

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

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BY

DAVID E. GOLFE
APPELLATE

CASE NO.: SC13-1437
L.T. CASE NO.: 4D12-3579, 4D12-4124
4011-3607
2006-673A; 674A

V

STATE OF FLORIDA
APPELLEE

AMENDED JURISDICTIONAL BRIEF
FLA B App. Proc. 9.120(d)

Respectfully Submitted

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STATEMENT OF FACTS

1. In 2007, Appellate was persuaded by Counsel that it was in his best interest to enter into a negotiated plea with the State for an Eight-year prison term. I.d. Appendix B
2. Following the plea colloquy and apart from the negotiated plea. The Court simply conditioned his acceptance of no-contest plea upon Petitioner's appearance at sentencing.

The court stated: Sir, "I'll accept your plea on one condition: I'll explain it to you in just a minute, you understand the nature and "Consequence" of it and there's a factual basis for it. Here, the Court never stated for the record and in open court: that the Court accepts the plea. Or that the plea was accepted." I.d. Appendix C. Also see and compare bottom of page 4 of Appendix B.

Where the Court states: The Court determines that the plea is freely and voluntarily entered upon a knowing and intelligent waiver of the Defendant's rights and there is a factual basis for it "The plea is accepted."

3. The Court proceeded to unilaterally stipulate his condition. Thereby, deferring formal acceptance of plea and sentencing to August 30, 2007. Reserving the right to sentence Appellate in *Absentia* to a maximum sentence, if Petitioner fails to appear for sentencing, Appellate was never asked did he accept or agree to Courts stipulation. I.d. Appendix C.
4. On August 30, 2007, Just before 1:15 pm. Petitioner met with his Counsel at the Courthouse. Petitioner explained, that he needed a continuance, because of an unfortunate incident that took place at his home. Based upon Counsel assurance that Judge would not grant continuance and Counsel refusal to at least try to meet Appellate request. Appellate fled Court, never entering the Court room. Id. Appendix D.

Illegal Sentence

5. Thus, Court departed from the negotiated plea, And SENTENCE PETITIONER TO A 60 YEAR PRISON TERM. IN VIOLATION OF PETITIONERS RIGHTS AND PROTECTION AGAINST DOUBLE JEOPARDY. PETITIONER WAS ALSO SENTENCE FOR CRIME IN WHICH DEFENDANT HAS NOT BEEN CONVICTED; PETITIONER WAS NEVER LEGALLY CHARGED OR CONVICTED OF FAILURE TO APPEAR I.d, APPENDIX E.F. CASE NO.: 4D12-3579; 4D11-3607, "3,800(a)".

6. SINCE THEN, PETITIONER HAS DISCOVERED THAT DUE TO FUNDAMENTAL REVERSIBLE ERROR, TRIAL COURTS SENTENCE ORDER IS VOID AND IS OF NO EFFECT. CASE NO.: 4D12-4124.

And that, had it not been for the gross negligence and legal malpractice of counsels, and trial courts illegal participation in the plea negotiations, PETITIONER COULD NOT HAVE AND WOULD NOT HAVE BEEN CONVICTED UNDER DEFECTIVE AFFIDAVITS AND VOID INFORMATION. CASE NO: 4D12-3579
[MOTION TO VACATE SET ASIDE OR CORRECT ILLEGAL SENTENCE]

7. Appellate sentence is illegal and is subject to correction by way of motion to vacate set aside or correct illegal sentence, 3,850. OR by way of motion to correct illegal sentence. SENTENCE EXCEEDS LIMITS PROVIDED BY LAW BECAUSE UNDER THE LAW, COURT COULD NOT HAVE IMPOSED SENTENCE.

