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IN THE SUPREME COURT OF FLORIDA

JORGE CASTRO, :

Petitioner, :

v. : CASE NO. 93,335

STATE OF FLORIDA, :

Respondent. :

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INITIAL BRIEF OF PETITIONER ON THE MERITS

I STATEMENT OF THE CASE AND FACTS

By information, the state charged petitioner, Jorge Castro, who is 77 years old, under section 322.34(1)(c), Florida Statutes, with the third-degree felony of driving while license is suspended or revoked (DWLSR) by a person with two previous convictions of the same offense, as well as grand theft auto and burglary of a conveyance (R 8-9,S 17).[1]

Castro pleaded guilty to the DWLSR charge only, reserving his right to appeal enhancement to a felony, on the ground there were no valid qualifiers because he was not represented by counsel in the priors (Plea 3-4,5). The other charges were nol-prossed (Plea 4).

The following took place during entry of the plea:

MR. WILLIAMS [defense counsel]: Just for

[1]In this brief, the record on appeal will be referred to as "R," the plea transcript as "Plea," and the supplemental record as "S," followed by the page number.

clarification, we're not disputing that he's got a prior driving while license suspended on his record. We are disputing there are no valid qualifiers for the enhancement because they were neither represented by counsel and validated in securing a plea.

These were all taken in south Florida. And they, unlike local county judges, herd through like cattle.

THE COURT: So there will be documents presented to the Court by the state at the time of sentencing, and they will either reflect that they are valid convictions or not.

MR. WILLIAMS: That's my understanding.

MR. FINA [prosecutor]: And the state would further nol-pros the remaining two counts of the information as part of this plea.

(Plea 3-4). Later, the prosecutor said:

. . .since. . .we're dealing with Dade County, I ask that he contact his attorney maybe a week before sentencing to ensure that we have got all the documents from Dade County. Usually it takes at least two months to get anything from them. And if we don't have it, maybe he can avoid a trip back up here for sentencing.

(Plea 9).

Castro failed to appear for sentencing, and a capias was issued (R 46-47). After his arrest, Castro wrote to the judge explaining that his aunt had died, which required him to go to Lima, Peru for two months, and he could not remember if he received a notice of the court date before he left (R 50).

At sentencing, defense counsel explained:

The issue is whether or not there is [sic] sufficient qualifying prior convictions for driving while suspended based upon his

> assertion that any prior he had did not have representation by a lawyer or a valid waiver that could be utilized for enhancement for felony purposes.

(S 5). A different prosecutor - Daniel Dill - appeared for the state. Dill said Castro had been convicted previously of felony DWLSR in Broward County in October, 1996 (S 6). Defense counsel argued that the mere fact of such a conviction did not prove that the issue of uncounseled priors was raised in the Broward case, or that the conviction there was valid. Further, the defense argued that the due process protections which attach to a conviction of felony petit theft would also apply in this context (S 7-8).

The prosecutor said a certified copy of Castro's driving record was in the file (S 9). Defense counsel argued the driving record was not sufficient to answer the questions of whether Castro had been represented by, or validly waived, counsel on the prior convictions (S 9). The court found the certified copy of the driving record to be sufficient proof that Castro had the requisite priors (S 10).

Castro also disputed several entries on the PSI as not his convictions (S 12). The record does not contain a sentencing guidelines scoresheet, but defense counsel asserted he scored nonstate prison (S 13). Although the state offered no proof that the disputed entries were correct, the trial court was "inclined to leave the scoresheet as is," because either way resulted in scoring as nonstate prison (S 13).

December 10, 1996, Castro was placed on probation for 1

year, with a condition that he serve 364 days in jail, plus pay court costs and a public defender lien (R 51-55). Credit for time served was orally pronounced as 172 days, including 50 days Castro was held in south Florida on the warrant (S 14). The written order, however, granted only 105 days (R 56).

