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IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

v. CASE NO. 85,651
(DCA NO. 94-864)

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW OF A PETITION FROM THE
FIRST DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, Kit Goins, Appellant/defendant below, will be referred to herein by name or as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement but clarifies and supplements with the following.

The written plea agreement included the following:

> I understand that the maximum period of imprisonment and fine that I could receive on each offense is as follows: [count 1, thirty years; count 3, 5 years]
> I further understand my sentence will be imposed under the Uniform Sentencing Guidelines. A presumptive sentence will be determined based upon certain factors. The Court can exceed this presumptive sentence and impose up to the maximum sentence permitted by law by stating clear and convincing reasons for such departure. If the guideline range is exceeded I will have the right to appeal my sentence.
> * * * *
> I am able to read and have read and understand everything on this entire agreement; or I cannot read but everything has been read to me and I understand all of it.
> (R-7)

The sentencing guidelines scoresheet shows a recommended range of 7-9 years imprisonment and a permitted range of 5-12 years. The sentence imposed was nine years imprisonment. (R-18, 20-26.)

Defense counsel Cobb presented the operative terms of the plea agreement to the trial court including the statement that the "State's going to recommend an adjudication and five and a half years department of corrections followed by three years of probation." (R-48.)

The record on appeal shows that petitioner attempted to persuade the trial court to depart downward from the sentencing guidelines and from the sentence recommended by the state in the plea agreement by imposing only community control and probation. (R-57.)

The record on appeal shows that petitioner never sought to withdraw his plea or to object to the sentence. (R-58.)

SUMMARY OF ARGUMENT

ISSUE I: There is no direct and express conflict between the decision below and decisions of other district courts. Here, the plea was not conditioned on the acceptance by the trial court of the sentence recommended by the state. In the decisions on which conflict is asserted, the plea agreements were conditioned on the acceptance by the trial court of a negotiated sentence. Thus, there is no jurisdictional basis for discretionary review by this Court. However, even though there is not direct and express conflict between the district courts, there is direct and express conflict between decisions of this Court and of the 2nd DCA.

ISSUE II: Petitioner entered into a plea agreement under which the state nol prossed a criminal count and agreed to recommend a sentence of five and a half years imprisonment to the trial court. The state so recommended which fully satisfied the terms of the plea bargain. The trial court was not bound to follow the recommendation of the parties and did not err in imposing a sentence which was consistent with the plea bargain, the sentencing guidelines, and the statutory maximum. Moreover, following sentencing, petitioner did not move to withdraw the plea in the trial court. Absent a motion to withdraw the plea, the district court had no appellate jurisdiction.

The petitioner was sentenced within the sentencing guidelines and the statutory maximum. There is no right to appeal an unconditional plea of nolo contendere entered without reservation where (1) the sentence imposed was within the range recommended

or permitted by the sentencing guidelines, (2) the sentence was within the statutorily authorized maximum and was thus not illegal, and (3) the defendant/appellant did not object to the sentence and did not move to withdraw the plea bargain. Thus, pursuant to sections 924.06(1)(d), 924.06(1)(e), and 924.06(3), Florida Statutes, there was no constitutional or statutory right to appeal and the district court should have summarily dismissed the appeal for lack of jurisdiction.

ISSUE III: It is clear that a recommended sentence is not binding on the trial court. An agreement to recommend a certain sentence is a bargain between the State and the defendant and the bargain is complete when the State makes the agreed recommendation to the trial court. If the trial court accepts the plea it should consider the recommendation but, as it has the ultimate authority in sentencing, it is free to impose a different sentence if it determines that the recommended sentence is not appropriate. Thus, the First District Court of Appeal properly held that when the trial court is not involved in the plea negotiations and there is no promise that the trial court will impose the recommended sentence, the trial court is not obligated to allow the defendant a clear opportunity to withdraw his or her plea.

ISSUE IV: The record shows that the State lived up to its end of the bargain, making the sentencing recommendation it agreed to, and the plea was not conditioned on the trial court's acceptance of the recommendation. The trial courts have the ultimate

sentencing power over criminals in this State. The Petitioner should not be allow to have another chance at a lighter sentence by getting an automatic right to withdraw his plea because the trial court did not follow the "recommended" sentence. The First District Court of Appeal did not err in so holding.

ARGUMENT

ISSUE I

IS THERE DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF OTHER DISTRICT COURTS?

The threshold issue is always whether a court has jurisdiction to hear a cause. Accordingly, the state first argues that there is no discretionary jurisdiction to hear this petition.