SUMNER V. STATE, 747 So.2d 987 (Fla. 5th DCA), HARRELL V. STATE 721 So.2d 1185 (Fla 5th DCA 1998); SENTENCE IS ILLEGAL INsofar AS IT PATENTLY FAIL TO COMPORT WITH STATUTORY AND CONSTITUTIONAL LIMITATIONS AND CAN BE DETERMINED AS A MATTER OF LAW WITHOUT NECESSITY OF AN EVIDENTARY DETERMINATION. STATE V. MANCINO, 714 So. 2d 429, 433 (Fla. 1998); HOPPING V. STATE, 708 So. 2d 263, 265 (Fla. 1998)

PROCEDURAL HISTORY

8. ON August 8, 2011, Appellate filed motion to correct illegal sentence challenging his sentence under double jeopardy case NO. 4D11-3607. ON August 23, 2011, Appellate filed Petition for writ of Habeas Corpus in the Circuit Court, which was transferred to be reviewed on the merits under Rule 3.850. CASE NO. 4D12-4124. ON August 23, 2012, Appellate filed 3830, motion to vacate set aside or correct illegal sentence. ON that same day Appellate filed a motion to correct illegal sentence 3800(c).
9. ON April 24, 2013, Appellate filed notice to invoke jurisdiction of this Hon. Court.
10. ON OR ABOUT Oct. 4, 2013, this Hon. Court made Appellate aware that he never filed jurisdictional brief. Thereby, giving Appellate opportunity to file jurisdictional brief.
11. ON Oct. 15, 2013, Appellate filed jurisdiction brief. And Appendix
12. HOWEVER, due to negligence of Appellate, Appellate failed to brief the illegality of his sentence and direct conflict of opinion in its totality. Thereby, asking this Hon. Court to subject him to a illegal sentence if remand is granted.
13. Therefore, Petitioner files this Amended Jurisdictional brief to remedy negligence. Appellate also files supplemented Appendix.

Summary of Argument

Fourth District Court of Appeals decision in its opinion is in direct conflict with Supreme Court of Florida and other district courts of appeal on the same point of law.

Jurisdictional Statement

The Florida Supreme Court has discretionary Jurisdiction to review a decision of the Supreme Court or another district court of appeal on the same point of law. Article V, §3(b)(3) Fla. A. App. p. 9.030(2)(a)(iv).

Argument ONE Case No. 4D12-4124

The Decision of Fourth District Court of Appeals in this case expressly and directly conflicts with decisions of this court and other district courts on same point of law.

Subsequently, to filing Petition for writ of Habeas Corpus in the Fifteenth Judicial Circuit Court Case No. 502011CA01272XXXXMB. Judge MEENU SASSER specifically stated: PETITIONER ALLEGES that he is subject to a UNLAWFUL CONFINEMENT due to PROSECUTORIAL MISCONDUCT, which he argues, under STEEL V. KENOE 7411, 50.2d 931, 934 (Fla. 1999), is not collateral attack of his sentence. HOWEVER, CONTRARY to this ruling issued DEC 21, 2011, in Judge MEENU SASSER'S third order to show cause. Judge MEENU SASSER restated Appellate arguments and on March 6, 2012 RECHARACTERIZED and transferred Petition to be considered under 3.850, motion for post conviction relief, citing DAVIS V STATE 26, 50.3d 647 (Fla. 2d DCA 2010). Sentencing court failed to address the merits of Petition and summarily denied Petition.

QUESTION OF LAW: Did HABEAS COURT ER by transferring WAIT OF HABEAS CORPUS RAISING PROSECUTORIAL MISCONDUCT TO BE CONSIDERED UNDER MOTION 3.850, WHEN CLAIMS OF PROSECUTORIAL MISCONDUCT AND LACK OF CIRCUIT COURTS SUBJECT MATTER JURISDICTION IS NOT COGNIZABLE UNDER 3.850, MOTION? STEEL V. KENOE. IF THE COURT DID NOT WANT TO RULE ON THE PETITION, PETITION SHOULD HAVE BEEN TRANSFERRED TO APPELLATE COURT AS DIRECT APPEAL. Id. Appendix G.

ARGUMENT TWO CASE NO. 4012-4124

THE DECISION OF THE FOURTH DCA IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS IN THIS COURT AND OTHER DISTRICT COURTS ON SAME POINT OF LAW.

IN THIS CASE THE AFFIDAVITS UTILIZED WAS SIGNED BY THE INVESTIGATING OFFICER RATHER THAN A MATERIAL WITNESS. THERE WAS NO SWORN MATERIAL WITNESS STATEMENTS ATTACHED TO THE POLICE REPORT AND THE AFFIDAVITS DID NOT ALLEGE THAT AFFIANT PERSONALLY OBSERVED THE EVENTS ALLEGED. FLA. R. CRIM. PROC. RULE 3.840(G) STATES IN HAGAN V. STATE 853 SO.2D 595 (FLA. 3TH DCA), IT IS FUNDAMENTAL REVERSIBLE ERROR TO CONVICT A DEFENDANT BASED ON A POLICE AFFIDAVIT NOT BASED ON PERSONAL KNOWLEDGE.

