IN THE SUPREME COURT
STATE OF FLORIDA

BUSH WADE HOLLAND,
Petitioner,

-vs-

STATE OF FLORIDA,
Respondent.
_____/

CASE NO. 68-605
1st DCA CASE NO. BF-209

INTIAL BRIEF OF APPELLANT

FOR APPELLANT

Bush Wade Holland
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INITIAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

COMES NOW, Bush Wade Holland, pro se petitioner, and files this initial brief in the above styled cause.

The Department of Legal Affairs, representing the State of Florida, will herein be referred to as the Respondent.

All other parties to this cause shall be referred to by the name Petitioner knows them.

The transcript and all documents that were attached to the Brief on Jurisdiction are numbered and will be used in this case.

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested on July 28, 1984. Eventually the State Attorney's Office, Second Judicial Circuit, Leon County, Florida, filed the Information, A-1-2, dated 17th August, 1984. Four charges were made:

Count 1, DWI Manslaughter (2nd Degree Felony);
Count 2, Manslaughter (2nd Degree Felony);
Count 3, Leaving the scene of an accident (3rd Degree Felony); and;
Count 4, Driving with a suspended or revoked license- (Misdemeanor 1st Degree).

On or about September 4, 1984, Petitioner made a not guilty plea to all charges, A-19. The Public Defender's Office, Second Judicial Circuit, Leon County, Florida, was appointed and bail bond was set at $20,000.00 on Count 1. Nothing was said about Count 4. Count 2 and 3 the court required no bond, A-19.

Assistant Public Defender, Randolph P. Murrell represented the defense in the plea proceedings, A-3 through A-12. Sentence were imposed as follows.

A sentence of twelve, (12) years in prison and a term of probation to end on December 4, 1999, A-8, on Count 1, D.W.I., Manslaughter.

Count 2 was nolle prossed, A-4 and A-19, Manslaughter.

Count 3 resulted in a five, (5) years probation term consecutive to Count 1, and to end on December 4, 2004, A-8, Leaving the scene of an accident.

On Count 4, a One, (1) year term of probation to end December 4, 2005, consecutive to Count 3, A-8, Driving while license suspended or revoked.

Restitution was ordered in various amounts, A-8-9. All participants in the plea proceedings were of the belief the Sentencing Guidelines applied to the case and were in fact using that system, A-3 through A-12, at A-10. Even after the proceedings some four, (4) months later defense counsel believed it, A-13 through A-15.

Petitioner was not made aware of how the point system worked by defense counsel.

Petitioner had begin serving the sentence when petitioner filed the first post-conviction motion less than thirty, (30) days after the plea and sentence had been imposed. The only issye presented was;

1. There was no statutory provision under Section 316.1931 relating to Manslaughter.

That motion was denied without an evidentiary hearing on January 5, 1985. No appeal was filed.

Petitioner admits, this petitioner has not drafted any of the motions or pleadings filed in this case and does not know how to do so. However, petitioner believes the sentences are unconstitutional and that defense counsel ineffectively represented petitioner (defendant) in this criminal case.

Petitioner, pursuant to that belief, did read hundreds of cases in Southern Reporters, the Florida Statutes, and Fla. R. Crim. P. Now having more knowledge, believes without question that defense counsel, Randolph P. Murrell ineffectively represented petitioner. That the plea and sentences are unconstitutional.

Petitioner filed this second post-conviction motion pursuant to Fla. R. Crim. P., 3.850 and for relief alleged:

1. Improperly scored sentencing guidelines scoresheet;

2. Excessive split sentence, and;
3. Improper restitution order.

This motion was denied without an evidentiary hearing on February 21, 1985. A timely appeal followed. Briefs were filed by appellant only.

