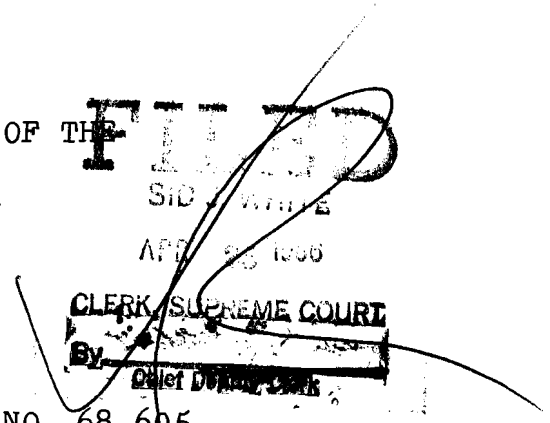
IN THE SUPREME COURT OF THE

STATE OF FLORIDA



BUSH WADE HOLLAND,	:	
	:	
Petitioner,	:	
	:	
-vs-	:	CASE NO. 68,605
	:	
STATE OF FLORIDA,	:	1st DCA CASE NO. BF-209
	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF ON JURISDICTION

FOR PETITIONER:
Pro se
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TABLE OF CONTENTS PAGE NO.

TABLE OF CITATIONS PAGE NO.

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-vs-	:	CASE NO. 68,605
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PETITION FOR DISCRETIONARY REVIEW

PRELIMINARY STATEMENT

The State of Florida was represented by the State Attorney's Office, Leon County, Florida, Second Judicial Circuit at the trial court stage, and by the Department of Legal Affairs on Appeal. Both will be referred to as being the Respondent.

Citations to the appendix attached will be listed parenthetically as "A", with page number following.

Opinions of the lower tribunal are cited at 10 F.L.W. 2689 (Orignal Opinion) and, on Motion For Rehearing at 11 F.L.W. 675, Case No.BF-209 (December 5th., 1985 and March 18th., 1986, Fla. 1st DCA), A 20-24, A 45-49.

STATEMENT OF THE CASE

Petitioner was found guilty on a plea of nolo contendere made December 5, 1984, A 3-12.

Count I, DWI Manslaughter, to 12 years in prison and a term of Probation at the end of the 12 years to end December 4th., 1999.

Count II, nolle prosequied.

Count III, Leaving The Scene Of An Accident, a term of Probation consecutive to Count I, to end on December 4th., 2004.

Count IV, Driving While License Suspended Or Revoked, a term of Probation consecutive to Count III, to end December 4th., 2005.

No direct appeal was taken. The trial Court Judge was, Hon. J. Lewis Hall, Jr., Case No.84-2169.

Petitioner's first "Motion for Post-conviction relief" alleged;

1. There was no Statutory provision under Section 316.1931 relating to manslaughter.

That was denied January 4th., 1985, no evidentiary hearing.

This Second instant "Motion for Post-conviction relief was filed, alleging;

1. Improperly scored sentencing guidelines scoresheet;

2. Excessive split sentence, and;

3. Improper restitution order.

Denied without evidentiary hearing February 21st., 1985. A timely appeal followed, and Briefs were filed by Appellant only.

The lower tribunal reversed on December 5th., 1985 on two grounds. First, because the assessment of 16 points for a second degree felony in the additional offense at conviction was erron-

eous as the second degree felony of Manslaughter was nolle prossed by the State prosecutor. Removal of the 16 points would result in a corrected total of 134 points with a recommended range of three (3) to (7) years, instead of the 150 points with a range of seven (7) to twelve (12) years incarceration.

Secondly, that the correction of the guidelines range would require correction of the split sentence in Count I.as required by Fla.R.Crim.P. 3.701(d)(12). And that the 12 years had exceeded the guidelines range without proper written reason having been given.

Respondent filed a "Motion For Rehearing based on the ruling in Bass v. State, 10 F.L.W. 2517 (Fla.1st DCA Nov. 13, 1985).

The District Court Of Appeal, First District, on March 18th., 1986 reversed it's prior December 5th., 1985 ruling, "because this was a guilty plea agreement", the sentencing error was harmless.

STATEMENT OF FACTS

Petitioner was charged by Information A 1-2 with four Counts. 1, DWI Manslaughter (2nd° Felony; 2, Manslaughter 2nd° Felony; 3, Leaving The Scene Of An Accident 3rd° Felony, and; 4, Driving With License Suspended Or Revoked, Misdemeanor.

Petitioner pleaded nolo contendere with the understanding that Count II, Manslaughter would be nolle prossed as made known in open Court, A 4. The trial Court adjudicated Petitioner (Defendant) guilty, A 8 and imposed sentences, A 8.