QUESTION OF LAW: APART FROM ANY UNDER OATH TESTIMONY, CAN A CONVICTION BE SUSTAINED BASED SOLELY UPON UNSWORN HEAR-SAY AFFIDAVITS? CAN A CAN A HEAR-SAY AFFIDAVIT UNSUPPORTED WITH UNDER OATH TESTIMONY OF AFFIANT OR ANY PERSON WHOMSOEVER PROPERLY CONFER CIRCUIT COURTS JURISDICTION OF THE SUBJECT MATTER, THE PERSON NAMED AS APPELLATE, IN ITS TERRITORIAL JURISDICTION? Id. Appendix H THRU L.

IN THIS PARTICULAR CASE THERE ARE NO UNDER OATH TESTIMONY OF ANY PERSONS WHOMSOEVER IN SUPPORT OF AFFIDAVITS AND INFORMATION.....QUESTION OF LAW: CAN A DEFECTIVE AFFIDAVIT UNSUPPORTED WITH LAW AND FACTS SATISFY FLA. R. CRIM. P. 3.140(G)? ACCORDING TO STATE V. WILLIAMS 362 SO.2D 678 (FLA. 4TH DCA); STATE V. MILLER 313 SO.2D 656 (FLA. 1975), BEFORE ANY PROSECUTION IS INSTITUTED BY INFORMATION CHARGING THE COMMISSION OF A FELONY, PROSECUTOR MUST CERTIFY THAT S/HE HAS RECEIVED TESTIMONY UNDER OATH FROM THE MATERIAL WITNESS OR WITNESS(ES). IF PROSECUTOR'S UNDER OATH TESTIMONY AND/OR DETERMINATION OF FACTS IS MATERIALLY FALSE AND CERTIFICATION DO NOT APPEAR IN THE INFORMATION, HOW COULD FLA. RULE CRIM. PROC. RULE 3.140(G) BE SATISFIED? QUESTION OF LAW: CAN A INFORMATION UNSUPPORTED WITH LAW AND FACTS PROPERLY CONFER COURTS JURISDICTION OF THE SUBJECT MATTER? CAN A PERSON BE PUNISHED FOR A CRIME WITHOUT SUFFICIENT ACCUSATION?

ARGUMENT THREE CASE NO. 4D12-3579

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEALS IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURTS DECISION AND OTHER COURTS DECISION ON SAME POINT OF LAW.

IN CASE NO. 4D12-4124 THE APPELLATE CHALLENGES THE VARIETY OF THE AFFIDAVITS AND THE SWORN UNDER OATH TESTIMONY MADE BY STATES ATTORNEY AND THE JURISDICTION OF STATE AND COURT. IN CASE NO. 4D12-3579 MOTION TO VACATE SET ASIDE OR CORRECT ILLEGAL SENTENCE, APPELLATE CHALLENGES THE DEFICIENT PERFORMANCE OF COUNSEL, THE VOLUNTARINESS OF HIS PLEAS AND THE ILLEGAL PARTICIPATION OF THE JUDGE IN THE PLEA NEGOTIATION.

IF YOU CHALLENGE A SENTENCES ILLEGALITY WITH A 3.850 MOTION IT IS NOT SUCCESSIVE IF YOU HAD FILED ONE PREVIOUSLY ON A DIFFERENT ISSUE? BRYAN V. STATE, 779 SO.2D 416 (FLA. 2D DCA 2000)*; RAMIREZ V. STATE, 822 SO.2D 593 (FLA. 2D DCA 2002)