The lower tribunal, in Holland v. State, (10 F.L.W. 2689) Case No. BF-209 on December 5, 1985, reversed ans remanded, A-20 through A-23. The reversal was based on the following findings;

A. The points added up to 150 points. That 16 of those points was based on Count 2 of the Information, charging Manslaughter. And that said charge had been nolle prossed. That with 150 points the petitioner was within the seven (7) to twelve (12) years range. That with the removal of the sixteen, (16) points, petitioner would be in the three, (3) to seven, (7) years range.

B. The reasons for departing from the guidelines were "all" invalid.

C. The split sentence itself was illegal.

On motion for rehearing, A-25 through A-29, the State argued that because it was all part of a negotiated plea agreement, the plea, convictions and sentence must stand. Petitioner filed a Motion For Recognizance Release, A-33 through A-37. The State filed a response, A-38, A-39. Petitioner's motion to dismiss the State's response was timely filed, A-40 through A-43. The District Court of Appeal, First District, denied the Motion For Recognizance Release, A-44. And reversed itself on the motion for post-conviction relief, A-45 through A-48. The reversal, 11 F.L.W. 675, was based on Bass v. State, 478 So.2d 461 (Fla. 1st DCA 1985); Smith v. State, 453 So.2d 388 (Fla. 1984). The bottom line

in the court's ruling is that, "if the defendant pleads guilty, or nolle contendere and has made a plea agreement, the defendant cannot thereafter seek appeal and correction of the illegal or unconstitutional sentences by way of 3.850 post conviction relief.

Petitioner has filed a timely brief on jurisdiction and timely Petition For Discretionary Review. The court has accepted jurisdiction on October 20, 1986.

SUMMARY ARGUMENT

1. In an opinion handed down on December 5, 1985, A-20 through A-24, the District Court of Appeal- First District, held that an error in computation of the sentencing guidelines resulted in the placement of petitioner in the next highest category, which was prejudicial error and vacated that sentence, (10 F.L.W. 2689).

On March 18, 1986, on motion for rehearing by the respondent, the District Court reversed its own December 5, 1985 decision, A-45 through A-48, stating that "it was a plea agreement sentences", and thus the original sentence was correct, (11 F.L.W. 675), Holland v. State, 485 So.2d 471 (Fla. App. 1st Dist. 1986).

Petitioner argued that the December 5, 1985, decision was correct and just and that the subsequent reversal of its own ruling upon motion for rehearing by respondent was in fact in error and unjust.

The March 18, 1986, ruling rests solely upon the issue that it was a plea bargain agreement and thereby exempted from the sentencing guidelines. And, no post-conviction relief can be sought or granted.

However, the courts March 18, 1986, ruling fails to reflect the fact that, in making the plea bargain agreement, the defense counsel improperly advised petitioner to change his not guilty plea to that of nolo contendere, based upon a faulty and erroneous computation of the sentencing guidelines, over-looked by all, A-13 through A-15. Petitioner based his decision to change his plea on defense counsel's advise.

A plea bargain agreement based upon erroneous information provided by defense counsel is reversable error.

And, defense counsel's failure to object to sentencing errors, are not available to a lawyer that fails

to see the errors. Petitioner's failure to make a timely objection is based on the same reason of not knowing the errors were there until long after the sentences were imposed and because petitioner had placed his trust in the attorney provided by the court. No contemporaneous objection need be made when it is a sentencing error. And, petitioner believes the sentencing guidelines do apply to guilty pleas and to nollo contendere pleas.

2. Secondly, the denial of a recognizance bond during the time this case was pending after the reversal and any re-sentencing, was error. This petitioner had no sentences, and had the lower tribunal not reversed itself, petitioner would have been in a situation where petitioner could have been placed on probation upon re-sentencing. A person that has made a plea, and is awaiting sentencing, is entitled to bail bond when it is not a capital felony.

ISSUES PRESENTED

1. THE DISTRICT COURT OF APPEAL, FIRST DISTRICT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THE FLORIDA SUPREME COURT AND OTHER DISTRICT COURTS ON THE SAME ISSUES.

