COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 7124

STATE OF ARIZONA

Appellee,

v.

FRANK BALDWIN DAVIS, JR.,

Appellant.

MARICOPA COUNTY
SUPERIOR COURT
NO. CR 1301190

TRANSMITTAL DATE

ORIGINAL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. FRANK BALDWIN DAVIS, JR., Appellant.	)	No. 1 CA-CR 7124 Maricopa County Superior Court Nos. CR-130463 and CR-131190

APPELLANT'S OPENING BRIEF

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED SEP 28 1983

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10-17-83

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STATEMENT OF THE CASE

In CR-130463, Appellant was charged by Information filed December 8, 1982 with the crimes of Driving While Intoxicated While License Suspended, Cancelled, Revoked or Refused, and Driving While Intoxicated With Two or More Prior Convictions For Driving While Intoxicated, both class 5 felonies. (Record on Appeal, CR-130463, p. 19). On March 2, 1983, Appellant pled guilty to the first count, pursuant to a plea agreement which provided he would also plead guilty in CR-131190, that he would receive concurrent four year sentences and that CR-131188 would be dismissed. (Record, p. 43). The agreement further provided that Appellant would admit one prior felony conviction. (Record, pp. 25 and 43).

In CR-131190, Appellant was charged by Information filed on January 19, 1983 with Driving While Intoxicated While License Suspended, Cancelled, Revoked or Refused, a class 5 felony. (Record in CR-131190, p. 14). On March 2, 1983, Appellant entered into a plea agreement whereby he agreed to plead guilty to the charge with one prior conviction alleged. (Record, CR-131190, p. 19; R.T. 3/2/83). The agreement provided for a stipulated four year sentence, to be served concurrently to the sentence in CR-130463; and for dismissal of CR-131188, of one allegation of prior conviction, and the allegation of Committing a Felony While on Bond. (Id.)

On April 12, 1983, Appellant was sentenced in accordance with the plea agreement to concurrent maximum terms of four years. (R.T. 4/12/83). Prior to imposing the sentence, the court announced that it had considered the aggravating and mitigating circumstances, and found that the terms of the plea agreement, and Appellant's prior criminal record were sufficient reasons to impose greater than the presumptive sentence. (Id., pp. 38-39). A notice of appeal was filed May 4, 1983.

COMPLIANCE WITH ANDERS V. CALIFORNIA

Counsel for Appellant has searched the record on appeal pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). No arguable question of law has been found. It is respectfully requested that this Court search the record for fundamental error pursuant to A.R.S. §13-4035. State v. Powell, 5 Ariz.App. 51, 423 P.2d 127 (1967).

Respectfully submitted,

ROSS P. LEE
Maricopa County Public Defender

By _____
JAMES R. RUMMAGE
Deputy Public Defender
Attorney for Appellant
132 South Central, 2nd Floor
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TWO COPIES of Appellant's Opening Brief mailed this 28th day of September, 1983 to ROBERT K. CORBIN, Attorney General of Arizona, 1275 West Washington, Criminal Division, Second Floor, Phoenix, Arizona, 85007.

ONE COPY of Appellant's Opening Brief mailed this 28th day of September, 1983 to FRANK BALDWIN DAVIS, JR., #38630, Safford Conservation Center, P. O. Box 791, Safford, Arizona, 85546.

ROSS P. LEE
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ORIGINAL

ORIGINAL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. FRANK BALDWIN DAVIS JR. Appellant.	)	No. 1 CA-CR 7124 Maricopa County Superior Court Nos. CR-130463 and CR-131190

APPELLANT'S SUPPLEMENTAL
OPENING BRIEF

FRANK B. DAVIS JR.
(pro per)
P.O. BOX 38630
FLORENCE, ARIZONA 85232

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STATEMENT OF THE CASE

In CR-130463, Appellant was charged by Information filed Dec. 8, 1982 with the crime of Driving While Intoxicated While License Suspended, Cancelled, Revoked or Refused, and Driving While Intoxicated (4 counts,Record, p. 19 and 26b), with two or more Prior Convictions for Driving While Intoxicated, both class 5 felonies.(Record on Appeal CR-130463,p. 25 and 39). On March 2, 1983, Appellant pled guilty to the 1st count and one prior allegation, the State having dismissed CR-131188 and prior convictions thereof. (Record, p. 43). Vivian Kringle Clerk of Superior Court omitted CR-131188 and prior conviction information on transmittal of records to Court Of Appeals, however included in my index A, A1, A2, A3, and A4 is copies of the same. The STATE, Maricopa County Attorney, Jerry Landau alleged (7) prior convictions in CR-130463 (Record,p. 25 and 39). All but one of the aforesaid priors were dismissed. Appellant pled guilty to the 1st count, pursuant to a plea agreement which provided he would also plead guilty in CR-131190, that he would receive concurrent four year sentences and that CR-131188 would be dismissed. (Record,p. 43).