The record on appeal shows that petitioner's plea was not contingent on the imposition of a negotiated sentence by the trial court. The written plea agreement itself explicitly recognized that the trial court could sentence within the sentencing guidelines and could, for good reason, even depart from the guidelines. Only in the latter event, was petitioner afforded the right to appeal. It should also be noted that, contrary to his claim that the plea agreement required a sentence of five and one half years imprisonment, petitioner himself argued to the trial court that it could depart downward from the guidelines by imposing probation only. The sentence imposed by the trial court was consistent with the plea agreement, the sentencing guidelines, and the statutory maximum. The district court did not err in noting that petitioner had not moved to withdraw the plea and that the trial court was under no duty to provide the petitioner with an opportunity to withdraw the plea when it decided to impose a sentence greater than that recommended by the state.

The district court below partially misspoke in noting apparent conflict with three cited cases from the 2nd DCA. There is no direct and express conflict with these decisions and this petition should be dismissed for lack of jurisdiction pursuant to article V, section 3(b)(3), of the Florida Constitution. Moreover, as will be seen below, the district court itself had no jurisdiction to review this appeal from a sentence which was within the sentencing guidelines and the statutorily authorized maximum and which was imposed consistent with a unreserved plea bargain from which no motion to withdraw was filed.

The district court below noted apparent conflict with a line of cases from the 2nd DCA which hold that a trial court must affirmatively offer a defendant an opportunity to withdraw a plea when the plea is conditioned on the imposition of a specific sentence and the trial court declines to impose the negotiated sentence. There is no direct and express conflict in decisions because, here, there was no provision making the plea agreement contingent on a negotiated sentence.

In Perry v. State, 510 So. 2d 1083, 1084 (Fla. 2d DCA 1987), "the trial court, the assistant state attorney, and the appellant's counsel agreed that the appellant would receive two years' incarceration in exchange for his plea of nolo contenders." Id. Thus, in Perry, the trial court itself agreed to the negotiated sentence prior to the acceptance of the plea but, after the prosecutor erroneously recited the terms of the agreement, subsequently imposed a sentence greater than that it had agreed to in accepting the plea. Similarly, in Rodriguez v.

State, 610 So. 2d 476, 477 (Fla. 2d DCA 1992), at the plea hearing, "all parties and the trial court understood that Mr. Rodriguez's plea was conditioned upon a guidelines sentence of not more than 22 years imprisonment." Thereafter, at the sentencing hearing, the trial court heard testimony from the victims and imposed a departure sentence greater than that which it had agreed to in accepting the plea. The holding in Rodriguez that a defendant may withdraw a plea when its terms are violated is unexceptionable. It does not conflict with the decision below simply because the trial court here did not violate the terms of the plea bargain in imposing a sentence which was consistent with the plea bargain.

The district court also noted apparent conflict with Kiefer v. State, 295 So. 2d 688 (Fla. 2d DCA 1974), the seminal case on which both Rodriguez and Perry rest. In Kiefer, again, the plea bargain itself was contingent on the imposition of a specific sentence of probation and it was agreed that the defendant would be permitted to withdraw the plea if any other sentence was imposed. The trial court subsequently sentenced Kiefer to one year in the county jail, contrary to the plea bargain. The 2nd DCA held that the trial court erred in not affirmatively offering the defendant an opportunity to withdraw the plea when it imposed a sentence greater than the negotiated sentence in the plea bargain. There is no direct and express conflict with the decision below because the trial court here imposed a sentence on petitioner which was completely consistent with the plea bargain. See written plea agreement at (R-7.)

Although there is no direct and express conflict in the decision below, it is obvious that the 1st DCA disagrees with the 2nd DCA's corollary requirement that a trial court affirmatively offer a defendant an opportunity to withdraw from a contingent plea when the sentence imposed is contrary to the plea. This is the apparent conflict to which the court below referred. It should be noted that Kiefer is a 1974 decision which precedes this Court's decision in Robinson v. State, 373 So. 2d 898 (Fla. 1979). The Kiefer rationale that a trial court must affirmatively offer a defendant an opportunity to withdraw from a plea when it decides not to honor a contingent provision of the plea bargain is, as the district court below recognized, in conflict with this Court's subsequent holding in Robinson at 902:

> [W]e find that an appeal from a guilty [or nolo] plea should never be a substitute for a motion to withdraw a plea. If the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea.

