited instances in which a defendant may be found to have knowingly waived his double jeopardy rights. Defendant's plea of guilty was not an explicit, intelligent, intentional waiver of the fundamental error involved in the violation of his constitutional double jeopardy rights that is required in order for there to be a knowing waiver of such rights. Accordingly, it being evident that the sentence presently under review is illegal as being in violation of Defendant's double jeopardy rights, it is correctable in this proceeding, even after a guilty plea. Robinson v. State, 373 So2d 898 (Fla. 1979); Cooper v. State, 465 So2d 1334 (Fla. 4 DCA 1985).

POINT II

A TRIAL COURT MAY NOT VACATE A DEFENDANT'S PLEA AND INCREASE HIS SENTENCE AFTER SENTENCE HAS BEEN RENDERED AND THE DEFENDANT HAS BEGUN SERVING THAT SENTENCE, EVEN WHERE THE DEFENDANT FAILS TO PERFORM A CONDITION OF HIS PLEA BARGAIN.

The United States Supreme Court has summarized the guarantee against double jeopardy as consisting of three separate protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. However, most importantly, as it relates to the issues raised in this case, it protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 US 711 (1969); United States v. DiFrancesco, 449 US 117 (1980).

In fact, the overriding function of the double jeopardy clause's prohibition against multiple trials is to protect against multiple punishments. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. An unconstitutional punishment need not derive exclusively from a second prosecution, but may stem from the imposition of more than one sentence following a single prosecution. Ex parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874). As stated by the United States Supreme Court in United States v. Benz, 282 US 304 (1931), the distinction that the Court during the same term may amend a sentence so as to mitigate the

punishment, but not so as to increase it, is based upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense. The Benz court went on to state as follows:

"For of what avail is the Constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger of jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgement has been rendered on the conviction and the sentence of that judgement executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the Constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?" *Id.* at 308.

As reflected by the aforementioned time honored decisions emanating from the highest court of this country, these principles are long standing and well established. A sentencing judge may recall a defendant in the same term of court, and increase his sentence only so long as the defendant has not yet begun to serve that sentence.

Consistently, the courts of this state, except for two below noted decisions which it is contended misapply principles emanating from this Court, have followed these historical precepts. For example, in Troupe v. Rowe, supra, this Honorable Court had occasion to review the constitutional validity of a second, increased sentence of a defendant following "plea bargaining" between the defendant and the State. The plea was to 30 days in the county jail followed by two years' probation. However, there were differences between the defendant and the State as to whether or not adjudication would be withheld. The trial judge ultimately withheld adjudication, and the defendant began serving his sentence. A recess was taken, after which the matter was brought back before the trial court at the insistence of a new prosecutor, who reiterated the State's vehement objection to a withheld adjudication. After more discussion regarding the matter, the trial court, in a state of exasperation, threw up her hands and set aside the adjudication and sentence, arbitrarily withdrawing defendant's guilty plea, and reset the case for trial. Citing Lange, supra, and Benz, supra, this Court remanded for reinstatement of the trial judge's original sentence, stating on pages 859-860,

"In the instant case, the facts reflect that a voluntary plea of guilty was entered and sentence imposed and the hearing concluded. The record also indicates that there was no further contemplated hearing for that day in the cause; thus the matter was concluded for all

purposes.

* * * * *

Jeopardy had attached in petitioner's case and the sentence which had been imposed could not thereafter be increased (as the second assistant state attorney's position would do) in violation of the defendant's constitutional guarantee not to be twice placed in jeopardy."