On appeal, petitioner argued inter alia 1) the state had failed in its obligation under the plea agreement to **prove** he had either been represented by counsel or waived counsel on his prior convictions, and 2) section 322.34(1)(c) is unconstitutional. The district court made no comment on the first issue, but rather, affirmed per curiam with a cite to State v. Gloster, 703 So.2d 1174 (Fla. 1st DCA 1997), which is pending review in this court, no. 92,235 (Fla. 1998).

In Gloster, the trial court reversed the conviction finding the statute to be unconstitutional. On appeal, however, the First District reversed, finding a trial judge has no opportunity to treat a violation of section 322.34(1)(c) as a misdemeanor, and therefore, the potential for violation of the constitutionally mandated separation of powers does not arise. This court has accepted discretionary review under Article V, section 3(b)(3), Florida Constitution, of Gloster, this case, and other similarly situated cases.

II SUMMARY OF THE ARGUMENT

Issue I: Section 322.34(1)(c), Florida Statutes (1995), is an inartfully drafted provision which, unlike comparable statutes enhancing a third or subsequent misdemeanor of DUI or petit theft into a felony, hinges the enhancement of a third or subsequent offense of driving while license suspended upon "conviction." In the absence of any clear legislative directive to the contrary, a withhold of adjudication following a no contest plea is not a conviction in this context. Therefore, the authority of the trial judge to impose or withhold adjudication gives the judiciary the power to prescribe punishments reserved by the Florida Constitution to the legislature.

District courts holding to the contrary are in error. Contrary to the conclusion in State v. Gloster, supra, the option to treat the offense as a misdemeanor is available to the trial judge upon a withhold of adjudication. The judge may impose a sanction of a year or less in duration. Moreover, the strained statutory exegesis in Raulerson v. State, 699 So.2d 339 (Fla. 5th DCA 1997), review granted, 709 So.2d 537 (Fla. March 5, 1998), and State v. Keirn, 23 Fla.L. Weekly D1144 (Fla. 4th DCA May 6, 1998), review granted, 718 So.2d 168 (Fla. July 22, 1998), notwithstanding, this statute is not excepted from the Florida rule that a plea of nolo contendere followed by withhold of adjudication of guilt is not a conviction. The Raulerson court has misread precedent in this area, and the construction urged in the concurring opinion smacks of judicial

legislation. The Keirn court erroneously incorporated section 322.34(1)(c) into a separate statute dealing with noncriminal traffic infractions to arrive at a flawed conclusion that adjudication is not necessary for felony enhancement.

Consequently, this court should rule section 322.34(1)(c) an invalid delegation of legislative power, in violation of Article III, Section 1 of the Florida Constitution.

Issue II: The state failed to fulfill its part of the plea bargain, in which it agreed to **prove** the prior convictions were counseled. The state having failed to prove the requisite prior convictions were valid, the trial court could not lawfully enhance the conviction to a felony, thus the conviction must be reduced to a misdemeanor.

Issue III: Although moot here, undersigned requests that this court address the issue of credit for time served for the guidance of the courts. Credit for time served was orally pronounced as 172 days, but the written order granted only 105 days. Where there is a discrepancy between the oral and written sentences, the oral pronouncement controls, and the written order should be corrected to conform to the oral. Petitioner contends that the Appeal Reform Act of 1996 did not abrogate this requirement of consistency as to **any** term of the sentence. More specifically, this court has held in Mancino v. State, infra, that a sentence is illegal to the extent credit for time served is not granted.

III ARGUMENT

ISSUE I

SECTION 322.34(1)(C), FLORIDA STATUTES (1995), VIOLATES THE CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS BECAUSE IT ALLOWS TRIAL JUDGES TO PRESCRIBE THE SEVERITY OF THE OFFENSE AND PERMISSIBLE PUNISHMENT VIA EXERCISE OF DISCRETION TO IMPOSE OR WITHHOLD ADJUDICATION OF GUILT.