This Court's holding in Robinson, unlike Kiefer and progeny, is consistent with the settled principle that claims and arguments not presented to the trial court are not cognizable on direct appeal. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); State v. Barber, 301 So. 2d 7 (Fla. 1974). Petitioner Goins maintains here, and maintained below in the district court, that the plea bargain as he understood it mandated the imposition of a specific sentence. That claim was not presented to the trial court even though, if petitioner's allegations are made in good faith, it goes to the

voluntariness of the plea and, as Robinson holds, "should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea." Robinson, 373 So. 2d at 902. It frequently happens that a defendant is dissatisfied with the sentence imposed following a plea bargain and may claim, and even believe, that it is contrary to the plea bargain. If so, the place to raise and initially resolve the issue is in the trial court itself, preferably as soon as possible so that the trial court may immediately conduct fact-finding or, alternatively, by a postconviction motion to either enforce the plea bargain or withdraw the plea. As Justice Overton made clear in Robinson, the remedy is always in the trial court and the law does not countenance sandbagging of issues in trial courts by permitting them to be raised for the first time on appeal.

Because the progeny of Kiefer are still being issued, this Court should make clear that its subsequent decision in Robinson controls, and that claims such as here may not be raised for the first time on appeal and must be first raised by a motion to withdraw the plea. Kiefer does not survive Robinson. This motion to withdraw may be filed immediately following the sentence to which objection is made or, as the district court below noted, may be filed as a postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850.

The district court below did err on one point which this Court should correct. Although it correctly held that the issue was not cognizable on appeal absent the filing of a motion to

withdraw, it overlooked the jurisdictional significance of that holding and routinely affirmed the trial court below. It should have summarily dismissed the appeal for lack of jurisdiction pursuant to section 924.06(3), Florida Statutes and Robinson at 903: "We find the district court justified in summarily dismissing the appeal as frivolous on the record before it." On this point, see also Issue II below.

ISSUE II

IS THERE A RIGHT TO APPEAL FROM AN UNRESERVED NOLO PLEA WHERE THE SENTENCE IMPOSED IS PRIMA FACIA LEGAL AND DOES NOT DEPART FROM THE SENTENCING GUIDELINES?

Because jurisdiction is always a threshold issue, the state points out that there was no constitutional or statutory basis for the exercise of appellate review in the district court and that the appeal should have been summarily dismissed. Here, the petitioner pled no contest without reservations and received a sentence which was incontrovertibly within both the sentencing guidelines and the statutory maximum. Under section 924.06 and Robinson, the state could have filed a simple motion to dismiss for lack of jurisdiction, the appeal would have been efficiently ended with a minimum of waste for all concerned, and petitioner could have, if he wished, sought the correct remedy of a motion to withdraw plea in the trial court. Instead, under erroneous decisions of the First District which conflict with both Robinson and section 924.06, the appeal has reached the highest court of the state on a completely frivolous issue.

The right to appeal, with the possible exception of capital cases, is purely statutory under both the Florida and United States constitutions; and the Florida Legislature has the constitutional authority under the separation of powers doctrine to grant or deny the right to appeal, to set the terms and conditions under which the right may be exercised, and to prescribe the conditions under which reversals may be permitted. See, Ross v. Moffitt, 417 U.S. 600, 611 (1974)("[I]t is clear that the State need not provide any appeal at all:); Abney v.

United States, 431 U.S. 651, 656 (1977)("It is well settled that there is no constitutional right to an appeal:" and "The right of appeal as we presently know it in criminal cases, is purely a creature of statute: in order to exercise that statutory right of appeal one must come within the terms of the applicable statute:); Evitts v. Lucey, 469 U.S. 387, 393 (1985)("Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors"); and State v. Creighton, 469 So. 2d 735, 739 (Fla. 1985)("Cases decided after the 1972 revision of article V [of the Florida Constitution] still recognize the right of appeal as a matter of substantive law controllable by statute not only in criminal cases but in civil cases as well")[1].

The Florida Legislature has granted both defendants and the state a limited right to appeal subject to the terms and conditions set out in chapter 924, Florida Statutes. Both the criminal defendant and the state may appeal sentences on the grounds that they are illegal or depart from the sentencing guidelines. Sections 924.06(1)(d) & (e), 924.07(1)(e)& (i). There are no other sentencing issues where an appeal of right is granted. Further, as a term and condition of appeal, section 924.06(3) states that a "defendant who pleads guilty or nolo contendere with no express reservation of the right to appeal

[1]The issue in Creighton was whether certain langauge in article V granted a constitutional right to appeal. This Court held that it did not and reaffirmed the long-standing law that appeals are a matter of substantive law controlled by statute.

shall have no right to a direct appeal." Such defendants "shall obtain review by means of collateral attack."