Similarly, in Cherry v. State, supra, an appeal was taken from a subsequently imposed sentence of five years which was imposed after the defendant had begun serving a previously imposed sentence of three years. Defendant had been charged with trafficking in cocaine, which carried a mandatory minimum term of imprisonment, but the State filed a motion for reduction of sentence pursuant to Section 893.135(3), Fla. Stat (1981). The State recommendation at that time was a five year sentence, but with the possibility of reduction if the defendant rendered additional assistance. The trial judge deferred sentencing to allow the defendant to attempt to render more assistance, thereby reducing his sentence further. Later, the matter came before the court for sentencing, and the trial court imposed a three year sentence instead of the five years previously discussed. Defendant was fingerprinted and began serving his sentence. Eight days later, pursuant to the State's motion to correct sentence, the matter came before the court. At that time, the court found that there had been an agreed plea which was contravened by his

mistake, and granted the motion to set the sentence aside. He then imposed a five year sentence upon the defendant. The appellate court reversed the second sentence by noting that an increase of a lawful sentence is expressly prohibited by florida case law, grounded on the double jeopardy clause of the 5th Amendment of the United States Constitution.

In Katz v. State, 335 So2d 608 (Fla. 2 DCA 1976), a defendant made various false statements which clearly influenced the trial judge to give the defendant a light sentence. Shortly thereafter, it came to the court's attention that certain statements made by the defendant at the sentencing hearing were false and misleading. The judge thereafter brought the defendant back before him, stating that he was reconsidering the sentence imposed. Expressing the belief that the defendant's behavior constituted a fraud upon the court, the judge imposed a new, increased sentence. Despite this affirmative fraudulent activity on the part of the defendant, the appellate court held that once the defendant started serving his sentence, the trial judge had no authority to resentence him to a longer prison term. When the judge discovered defendant's misrepresentations, the proper course to take was to hold the defendant in contempt, or if the statements were made under oath, to recommend a charge of perjury. But the sentence could not be increased at this point.

In Pooly v. State, 403 So2d 593 (Fla. 1 DCA 1981), the trial judge attempted to increase a defendant's sentence after

the defendant had begun serving his sentence. Again the appellate court stated that once a sentence has been imposed by the court and the defendant has begun serving that sentence, it is a violation of the defendant's constitutional guarantee against being twice placed in jeopardy for the court to resentence the defendant to an increased period of incarceration.

In Scott v. State, 419 So2d 1178 (Fla. 3 DCA 1982), and Pittman v. State, 478 So2d 1193 (Fla. 3 DCA 1985), the defendants entered negotiated pleas, and were granted temporary stays of their sentences in order to straighten out their personal affairs, with the condition (which was accepted by the defendants) that if the defendants failed to report at the end of the stay period the negotiated sentence would be vacated and increased sentences would be imposed. The defendants failed to appear as required by the stay agreement, and the sentences were vacated and increased sentences imposed. The appellant courts reversed and remanded with instructions to reinstate the original sentences. They noted that the enhancement of a negotiated sentence for failure to perform according to a condition subsequent constituted a double jeopardy violation. The judgements of conviction and sentences were complete in themselves, and were legally incapable of being subject to a condition subsequent. The Pittman court noted that the policy reasons advanced by the State for affirming the trial court were unpersuasive. There were other means, not constitutionally prohibited, of accomplish-

ing the same end. Further, willful non-compliance with the condition subsequent could be the subject of a separate criminal charge. The Scott court noted that the alleged failure by the defendant to perform a future act in compliance with a plea negotiation agreement could not be a lawful basis to vacate a previously imposed lawful sentence.

In this case, Defendant entered a plea to trafficking in cocaine. The State filed a motion for reduction of sentence pursuant to Section 893.135(3), Fla. Stat. (1983). Having made this motion, the statutory minimum penalties associated with trafficking in cocaine were properly eliminated, and the sentence was within the trial court's discretion. Cherry, supra. The trial judge lawfully exercised his discretion and imposed the lawful sentence of seven years imprisonment. As a condition subsequent, Defendant was to give a statement to the State. Defendant was fingerprinted and began serving his sentence. The sentencing hearing ended. Defendant had an expectation of finality in his sentence at this point. Farber v. State, 409 So2d 72 (Fla. 3 DCA 1982). Florida law provides no right of appeal, or review, on the part of the State to increase a lawfully imposed legal sentence.