In CR-131190, Appellant was charged by information filed on Jan. 19, 1983 with Driving While Intoxicated,While License Suspended, Cancelled, Revoked or Refused, in violation of A.R.S. 28-692, 28-692.02, 13-701, 13-702, 13-801, 28-444, 28-445, and 13-604.01, a class 5 felony. (Record in CR-131190,p. 14). On March 2, 1983, Appellant entered a plea agreement whereby he agreed to plead guilty to the charge with one prior conviction alleged. (Record,p. 19). County Attorney alleged (7) prior convictions (Record,p. 17) and dismissed <u>all</u> but <u>one</u>. Also alleg-

ed was Allegation of Committing A Felony While Released On Bond, (Record,p.16) and same was dismissed. The agreement provided for a four year sentence, to be served concurrently with the sentence in CR-130463; and for dismissal of CR-131188, one allegation of prior, when (7) was alleged, and dismissal of Committing a Felony While On Bond. (Record, p. 19;R.T. 3/2/83).

On April 12,1983, Appellant was sentenced in accordance with the plea agreement to concurrent maximum terms of four years. (R.T.4/12/83). Prior to imposing the sentence, the Court announced that it had considered the mitigating and aggravating circumstances, and found that the terms of the plea agreement, and Appellant's prior criminal record were sufficeint reasons to impose the maximum sentence. (R.T.4/12/83).

On April 29,1983,Appellant, Frank B. Davis Jr. filed a timely notice of appeal, giving the name and address of Appellant and Appellant's attorney of record to wit: Luis E. Kame, Suite1150, First Interstate Bank Plaza, 100 W. Washington, Phoenix, Arizona 85003. (Record on Appeal, CR-130463, p. 46 and CR-131190 p. 23). Approx. 41 days after the Appellant filed a notice of appeal on April 29,1983, Luis Kame attorney of record, on June 9,1983 submitted a frivilous petition to withdraw as counsel (Appellant's INDEX, B;B1),(this record was omitted on Record on Appeal), and on June 16,1983 The Hon. John H. Seidel, div. 27-I granted this petition and Ordered the Public Defender's Office to represent the Appellant.Appellant was not aware of this appointment until he received a letter from P.D. James Rummage (Appellant's INDEX, D). The order by Judge Seidel is in the record CR-130463, between the minute entries and the Record on Appeal. There is no reference to same by the

Clerk of Court in her INDEX. Also, is a copy of the same in (Appellant's INDEX,C). Appellant did not receive a notice from Superior Court pursuant to 17 A.R.S.,Rule 6.5a, matter of appointment, and was not aware that the Public Defender's Office wasrepresenting him until he received a letter from same on or about July 14,1983. (INDEX,D). Also, there was no further contact from the Public Defender's Office until Sept. 28,1983 via telephone and a letter sent to the Appellant on the same date. (INDEX, D1 and D2). On Nov.19,1983 I received a letter from the P.D. James Rummage dated Nov.14,1983 (INDEX,D3). Also, enclosed was a copy of Record on Appeal, CR-130463 and CR-131190, informing me of the Court Order had on Nov.4,1983, to file an opening brief in compliance Anders v. California, 386 U.S. 738, 87 S. CT. 1396, 18 L. Ed. 2d 493 (1967), and that same had to be filed on or before Dec.5,1983.

On Nov.23,1983, property room records at ASPC C/U will reflect the same,,Appellant received a copy of Court Of Appeals Order dated Nov.4, 1983, ordering same to file an opening brief on or before Dec. 5,1983, and order granting appellant's counsel's motion for appellant to file a supplemental brief pursuant to Anders v. California.Further ordering Appellant to file original and six copies with the Clerk of Court, two copies to the Attorney General and one to appellant's counsel.Also, no further extension of time would be granted for filing of supplemental brief by the appellant.

Appellant forgot to mention that on ~~april~~ MARCH 2,1983, The Hon.John H. Seidel ordered Luis Kame, appellant's counsel and County Attorney to submit a sentence memorandum pertaining to the legality of dismissing a violation of ARS 28-692. (R.T.pp.18,19 3/2/83). Appellant's counsel

responded and filed a SENTENCING MEMORANDUM on March 30,1983 (Record, CR-130463,pp.44,44a,44b,44c,44d,44e). However, County Attorney Jerry Landau did not comply with the order of the Court, and same did not submit a sentencing memorandum. Also, on March2,1983 the Court ORDERED that counsel for both sides SUBMIT F.D. a written MEMORANDUM of POINTS and AUTHORITIES regarding the dismissal pursuant to the plea agreement in light of the provisions of A.R.S. Section 28-692(C). Said memorandum to be filed on opposing counsel and delivered to the Court no later than March 29,1983. Counsel for the appellant did not file his memorandum until a day after the Court Order and was in contempt of court and Jerry Landau did not file his at all and was in contempt of the COURTS ORDERS. Court ORDER (Record on Appeal,CR-130463, minute entry 11C).