Count I, DWI Manslaughter, 12 years imprisonment and a term of Probation until December 4th., 1999, A 8.

Count II, nolle prossed.

Count III, Leaving The Scene Of An Accident, five years Probation to end December 4th., 2004, A 8.

Count IV, Driving With License Suspended Or Revoked, Probation for one year to end December 4th., 2005, A 8. All sentences were consecutively with 130 days jail time, A 10-11.

No appeal was taken. And, no appeal was taken from the first Motion for Post-conviction relief.

This second motion was filed and denied without evident - iary hearing on February 21st., 1985, a timely appeal followed. Three grounds for relief was presented. 1, Improperly scored sentencing guidelines scoresheet; 2, Excessive split sentence, and; 3, Improper restitution order. The District Court of Appeal, First District, granted relief on grounds 1 and 2, as reported in F.L.W. 2689 (Original Opinion) December 5th., 1985, A 20-26. Respondent filed a "Motion For Rehearing", A 25-29. Petitioner filed a response, A 30-32. Petitioner also filed a motion for Recognizance Release, A 33-37. Respondent filed a Motion To Dismiss, A 38-39. Petitioner responded, A 40-43. The lower Court denied relief for Recognizance Release March 18th.,1986, A 44. And reversed it's orignal Opinion on March 18th., 1986, A 45-49. 11 F.L.W. 675 (Fla. 1st DCA Case No.BF-209. Ruling, that because Petitioner had made a plea agreement, errors in

the sentencing did not apply. Petitioner submits that Opinion of March 18th., 1986, on both, the Motion for Post-conviction relief and Motion for Recognizance Release are in express and direct conflict with decisions of the Florida Supreme Court on the same questions of law.

JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the jurisdiction of the Supreme Court of the State of Florida because the lower court has issued two (2) decisions, one on the Post-conviction application on March 18th., 1986 and one on the motion for Recognizance Release on March 18th., 1986, that stand in direct and express conflict with Constitutional law, Statutory law and prior decisions of the presiding Court, or would be in conflict if the presiding Court ruled on such questions of law as presented in this case. Jurisdiction is also invoked under Article V, Section 3(b)(3) of the Florida Constitution and, pursenant to Fla.R.App.P. 9.030(a)(2)(A)(iv) for the above same reasons of conflict, and as being additionally in conflict with decisions of the other District Courts of Appeal on the same issues, as well as being conflicting with it's own prior Opinion of December 5th., 1985.

SUMMARY ARGUMENT

The Supreme Court should exercise its discretionary review of the lower Court's Opinion as provided by Article V, Section 3(b)(3), Florida State Constitution and Fla.R.App.P. 9.030(a)(A)(iv), because said decisions hold that sentencing errors are

are not open to collateral attack because Petitioner made a plea agreement. And that a pr soner cannot have a release on bond where the sentence(s) have been vacated, but not the adjudication of guilt. These rulings expressly and direcly conflict with decisions of the presiding Court and other District Courts of Appeal.

ARGUMENT ONE

THE FIRST DISTRICT COURT OF APPEAL'S SECOND DECISION REVERSING IT'S FIRST DECISION IS IN CONFLICT WITH THIS COURT AND DISTRICT COURTS OF APPEAL OF THE STATE OF FLORIDA.

1. Improperly scored sentencing fuidelines scoresheet.

2. Excessive split sentence.

The lower Court correctly ruled in it's first Opinion of December 5th.,1985, 10 F.L.W 2689, A 20-24. However, in the second Opinion on rehearing, A 48, the lower court committed error when it ruled;

> "* * * however, in that the sentence imposed here was the result of a plea-bargain agreement. Therefore, the ruling in Chaplin does no apply."

In Chaplin v. State, 473 So.2d 482 (Fla. 1st DCA 1985), review granted, Case No.67,492. The Court held a sentencing computation error similar to the ones in issue here, could be raised in a motion for Post-conviction relief even though they could have been raised on direct appeal, A 47.

In ruling in this case that a sentence that is in error could stand "because it was imposed on a plea agreement" overlooks the fact Petitioner did not know of, and was not informed

by anybody, defense counsel, prosecutor, or the court, that the trial Court would be using the points from Count II when sentencing Petitioner (Defendant). The agreement was that Count II, Manslaughter, would be nolle prossed. That also included the points for that crime. The trial court cannot impose a sentence for a crime where there was no conviction. A 13, 14 and 15 shows;

> The presentence report conducted was a pre-plea investigation. In it the probation officer scored the "additional offenses" as if Mr. Holland had plead to all four charges. Consequently, the probation officer assigned him 16 points for the offense of manslaughter. As I have stated, though, Mr. Holland did not plead to the manslaughter charge, but plead to the DWI manslaughter, the leaving the scene charge, and the suspended license charge. I'm afraid that neither I, nor the state, nor the judge caught the error. The additional 16 points brought Mr. Holland's total to 150. That sum placed him in the guidelines range of seven to 12 years. The next lower cell ranges from three to five years. Subtracting the 16 points that were erroneously added would, thus, place Mr. Holland in that lower cell with a total of 134 points. Theoretically, that would entitle him to a lesser sentence.