The issue in this case is whether section 322.34(1)(c), Florida Statutes, violates the constitutional requirement of separation of the powers of the judiciary and legislature, on grounds that it gives trial judges the authority to prescribe crimes and authorized punishments. This case follows the First District's opinion in State v. Gloster, 703 So.2d 1174 (Fla. 1st DCA 1997).

As set out in the district court opinion in Gloster, the statute provides that a third or subsequent offense of driving while license suspended or revoked (DWLSR) is to be punished "upon conviction" as a third-degree felony, an enhancement from misdemeanor treatment for previous offenses. In accord with the decision in State v. Santiago, 4 Fla.L. Weekly Supp. 220 (17th Cir. Aug. 2, 1996), Gloster argued that a conviction under the statute correlates to adjudication of guilt. The authority of the trial judge to withhold or impose adjudication of guilt, pursuant to section 948.01(2), Florida Statutes, unconstitutionally carries with it the legislative prerogative to prescribe authorized punishments.

The district court rejected this argument, reasoning that,

because a withhold of adjudication must be accompanied by probation, which upon revocation must result in adjudication, the trial judge never has an opportunity to treat a third or subsequent DWLSR as a misdemeanor. Thus, concluded the court, the constitutional concern does not arise. Gloster, supra. Two other district courts have upheld the statute for different reasons, each construing the statute such that an adjudication of guilt is not necessary for conviction. Raulerson v. State, 699 So.2d 339 (Fla. 5th DCA 1997), review granted, 709 So.2d 537 (Fla. March 5, 1998); State v. Keirn, 23 Fla. L. Weekly D1144 (4th DCA May 6, 1998), review granted, 718 So.2d 168 (Fla. July 22, 1998).

Each of these decisions is in error. Under section 322.-34(1), unlike other recidivist enhancement statutes, the judge retains authority to impose or withhold adjudication, a decision which determines whether the offense is a misdemeanor or felony, and what punishment may be imposed therefor. Contrary to the conclusion in Gloster, the option to treat the offense as a misdemeanor does indeed arise. Moreover, the strained statutory exegesis in Raulerson and Keirn notwithstanding, this statute is not excepted from the rule followed in Florida that a plea of nolo contendere followed by withhold of adjudication of guilt is not a conviction.

In the discussion that follows, petitioner will contrast this statute with comparable recidivist enhancement schemes elevating misdemeanors into felonies, set out the pertinent

caselaw concerning the meaning of the term "conviction" in Florida law and, finally, point out the flaws in Gloster, Raulerson and Keirn.

A. "CONVICTION" UNDER FLORIDA LAW

As one court has noted, the word "conviction" is susceptible of different interpretations depending on the context in which it is used. State Department of Highway Safety v.DeGrossi, 680 So.2d 1093, 1095 (Fla. 3d DCA 1996). In Smith v. State, 75 Fla. 468, 78 So. 530 (1918), the state prosecuted the defendant for sale of liquor in a dry county, "having been before convicted of the same offense." The conviction was reversed on the court's finding that "convicted" meant "adjudicated," and the information alleged only that the defendant had previously pled guilty to the offense. Citing Smith and other precedent, the Third District held that the offense of possession of a firearm by a convicted felon contained, as an essential element, a prior felony adjudication of guilt. Castillo v. State, 590 So. 2d 458 (Fla. 3d DCA 1991).

The federal courts agree that, under Florida law, when a "conviction" is an essential element of another offense, adjudication, a guilty verdict or at least a guilty plea is required. In United States v. Thompson, 756 F.Supp. 1492 (N.D. Fla. 1991), the court found that a *nolo contendere* plea without adjudication could not be used as a felony conviction to establish the federal offense of receiving firearms by a person previously convicted of a felony. The Eleventh Circuit recent-

ly approved Thompson when it reversed a federal conviction of possession of a firearm by a convicted felon in United States v. Willis, 106 F.3d 966 (11th Cir. 1997). The Thompson and Willis courts based their decisions on passages from two Florida Supreme Court opinions, Garron v. State, 528 So.2d 353 (Fla. 1988), and State v. Gazda, 257 So.2d 242 (Fla. 1971). The Garron court held that a *nolo contendere* plea is not a confession of guilt, and is therefore not tantamount to a conviction for purposes of an aggravating circumstance in capital sentencing proceedings. In Gazda, the court held that, for purposes of determining whether a sentence previously withheld upon conviction may subsequently be imposed,

> the term "conviction" means a determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court. It is important to distinguish a "judgment of conviction" which is defective unless it contains an adjudication of guilt.