2. THE DISTRICT COURT OF APPEAL, FIRST DISTRICT'S DENYING RECOGNIZANCE RELEASE IS IN CONFLICT WITH STATUTORY AND CONSTITUTIONAL LAWS.

ISSUSE ONE AND ARGUMENT

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF FLORIDA AND OTHER DISTRICT COURTS ON THE SAME ISSUES.

The Supreme Court of this State of Florida should

reverse and remand this case, and the ruling of March 18, 1986, made in this case by the lower tribunal. In support, petitioner would show, to wit:

The District Court of Appeal, First District, first ruled the addition of 16 points for the offense in Count 2, was in error as it placed petitioner in the 7 to 12 years range. The court of appeals went no further with the issue. The facts show that petitioner was sentenced to 12 years in prison, followed by a total of 9 years probation. That was the agreement defense counsel advised defendant to accept! And that is what happened. The law shows that had defense counsel made no advice, none whatsoever, that petitioner, with a jury trial and/or without a jury trial, under the sentencing guidelines, could not have received any more then 7 to 12 years "with the 16 points counted". In short, defense counsel advised petitioner to accept more time then what the sentencing guidelines called for on a conviction of all 4 counts! With the removal of the 16 points, the sentencing guidelines called for a term of 3 to 7 years. But as the respondent contends, that if the sentences are set aside, the plea should be also set aside so the State can proceed on the original 4 charges and not just the 3 that sentences were imposed on. Fine, so be it, because petitioner could not receive a sentence under the sentencing guidelines of more then 12 years imprisonment with probation combined. Fla. R. Crim. P., 3.701 (d) (12). Counsel plainly erroneously advised this petitioner to change the not guilty plea, to nolo contendere, and accept a sentence far beyond that of which the sentencing guidelines called for.

Then the appeal court over looked the fact counsel for the defense had failed to make a motion to have the sentences vacated after having learned of the error, A-14-15.

In fact, defense counsel admits that he advised petitioner that petitioner could get a maximum of 21 years, A-14. That would only be possible if petitioner was sentenced to the maximum as provided by statutory law. The maximum provided on all 4 counts with all points, would have been 12 years under the sentencing guidelines. This obviously shows defense counsel did not know much about the sentencing guidelines. And, it is the trial court's duty, " to make sure the sentencing score sheet is correct" before imposing any sentence(s). Fla. R. Crim. P., 3.701, 13, (d)(1), of the committee note. p. 198 of the West Dest Copy Fla. Rules of Court.

> Ultimate responsibility for assuring that scoresheet are accurately prepared rest with the sentencing court.***

The appeal court then went on to over-look the fact the trial court, defense counsel and the State Attorney had all proceeded as if the proceedings were in fact, sentencing guidelines, A-3 through A-12. That in doing so, removed the plea proceedings from the law of the sentencing guidelines. In fact, did state in the reversing opinion, A-47-48, that the sentencing guidelines did not apply. That violates the rule of the Supreme Court when adopting the sentencing guidelines. The per curium opinion of the Florida Supreme Court of September 8, 1983 (439 So.2d 848), adopting this rule and form 3.988, provides in part:

> "The sentencing guidelines adopted herein will be effective for all applicable offenses committed after 12:01 a.m., October 1, 1983 and, if affirmatively selected by the defendant, to sentences imposed after that date for applicable crimes occuring prior thereto."

If the sentencing guidelines did not apply, what sentencing law(s) do apply? The reason for this question is because petitioner would like to know if he is entitled to parole considerations the same as those defendants sentenced prior to the sentencing guidelines? If so, would not the Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981), rule apply? By the appeal court holding in this case that the sentencing guidelines did not apply to a nolo contendere plea, the court of appeal disregarded the Supreme Court's words that;

> The sentencing guidelines adopted herein will be affective for all applicable offenses committed after 12:01 a.m. October 1, 1983 and, ***.