OPENING ARGUMENT

In CR-130463, Appellant was charged by information filed Dec. 8, 1982 with 2 counts of DWI with 2 or more prior convictions,(Record,p. 19); An ammended information alleging 4 counts,(Record,p.26b); in violation of ARS 28-692, 28-692.02, 13-701, 13-702, 13-801, 28-444, 28-445, 13-604.01.Also, 6 prior convictions were alleged,(Record,p.25). also, another prior was alleged in CR-130463 that was frivilous and malicious and without merit,(record,p.39), by Jerry Landau, County Attorney, in that it was not conceivably possible to have committed a prior here as the date of offense in CR-130463 was Sept26,1982 and the date of offense in Cr-131190 and CR-131188 were after Sept.26, 1982. In CR-131190 Appellant was charged by information filed Jan.19, 1983, with DWI While License Suspended, Cancelled, Revoked, or Refused, in violation of ARS 28-692, 28-692.02, 13-701, 13-702, 13-801, 28-444, 28-445, and 13-604.01.(Record,p.14). The State alleged the appellant committed a felony while released on bond.(Record,p.16). The State also alleged 6 prior convictions.(Record,p.17). Jerry Landau again maliciously and knowingly alleged a false proir on Feb.17,1983 (Record,p.18); in that the date of offense in CR-131190 was Nov.21, 1982 and the date of offense in CR-131188 was Dec.8,1982.(R.T.3/2/83 pp.30&31). It was approx. 17 days later when the date of offense in CR-131188 was alleged, thereby making that prior frivilous. In CR-131188 appellant was charged by information filed Jan.19,1983 with DWI in violation of A.R.S. 28-692, 28-692.02, 13-701, 13-702, 13-801, 28-444, 28-445 and 13-604.01.(Appellant's Index,A). Appellant was alleged to have committed 6 priors(Index,A1-A3), and to have committed a felony

While Released On Bond.(Appellant's Index,A4). Appellant points out to the COURT in effect what we have is a total of 6 counts in violation of 28-692, et al.; a total of 18 allegations of prior convictions, and 2 priors maliciously and falsely alleged by Jerry Landau.

On or about March 2,1983, Jerry Landau and Luis Kame (attorney for defendant), both attorney's, both professional's (?), both members of ABA did knowingly and willfully construct a plea agreement that was frivilous, without merit, and in non compliance and in violation of Arizona Revised Statutes. Both attorney's were COURT ORDERED on March 2,1983, by The Hon. John H. Seidel (Record, CR-130463, minute entry, 11C); to submit to the court a written memorandum regarding whether or not it was permissible for the court to dismiss CR-131188; said memorandum was to be served on opposing counsel and delivered to the court no later than March 29,1983. I bring to the courts attention that Luis Kame did not file his memorandum until March 30,1983, thereby not complying with the court order (Record, CR-130463,p.44), and said memorandum was frivilous and only served to misconstrue the legislature's intent and only served to render the proceeding a farce and a sham and was only a mockery to our justice system. In his frivilous memo Luis Kame stated,"If the legislature's intent with respect to ARS 28-692.02 is not clear, then this case represents an oppurtunity for the court to inform the legislature that an ambiguity exists in the statute." Regardless, one point remains that counsel did not comply with the court order and should be held in contempt of court or Judge Seidel should be held to answer for misfeasance in office. Also County Attorney, Jerry Landau rendered him-

self incompetent and in contempt of court, in that, he didn't even respond to the Court Order. Appellant believes there to be a volume to Arizona Rules of Court, 1982; that same consist of a Rule 45, Canon's of Judicial Ethics and Rule 29, Professional Conduct, DR's 101,et al; a Board of Governor's to direct complaint's to, etc.. However, this is only speculation as I do not have the where-with-all at present and the last copy I was familiar with was in 1980. The court will have to ascertain the fact that presently the Appellant is in a "deadlock" status at ASPC Central Unit and has no access to the law library and has filed grievances to the same, and has received no response to said grievances.

Anyway, back to the issue of ARS 28-692 and the dismissal of CR-131188, and approx. 16 prior allegations; the plea agreement in general was and is frivilous for the following reasons: ARS 28-692,(C) is explicitly clear;

> C. The state shall not dismiss a charge of violating A or B of this section:
> 1. In return for a plea of guilty or no contest to any other offense by the person charged with the violation of subsection A or B of this section; or.....

This is not ambiguous, nor can this statute be misconstrued, it is explicitly clear; any layman, any reasonable and prudent person and especially an attorney can acknowledge the context of this statute.

In this instant case Jerry Landau and Luis Kame constructed a plea agreement on March 2,1983, that dismissed CR-131188, a class 5 felony in violation of ARS 28-692, 28-692.02, 13-701, 13-702, 13-801, 28-444, 28-445, and 13-604.01. Jerry Landau acted out of his jurisdiction and the scope of his authority in presenting such a proposal and

the appellant pled guilty to Cr-130463 and CR-131190 and the State dismissed CR-131188, which is expressly disallowed; thus rendering the plea agreement had on March 2,1983, a farce and as a result the sentence on April 12,1983, was a farce, a sham, and a mockery to our justice system. Appellant was denied due process U.S.C.A. Const. Amend 5; and equal protcetion U.S.C.A. Amend.14.Appellant was also denied adequate and effective assistance of counsel pursuant to U.S.C.A.,Amend.6.

