IN THE SUPREME COURT OF FLORIDA

BUSH WADE HOLLAND,
Petitioner,

Versus

CASE NO. 68,6[illegible]

STATE OF FLORIDA,
Respondent.
_____/

PETITIONER'S REPLY BRIEF

Petitioner
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IN THE SUPREME COURT OF FLORIDA

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PETITIONER'S REPLY BRIEF

Statement Of The Case And Facts

Petitioner rejects respondent's Statement Of The Case And Facts on pages 3-5 of respondent's brief in as much that petitioner was not aware of the points and sentencing range at the time of the plea change from not guilty to nolle contendere. Petitioner did not know of the 16 point computation error. Defense counsel and no one else seems to have known of it either. Petitioner did not know that he had the right to be sentenced under the guidelines nor anything about the guidelines until the trial judge stated that the probation sentences were illegal because they exceeded the guidelines. Everybody but the petitioner knew of the guidelines and seem to have been using them for this case. Count II was nolle prossed, but not the points. The respondent is in error by saying;

> *** The second (manslaughter) was nolle prossed and [Petitioner] plead nolo contendere to Counts I, III, and IV. A sentencing guidelines scoresheet was then prepared, reflecting a total 150 points and a recommended range of seven to twelve years incarceration.

The underlining is by petitioner to show that part of respondent's statements that is totally untrue. The 16 points for the second count were already computed, and when Count II was nolle prossed, the points were left unchan-ed. To reason that the points were added after Count II, was nolle prossed, is unacceptable. Everyone would have caught "that" error, except petitioner as petitioner did not know of the point system nor understand what it would have meant. As reflected by A-10, the scoresheet had already been made prior to the plea proceedings.

Further, respondent is in error in the statement about the sentences. Respondent states;

> *** [Petitioner] was sentenced on December 5, 1984 to twelve years incarceration on Count I to be followed by a three-year term of probation (to expire on July 28, 2004), and one year probation on Count IV (to expire on July 28, 2005).

The sentences were;

Count I, twelve years in prison followed by three years probation to end July 28, 199;

Count III, five years probation to end on July 28, 2004;

Count IV, one year probation to end on July 28, 2005. Respondent had left out the sentence for Count III.

The reasons for going outside of the sentencing guidelines was illegal. The sentence in Count I is also illegal and unconstitutional because it denys petitioner the right to earn any statutory or incentive gaime as provided by Section 944.275, Fla. Stat. (1983), in that by placing a date for the probation of three years to end, it being three years, would require that it start on July 28, 1996, to end on July 28, 1999. That would require petitioner to serve the entire 12 years from 1984 to July 28, 1996 at which time the probation term of three years would start. Petitioner did not bring that out in the trial court, or on appeal, in the 3.850 motion. The error is there and renders the sentences all illegal as all the ending dates would have to be moved forward by whatever gain time was given to petitioner by statutory law and by the Fla. Department of Corrections, for incentive gain time earned while serving the 12 years.

When the lower court reversed itself in this case, it placed into issue the plea agreement. Up until that point, petitioner had attacked the sentence as a guidelines sentence. The trial court had both treated the

case as a guidelines sentencing case. The respondent brought the motion for rehearing and argued it was a plea agreement case. The lower court reversed itself on that basis. In doing so, placed for the first time to petitioner's knowledge, the case under the old law where a parole could be granted after petitioner served so much of his sentence. Because the lower court removed the sentences from being a guideline sentence by holding the 16 point error and the illegal check-list errors did not apply to a sentence imposed under a plea agreement. If the guideleines did not apply, what sentencing law(s) do apply ?

How was it that the trial judge believed he was going outside of the sentencing guidelines ? Respondent claims petitioner is now presenting the issue of ineffective assistance of counsel; that petitioner is attempting to back out of the plea agreement. Petitioner did not present the issue of ineffective assistance of counsel as a claim in the case yet. The petitioner put it there for the court to consider if the court wanted to do so now, rather then to compel further needless filing of pleadings. With all the facts and evidence before the court, the issue could not be any further ready for the court to deal with it. Did respondent request the case be remanded to the trial court to insure an evidentiry

hearing to get a ruling on that claim ? No! Did the respondent request the court to relinguish jurisdiction for any time to allow an evidentiary hearing on the ineffective assistance of counsel claim ? No! Did respondent point out that it was the trial court, the state attorney and defense counsel that allowed the 16 points to violate the plea agreement ? The agreement was to drop Count II. That included the punishment for that offense. That was not done, but instead was used to place the sentence at 12 years, the top of the sentencing guidelines range. The sentencing guidelines were used in this case.