257 So.2d at 243-44.

Thus, for purposes of determining the elements of an offense and the punishment authorized therefor, a "conviction" is defined in Florida as an adjudication of guilt, verdict of guilt, or plea of guilty. This definition excludes a plea of *nolo contendere* without adjudication of guilt.

Unlike Gloster, the trial court rejected Castro's claim that he could not be convicted of a felony because the state had failed to prove he had two valid prior convictions. Castro was convicted, i.e., adjudicated guilty, of a felony. The

actual disposition of his case, however, does not defeat the separation of powers argument made here. In Gloster, by comparison, because a different trial court ruled in his favor, the case against Gloster was dismissed without a plea. Had the issue been resolved against him, he doubtless would have pled no contest, reserving the right to appeal the denial of the motion to dismiss. Thus, short of an adjudication of guilt, he would not have a "conviction" for purposes of section 322.-34(1)(c), Florida Statutes.

This conclusion is consistent with the traffic court rules, which define a conviction under Chapter 322 as a "determination that a defendant has committed a traffic infraction. . .unless adjudication is withheld..." Fla. R.Traf.Ct. 6.560. Though driving with a suspended license is a criminal offense, not an infraction, it is part of Chapter 322 and should therefore be applied consistently with other provisions therein. If adjudication is withheld, the offender has not been convicted.

B. OPERATION OF COMPARABLE STATUTES

The differences between this statutory provision and the two it most closely resembles, governing felony DUI and felony petit theft, reinforce the conclusion that a conviction requires adjudication under section 322.34(1)(c). Because of similarities in the provisions, construction *in pari materia* is appropriate. See Smith v. Crawford, 645 So.2d 513, 523 (Fla. 1st DCA 1994); V.C.F. v. State, 569 So.2d 1364 (Fla. 1st DCA 1990) (statutes on related subject or object are construed *in*

pari materia to reach compatible interpretations). Judge Kaplan compared the felony DWLSR, felony DUI and felony petit theft provisions in Santiago, supra, to petitioner's knowledge, the first published opinion on this issue.

Section 316.656(1), Florida Statutes, requires adjudication in DUI cases, leaving no judicial discretion to dictate the degree of the offense via the power to withhold or impose adjudication. Consistent with the recognition in Thompson, of a "common perception" that one who has not been adjudicated guilty is not convicted, 756 F. Supp. at 1496, this provision creates an exception to the rule. Otherwise, the language of section 316.656(1) would be superfluous. Section 812.014-(3)(c), defining felony petit theft, takes another tack around the common perception by defining the repetition of the offense as a felony regardless of whether it results in conviction.

As the circuit court recognized in Santiago, the felony DWLSR provision is unconstitutional precisely because it is not written like either the felony DUI or felony petit theft provisions. The court there also recognized that the judiciary cannot rectify this error by rewriting the statute. Only by departing from the plain meaning of the provision, by abandoning precedent, and by violating rules of strict construction and resolution of ambiguity in favor of the accused can the disparity be overcome and the constitutional defect in the statute be dissolved.

C. CRITIQUE OF RAULERSON

In Raulerson, supra, the Fifth DCA held that section 322.-34(1)(c) does not violate the constitutionally required separation of powers because a "conviction" as specified in the statute does not require adjudication of guilt. Both the majority and concurring opinions in Raulerson suffer substantial flaws. Both opinions rely on the excerpt in Gazda, quoted above, without taking stock of the fact that, by omission, the Gazda court exempted no contest pleas without adjudication from the definition of "conviction." Raulerson pled no contest. Id. at 339.