This Court upheld the constitutionality of section 924.06(3) in Robinson, interpreting it to mean that defendants could appeal a sentence imposed following a plea of guilty or nolo on the ground that the sentence is illegal. This was consistent with the legislative decision in section 924.06(1)(d), as it existed in 1979 when Robinson issued, because a sentence is pronounced after entry of a plea and, necessarily, a criminal defendant cannot know at the time of the plea what sentence will be subsequently imposed. Thus, reading sections 924(6)(1(d) and 924.06(3) in para materia, the statutory right to appeal on grounds that a sentence was illegal could still be exercised following entry of either a guilty or nolo plea. Moreover, since Robinson issued in 1979, the sentencing guidelines have been enacted and the legislature has authorized both the state and the criminal defendant to appeal sentences imposed outside the range recommended by the guidelines. Again, as with a claim of an illegal sentence, a departure sentence can only be imposed following entry of a plea or adjudication of guilt, and section 924.06(3) does not preclude appeal of either an illegal sentence or a departure from the guidelines.

It should be noted, however, that a departure sentence and an illegal sentence are the only two sentencing issues for which the Florida Legislature has authorized a right of appeal under any circumstances, not merely following entry of a plea. Thus, criminal defendants who unreservedly plead nolo or guilty have no

right to a general appeal. Pursuant to Robinson and section 924.06(3), they may only challenge the plea if they assert that the circuit court lacked jurisdiction or that the circuit court erroneously denied a motion to withdraw the plea. Similarly, they may only challenge the sentence if they specifically assert that it is illegal or a departure from the sentencing guidelines. See, Robinson, 373 So. 2d at 902-903:

> The appellant contends that he has a right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived. In effect, he is asserting a right of review without a specific assertion of wrongdoing. We reject this theory of automatic review from a guilty plea.
>
> * * * *
>
> There is clearly no authority to seek an appellate review upon unknown or unidentified grounds, and it is improper to appeal on grounds known to be nonappealable. [e.s.]
>
> * * * *
>
> Attorneys have a responsibility to ensure that our system of justice functions properly. If counsel believes that the plea proceedings are defective or improper, he is ethically bound to immediately advise the trial judge of that fact. It is ethically wrong to ignore or cause technical or procedural errors to ensure an opportunity for reversal on appeal.

This Court might well ask why belabor such an obvious point? The state is doing so because the First District Court of Appeal, in direct contradiction to the holdings of Robinson quoted and discussed above has instituted a system of appellate review under which there is an absolute right to appeal from all guilty or unreserved nolo pleas and to obtain full briefing and review by

the appellate court prior to the determination of the threshold point of whether there is jurisdiction for the appeal. As a consequence of this clearly erroneous and incredibly wasteful policy, approximately 25-35% of the criminal direct appeals which the First District now reviews consists of cases where appellant's counsel files briefs pursuant to Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967) acknowledging that there are no arguably reversible errors, most frequently because the appellant pled guilty and received a sentence incontrovertibly within the sentencing guidelines and the statutory maximum, i.e. for which there was no right to appeal.

The source of this error and mischief is Ford v. State, 575 So. 2d 1335 (Fla. 1st DCA), rev denied, 581 So. 2d 1381 (Fla. 1991) and its progeny. Ford pled no contest without reservation to armed robbery and false imprisonment. He was adjudicated as an habitual felon and sentenced to ten years on one offense and five years on another. Although Ford had pled no contest without reservation and received a legal sentence pursuant to a negotiated plea, he filed a notice of appeal. The state moved to dismiss, pointing out that the plea was without reservation and that Ford had received a negotiated sentence which was within the statutorily authorized maximum[2]. The district court denied the state's motion to dismiss by erroneously attributing to Robinson an unrestricted right to appeal any "issues which occur at the

[2]In actual fact, the sentence was below the statutorily mandated minimum sentence of fifteen years.

time the plea is entered." Ford, 575 So. 2d at 1337. Based on this open-ended misreading of Robinson, and contrary to sections 924.06(1) and (3), the district court then concluded that the state could not raise the jurisdictional bar until a complete record on appeal had been prepared, appellate counsel for both parties had fully reviewed the record and prepared appropriate briefs, and the district court itself had conducted full review pursuant to Anders when no arguable reversible errors had been detected. Only then would the district court make a determination of what had theretofore been a threshold issue, was there jurisdiction for the appeal? Ford's nolo plea without reservation and a negotiated sentence enabled him to circumnavigate Florida's appellate system twice despite the absence of any jurisdictional authority for the appeal or of any cognizable issues. Ford v. State, 575 So. 2d 1335 (Fla. 1st DCA), rev. denied, 581 So. 2d 1381 (Fla. 1991); Ford v. State, 586 So. 2d 511 (Fla. 1st DCA 1991), approved 595 So. 2d 954 (Fla. 1992).