The records shows the trial judge had used the guidelines to base the sentences on, A-3 through A-12, and A-20 through A-23. With that being true, and the plea agreement sentences having been imposed with the sentencing guidelines as the guide being used for the sentences that were imposed, with the appeal court having found the written reasons for departure all having been found to be invalid, A-21, 22. The trial judge, had he known this, may well have imposed concurrent sentences instead of consecutive sentences. This is pointed out because the trial judge stated the departure, A-10. Indeed they are, Fla. R. Crim. P., 3.701 (d) (12). If the sentencing guidelines do no apply to this case, can the trial judge depart from a twelve, (12) years plea agreement by imposing consecutive terms of probation by using the sentencing guidelines?

Can the trial judge depart from a plea agreement of 12 years without first informing the petitioner the agreement is not going to be accepted and state the reasons why, and give the petitioner the chance to withdraw the plea?

Fla. R. Crim. P., 3.172 (g), states that when the trial judge does not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the plea may be withdrawn. Petitioner was not given the chance to withdraw the nolo contendere plea, and the trial judge departed anyway, A-10. The trial judge did not advise petitioner of the maximum penalty provided by the sentencing guidelines, this required by Fla. R. Crim. P., 3.172 (c)(i). The trial judge did not inform petitionet that the sentencing guidelines did not apply to the plea agreement. In fact, the complete record shows the trial court believed the sentencing guidelines was being used in this case. Petitioner did not understand the sentencing guidelines and it's point system at that time and, defense counsel did not explain it to petitioner. So there was no way petitioner could have appealed the erroes. Defense counsel did not know of it either, A-15. So defense counsel did not appeal. It is shown on A-14, that defense counsel told petitioner;

> "I told him that the maximum penalty he could receive was 21 years."

According to the sentencing guidelines and petitioners points of 150 for all 4 counts, the maximum penalty was 12 years. When defense counsel told petitioner the maximum was 21 years, A-14, and was thereby able to get petitioner to change the plea from not guilty to nolo contendere, defense counsel did in fact misinform this defendant. The sentencing guidelines only called for 12 years maximum with no charges nolle prossed. Due to counsel's misinformation, petitioner believed he could get 21 years, that the prosecution wanted to have 20 years imposed, A-15, and defense counsel was allegedly making a deal for a plea

agreement of 12 years. Whereas the truth was, the sentencing guidelines with all charges, and all points, had a maximum of 12 years and 3 to 7 years with count 2 nolle prossed. It was only by withholding the true facts from petitioner, that brought about the change in the not guilty plea.

Petitioner, as stated, has not drafted his own post-convictions motions. Petitioner sought the assistance of other inmates that seemed to know more about legal pleadings. Having done so, resulted in petitioner's failure to directly contends ineffective representation by defense counsel. And with all parties in the trial court believing, and the transcript supports it, that it was a sentencing guidelines sentence, petitioner had filed only against the sentences themselves. The District Court of Appeal had even treated the case as a sentencing guidelines case. Then on rehearing, contends that it is not a sentencing guidelines case and that because the trial counsel did not appeal it, or the errors, and petitioner did not make a direct appeal, the errors could not be reached! And cited Bass v. State, 478 So. 2d 461 (Fla. 1st DCA 1985); Smith v. State, 453 So.2d 388 (Fla. 1984).

Smith, supra is not applicable. The Smith case shows it was a jury trial and the issues raised were not timely presented to the trial court. And the one issue that was worth the court's consideration of comment, was known by both, the defendant Smith and trial counsel. That is not the case here. Also, Fla. R. Crim. P., 3.172 (c)(iv) grants petitioner the right to review by appropriate collateral attack.

> That if he pleads guilty, or nolo contendere without express reservation of right to appeal, he gives up his right to appeal all matters

> relating to the judgement, including the issue of guilty or innocence, but he does not impair his right to review by appropriate collateral attack.

This obviously implies to Fla. R. Crim. P., 3.850. There waa no expressed right sought for appeal, thus collateral attack by post-conviction was correct.