A.R.S. 28-692,(D) reads in pertinent part as follows:

D. In any prosecution for a violation of subsection A or B of this section the state shall, for the purpose of classification and sentencing pursuant to 28-692.01, allege all prior convictions of violating subsection A or B of this section occurring within the past thirty-six months, unless there is clearly an insufficient legal or factual basis to do so.

Again both counsels rendered them self so inept in the construction of the plea agreement that over 16 prior allegations were dismissed on 3/2/83, and that all priors were to be used,alleged for sentencing purposes pursuant to the above mentioned Statute. Again, the statute is not ambiguous and the attorneys acted incompently and out of the scope of their authority and jurisdiction in dismissing said priors in the plea agreement had on March 2, 1983.(RT. 3/2/83 p. 14) f.D.

On April 29, 1983, the appellant filed a timely "notice of appeal" pursuant to 17 ARS, Rule 31.3; at that time counsel of record was Luis Kame, and Luis Kame was still counsel for the defendant until The Hon. John H. Seidel permitted counsel to withdraw on June 16, 1983, 48 days after the notice of appeal was filed;(see Appellant's Index, C).A copy of the same minute entry is in the Record on appeal CR-130463, between the minute entries and the record,not labeled. The Court, Judge Seidel,

created another misfeasance as he did not apply 17 ARS, Rule 6.5 Manner of Appointment; At that time I was at Safford Conservation Center, ADOC, SCC records all incoming legal mail and I was never noticed by the Court pursuant to 17 ARS, Rule 6.5. Also, Judge Seidel entered the following order:

> ORDERED directing the Public Defender to notify the defendant to and directing defendant hereafter to communicate with the Public Defender and not with the Court.

Here I was ORDERED that I had no access to the Court, when in fact I had many avanues of approach. I could have petitioned the Court for a Rule 32,17 ARS; I could have waived my rights in writing to counsel pursuant to 17 ARS, Rule 6.1c; I could have ordered documents from the Court pursuant to 17 ARS, Rule 31.8; however I could do none of the aforesaid, as I WAS ORDERED NOT TO COMMUNICATE WITH THE COURT. Thus, Judge Seidel had no authority to enter such an order, thereby creating another misfeasance in office. I bring the Courts attention to a letter I received from the Public Defender James Rummage on Sept. 28, 1983. (Appellant's Index,D1). The last sentence in the letter states, "Should you desire the preparation of transcripts from other proceedings prior to the guilty plea proceeding, you may certainly request the court to order their preparation.

Here competent counsel (?), declared I could communicate with the Court; however, there is a standing COURT ORDER that I cannot communicate with the Court, Here another misfeasance was incurred and not on behalf of the Appellant. Either counsel is informing me to violate a COURT ORDER or the Judge's order is frivilous, which in fact is, or 17 ARS Rules of Criminal Procedure are false. Appellant is left in limbo, he doesn't know which end is up. I have a question pursuant to

17 ARS, Rule 31.8(h), the rule is explicitly clear and I am to submit the differences to the trial court. However, I can't! Appellant has a COURT ORDER declaring he can't communicate with the trial court. I'll elaborate more on this in a minute, before I do I have to bring the Courts attention back to Judge Seidel's ORDERS of June 16, 1983.

The Hon. John Seidel ORDERED as follows:

> ORDERED granting Motion to Withdrawal filed by Luis Kane as to above matters and Mr. Kane is permitted to withdraw as counsel for defendant. (Appellant's Index, C).

I bring the courts attention to the MOTION TO WITHDRAW AND ORDER submitted to the trial court on June 9, 1983. (Appellant's Index,B and B1). This is another important record that was not forwarded to The Court of Appeals as Record on Appeal. Luis Kane's motion was false and frivilous for the reasons declared therein. Luis Kane stated, " Counsel advises this Court that it is defense counsel's belief that Defendant wishes to represent himself on the appeal and does not wish counsel to represent him."How much more can an attorney render himself inept or incompetent that it reduces a proceeding to a farce, a sham, a mockery, or injustice. Belief, Belief, where are the facts. I never once expressed I had any desire to represent myself in this case. I have an absolute right to counsel and I have not waived those rights, nor do I wish to do so now. I will bring to the Courts attention had I desired to waive my rights to counsel I would have done so in writing pursuant to 17 ARS, Rule 6.1 (c), Waiver of Rights to Counsel. This did not take place. Nor was the motion by Luis Kane submitted in good faith or timely pursuant to 17 ARS; plus it was submitted and ORDERED 48 days after Appellant filed a Notice of Appeal, which is not proper