The ultimate outcome of the Ford contretemps after the waste of judicial and public resources was a per curiam affirmance of his convictions and sentences without prejudice to his right to move to withdraw the plea. This returned the case to its original 1990 trial court starting point, a result which could have been easily obtained without the attentions of twenty appellate judges and innumerable lawyers and other support personnel had the district court followed Robinson and dismissed the original appeal without prejudice to Ford's right to move to withdraw his plea as mandated by Robinson.

The routine application of Ford which occurs day after day is illustrated by Kearney v. State, 579 So. 2d 410 (Fla. 1st DCA 1991). Kearney pled nolo contendere to three counts of grand theft and one count of possession of stolen credit cards. He stated that he wanted to reserve the right to appeal the issue of the amount of restitution ordered by the court[3]. The trial court sentenced Kearney to concurrent two-year terms of community control and did not order restitution. Thus, pursuant to Robinson and section 924.06(1), Kearney could appeal only if his counsel was prepared to make a good faith argument that two years of community control exceeded the statutory maximum for grand theft and possession of stolen credit cards. Whether in good faith or not, Kearney appealed and the state moved to dismiss based on the obvious absence of jurisdiction. The First District denied the state's motion to dismiss on the authority of Ford, reasoning that jurisdiction, as a matter of law, cannot be determined until full briefing and judicial review have been conducted. Kearney's counsel then filed an Anders brief, the state answered, the district court reviewed everything and determined, correctly if belatedly, that there were no cognizable

[3]There is no right to appeal the amount of restitution imposed unless restitution is unauthorized or exceeds the maximum amount authorized, i.e., is illegal. In either event, reserving the right was a useless act because the imposition of illegal restitution would be cognizable under 924.06(1)(d) and Robinson. Reserving the right was also contrary to Brown v. State, 376 So. 2d 382 (Fla. 1979).

Robinson issues, that jurisdiction was not present, and that the appeal should be dismissed[4].

There are two obvious conclusions to be drawn from the above. First, although **Ford** purports to rely on **Robinson**, the two decisions are totally antithetical. **Robinson** recognizes a very narrow right to appeal following entry of nolo and guilty pleas; **Ford** creates an unlimited right to appeal. **Robinson** is consistent with section 924.06 and the legislative authority to grant appeals and set terms and conditions; **Ford** ignores the statute and the legislature entirely. **Robinson** is a practical and efficient way to handle the limited issues which may arise in nolo and guilty pleas; **Ford** creates a Rube Goldberg nightmare which serves only to furnish employment to appellate lawyers and to burden the system and the taxpayer with useless appeals.

The second obvious point is that this petition should never have survived a motion to dismiss for lack of jurisdiction in the district court. Had this been permitted, petitioner Goins could have long since obtained a ruling on his only remedy, a motion to withdraw the plea in the trial court and everyone concerned would have been well- and better-served.

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[4]The district court continues to perform its full-blown Ford review but, presumably out of professional embarassment at having to author and sign such published opinions for the public record, now dismisses such appeals with a terse unpublished order citing simply to Kearney. See appendix A and B which contains a recent example of such unpublished order and a boilerplate answer brief which the state now files in such frivolous appeals. The system has now evolved so that it performs useless work with a high degree of efficiency.

For the above reasons, the state urges this Court to resolve the conflict between **Robinson** and **Ford** and issue an appropriate clarifying decision on the right to appeal following entry of a guilty or unreserved nolo plea.

ARGUMENT

ISSUE III

WHETHER A TRIAL COURT IS OBLIGATED TO PROVIDE A DEFENDANT AN OPPORTUNITY TO WITHDRAW HIS PLEA WHEN THE TRIAL COURT IMPOSES A SENTENCE WHICH IS GREATER THAN THE SENTENCE THE DEFENDANT HAD ANTICIPATED.