As noted above, the felony DWLSR prosecution against Gloster was dismissed without a plea; had the trial court ruled against him on a motion to dismiss, his plea would have been no contest, reserving the right to appeal denial of the motion. Thus, Gloster faced the potential of punishment for a third-degree felony based on the trial court's determination to adjudicate him guilty following a plea of no contest. Petitioner Castro, on the other hand, faced the reality, not merely the potential, of this outcome.

The majority in Raulerson also quoted from Florida Rule of Criminal Procedure 3.702(d)(2), which defines a conviction as a determination of guilt resulting from plea or trial for purposes of the sentencing guidelines. This illustrates only that "conviction" has different definitions for different purposes. As noted above, the general rule is that a conviction connotes an adjudication of guilt. Also as noted above, the traffic

rules exclude offenses for which adjudication has been withheld from the definition of conviction. Felony DWSLR, though a criminal offense, is part of chapter 322, and the rules governing other provisions under that specific chapter have greater application in interpreting the statute than do the general guidelines rules.

In his concurring opinion in Raulerson, Judge Harris took the position that, although the felony DUI and felony DWSLR statutes are written differently, they should be applied consistently for policy reasons. Id. at 341. Petitioner respectfully suggests that this is precisely the type of judicial legislation Judge Kaplan prudently declined to embrace in Santiago, supra. See generally, Brown v. State, 358 So.2d 16, 20 (Fla. 1978) (courts must not effectively rewrite enactment in an effort to uphold it). Judge Harris concluded:

> This is an appropriate case, as indicated by the majority opinion, in which to apply the supreme court's distinction between a conviction and an adjudication of guilt.

Id. at D2269. This is an apparent reference to Gazda, supra. However, the Raulerson court evidently did not recognize that no contest pleas without adjudication are not convictions even under Gazda, a significant oversight in light of Raulerson's plea of no contest.

D. CRITIQUE OF KEIRN

In State v. Keirn, supra, the Fourth District closely analyzed Chapters 318 and 322, Florida Statutes, as well as several traffic court provisions to conclude that a conviction

under section 322.34 means a finding of guilt, regardless of adjudication. In petitioner's view, the Keirn court's invocation of the provisions of Chapter 318 to construe "conviction" contrary to the general Florida rule is unwarranted.

In Keirn, the court focused on section 318.14(10)(a), which provides for a withhold of adjudication for noncriminal traffic infractions under specified circumstances which are unavailable for the criminal offense of DWSLR under section 322.34(1). If adjudication is withheld for an offense prescribed in section 318.14, there is no conviction. § 318.-14(11). The court also pointed to Florida Rule of Traffic Procedure 6.291(d), which provides that "elections" under section 318.14(10) -- the means by which to avoid adjudication -- are not convictions as the term is used in chapter 322. The court concluded:

> Given this construction of the term "conviction," the concern noted by the trial judge does not exist. Even if the judge in this case were to withhold adjudication on the driving while license suspended charge after a plea or verdict, such a disposition would still amount to a third "conviction" under section 322.34(1)(c), because it is a disposition outside of section 318.14(10).

Id. at 1147.

In petitioner's view, the flaws in this formulation stem from the rationale that section 318.14(10), which concerns noncriminal traffic infractions, also governs the criminal traffic infraction of driving while license suspended set out in section 322.34, Florida Statutes. Although the court

pointed out that section 318.14 governs some criminal traffic infractions, these are set out in the provision and driving while license suspended under section 322.34 is not among them.

The Keirn court's incorporation of section 322.34 into section 318.14 by implication does not comport with principles of statutory construction. Statutes are to be construed according to their plain meaning. State v. Perez, 531 So.2d 961, 962 (Fla. 1988); Hamilton v. State, 645 So.2d 555, 560 (Fla. 2d DCA 1994), app'd in part, 660 So.2d 1038 (Fla. 1995). Moreover, penal statutes must be strictly construed, and any ambiguity must be resolved in favor of the accused. §775.021(1), Fla. Stat.