When the lower court over turned its own ruling, it based its ruling on the reason that sentencing guidelines do not apply to plea agreements. The sentencing guidelines were used in the trial court to decide what the sentence should be. Once the trial court and counsel for both the state and defense use the guidelines, they become a part of the proceedings. Once that takes place, petitioner is free to contest the manner in which the sentencing guidelines were applied if prejudicially affected by their application.

Issues In Conflict

1. The Lower Court's decision affirming trial Court's denial of Rule 3.850 Motion was error.

This case reflects from the records that all persons involved in this case in the trial court, had governed themselves and the proceedings af if this case was a sentencing guidelines case. The appeal court rendered its first opinion with that belief. With all of those people schooled in Florida Jurisprudance believing it was a guidelines sentencing case, and this petitioner having attacked the sentence only. Then receiving the final ruling, stating it is not a sentencing guidelines case, reflects proof that petitioner, a layman unschooled in law, could not have possibly known what laws applied to the sentences, or it there was any less punishment laws involved. If the guidelines do not apply, it becomes obvious that there was a lesser punishment available at the time of the plea... the sentencing guidelines. Not having been informed of the available lesser punishment, and not being informed that a guilty plea or nolo contendere plea would remove petitioner from being sentenced under the sentencing guidelines, renders the sentences open to collateral attack because they were imposed without petitioner being fully advised.

Without full knowledge of all the facts. Without knowledge of what the alternative punishments were a defendant that is not fully advised, that is not aware of the sentencing alternatives, could not have made any intelligent plea. That renders the sentences imposed illegal and unconstitutional. And for the facts of this case to be so misleading that all parties treated the case as a guidelines sentencing case up to the point of motion for rehearing in the appeal court was filed, shows the degree of misunderstanding involved. Petitioner should not be held to sentences that were imposed in the trial court that are so misleading, or that were the results of a sentencing process that had no relationship to the sentencing guidelines.

The petitioner, in good faith, based his collateral attack upon what was in the records and files of this case. Fla. R. Crim. P. 3.850 requires the sentence and or plea to be vacated "if the recordd and files show merit to the claims", because the score sheet and plea agreement were all a part of the records and files and used in the trial court, they become a part of the case. Petitioner thereby correctly used them documents to support his claims. The appeal court relied on the records and files to make the first ruling. Then, on motion to rehear, threw all the records out in favor of holding that the sentencing guidelines did not apply to a plea agreement. If that is so,

the court should have remended the case with instructions to re-do the plea proceedings with, or without, the sentencing guidelines being involved. One way only. Either apply the guidelines, or leave them out of it. Not make a record that reflects usage of the guidelines to impose sentences then claim the guidelines do not apply.

Further, by ruling the guidelines do not apply, the lower court exempted petitioner's sentences from having been imposed as required by Fla. R. Crim. P. 3.701, that provided all sentences excepting in capital cases, would be imposed under the guidelines. If that rule applys, then the case of Forbert v. State, 437 So.2d 1079 (Fla. 1983), at 1080, #2, would control.

> When a defendant pleads guilty with the understanding that the sentence he or she receive in exchange is illegal, when in fact sentence is not legal, defendant should be given the opportunity to withdraw the plea when later challenging the legality of the sentence.

Under the sentencing guidelines, the 16 points on Count II and the consecutive probation terms that exceeded the guidelines range, are illegal. Petitioner had only attacked the sentence because petitioner did not know at that time how to draft a pleading for post-conviction relief and did not know he had other valid claims such

as ineffective assistance of counsel. Or that petitioner changed the plea of not guilty without knowing all the facts. That a plea change made without understanding or knowing of any alternative punishments, could not be termed a very intelligent plea. The guidelines provided a sentence maximum of seven years. Had petitioner known that, petitioner would not have made any agreement for twelve years, plus probation.

If the court presiding decides the sentencing guidelines do apply. The lower court's ruling of March 18, 1986, must be vacated based on the violations made during sentencing of Fla. R. Crim. P. 3.701. If the court decides the guidelines do not apply to a plea agreement, then the plea and sentences must be vacated completely because the plea was made withput benefit of petitioner's knowing the guidelines provided a lesser punishment then that offered in the plea agreement.