THE EXCEPTION IS, WHERE PREVIOUS MOTION(S) HAVE BEEN SUMMARILY DENIED AS FACTUALLY OR LEGALLY INSUFFICIENT AND THE MERITS OF THE CLAIMS NEVER REACHED; THEN YOUR SUCCESSIVE MOTION SHOULD BE REACHED ON THE MERITS. MCCRAY V. STATE, 437 SO.2D 1388 (FLA. 1983)*; NUNEZ-MEDINA V. STATE 817 SO.2D 937 (FLA. 1ST DCA 2000). IF DENIED AS SUCCESSIVE THE COURT MUST ATTACH THE PREVIOUS ORDERS OF DENIAL PROVING THE PREVIOUS MOTION(S) HAD THE MERITS OF THE CLAIMS REACHED. WATERFIELD V. STATE, 736 SO.2D 735 (FLA. 2D DCA 1999)*; FLA. R. CRIM. P. 3.850(F)(4).

IF A SENTENCE EXCEEDS LIMITS PROVIDED BY LAW BECAUSE UNDER THE LAW, COURT COULD NOT HAVE IMPOSED SENTENCE. THEN SENTENCE IS SUBJECT TO CORRECTION BY WAY OF MOTION TO VACATE SET ASIDE OR CORRECT ILLEGAL SENTENCE. AND MOTION CAN NOT BE DEEMED SUCCESSIVE OR UNTIMELY. HARRELL V. STATE 721 SO.2D 1185 (FLA. 5TH DCA 1998)*; SUMNER V. STATE 747 SO.2D 987 (FLA. 5TH DCA) QUESTION OF LAW? DO A COURT ABUSE ITS DECRETION AND JUDICIAL AUTHORITY WHEN IT DEEMS A FACTUALLY SUFFICIENT AND PROPERLY FILED MOTION UNTIMELY, SUCCESSIVE, AND FRIVOLOUS TO ALLUDE ADDRESSING THE MERITS OF THE MOTION?

GROUND FOUR CASE NO. 4D12-3579 3.800(a)

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEALS IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISION OF THIS COURTS DECISION AND OTHER DISTRICT COURT DECISION ON SAME POINT OF LAW.

(1) THE FLORIDA SUPREME COURT HAS DETERMINED IN WILLIAMS V. STATE 500 SO.2D 501 (FLA. 1986); TAYLOR V. STATE 752 SO.2D 85 (2000) THAT FAILURE TO APPEAR AMOUNTS TO CRIMINAL CONTEMPT. IN MONTI V. STATE 480 SO.2D 223 (FLA. 5TH DCA 1985) AND IN WILLIAMS V. STATE IT IS HELD, THAT FAILURE TO APPEAR IN ITSELF IS A CRIME, PUNISHABLE UP TO FIVE YEARS. AND TO PERMIT THE DEVIATION FROM A GUIDELINE SENTENCE WOULD, IN ESSENCE, CIRCUMVENT THE LEGISLATIVE ESTABLISHED PUNISHMENT OF FIVE YEARS. WITHOUT A TRIAL, HE COULD BE SENTENCED TO ANY PERIOD WITHIN THE STATUTORY MAXIMUM FOR ALL HIS PENDING OFFENSES, THAT THE JUDGE MIGHT ARBITRARILY CHOOSE WITHOUT ANY HOPE OF PAROLE. THUS, PERMITTING DEPARTURE FOR A OFFENSE FOR WHICH A DEFENDANT HAS NOT BEEN CONVICTED IS CLEARLY PROHIBITED.⁽²⁾ RULES OF CRIMINAL PROCEDURES PROHIBIT DEPARTURES FOR CRIME IN WHICH DEFENDANT HAS NOT BEEN CONVICTED.

IN THIS PARTICULAR CASE, APPELLATE ENTERED PLEA BARGAIN FOR AN EIGHT YEAR PRISON TERM. AND BASED UPON FAILURE TO APPEAR COURT DEPARTED FROM PLEA BARGAIN. THE FOURTH DCA DETERMINES THAT PETITIONER WAS SENTENCE UNDER CRIMINAL PUNISHMENT CODE. THAT IT WAS PERMISSIBLE FOR THE COURT TO DEVIATE FROM THE PLEA BARGAIN BASED UPON A CRIME FOR WHICH APPELLATE HAS NOT BEEN CONVICTED. HOWEVER, THIS COURT DETERMINED IN WILLIAMS V. STATE, RELYING ON THE DECISION IN MONTI V. STATE. THAT A TRIAL COURT CAN NOT IMPOSE AN ILLEGAL SENTENCE PURSUANT TO A PLEA BARGAIN, AND CITING ROBINS V. STATE 413 SO.2D 850 (FLA. 3D DCA 1982); SMITH V. STATE, 358 SO.2D 1164 (FLA. 2D DCA 1978). IT WAS ALSO DETERMINED THAT A DEFENDANT CANNOT BY AGREEMENT CONFER ON THE COURT THE