The error in incorporating section 322.34 by implication led the Keirn court to reach the unwarranted conclusion that section 318.14(10) is the sole means to avoiding a "conviction" under 322.34, despite that the trial judge retains the authority to withhold adjudication pursuant to section 948.01(2), Florida Statutes.

The extensive cross-referencing and nods to legislative intent of Keirn notwithstanding, there is no unambiguous mandate in these provisions to construe "conviction" under seciton 322.34(1)(c) in a manner that makes adjudication of guilt irrelevant. As recognized in Part I of the opinion in Keirn, absent statutory direction to the contrary, the withholding of adjudication following a plea of nolo contendere does not constitute a conviction under Florida law. Id. at D1145. See

Garron v. State, supra.

E. CRITIQUE OF GLOSTER

In Gloster, the First District reasoned that no encroachment on legislative powers can occur under section 322.-34(1)(c), because the trial court never has an opportunity to treat the offense as a misdemeanor.

> ...[I]t becomes apparent that there are two possible alternatives when one charged with a violation of section 322.34(1)(c) has adjudication of guilt withheld and is placed on probation--either the term of probation will be successfully completed, in which event the defendant will not have been convicted at all; or probation will be revoked, in which case the defendant must be adjudicated guilty of a violation of section 322.34(1)(c) and sentenced accordingly. Treating the charge as a misdemeanor (as *Santiago* suggests) is simply not an available alternative.

Gloster, supra, 703 So.2d at 1176.

The First District's perspective creates more problems than it solves. These problems arise from uncertainty over the sanction available to the trial court when it withholds adjudication of guilt. The court does not address the permissible duration of probation which may be imposed upon a withhold of adjudication. If probation of more than a year in duration is imposed, the offender will have received an illegal sanction, one which exceeds the permissible punishment for a first-degree misdemeanor. § 775.082(4)(a), Fla.Stat. (1997). No felony punishment is authorized for a case in this posture; the offense is a misdemeanor precisely because adjudication was withheld. Of course, the offender must at this point challenge

the illegality of the sentence on direct appeal or be held to have waived it.

Additional uncertainty arises upon violation of probation of a year or less in duration following a withhold of adjudication. May the trial court then, upon adjudication of guilt, impose a sentence of up to 5 years in prison? This uncertainty in the potential punishment for an offense deprives the offender of notice essential to due process of law under the state and federal constitutions. See generally, Kolendar v. Lawson, 461 U.S. 352 (1983); Grayned v. City of Rockford, 408 U.S. 104 (1972).

F. CONCLUSION

Section 322.34(1)(c) is an inartfully drafted provision which, unlike comparable statutes enhancing a third or subsequent misdemeanor into a felony, hinges the enhancement on adjudication of guilt. In the absence of any clear legislative directive to the contrary, a withhold of adjudication following a no contest plea is not a conviction in this context. Therefore, the authority of the trial judge to impose or withhold adjudication gives the judiciary the power to prescribe punishments reserved by the constitution to the legislature.

ISSUE II

THE TRIAL COURT ERRED REVERSIBLY IN ACCEPTING FOR ENHANCEMENT TO A FELONY THE CHARGE OF DRIVING WHILE LICENSE SUSPENDED PRIOR CONVICTIONS WHICH PETITIONER CONTENDED WERE UNCOUNSELED, AND WHICH THE STATE AGREED TO BUT FAILED TO PROVE WERE VALID.

Undersigned counsel candidly concedes that this is not the issue on which this court granted discretionary review. Nevertheless, whatever the basis for this court's jurisdiction may be, once acquired, its jurisdiction extends to all issues. See, e.g., Feller v. State, 637 So.2d 911, 914 (Fla. 1994).