as the Record on Appeal should have been transmitted within 45 days, pursuant to 17 ARS, Rule 31.9a; the Court of Appeals did not apply 17 ARS, Rule 31.9c and notice all parties if there was an extension granted. Also, Record on Appeal CR-131190, was not transmitted until 122 days after Appellant filed a Notice of Appeal. The Clerk didn't even send a copy of the Notice Of Appeal until August 17, 1983, 110 days after the Notice of Appeal was filed. Nor did Court of Appeals comply with 17 ARS, Rule 31.10 Filing of the Record., or notice all parties thereof. So technically what has taken place is the Appellant filed a notice of appeal on April 29, 1983 and approx. 204 days later on Nov. 19, 1983, Appellant receives the Record on Appeal, and 4 days after that, Nov. 23, 1983, Appellant receives a court order from the Court of Appeals, declaring the Appellant has approx. 12 days to file an opening brief; and no further extensions of time will be granted for filing a opening brief. Records here at ASP Central Unit will indicate that I did not receive any legal mail until Nov. 19,and Nov. 23, 1983. At this time I will inform the court I am on a " deadlock " status (not allowed out of my cell, accept to shower), that I do not have access to the law library, that today is Dec. 4, 1983 and that my opening brief is due tomorrow, Dec. 5, 1983; and the Appellant has worked diigently for the past week to effect his rights to an Appeal. If the Appellant would have received adequate and effective assistance of counsel he certainly would not have to proceed pro per, which is not the Appellant's choice.

So in effect what has taken place so far is: Luis Kame acted incompetently, was in contempt of court, and submitted ~~be~~ two F.D. frivilous

petitions to the trial court, which substantially impaired the rights of the defendant/appellant; Jerry Landau acted incompetently, was in contempt of a court order and acted negligently and out of his jurisdiction; Judge Seidel created a misfeasance in office on several occasions, denied the appellant access to the court, and accepted a frivilous plea agreement; Clerk of Courts did not transmit the records as applicable 17 ARS Rules of Criminal Procedure, and records are false and not complete; Court of Appeals has suppressed my pursuits in said court, has not applied 17 ARS Rules of Criminal Procedure, nor noticed all parties pursuant to the rules. So I ask the Court what happened to the Appellant's rights, rights to due process and equal protection as afforded by USCA, 5 and 14 Amend.. My rights to effective assistance of counsel, USCA, 6 Amend.

Now I bring to the Courts attention, Anders v. California as submitted in Public Defender's opening brief Sept. 28, 1983, and the motion submitted on Sept. 28, 1983. In the motion counsel stated, "Counsel has not moved to withdraw for the reason that to do so would leave Appellant without the assistance of counsel, in violation of the Sixth Amendment." In reality appellant is without assistance of counsel. Appellant is bringing forth these deprivation of rights, the constitutional test of the plea agreement,test that are valid and with merit. But, where is counsel for the appellant at, what is he doing to assist the appellant, how can the appellant cite cases that would support his pursuits, he can't because he doesn't have adequate and effective assistance of counsel, Counsel has rendered this proceeding to a farce and a sham. Instead counsel submitts a frivilous petition

to the Appeal's Court, that has no merit. The United States Supreme Court in Anders v. California, "assured the penniless defendants the same rights and oppurtunities on appeal (to be represented by counsel) enjoyed by those persons who are in a similiar situation but who are able to afford the retention of private counsel." 386 U.S. 738, 745 (1966). "The central principle that Anders seeks to apply is relatively straightforward.... An indigent criminal defendant has a right to the same basic means of presenting an appeal as a defendant who is not indigent." I agree with the Anders court that it is not the function of such an attorney (a competent attorney who examines the record and the law conscientiously as an advocate for the appellant) to decide the merits of the appeal. Counsel should, and must, raise whatever issues arguably support the appeal." THE LAW IS CLEAR. The appointed appellant attorney must represent his client vigorously and conscientiously. In this instance, Mr. Rummage of the Public Defenders Office failed to do either.

Now I bring to the Courts attention ARS 28-692, (A,B); which reads in pertinent part as follows:

> A. It is unlawful and punishable as provided in 28-692.01 for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state.
> B. It is unlawful and punishable as provided in 28-692.01 for any person to drive or be in actual physical control of any vehicle within this state while there is 0.10 per cent or more by weight of alcohol in the person's blood.

Appellant alleges ARS 28-692 is in violation of the United States Constitution, the Arizona Constitution, and ARS 13-116, in that it provides for "double punishment" for the same acts and occurrences. It further denies the appellant due process and equal protection as

afforded by the Constitution. The original information filed against the appellant alleged 2 counts of violating ARS 28-692 and then the State amended the information to violating 4 counts of ARS 28-692, in CR-130463. The Court convicted the Appellant in CR-130463 out of a frivilous plea agreement. The State secured convictions of more than one count of violating ARS 28-692 in CR-130463, thus violating the appellant's constitutional right to be free from double jeopardy and double punishment for the same offense; PURSUANT TO AMENDED INFORMATION (CR-130463) L.D.

The Fifth Amendment to the United States Constitution provides that no person shall be twice put in jeopardy for the same offense. This prohibition is binding upon the States. Benson V. Maryland, 395 U.S. 784, State v. Bollander, 112 Ariz. 35(1975). Both the Ariz. Constitution, Art.2, Sec.10, and the Criminal Code ARS 13-145 (When the defendant is convicted or acquitted, or has once been placed in jeopardy upon an indictment or information, the conviction, acquittal or jeopardy is a bar to another...) contain substantially the same language. Federal cases using a common sense approach found the protection extended to multiple convictions entered in a single trial. Grires v. United States, 604 F.2d 6 (2d. Cir. 1979). The purpose and root of the protections was expressed in the Supreme Court decision United States v. Wilson, 420 U. S. 332 (1975). The question of whether two offenses are the same, and the criteria for resolving this issue are set out in State v. Tinghitella, 108 Ariz. 1 (1971). While the test was devloped under Arizona's former double jeopardy rule, Arizona Courts have continued to recognize it as the controlling standard even after passage of ARS 13-116. State v. Gordon, 125 Ariz. 425 (1980). State v. Poland 645 P. 2d 784 (1982).