Secondly, the proper rule is set forth in Walcott v. State, 460 So.2d 915 (Fla. 5th DCA 1984) that held:

> It should be recognized that, because persons accused of crime are held to be entitled to competent, effective defense counsel and because defense counsel who unwrittingly fails to assert and protect valuable substantive and procedural legal rights of a defendant are not competent and effective, the concept of implied waiver of such rights by failure of counsel to timely object to, and appeal, the violation of such legal rights in essentially inconsistant with the trend to grant defendants relief from the results of failing of incompetent counsel to timely object to and appeal legal errors in criminal cases.

This case involves errors of which defense counsel should have prevented. Petitioner however, not being schooled in law, did not directly contend that counsel was ineffective as an issue. And by the time petitioner did find a law clerk that would assist in drafting the pleadings correctly, the case was on appeal and the point could not be raised. In the interest of justice, and because the issues lead back to defense counsel's failure to effectively represent petitioner, wrongfully informing petitioner, the court should grant the relief in this case now, rather than have the petitioner relitigate the case on ineffective assistance of counsel, Walcott, supra.

In the case of Bass v. State, 478 So.2d 461 (Fla. 1st DCA 1985) the court of appeal held that issues that

should have and could have been raised on direct appeal, could not be raised by post-conviction. The amended rule, Fla. R. Crim. P. 3.850 should not bar successive motion where failure to present error on direct appeal cannot be laid to defendant instead goes to defense counsel. The same court ruled "all" of the reasons for going outside of the guidelines in petitioner's case were invalid. The only difference in the two, (2) cases cited, Bass and Smith, were that both of those cases were jury trials and the issues related to pretrial and trial issues. Bass received no relief on the sentencing issue. Smith failed to allege ineffective assistance of counsel. Whereas Bass did allege it.

This leaves only the guestion of whether or not a prisoner can attack a sentence by post-conviction 3.850?

The same appeal court in Thrasher v. State, 477 So. 2d 1083 (Fla. App., 1st Dist. 1985), granted relief in a situation the same as petitioner. Thrasher had made a plea agreement, a number of charges were dropped, nolle prossed, and about six (6) sentences were imposed, totaling 20 years. The trial judge in that case had used the nolle prossed charges as the reason for exceeding the guidelines. Thrasher filed a 3.850 post-conviction motion, relief was granted. Fla. R. Crim. P., 3.850 allows for a collateral attack. Fla. R. Crim. P., 3.172 (c)(iv) affirms the right to collateral attack. Petitioner has shown counsel ineffective represented petitioner. And by the trial court's using an offense for which there was no conviction, count 2, the Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984), rule would apply. The same rule as relied on for reversing Thrasher, supra. Also required by Fla. R. Crim. P., 3.701 (d)(11). And Thrasher's case was a plea agreement case. So it leaves one wondering how the same court would rule two different ways on the same

issue? The court should have applied the same rule as applied in Chaplin v. State, 473 So.2d 842 (Fla. 1st Dist. 1985). Finally, the ruling herein contested, Holland v. State, 485 So.2d 471 (Fla. App. 1st Dist. 1986), directly conflicts with Thompson v. State, 351 So.2d 701 (Fla.1977), cert. denied, 435 U.S. 988, 98 S.Ct. 1653, 56 L.Ed.2d 88 (1978), holding:

> "The defendant has established to our satisfaction that he was prejudiced by an honest misunderstanding which contaminated the voluntariness of the plea." Also see Richmond v. State, 375 So.2d 1132 (Fla.DCA 1979); Costello v. State, 260 So.2d 198 (Fla. 1972).

It is plain that defense counsel, Randolph P. Murrell had a misunderstanding of the sentence that could be imposed, A-14. That petitioner could get 21 years maximum. The sentencing guidelines only had a maximum of 12 years. And only 7 years with count 2 nolle prossed. Counsel's misunderstanding was the cause of the change of plea of not guilty, to nolo contendere.