The prosecutor could have taken a proffer from Defendant as to the statement that the State assumed the defendant would give. Moreover, the State could have requested the trial judge to defer sentencing until after Defendant's statement (condition subsequent) was taken. Indeed, the trial judge, on his own,

could have deferred sentencing for purposes of allowing the State to take Defendant's statement. (It is to be noted that such deferral of sentence is not contrary to Section 893.135(2), Fla.Stat (1983), in that the trial court was relieved of that mandate pursuant to the State's motion to reduce sentence). Plus, there were other means, not constitutionally prohibited of satisfying the State's concerns. However, the manner in which the State and the trial court proceeded was without legal authority and was constitutionally unacceptable.

Defendant recognizes that United States v. DiFrancesco, supra, involved a case wherein the United States Supreme Court had occasion to review a sentence which was appealed by the government because it thought an increased sentence was warranted inasmuch as defendant was classified as "dangerous special offender." The matter of whether or not the defendant's double jeopardy rights were being violated by the government's appeal was the issue before the court. The court reviewed the history of the double jeopardy clause, and concluded that the defendant's double jeopardy rights were not being violated by the government's appeal of the defendant's sentence. Ultimately, the court's decision turned upon the fact that the government had a statutorily granted right to review this type of sentence, and the defendant was charged with knowledge of that statute and its appeal provisions. Consequently, the defendant had no expectation of finality in his sentence until the appeal was concluded

or the time to appeal had expired. After noting that Lange, supra, observed that to impose a year's imprisonment after five days had been served on a lesser sentence was to punish twice for the same offense, the court reaffirmed the validity of Lange, supra, and Benz, supra, in their own contexts. As noted by the United Supreme Court in DiFrancesco, on page 139,

"Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.

Following DiFrancesco, supra, various federal courts of appeal have noted that the 5th Amendment prohibition against resentencing for the same offense bars an increase in a legal sentence once it has been imposed and the defendant has commenced serving it. This holds true even if a court alters the sentence solely to conform to its original intent. United States v. Wingender, 711 F2d 869 (9th Circuit 1983); United States v. Naas, 755 F2d 1133 (5th Circuit 1985).

Of course, the State would rely upon cases such as Brown v. State, supra. In that case, the defendant entered an negotiated conditional plea which was accepted by the trial judge on

the basis of defendant's representation that he would later perform certain acts, namely submit to a lie detector test, appear before a grand jury, and testify truthfully against a co-defendant. This Honorable Court held that, despite the fact that jeopardy attached when the trial judge accepted the plea, it was not a violation of the double jeopardy clause to vacate the defendant's plea and re prosecute him when he did not honor the conditions of the conditional plea. It is to be noted that, in Brown, contrary to the present case, the defendant had not yet been sentenced when he reneged on his bargain, nor had the defendant begun serving any sentence.

Brown did not purport to overrule Troupe v. Rowe, supra, nor did Brown disapprove or limit the holding of Troupe v. Rowe. Indeed, Brown serves a situation where a defendant has not yet been sentenced while Troupe v. Rowe, serves a situation where a defendant has already been sentenced and begun serving that sentence. This distinction coincides with the double jeopardy protections afforded by the United States and Florida Constitutions, as noted in the above analysis.

Quite obviously, the concerns stated in Brown, supra, as to the dilution of the plea bargaining process should a defendant be allowed to receive the benefit of a negotiated plea and then renege on his obligations under the protection of the double jeopardy clause, are legitimate concerns. However, such dilution of the plea bargaining process does not take place unless he

court attempts to attach a condition subsequent to the imposition of sentence, a circumstance that is essentially a non - sequitur inasmuch as a judgement of conviction and sentence is complete in itself and legally incapable of being subject to a condition subsequent. Scott, supra.

The final step in a plea bargaining process is the sentence. In order to insure that all parties receive the benefit of the bargain in a plea negotiation, the sentence must be deferred until the State receives the benefit of this bargain. If the State does not receive the benefit of this bargain, then the trial court is not bound by any sentence negotiation, and can sentence defendant to any term authorized by law. Moreover, if the State does not receive the benefit of this bargain, the defendant's plea (before sentencing) can be withdrawn and a not guilty plea entered on his behalf. Thus, the policy reasons advanced by the State, as to the dilution of the plea bargaining process, are unpersuasive. There are other means, not constitutionally prohibited, of accomplishing the same end.