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Under the Tinghitella rule, the court must eliminate the evidence supporting the elements of one charge and determine whether the remaining evidence supports the elements of the remaining charge. State v. Ferguson, 119 Ariz. 55, 579 P. 2d 559 (1978). Interpretation of the test reveals ".... in order to constitute different offenses, no elements of either offense may be an element of the other." (emphasis added). State v. Cassius, 119 Ariz. 485 (1974).

SUBSECTIONS A AND B OF ARS 28-692 ARE THE SAME OFFENSE.

Appellant was charged with violating both sections of ARS 28-692, it is the appellant's position that he may not be charged with or convicted of violating both subsections A and B of ARS 28-692 for the reasons that these subsections merely set out two ways to prove the same offense and not two separate offenses.

This conclusion is supported by the application of the Tinghitella case. A reading of both subsections reveals each contains identical language but for one element. Subsection A, requires proof that a person "was under the influence of intoxicating liquor" while subsection B, prohibits "0.10 percent or more by weight of alcohol in the person's blood." When one eliminates the common elements of each other, neither subsection's remaining element is sufficient standing alone to support a second charge. Recall that under this standard an element once determined to be part of one offense may not be reused to support a second offense. In the instant case there is but one act which violates one law and supports one punishment. Therefore there are two outstanding counts against the appellant in CR-130463, as the court dismissed one count, see (Record on Appeal, CR-130463, p.43)was convicted of another

count of violating ARS 28-692, and 2 counts are still outstanding, as appellant was charged with 4 counts, see (Record,CR-130463,p.26b),all is in violation of the Appellant's constitutional rights and in violation of Arizona Revised Statutes. Again, this conclusion is supported by the argument hereinbefore mentioned, the Arizona Revised Statutes, the Record on Appeal and the facts therein, and appellant's U.S. constitutional rights.

Appellant comesforth and declares that the record is false in CR-130463, (record,p.15a, minute entries); the entry shows the Defendant was sentenced to the Department of Corrections for the presumptive term of 4 years, which is false; Appellant was sentenced to the maximum term of 4 years, see (R.T.4/12/1983,p.38). The court credited the defendant with 56 days of presentence incarceration, which the Court split in half and allocated 28 days to each offense, CR-130463 and CR-131190. However, the appellant spent Sept.26,27th, Nov.13,14,and 15th, Dec.8th, Dec.12-16th, and Nov.22nd, 1983 in custody; also from Jan. 6 to March 2, 1983. A total of 68 days was spent in presentence incarceration as a direct result to this instant case. Therefore the appellant was entitled to all credit. Umphenour v. State, 535 S.W.2d 579 (1976); Trigg v. State, 523 S.W.2d 375 (1975); Cf. Wingfield v. Page 422 P.2d 229 (1966). Also, (Record, CR-131190,p.14a,minute entry) is false as well; as again the appellant received the maximum 4 year sentence and not the presumptive as declared by the Clerk of Courts. The trial court erred in not crediting the defendant with all presentence incarceration and rendered the sentence unlawful, ambiguous, and excessive. nor did at any time the State present the court any sup-

porting evidence that the proof was evident or the presumption great to detain the defendant for committing a felony while released on bond. thereby subjecting the defendant to a lenghtly and unwarranted presentence incarceration that the appellant would otherwise be entitled to if the plea agreement wasn't illegal.

Appellant declares he was entitled to all 68 days in custody prior to the sentence date April 12, 1983; that he received a maximum term of four years and that one day longer or beyond the required amount of the statutes would subject the appellant to cruel and unusual punishment in violation of USCA, Eight Amendment. The trial court did find it appropriate to allocate 56 days; however the plea was not constitutional, nor was the splitting of 56 days proper to apply 28 days to each cause number as both sentences ran concurrent in CR-130463 and CR-131190, and I should have received credit to 68 days alotted to both cause Nos.

Criminal Law, 1216(1); Only when the time spent in confinement is due to or arises out of the offense against which credit is claimed does any right to such an allowance occur. State v. Prevost, 574 P.2d 1319 (1978).