Petitioner pleaded no contest to the charge of driving while license suspended or revoked (DWLSR). As a term of the plea agreement, he maintained that he did not have sufficient **valid** prior convictions to make the offense a felony, because his priors were uncounseled (R 42). The state agreed, as part of the plea agreement, that the offense would become a felony only if it proved sufficient valid prior convictions. The state failed to prove the validity of any prior convictions, yet the trial court nevertheless accepted a certified copy of Castro's driving record to find the priors and to find him guilty of felony DWLSR (S 6-10). This was reversible error.

The error is primarily that the state failed to prove that Castro's prior convictions were valid, that is, counseled. The error also has the taint, however, of the state reneging on its part of the plea agreement.

The following took place during entry of the plea:

MR. WILLIAMS [defense counsel]: Just for

> clarification, we're not disputing that he's got a prior driving while license suspended on his record. We are disputing there are no valid qualifiers for the enhancement because they were neither represented by counsel and validated in securing a plea.
>
> These were all taken in south Florida. And they, unlike local county judges, herd through like cattle.
>
> THE COURT: So there will be documents presented to the Court by the state at the time of sentencing, and they will either reflect that they are valid convictions or not.
> MR. WILLIAMS: That's my understanding.
>
> MR. FINA [prosecutor]: And the state would further nol-pros the remaining two counts of the information as part of this plea.

(Plea 3-4). Later, the prosecutor, Mr. Fina, said:

> . . .since. . .we're dealing with Dade County, I ask that he contact his attorney maybe a week before sentencing to ensure that we have got all the documents from Dade County. Usually it takes at least two months to get anything from them. And if we don't have it, maybe he can avoid a trip back up here for sentencing.

(Plea 9).
At the sentencing hearing, defense counsel explained:

> The issue is whether or not there is sufficient qualifying prior convictions for driving while suspended based upon his assertion that any prior he had did not have representation by a lawyer or a valid waiver that could be utilized for enhancement for felony purposes.

(S 5). A different prosecutor - Daniel Dill - appeared for the state. Mr. Dill said Castro had been convicted of felony DWLSR in Broward County in October, 1996 (S 6). Defense counsel argued that the mere fact of such a conviction did not prove

the issue of uncounseled priors was raised in the Broward case or that the conviction there was valid (S 7-8).

The prosecutor said a certified copy of Castro's driving record was in the file (S 9). Defense counsel argued the driving record was not sufficient to prove Castro had been represented by, or validly waived, counsel on the prior convictions (S 9). The court found the driving record to be sufficient proof that Castro had the requisite priors (S 10). The problem with the state's "proof" is that the driving record and even a subsequent conviction of felony DWLSR does not prove that Castro had two prior qualifying, i.e., counseled, convictions of DWLSR. Thus, the state failed to prove the predicate, which it had agreed to prove as part of the plea agreement.

While the issue here is primarily the state's failure to prove the predicate offenses were counseled, there is also an element of the state reneging on its agreement to prove the offenses. As the Florida Supreme Court has said in another case of the state reneging on a plea agreement:

> A "constant factor" insuring basic fairness in the plea bargaining process is the requirement that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Hunt v. State, 613 So.2d 893, 897 (Fla.1992), quoting Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). The court added:

> When an agreement with the defendant has not been fulfilled, the defendant is

> entitled to specific performance of the unfulfilled promise or to withdrawal of plea. In this case, we believe that specific performance is the adequate remedy.

Hunt, 613 So.2d at 898, citing Santobello.

In choosing between specific performance and withdrawal of a plea to relieve a defendant from the state's breach of an agreement, the court "ought to accord a defendant's preference considerable, if not controlling weight * * *." Santobello, 404 U.S. at 265, 92 S.Ct. at 501 (Douglas, J., concurring); accord: U.S. v. Rewis, 969 F.2d 985 (11th Cir. 1992). Here, plainly, withdrawal of the plea would not remedy the loss of Castro's bargain or inducement in deciding to plead. Thus the state should be bound to the plea agreement, with the result that, having failed to prove the predicate offenses, Castro's conviction must be reduced to a misdemeanor.