A 19 shows defense counsel had marked on paper what each took place on each Count. Petitioner was not aware of the 16 points being used, or what the sentencing guidelines called for because no one informed Petitioner. Had Petitioner known, a timely objection could have been made. Petitioner would not have pleaded for any sentence above 5 years had Petitioner been properly informed. The 16 points represents a crime Petitioner was not convicted of and did not agree to plea to. The lower

Court is is saying that because it was a plea agreement, it is OK to impose additional time to be served even when there is no conviction for the additional time to be served. Petitioner did not agree to the extra 16 points and those points violate the plea agreement. The view taken by the lower Court conflicts expressly and directly with Thompson v. State, 351 So.2d 701 (Fla. 1977), cert. denied 435 U.S. 998, 98 S.Ct. 1653, 56 L.Ed. 2d 88 (1978).

> "The defendant has extablished to our satisfaction that he was prejudiced by an honest misunderstanding which contaminated the voluntariness of the pleas."

The lower Court's decision conflicts with Ramsey v. State, Fla.App., 408 So.2d 675 (4th DCA 1981) which holds that a defendant is intitled to an evidentiary hearing were defendant was erroneously advised by defense counsel that he would not be required to serve three years in prison before being paroled or eligible for gain time considerations ware a three years mandatory sentence was imposed. A case that comes close to saying it all is Bishop v. State, Fla.App., 403 So.2d 1062 (2nd DCA 1981).

> "* * * if trial Court on remand would determine that the bargain did not contemplate a probationary period, it would be required to simply vacate the probation requirement."

As defense counsel advised Petitioner that 12 years was the less Petitioner could get "based on the points of 150" and were defense counsel, judge, or prosecutor, did not see error of additional 16 points, advise of counsel was in error and

Petitioner was not able to contemplate what the effects of the 16 points removed would have on the length of the sentences. Also see Alvis v. State, Fla.App., 421 So.2d 769 (4th DCA 1982).

> "* * * that evidence that the special condition of probation, that the defendant not drive or operate a motor vehicle without special permission of the court, was not contemplated by the plea agreement was such as to require reversal of the conviction on the firearms count and a remand of the case for purpose of allowing the matter to proceed in a manner consistent with withdrawal by defendant of his plea of guilty.

In Ream v. State, 449 So.2d 960 (Fla.App., 4 Dist. 1984). Defendant had agreed to a three years probation term. The trial Court sentenced Ream to 3 years in prison and a $10.000 fine. Again, it was a case where the defendant did not contemplate the term being that of imprisonment.

ARGUMENT TWO.

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

The lower court denied Petitioner's "Motion For Recognizance Release", A 33, based upon the State's "Response To Motion For Recognizance Release", A 38, of which Petitioner filed a "Motion To Dismiss Appellee's Response To Motion For Recognizance Release", A 40, 41, 42, 43. The lower Court's Order denying the motion, A 44, gives no reason for denying the relief. The lower court relied upon Collins v. State, 478 So.2d 402 (Fla. 1st DCA 1985). That case does not fit this case because the sentence in this case had been vacated. If the Petitioner were before the trial court he could of had a bond because even

while adjudicated guilty, Petitioner could of been placed on a probation. That included this case had it been remanded at that point. Section 921.187, Florida Statutes;

> (a) Place an offender on probation with or without an adjudication of guilt pursuant to s. 948.01.

Petitioner made his argument, A 40, 41, 42, 43 and the lower court denied relief without reason. Petitioner was denied his liberty without cause in violation of due process of the law of the fifth and fourteenth Amendments. And denied liberty in violation of due process of the law in violation of Section 9, Florida State Constitution, by being denied a recongizance release. Petitioner's custody at the institution is minimum.

CONCLUSION

Based upon the foregoing argument and authority cited in the foregoing, Petitioner has shown the requisite conflict between the lower Court's decisions herein and decisions of this Court and other courts of Appeal. The lower court's Opinion of March 18th., 1986, should be vacated, the Opinion quashed.

Bush Wade Holland

PETITIONER
BUSH WADE HOLLAND