(1) SEC. 842.15 FLA. STAT. (1985)

(2) FLA. R. CRIM. P. 3.701(d)(1)

Authority to impose an illegal sentence. ~~and~~ Question of Law:
Is it permissible for the court to deviate from a plea bargain based upon a crime for which a defendant has not been convicted because a defendant is sentenced under the criminal punishment code?

In *Goin v. State*, 672 So.2d 30 (Fla. 1996), this court determined that where a trial court's only condition on honoring plea bargain is that defendant appears for sentencing, trial court "must" either sentence defendant to terms of plea or allow him to withdraw plea. And motion to withdraw plea need not be made to preserve issue on appeal. In this particular case trial court's only condition on honoring plea bargain was that appellate appear for sentencing.

GROUND FIVE CASE NO.: 4D11-3607

The decision of the Fourth DCA in this case expressly and directly conflicts with decision of this court's decision and other district court decision on same point of law.

On August 8, 2011, Appellate filed 3,800(a), motion to correct illegal sentence. Appellate attempted to challenge his illegal sentence on double jeopardy grounds. The motion was denied (as) procedurally barred and affirmed on appeal.

Fundamental error may be brought for the first time on collateral attack in post conviction proceeding such as Rule 3.850. *Johnson v. State*, 460 So.2d 954 (Fla. 5th DCA 1984)

Approved at 483 So.2d 420 (Fla. 1986). Double Jeopardy is fundamental error. *Keel v. State*, 750 So.2d 154 (1st DCA 2000); *Stewart v. State*, 746 So.2d 593 (2nd DCA 1999); *Turnage v.*

STATE 776 SO.2d 992 (Fla 4th DCA 2000); Bell v. State, 768 SO. 2d 528 (1st DCA 2000). Thus, being that motion was construed as a challenge of Appellate conviction on double Jeopardy. Motion could not have been denied (AS) procedurally barred. Because double Jeopardy can be raised for first time on motion for Post Conviction Relief. And because motion to correct illegal sentence can be raised at any time. Motion can not be denied (AS) procedurally barred. Had 3,800(a) motion to correct illegal sentence was construed to a " 3,850, motion for Post conviction Relief. Court would have had to grant Relief. Because double Jeopardy violation is fundamental error that can be raised for first time on motion 3,850.

Question of Law: Can a defendant obtain Relief where defendant raised double jeopardy violation on 3,800(a) motion to correct illegal sentence and double jeopardy violation can be determine on the face of the record without an evidentiary hearing? I.d. Appendix M.

CONCLUSION

The Florida Supreme Court has discretionary Jurisdiction to review the decisions below, and the Court should exercise that Jurisdiction to consider the merits of the Appellate Arguments. Wherefore, Appellate prays to YHWH the Law of Cause and Effect, that this Court exercise its Jurisdiction. The decision of the Fourth DCA cannot be reconciled with decisions of this Hon Court and other DCA decisions on same point of Law: Where fundamental errors appear on the face of the record, Appellate Court should have reviewed the issues.

Respectfully Submitted
H David E. Goffe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT THE ORIGINAL AND A TRUE COPY OF THE FORGOING DOCUMENTS HAS BEEN PLACED IN THE HANDS OF AN INSTITUTIONAL OFFICIAL FOR MAILING TO BE FURNISHED AND FORWARDED BY PREPAID FIRST CLASS UNITED STATES MAIL DELIVERY ON THIS 21 DAY OF OCT, 2013, TO THE FOLLOWING: OFFICE OF THE ATTORNEY GENERAL PL-01, THE CAPITAL, TALLAHASSEE, FL 32399-1050, SUPREME COURT OF FLORIDA, 500 SOUTH DUVAL STREET TALLAHASSEE FL, 32399-1925.

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