The respondent suggests that the plea and sentences be all vacated and that petitioner be compelled to face trial on all of the original charges. Petitioner, in fairness, attacked only the sentences because of the possibility of application of the case of Jolly v. State, 392 So.2d 54 (Fla. 5th DCA 1981), being brought into affect. The respondent does not seem concerned with it,

the trial counsel for the state may want to use it, thus petitioner has brought it to the attention of the court because it is petitioner's understanding that once key witness for the prosecution has died. Thus, in respects to seeking a true and correct judgement, petitioner presents that information to the court for its consideration. The sentences should be vacated with application of Fla. R. Crim. P. 3.701 being thereafter made fully applicable to any resentencing.

Issue In Conflict

2. The lower court committed error by not granting bail bond, or a recognizance release.

At the time petitioner filed his motion for bail bond, or recognizance release, petitioner did not have any sentence. The case was pending a ruling on motion to rehear. During that time petitioner was intitled to bail or release on recognizance. Petitioner's reasoning is founded on the belief that with the sentence of imprisonment having been vacated, and had that ruling remained unchanged, the case would have went before the trial court in that status. The trial court could have elected to place petitioner on probation and withheld adjudication of guilt. That placed petitioner in a situation where Article 1, Section 14, Fla.

Const., would have controled. Because petitioner could received probation upon remand of this case, bail bond and/or recognizance release was available. It was thereby error for the appellate court to apply the case of Collins v. State, 478 So.2d 402 (Fla. 1st DCA 1985).

The Supreme Court can review the order denying the bail bond or recognizance release, as provided by Art. 5, Sec. 3(b)(1), Fla. Const.

> The Supreme Court shall hear appeals ***and decisions of district courts of appeal initially of a state statute or a provision of the state or federal constitution.

By ruling that petitioner was not intitled to have bond or recognizance release, during a time when petitioner had no sentence, was the same as sayiny Art. 1, Sec. 14, Fla. Const., does not apply. That is making a ruling on a provision of the Fla. Const., which makes the ruling reviewable by the Fla. Supreme Court. While it is true, the issue has become moot, petitioner has a standing interest in securing a ruling because the same situation could happen again. Due process requires that a ruling be made to avoid unnecessary imprisonment in the future.

SUMMATION

The arguing of various points of law and citing this case or that case definitely serves its purpose in

in the judicial process. However,, petitioner says the matter before this Honorable Court can be resolved completely and immediately by the mere reading of a letter (Exhibit-4) written by the defense counsel to the Florida Bar. Though the entire letter expounds upon the case at bar, petitioner calls the court's attention to page A-14 lines 39-42 and page A-15 lines 1-20; specifically, page A-15 lines 14-20;

> "...I had not discovered the error until I reviewed my file for the purpose of writing you this letter. Thus, when I advised Mr. Holland of his options I did so with the understanding that he fell in the seven to twelve year range. He, thus, entered the plea with that understanding. Furthermore, the judge sentenced Mr. Holland with the understanding that he fell within the higher cell..." (Record on Appeal- Exhibit 4)

Whatever understanding the judge had when he sentenced petitioner is irrellavant. The issue of whether petitioner was incorrectly advised of his options is made emphatically clear by this letter. Counsel for petitioner admits freely and clearly that he wrongfully advised him of the issue and petitioner based his decision upon that incorrect and erroneous advice, that brought about the illegal sentence.

CONCLUSION

The sentences imposed on December 5, 1984, and the plea should all be vacated and set aside, the case remanded with directions to apply the sentencing guidelines.

Respectfully Submitted,

/s/ Bush Wade Hallard

Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME this 16 day of December, 1986.

/s/ Glenda C. Farma

NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES: [redacted].

CERTIFICATE OF SERVICE

I, Bush Wade Holland have sent a true verbatim copy of the "Petitioner's Reply Brief" , to:

Sid J. White (for filing)
Supreme Court Building
Tallahassee, Florida 32301

Gregory G. Costas
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Department of Legal Affairs
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SUBSCRIBED AND SWORN TO BEFORE ME this 16 day of December, 1986.

/s/ Glenda Farmer
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES: [illegible].