Appellant further submits he was denied bail from Jan.6, 1983 to March 2, 1983; that at no time did the County Attorney submit to the Court probable cause, or proof was evident or the presumption was great that tha defendant committed a felony while released on bond; the appellant was seeking bail and was presumed innocence and bail was not to be used as a means of oppression. State v. Marlin, 428 P.2d 699; Gusick v. Boies, 234 P.2d 430; And from C.J.S., Bail, 51(b)(2), I quote: " The exercise of discretion by a court or officer in fixing the amount

of bail is subject to review, but his decision will not be disturbed by the appellate court unless an abuse of power is clearly shown, for the action of the trial court is presumed to be well founded until such presumption is overcome by some character of proof." (Emphasis supplied). It's obvious the state used a no bail status against the appellant as a means of oppression, as the appellant was not entitled to a release until he entered an agreement that was constructed by two competent counsels on March 2, 1983. Appellant had no knowledge that the agreement was illegal and a farce as he was represented by counsel, which was State appointed. In fact, appellant was not aware of the invalidity until he received the record on appeal on Nov. 19, 1983; that's why the appellant is urging this Appeal as expeditiously as possible. Also, bail is set for the sole purpose of securing attendance in court and not to be an instrument of oppression. State v. Norcross (1976), 546 P.2d 840.

Now I bring to the courts attention; defense counsel and county attorney are officer's of the court and are obligated to comply with Arizona Revised Statutes, and see that a good change of plea takes place. State v. Tiznado (1975) 23 Ariz. App. 483. Both counsels only illustrated contempt and misconduct, in their fabrication of a frivilous plea agreement. Plea agreements are made by defense counsel and prosecuting attorney. State v. Whitehead, 596 P.2d 370 (1979).

Prosecution is bound by plea bargain which induces guilty plea, the state is bound to the same. State v. Fuentes (1976) 26 Ariz. App. 444; State v. Stadie (1975) 112 Ariz. App. 196;and State v. Stone, 523 P.2d 493. Plea agreement should be subject to revocation only under most compelling circumstances. Id.

Also, Terms of plea agreements must be meticulously adhered to, and defendant's reasonable expectations under agreement should be accorded deference, and if prosecution does not fulfill its promises under the agreement, defendant is entitled to appropriate relief. State v. Rosenbaum, 601 P.2d 314. There is absolutely no doubt that the State cannot conform to the provisions as required in the plea agreement had on March 2, 1983; and as a result of the misconduct and negligence by Jerry Landau and Luis Kane, the appellant (not knowing the agreement to be illegal as it was constructed by two court advocates) knowingly, willfully, and intelligently, and in good faith was subject to enter an illegal agreement. When plea bargain has been reached and counsel for both State and defendant are present in court for purpose of consummating that agreement by obtaining court's acceptance for bargained-for guilty plea, counsel for both State and defendant have affirmative duty to assist court to the end that appropriate procedural requirements are met. State v. Mendiola, 532 P.2d 193 (1975).

Appellant submits to enter a plea agreement that had merit, was not frivilous, and illegal, was the burden of defense counsel, county attorney, and the court in accepting said plea agreement. Appellant is a layman and is not aware of the complexity and the context of the Statutes, until he was forced to proceed pro per on Appeal. Appellant has had to research and pursue litigation as a result of negligence, misconduct, and incompetency by advocates of the court. This is why James Rummage (P.D.) did not pursue an appeal for the appellant and only served to cover-up the misfeasance's by the court, and advocates thereof, and in doing so rendered himself incompetent and denied the appellant

his constitutional rights to effective assistance of counsel, due process and equal protection of the laws, pursuant to the Fifth, Sixth, and Fourteenth Amendments of the USCA.

Appellant declares that the prejudice incurred by the Court, county attorney, and defense counsel would violate his rights to a speedy trial pursuant to 17 A.R.S., Rule 8 (Speedy Trial), and the United States Constitution, per se. In that, this instant case could not be remanded back to trial court for trial purposes as it would vio- Appellant's Constitutional rights.

To reiterate, the appellant request the Court to take notice of the Reporter's transcript, April 12, 1983,pp. 39 and 40; I will quote Judge Seidel's statement and ORDER, " There's a motion made in the plea agreement to dismiss the charges filed in CR-131188 and Count 2 of 130463. I'm aware of an issue that is present with regard to whether or not the Court can dismiss those charges. In my opinion, since those charges were filed under Arizona Revised Statute Section '28-692.02', (emphasis) and since that statute contains no prohibition to dismissal of charges, I'm going to order that the charges that I just designated and identified be dismissed." (emphasis added). NOW, I must bring to the Court's attention, Count 2 CR-130463 complaint and information that Judge Seidel dismissed; Seidel declared I was charged with ARS 28-692. 02; however, look at the complaint in 130463 (Record,1); In Count 2,I was charged with violating ARS 28-692, 28-692.01, 13-707, 13-802, and 13-604.01; and not 28-692.02 as the Judge declared, creating a misfeasance and falsification of court records.