It is not necessary to further review the merits of the decision below. Should the Court wish to, however, the State submits the following. "A judge is never bound in sentencing by the negotiations which occur between the prosecuting attorney and the defense counsel." State v. Adams, 342 So. 2d 818, 820 (Fla. 1977)(citing Davis v. State, 308 So. 2d 27 (Fla. 1975)). In Adams, the defendant changed his plea to guilty based on a plea agreement in which the State agreed to recommend a sentence of not over ten years. Id. at 819. The trial court accepted the plea, however, "[a]fter a presentence investigation, the trial judge refused to accept the recommendation of the state attorney and sentenced the defendant to a term of twenty years." The First District Court of Appeals vacated this sentence and remanded with instructions to either impose the sentence in accordance with the plea bargain or provide the defendant an opportunity to withdraw his plea. Id. This Court quashed that decision of the First District and ordered the original twenty year sentence be reinstated. Id. at 820. This Court reasoned that, because the trial judge was not bound to accept the recommended sentence and that the bargain of the plea agreement was met when the state attorney made the agreed recommendation to the court, there was no need for the trial court

to inform the defendant that it could not follow the recommended sentence nor did the trial court have to offer the defendant an opportunity to withdraw his plea. Id.

In the instant case the Petitioner signed a plea agreement which stated that:

> I understand that the maximum period of imprisonment and fine that I could receive on each offense is as follows: Count 1- sexual activity with a child- 30 years, Count 3- solicitation of sexual activity with a child- 5 years."

(R-7)(emphasis added). The agreement also stated that:

> I further understand that my sentence will be imposed under the Uniform Sentencing Guidelines. A presumptive sentence will be determined based upon certain factors. The Court can exceed this presumptive sentence and impose up to the maximum sentence permitted by law by stating clear and convincing reasons for such departure.

(R-7). At the plea hearing, the trial judge asked the Petitioner if he had had an opportunity to think about the terms of the agreement and discuss them with his attorney. (R-49). The Petitioner responded "Yes". (R-49). The trial judge asked the Petitioner if he believed the terms of the plea agreement were in his best interest. Again, the Petitioner responded "Yes". (R-50). With these responses, the Petitioner expressed to the trial court his knowledge and understanding of the above listed terms of the plea agreement. Thus, he expressed his knowledge that the trial court could exceed the recommendation of the state attorney and impose a sentence up to the maximum permitted by the guidelines. Further, the Petitioner expressed his knowledge and understanding

that the trial court could exceed the guidelines in sentencing him if the court found "clear and convincing reasons for such departure." Hence, the plea agreement and the transcript of the plea hearing show that the Petitioner was aware of the possibility that the trial court would not impose the recommended sentence.

Contrary to the Petitioner's claim, nothing in the record indicates that the Petitioner entered into the plea agreement conditioned on the trial court accepting the recommended sentence of the State. This Court warned disgruntled defendant about making such claims in Costello v. State, 260 So. 2d 198 (Fla. 1972). In Costello this Court stated:

> Defendants who plead guilty and are given a stiffer sentence than they anticipated cannot automatically expect to receive another try at a lighter sentence. It is not enough for a defendant to argue that he was under an impression that a promise of a lesser penalty had been made by a judge or prosecutor. A reasonable basis for such an impression must be shown.

Id. at 201. The only promise indicated by the record is the State's promise to "recommend" a sentence of five and a half years department of corrections to be followed by three years probation. This is precisely what the defense counsel told the trial judge when explaining the plea agreement at the plea hearing. (R-48). The record contains no statements expressing that the plea was conditioned on the trial court's acceptance of the recommended sentence. The record shows that the trial court never promised it would impose the recommended sentence. The record also shows that the Petitioner never requested that the trial court allow him to

withdraw his plea if the trial court determined it could not follow the recommended sentence. Therefore, as in Adams, the only bargain in the plea agreement was that the State would make a recommendation to the trial court to impose a sentence of five and a half years incarceration followed by three years probation. The State lived up to its end of the bargain and made such a recommendation and stood by it through sentencing. (R-8, 48, 57-58). Because the State had lived up to its end of the plea bargain and the trial court was not bound to accept the recommended sentence, following Adams, there was no need for the trial court to allow the Petitioner an opportunity to withdraw his plea. See Oglesby v. State, 584 So. 2d 93, 94 (Fla. 1st DCA 1991).

