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**IN THE SUPREME COURT
STATE OF FLORIDA**

RHONDA MCCOY,

Petitioner,

vs.

**Case No. 78,316
2ND DCA NO. 90-1553**

STATE OF FLORIDA,

Respondent.

_____ /

**REVIEW OF THE DECISION OF THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA**

**MERITS BRIEF OF RESPONDENT ON
CERTIFIED QUESTION**

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SUMMARY OF ARGUMENT

This Court's analysis in Goene concludes that judgements which are the product of fraud or deceit may be vacated at any time. The federal court's analysis in Bishop determined that a rule limiting the time a trial court can modify a judgement does not preclude a modification when fraud or misrepresentation occurs.

A harsher sentence may be imposed after the term of court or after sixty day rule, if the defendant has perpetrated a fraud on the court.

CERTIFIED QUESTION

WHETHER A HARSHER SENTENCE MAY BE IMPOSED
EITHER AFTER EXPIRATION OF THE TERM OF COURT
IN WHICH THE ORIGINAL SENTENCE HAD BEEN
IMPOSED OR MORE THAN SIXTY DAYS AFTER THE DATE
OF THE ORIGINAL SENTENCE.

Petitioner appealed to the Second District Court of Appeal from the vacating of her sentence for trafficking in cocaine, and the subsequent reimposition of a harsher sentence more than sixty days after her original sentence had been imposed, after she had begun serving her original sentence, and after the expiration of the term of court in which the original sentence had been imposed.

The Second District held that the evidence supports the trial court's finding that after her original sentencing Petitioner violated the plea agreement which had been the basis of that sentence, and which had required her to testify truthfully in a specific manner against a co-defendant. See, Brown v. State, 367 So.2d 616, 623 (Fla. 1979).

Petitioner in her merit brief, complains once again that she did not violate her plea agreement and that she complied with the conditions of the plea. Instead of focusing on the issue of her lack of cooperation with the State, she asserts that the State made a mistake in not having her testify before she was lost her memory and committed fraud on the court. [Petitioner's Merit Brief, Page 9]

It is clear that Petitioner has misunderstood the basis of the certified question presented by the Second District Court of Appeal. Therefore, the Respondent will not reargue the merits of

whether Petitioner violated the terms of her plea agreement or whether the State should have sentenced her before she committed fraud on the trial court. This point has been well-settled by the trial court and the Second District Court of Appeal and need not be revisited.

In reviewing this case, the Second District examined two areas of law, the first being common law. Under common law, any court could amend, vacate, modify or change its orders, decrees, or judgements at any time during the term of court when rendered. However, this restriction does not apply to such orders, judgements or decrees which are the product of fraud, collusion, deceit, mistake, etc. Such may be vacated or modified at any time. State v. Burton, 314 So.2d 136, 138 (Fla. 1975). The second area examined by the Second District was the applicable rules of criminal procedures, namely Rule 3.800, Florida Rules of Criminal Procedure.

The first area of law, that of common law, does not limit the ability of the trial court to vacate Petitioner's sentence, since she had perpetrated a fraud upon on the trial court. In Goene v. State, 577 So.2d 1306 (Fla. 1991), this Court recognized that there is no double jeopardy prohibition to the imposition of a harsher sentence when the defendant has committed fraud upon the court. Since the trial court imposed Goene's harsher sentence within sixty days of the original sentence, it still had jurisdiction under Rule 3.800 to modify the sentence. Additionally, and of more interest to Respondent, this Court went on and held:

As this Court has previously recognized, orders, judgements or decrees which are the product of fraud, deceit or collusion "may be vacated, modified, opened or otherwise acted upon at any time. This is an inherent power of courts or record, and one essential to insure the true administration of justice and the orderly function of the judicial process." State v. Burton, 314 So.2d 136, 138 (Fla. 1975). [Underlining Added]

Goene at 1309. As the Second District Court recognized, the trial court had the inherent power to vacate Petitioner's sentence since it was based on fraud.

Regarding the second area of law examined by the Second District, Judge Parker in his special concurring opinion, stated that the real issue before this Court is whether Petitioner can be resentenced for the same crime to additional prison time beyond the sixty-day window provided in Rule 3.800, Florida Rules of Criminal Procedure. Respondent urges this Court to respond in the affirmative when a defendant perpetrates a fraud upon a court during a criminal sentencing proceeding.

Judge Parker examined the potential conflict between a court's inherent power to modify a sentence procured by fraud versus a rule which limits the period of time for modification of a sentence. In order to explain this issue, he specifically notes a federal case on point. In United State v. Bishop, 774 F.2d 771 (7th Cir. 1985), the rule in question, was the 120-day time limit set forth in Rule 35(b), Federal Rules of Criminal Procedure which had expired.

Judge Parker's special concurring opinion explains and examines the federal review of this issue, as follows:

In affirming the trial court's action of setting aside the order modifying Bishop's sentence and reimposing Bishop's original sentence, the appellate court relied upon the civil case of Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) which recognized a court's inherent power to correct judgements obtained through fraud or intentional misrepresentation. The Bishop court, quoting from Hazel-Atlas Glass Co., stated:

Equitable relief against fraudulent judgements is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgements should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in the situations.

Bishop, 774 F.2d at 774 (quoting Hazel-Atlas Glass Co., 322 U.S. at 248). The Bishop court found that the rule of law concerning equitable relief against fraudulent civil judgements pertained similarly to fraud perpetrated upon a court during a criminal sentencing proceeding. The court noted:

The fact that this case involves a fraud perpetrated upon the court during the criminal sentencing process rather than during a civil proceeding, such as in Hazel-Atlas, does not change the result. It is the power of the court to correct the judgement gained through

fraud which is determinative and not the nature of the proceeding in which the fraud was committed. Thus, in the analogous situation of revocation of a sentence of probation, courts have used their inherent power to revoke a sentence of probation and impose a jail term where defendant's sentence of probation was gained through intentional misrepresentation made to the court. See Trueblood Longknife v. United State, 381 F.2d 17 (9th Cir. 1967), cert. denied, 390 U.S. 926, 88 S.Ct. 859, 19 L.Ed.2d 987 (1968); cf. United States v. Evans, 459 F.2d 1134 (D.C. Cir. 1972).

Bishop, 774 F.2d at 774 n.5.

McCoy v. State, 582 So.2d 680, 681 (Fla. 2d DCA 1991).

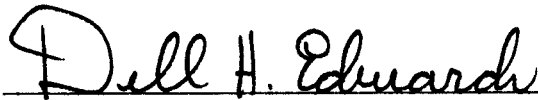
This Court's analysis in Goene concludes that judgements which are the product of fraud or deceit may be vacated at any time. The federal court's analysis in Bishop determined that a rule limiting the time a trial court can modify a judgement does not preclude a modification when fraud or misrepresentation occurs.

CONCLUSION

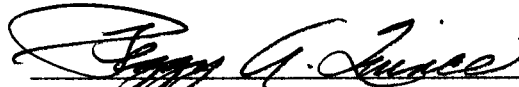
WHEREFORE, based on the above reasons and authorities, the State asks this Court to answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, has been furnished by U.S. Mail to BRAD PERMAR, Assistant Public Defender, Criminal Court Building, 5100-144th Avenue North, Clearwater, Florida 34620, this 4th day of September, 1991.



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