Prior uncounseled convictions are invalid for the purpose of enhancing a misdemeanor charge to a felony, because, if there was a right to counsel, the lack of counsel or waiver of counsel renders the convictions constitutionally infirm. Hlad v. State, 585 So.2d 928 (Fla. 1991). Hlad was convicted of felony DUI. DUI, which ordinarily is a misdemeanor, was enhanced to a felony because Hlad had been convicted three times previously of DUI. This method of enhancing a misdemeanor to a felony is similar, although not identical, to that for enhancing petitioner's conviction of DWLSR to a felony.

Hlad lost his appeal because he failed to establish that he had a right to counsel on the prior convictions. Right to

counsel is established by proving either that the offense was punishable by more than 6 months in prison, or that the defendant was actually subjected to a term of imprisonment. Id. Petitioner contends his situation is different from Hlad's, however, because by agreeing as part of the plea agreement to prove the prior convictions, the state waived any argument that the predicate had not been established. Any rights, even constitutional rights, may be waived, and foundation requirements may be waived as well. See, e.g., Arnold v. State, 611 So.2d 21 (Fla. 1st DCA 1992) (stipulation that defendant has sufficient prior convictions for habitual offender sentence waives the necessity of the court making such findings).

Petitioner contends the state here waived the necessity of laying a predicate by agreeing as part of the plea agreement that it would prove the prior convictions. Moreover, the state never argued below that petitioner had failed to lay an adequate predicate. The rule that the precise argument must be made to the trial court in order to raise the issue on appeal applies to the state as well as to defendants. State v. Dupree, 656 So.2d 430 (Fla. 1995); Cannady v. State, 620 So.2d 165,170 (Fla. 1993). Thus, the state is precluded from arguing for the first time on appeal that petitioner failed to lay an adequate foundation.

The state failed to fulfill its part of the plea bargain, in which it agreed to **prove** the prior convictions were counseled. The state having failed to prove the requisite prior

convictions, the trial court could not lawfully enhance the conviction to a felony, thus the conviction must be reduced to a misdemeanor.

ISSUE III

A DISCREPANCY BETWEEN THE ORAL AND WRITTEN AMOUNT OF CREDIT FOR TIME SERVED SHOULD BE CORRECTED.

Although it is moot as to petitioner, undersigned requests that this court address the issue of credit for time served for the guidance of the courts.

Credit for time served was orally pronounced as 172 days, including 50 days where Castro was held in south Florida on this warrant (S 14). The written grant of credit, however, gives only 105 days (R 56). Where there is a discrepancy between the oral and written sentences, the oral pronouncement controls, and the written order should be corrected to conform to the oral pronouncement. Taylor v. State, 425 So.2d 1191 (Fla. 1st DCA 1983).

Petitioner contends that the Appeal Reform Act of 1996 did not abrogate this requirement of consistency as to **any** term of the sentence. More specifically, this court has held in Mancino v. State, 714 So.2d 429 (Fla. 1998), that a sentence is illegal to the extent credit for time served is not granted.

Not only can facially apparent scoresheet errors and other errors rendering the sentence "illegal" as a term of art, be raised at any time under Rule 3.800(a), Florida Rules of Criminal Procedure, but this court has also held that errors raiseable "at any time" can be raised for the first time on appeal. State v. Whitfield, 487 So.2d 1045 (Fla. 1986)(facially apparent scoresheet error). Rule 3.800(a) was not amended in the

aftermath of the Reform Act, nor has this court receded from Whitfield. See also, Baldwin v. State, 679 So.2d 1193 (Fla. 1st DCA 1996) (*op. on rehearing*).

Therefore, the award of credit for time served should be corrected, even if raised for the first time on appeal, but for the fact that the issue is moot as to Castro.

IV CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court, declare section 322.34(1)(c), Florida Statutes (1995) unconstitutional, or in the alternative, to find that the state did not comply with the plea bargain, and on either ground, remand with directions to reduce petitioner's conviction to a misdemeanor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to J. Ray Poole, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Jorge Castro, at his last known address, this 13 day of November, 1998.

KATHLEEN STOVER