In Peterson v. State, 350 So. 2d 565 (Fla. 1st DCA 1977), the appellate court discussed the proper procedure a defendant should follow if he intends to make the plea agreement contingent on the trial court's imposition of the recommended sentence. The appellate court instructed as follows:

> Unless a defendant is willing to enter a plea of guilty or nolo contendere to a charge based only upon the state's recommendation as to disposition of the case, the entry of such a plea should be conditioned upon agreement by the trial court that if it determines that it will not make the recommended disposition, it will then allow the defendant to withdraw his plea. Such procedure would, we believe, carry out the intent of the aforesaid rule (Rule 3.171 Fla.R.Crim.P.) and would eliminate the possibility that a defendant may be misled by too great a reliance on the prosecutor's recommendation. The court, of course, can decline to accept such condition, and if it does, the defendant must then determine whether or not he wishes to enter the plea without a commitment by the court that it will either accept the state's recommendation or allow the defendant to withdraw his plea if it is not accepted.

Id. at 560. Accord Wood v. State, 357 So. 2d 1060, 1065 (Fla. 1st DCA 1978). See, e.g., Rodriguez v. State, 610 So. 2d 476 (Fla. 2d DCA 1992)(in which the Second District Court of Appeals held that the trial court should have taken action to permit the defendant to withdraw his plea after it decided to depart from the guidelines and not sentence him to the agreed upon 22-year sentence because "all parties and the trial court understood that Mr. Rodriguez's plea was conditioned upon a guidelines sentence of not more than 22 years' imprisonment.")(emphasis added). Again, in the instant case, the record shows that such an understanding did not exist and the Petitioner never raised the issue of such a contingency before the trial court.

As discussed in Issue I above, an appeal from a plea should never be a substitute for a motion to withdraw. Robinson v. State 373 So. 2d 898 (Fla. 1979). As the First District Court of Appeal pointed out in its opinion in this case, had the Petitioner wanted to withdraw his plea when the trial court announced it would impose a nine year sentence he should have motioned to do so. Instead the Petitioner and his counsel sat silently (R-58), and no such request was ever made. Nothing in the rules of criminal procedure require defendants to wait for an invitation from the trial court before they can move to withdraw a plea.

Hence because: the Petitioner entered into a plea agreement in which the only sentencing promise was that the State would recommend a certain sentence and that promise was kept, the petitioner was aware that the trial court could impose a harsher

sentence than that recommended by the State, the plea was not conditional on the trial court's imposing the recommended sentence, and the petitioner failed to ever move to withdraw his plea after the trial court announced the sentence, the First District Court of Appeal made the appropriate determination that the trial court properly sentenced the Petitioner without providing him a clear opportunity to withdraw his plea.

ISSUE IV

WHETHER THE TRIAL COURT HAD AN AFFIRMATIVE DUTY TO PROVIDE THE DEFENDANT WITH A CLEAR OPPORTUNITY TO WITHDRAW HIS PLEA WHEN THE TRIAL COURT DECLINED TO FOLLOW THE RECOMMENDED SENTENCE IN THE PLEA AGREEMENT.

The Petitioner does not argue that he was prohibited from moving to withdraw his plea, as he clearly had the right and opportunity to do so but for his own reasons chose not to do so. Instead the Petitioner argues that there should be a broad rule that trial courts be required to take affirmative action to provide defendants an opportunity to withdraw their pleas whenever a trial court decides not to follow the recommended sentence of the plea agreement. Apparently, the Petitioner's argued for rule of law would apply regardless of the trial court's level of involvement in the plea negotiations or whether a contingency that the agreement was conditioned on the trial court's following the recommended sentence existed.

The Petitioner's position is in conflict with the opinion of the First District Court of Appeal in the instant case as it holds that "[w]hen the trial court does not participate in the plea negotiations or promise the defendant that it will impose the recommended sentence, it is under no duty to provide the defendant a clear opportunity to withdraw his or her plea at sentencing when it decides to impose a sentence greater than that recommended in the plea agreement." (Appendix C).

The facts of the instant case are similar to those of another case, Stewart v. State, 511 So. 2d 375 (Fla. 1st DCA 1987), in which the First District Court held that the trial court was under no obligation to allow the defendant to withdraw his plea. In Stewart, the First District Court reasoned as follows:

> [B]ecause the plea bargain was one for the prosecutor's recommendation of a certain sentence, and the transcript shows that the prosecutor fulfilled the agreement by making the recommendation, the court was not bound by that recommendation and was under no duty to allow appellant to withdraw his plea.