The facts show petitioner could not have contemplated the difference between the sentencing guidelines and the sentance the plea agreement was made for, when petitioner did not know of the differences. Bishop v. State, Fla. App. , 403 So.2d 1062 (2nd DCA 1981), provides that when plea bargain did not contemplate probation period, it would be vacated. The two cases just cited, were plea cases. Also, other such cases are; Alvis v. State, Fla. App., 421 So.2d 769 (4th DCA 1982); Ream v. State, 449 So.2d 960 (Fla. App., 4th DCA 1984), and Ramsey v. State, 408 So.2d 675 (4th DCA 1981) in which defense counsel erroneusly advised defendant the sentence to be imposed would not require him to serve three years in prison before being paroled or being eligible for good-time

consideration and attorney's advise caused defendant to change plea. That case was a post-conviction collateral attack on a plea. So it is obvious the court of appeal has errored in it's ruling in this case. There are thousands of cases that reveral resulted as a result of pro-se post-conviction action. And the court now seeks to stop it by court's rules that conflicts with the Rules of Court, Fla. R. Crim. P., 3.172 (c)(iv) and 3.850. The ruling of the First District Court of Appeal, denying petitioner due process of the laws in violation of Art. 1, Sec. 9, Fla. Const., the 5th and 14th Amend. United States Constitution, by abridging petitioner the right to petition for redress of grievances as provided by the 1st Amend., U.S. Const., Art. 1, Sec. 14, Fla. Const., and Fla. R. Crim. P. , 3.172 (c)(iv) and 3.850. The ruling, A-45 through A-49 must be reversed, vacated and set aside, the sentences and plea should be vacated and set aside. The reasoning in cases like Walcott, supra, should prevail. Petitioner's plea was not intelligently given where petitioner was not advised of the true punishments provided by law, the records of this case fully prove that.

ISSUE TWO

2. THE DISTRICT COURT OF APPEAL, FIRST DISTRICT'S DECISION DENYING RECOGNIZANCE RELEASE IS IN CONFLICT WITH STATUTORY AND CONSTITUTIONAL LAW.

ARGUMENT

Again, as in Issue One, petitioner argues that this Honorable Court must answer "yes" and rule for the petitioner.

For cause petitioner would show that statutory law, Section 921.187, Florida Statutes (1983), holds that a person may be placed on probation with or without adjudication of guilty, pursuant to Section 948.01 Florida Statutes. However, on the ruling case, Collins v. State, 478 So.2d 402 (Fla. 1st DCA 1985), the individual had a sentence. In the instant case, petitioner did not. It had been vacated.

Florida law holds that a release on bond is not available to a capital felony which the death sentence could be imposed. However, on all other cases, the defendant may post bond or be released on his own recognizance.

Because petitioner's sentence had been vacated, the motion for recognizance release should have been granted. In denying recognizance release, petitioner was denied due process and equal protection of the laws, in direct violation of the 5th and Fourteenth Amendment to the United States Constitution, as well as violation of his rights under law as provided by Section 9, Article 1, of the Constitution of Florida.

In view of the fact the sentence had been vacated,

petitioner was in a status of pre-trial procedure even though the case was in the appellate court. This reasoning based on the fact that until a defendant is sentenced, he is subject to being placed on a term of years on probation, rather than to a harsher prison sentence.

Secondly, Fla. R. Crim. P., 3.691 (a), provides in part:

> "All persons who have been adjudicated guilty of the commission of any offense, not capital, may be released, pending review of the conviction, at the discretion of either the trial or appellate court,"***

Fla. R. Crim. P., 3.691 (b), provides in part:

> In any case in which the court has the discretion to release the defendant pending review of the conviction, and after the defendant's conviction, denies release, it shall state in writing its reasons for such denial.

Both above rules reflect that bond should be granted pending appeal and review.