Similarly, the State's argument that Defendant waived his double jeopardy rights by agreeing to the condition subsequent are unpersuasive. The fact remains that the state cannot appeal or seek review of a matter unless there is specific authority granting the State such right. State v. C. C., 476 So2d 144 (Fla. 1985). There is no legal authority giving the State the right to seek a revisitation of a legal sentence law-

fully imposed. Thus, the trial court did not have jurisdiction to entertain such a request, and such jurisdiction could not be granted by consent, waiver, stipulation, or agreement. Hadley v. Hadley, 140 So2d 326 (Fla. 3 DCA 1962).

Finally, the State's reliance upon Miller v. Swanson, supra, and Lerman v. Cornelius, supra, deserves, at best, questionable respect. Those cases purported to rely upon this Court's opinion in Brown, supra, to sustain a reprosecution of defendants after sentence had already been imposed upon them and they had already begun serving their sentence. However, Brown dealt with a presentence situation. Brown did not purport to indicate that a legal sentence lawfully imposed which had already begun to be served can subsequently be increased. Brown stands for the proposition, at most, that a plea can be vacated after it has been accepted by the court, if it is determined by competent proof that the plea bargain was not honored by the defendant. A trial judge is not bound by a plea agreement.

On the other hand, Miller v. Swanson, supra, and Lerman v. Cornelius, supra while law purporting to rely entirely upon Brown, supra, go further than Brown, and indicate that not only may a plea be vacated when a defendant does not honor a plea bargain, but also a lawfully imposed legal sentence which has already begun to be served may be vacated and subsequently increased. This reliance on Brown is misplaced. It expands the

holding of Brown to the point of overruling Troupe v. Rowe, which Brown did not purport to do.

This point was not lost on the Fourth District Court of Appeal in the present case for, as stated by that court:

"The State directs us to Brown v. State, 367 So2d 616 (Fla. 1979). In Brown, the Court held that although jeopardy does indeed attach when the trial court accepts a defendant's negotiated and conditional plea, the plea may be vacated if the defendant fails to perform a condition of his plea agreement. The state can then re prosecute. It must be noted that in Brown the defendant had not been sentenced when the court vacated his plea. This distinction is crucial to our understanding of these two cases. Since they deal with different stages of the criminal proceeding, one prior to sentencing and one after sentencing was completed, we see no conflict between them. Troupe v. Rowe has not been overruled by Brown, either expressly or impliedly."

In the final analysis, the State could have and should have obtained the statement from the Defendant prior to his actual sentencing and, in that way, the State would know before sentencing whether or not it would be satisfied with the statement. At the very least, a proffer should have been taken by the State from the Defendant. The Fourth District Court of Appeal, in the Opinion presently under review, noted that this whole situation could have been avoided had the State insisted upon receiving the nature of the statement prior to the imposi-

tion of the Defendant's sentence. At this point, the State having "made its bed," it cannot attempt to "remake its bed" if, in so doing, Defendant's rights are trampled upon. Such indulgence is not the State's privilege under these circumstances, nor can this Court allow it. The State can seek contempt or perjury charges against Defendant, but it cannot seek to institute a review of Defendant's legal sentence, by arbitrarily and subjectively concluding, without even so much as presenting any matters or evidence to back up its conclusions, that Defendant's statement was an untruth.

The certified question must be answered in the negative, and the decision of the Fourth District Court of Appeal approved.

CONCLUSION

Based upon the foregoing arguments, supported by the circumstances and authorities presented therein, Defendant would respectfully request that this Honorable Court answer the certified question in the negative, and approve the decision of the Fourth District Court of Appeal.

Respectfully submitted,

BRAVERMAN & BOGEN
Attorneys for Respondent
625 Northeast 3rd Avenue
Fort Lauderdale, FL 33304
(305) 524-0505 Broward
(305) 737-2633 Palm Beach

By: 

Robert L. Bogen
Fla. Bar No. 210080

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail to Carolyn V. McCann, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 11 day of July, 1986.

BRAVERMAN & BOGEN

By: 

Robert L. Bogen