Id. at 376 (citing State v. Adams, 342 So. 2d 818 (Fla. 1977)). Similarly in the instant case, as shown in Issue III, the trial court was not involved in the plea negotiations and the plea agreement was for the prosecution to recommend a certain sentence. (R-48). This was done. (R-8, 48, 57-58). Further, as shown in Issue III, the Petitioner was aware that the trial court was not bound by the prosecution's recommended sentence as the plea agreement specifically stated what sentencing option were available to the trial court. (R-7). Thus, under the direction of this court in Adams, the First District Court held the trial court was not obligated to allow the Petitioner to withdraw his plea.

In the decisions of the First District Court, which pertain to there not being an obligation on the trial court to allow the defendant to withdraw his plea when a sentence greater than that recommended is imposed, cite to several limitations of this rule. In Little v. State, 492 So. 2d 807 (Fla. 1st DCA 1986), the First District stated as follows:

> [T]he trial court is under no duty to provide the defendant with a clear opportunity to withdraw his plea at sentencing where there is no suggestion that the trial court promised the sentence recommended by the State, or that the trial court was a party to the plea negotiations, and there was no assertion that the trial court refused a request by the defendant to withdraw his plea or that such request was ever made.

Id. at 808. This holding is in keeping with the decision of this Court in Davis v. State, 308 So. 2d 27 (Fla. 1975), in which it held that when a trial court participates in the plea negotiations and indicates it will impose a certain sentence as part of the bargain, "[s]hould a trial judge later decide that a sentence should not be as lenient as he had contemplated earlier, he must be liberal in permitting a withdrawal of the guilty plea." Id. at 29. Many of the Second District Court's reversals in cases where the defendants were not afforded an opportunity to withdraw their pleas are based on this same factual situation. See Dunkel v. State, 432 So. 2d 201 (Fla. 2d DCA 1983)("Appellant changed his plea upon being advised by a trial judge that appellant could anticipate a maximum possible sentence of up to one year in the county jail."); Gumbiner v. State, 429 So. 2d 828 (Fla. 2d DCA 1983)(appellant pled no contest "based upon a bargain with the state, tentatively approved by the court . . ."); Freeman v. State, 376 So. 2d 294 (Fla. 2d DCA 1979)("the sentence cannot stand because it deviated from the terms of the plea bargain which the court had originally approved."); Perry v. State, 510 So. 2d 1083, 1084 (Fla. 2d DCA 1987)("the trial court, the assistant state attorney, and the appellant's counsel agreed that the appellant would receive two years' incarceration in exchange for his plea of nolo contendere.").

The other cases the Petitioner relies on from the Second District contain other factual situations which provided justifiable grounds to allow a defendant to withdraw his or her plea. See Goldberg v. State, 536 So. 2d 364, 365 (Fla. 2d DCA 1988)(in which, due to misrepresentations by the defendant that he had no substantial prior criminal record, all parties believed the defendant would receive probation.) Rodriguez v. State, supra, 610 So. 2d at 477 (The trial court was aware the plea was conditioned on the defendant receiving not more than 22 years in prison.); Kiefer v. State, 295 So. 2d 688, 689 (Fla. 2d DCA 1974)(where it was understood that the defendant's plea was conditioned on his receiving probation).

If this Court were to find in favor of the Petitioner, pleas of guilty or nolo contendere would serve as free tries at sentencing. The sentencing power of the trial courts, in any case involving a plea agreement, would be limited to imposing the recommended sentence agreed to by the state attorney and defendant. Thus, the nature of a "recommended" sentence would be lost as it would become a binding obligation on the trial court. The trial courts of Florida have the ultimate authority in sentencing criminals and this authority should not be bargained away by anyone other than the trial courts themselves. Hence, the First District Court of Appeal made the appropriate determination that the trial court in the instant case was not obligated to provide the Petitioner a clear opportunity to withdraw his plea when it determined not to impose the recommended sentence.

CONCLUSION

Based on the foregoing arguments, reasoning, and cited legal authorities the State respectfully requests this Honorable Court to hold that there is no discretionary jurisdiction in this Court and that there was no appellate jurisdiction in the district court. If the merits are reached, the district court below should be affirmed and the conflicting opinions of the Second District Court of Appeals disapproved.

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 MARK EVAN FREDERICK, attorney for Petitioner, Post Office Box 385, Destin, Florida 32540-0385, this 8th day of September, 1995.

DOUGLAS GURNEE
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IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

v. CASE NO. 85,651
(DCA NO. 94-864)

STATE OF FLORIDA,

Respondent.

_____/

APPENDIX

A. First District Court of Appeal Order Dated September 1, 1995.

B. Answer Brief Dated August 28, 1995.

C. First District Court of Appeal Opinion dated April 13, 1995 affirming the decision of the trial court.