The respondent contends there was no direct appeal and no bond should be allowed, citing Collins v. State, 478 So.2d 402 (Fla. 1st DCA 1985), A-38. Petitioner has already pointed out that Collins had a sentence that was active. Whereas, petitioner had no sentences at the time the motion for recognizance bond was made. This put petitioner in the position of being remanded for re-sentencing. From that, Petitioner could have taken a direct appeal of the judgement of conviction and sentence(s). That would have placed petitioner right under the provisions of Fla. R. Crim. P., 3.691 (a). Until the District Court reversed itself, petitioner was entitled to bond as a matter of right, and by the rule. As the District Court had placed the case in that

status in which bond was available for petitioner, the District Court compounded the error by not giving "a written reason for denyiny the bond," Fla. R. Crim. P., 3.691 (b), A-44.

Art. 1, Sec. 14, Fla. Const., provides that unless the prisoner is charged with a capital offense, bail bond will be made available. Fla. R. Crim. P., 3.691 (a), follows that reasoning. And when bond is denied, it was intended there be a valid good reason, Fla. R. Crim. P., 3.691 (b). Also, the Eight Amend., U.S. Const., requires that the bond not be excessive.

At the time the District Court reversed and vacated the sentences, it placed petitioner's case in the above posture, and that was the same as a case takes is a situation as shown by Fla. R. Crim. P., 3.820 (a) and (b):

> (a) When a defendant has been sentenced, and is actually serving his sentence, and has not appealed from the judgement or sentence, but seeks his release from imprisonment by habeas corpus proceedings, and the writ has been discharged after it has been issued, the custody of the prisoner shall not be disturbed, pending a review of the appellate court.
>
> (b) Pending a review of a decision discharging a prisoner on habeas corpus, he shall be discharged upon bail,****.

Should the Supreme Court hold the same as held in Collins, supra, it would be invalidatiing the above rule. Collins does not apply here because there was ab active sentence in that case. The above rule makes it plain that when the sentence(s) and or judgement of conviction(s) is vacated, bond must be made available. Fla. R. Crim. P., 3.850 also incorprates the power of the writ of habeas corpus, tp produce the body. And the rule, 3.850 was made

to take the place of the petition for habeas corpus relief to the extent it gave the trial court jursidiction "to hear the grievance(s)". In all other respects, it gives the courts the power(s) aa is vested by juridiction on the courts when application for habeas corpus is made. A bond should have been set. Or a recognizance bond granted.

The District Court's opinion is in error as it denys petitioner due process of the laws, supra, and that violates Art. 1, Sect. 9, Fla. Const., the 5th and 14th Amend., U.S. Const., by abridging petitioner due process of the laws.

CONCLUSION

In conclusion, petitioner contends that the plea, judgement of conviction and sentences in his case, and the ruling in Holland v. State, 485 So.2d 471 (Fla. App. 1st Dist. 1986), should be vacated and set aside and this case remanded, the State given sixty (60) days to retry petitioner, as the law require.

/s/ Bush Wade Holland
Petitioner
Bush Wade Holland
DC# 029346
Apalachee Correctional inst.
Post Office Box 699-W
Sneads, Florida 32460

IN JACKSON COUNTY)
STATE OF FLORIDA)

Subscribed and sworn to before me this 5th day of November, 1986.

/s/ Barbara J. Walden
NOTARY PUBLIC, STATE OF FLORIDA

Notary Public, State of Florida at Large.
My Commission Expires Jan. 2, 1989.

MY COMMISSION EXPIRES: _____, 19____.

CERTIFICATE OF SERVICE

I, Bush Wade Holland have sent a true verbatim copy of the "Initial Brief of Appellant" with proper postage for mailing, to

Jim Smith, Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

Mr. Sid J. White
Clerk, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

/s/ Bush Wade Holland
Petitioner
Bush Wade Holland
DC# 029346
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Notary Public, State of Florida at Large.
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MY COMMISSION EXPIRES: _____, 19____.