NOW, look at the Information in 130463, (Record,p.19); again it

is the same as the complaint mentioned above and Count 2 states,"... .. there was 0.10 percent or more by weight of alcohol in FRANK BALDWIN DAVIS JR.'s blood, in violation of A.R.S. 28-692, 28-692.01, 13-707, 13-802, and 13-604-01." This is the sections I was charged with and not section 28-692.02, as the Judge declared; thereby rendering this proceeding a farce on April 12, 1983; this section is prohibited by Arizona Revised Statutes 28-692 (C) and is expressly disallowed to be dismissed. So the Judge falsifed a record to cover-up dismissing the Statutes I had actually violated. I attest there isn't anything more contemptible

Also, again Judge Seidel did the same thing in CR-131188; see (Appellant's Index,A) Information. This was a very important part of the Record on Appeal, and the Clerk conspired with other judicial advocates to exclude from the record this very important document; however the appellant through independent means I.D. did get a copy of said document and same is included in Appellant's Index (A). In CR-131188, Information; the defendant was charged with violating ARS 28-692, 28-692.02, 13-701, et al; Appellant was not only charged with 28-692.02 as Judge seidel declared, but was charged with 28-692; ARS 28-692 is meant to include, A,B,C,D, et al, in that section. Again, the Judge dismissed 28-692(A,B), and pursuant to 28-692 (C) is expressly disallowed; again acting negligently and out of his jurisdiction. I ask the Court how much more can a defendant be prejudiced in a Court of Law.

Appellant also brings to the Court's attention that on March 2, 1983, he entered a plea agreement that waived certain rights, see (Record, CR-131190,p.19a and CR-130463,p.43a); however the Appellant did

not waive his Rights to Appeal for the reasons declared herein. Also, the taking of the illegal plea agreement was March 2, 1983 and on April 12, 1983, approx. 40 days later the Court entered an ORDER reasserting the defendant's right to Appeal; see R.T.4/12/83,p.39, and Notice of Right to Appeal, (Record CR-131190,p.22; Record CR-130463,p.45). Which states in pertinent part...."You have a right to appeal from a final judgement of conviction, from an order denying a post-trial motion, or from a sentence which is illegal or excessive." At that time the County Attorney offered absolutely no objections to the Court ORDER; thereby, waiving the State's rights to object at a later date in a higher court, as it was deemed waived at trial court level. For these reasons and others declared herein, an illegal plea agreement, and court advocates not conforming to Arizona Revised Statutes and provisions thereof not applying their oath of office pursuant to Arizona Constitution and United States Constitution, the Appellant Appeals.

> Judgement by court in criminal case must conform strictly to statute and any variation from its provisions, either in character or extent of punishment inflicted, renders judgment void. State v. Claytor (1966) 3 Ariz.App. 226, 413 P.2d 285

Appellant deems it appropriate to reiterate (p.8, this brief) concerning the prior allegation in the frivilous plea agreement. My wife sent me a copy of CR-111841 Information, which I must insert in this brief. See Appellant's Index E.

The only lawful authority Jerry Landau and Luis Kame had in constructing the plea agreement for allegations of priors was 17 ARS 28-692(d), and alleging priors pursuant to that section, in violation of 28-692 (A or B) occurring within the past 36 months. ABSOLUTELY NO PRIORS WERE ALLEGED FOR SENTENCING PURPOSES PURSUANT TO 28-692(D); again court adcocates did not conform strictly to statutes.

I bring to the Courts attention (R.T.3/2/83,p.14); ALL priors were dismissed, except one, THE STATE HAD NO INSUFFICIENT LEGAL OR FACTUAL BASIS TO DISMISS SAID PRIORS pursuant to ARS 28-692(D). The Appellant did have priors in violation of 28-692,A or B, see (Record CR-130463,p. 19a); however, they were not alleged for sentencing on 4/12/83 and this is expressly disallowed pursuant to 28-692(D).

NOW I BRING TO THE COURTS ATTENTION the prior accepted in CR-130463 (R.T.3/2/83,p.17,line15) was felony flight; again,in CR-131190 the court accepted the same prior.(R.T.,p.32,lines 1-12). NOW, Luis Kane designated that prior as CR-111841 occurring on August 25, 1980. (R.T.3/2/83,p. 34,lines 12-25). NOW, see appellant's INDEX,(E); CR-111841 INFORMATION; NEITHER, one of the two counts are in violation of ARS 28-692(A or B) to fulfill the requirements of ARS 28-692(D), for sentencing purposes. Again, advocates of the state did not adhere strictly to the provisions of the statutes, thereby rendering the judgment void as described in State v. Claytor, and 21 Am. Jur.2d,Crim. Law 535,p.517. See C.J.S. cross references.

NOW, look at (Record CR-130463, m.e.,pp.9,9a). If you get the R.T. for Feb.16, and 25th, 1983; you will see that I proved prejudice by the court; motioned for change of judge; ineffective counsel, etc.. so now you know the reason for the hastily prepared and frivilous plea agreement that does not conform to ARS. By the way,James Rummage refused to get the transcripts of 2/16/83 and 2/25/83, and that's the reason for his letter. (Index,D1). The court erred in not turning my case over to the Presiding Judge immediately. I have sent letters to the Clerk of Courts requesting these transcripts and have received no response.

I'm not going to elaborate on those proceedings as I don't have the

transcripts to suppot my claims. As I do have the Record on Appeal to support the mockery of justice declared herein.

Appellant brings to the Courts attention that this is the first opening brief he has ever filed and respectfully request the Court to waive any errors having been committed herein. Appellant has broughtforth the issues herein in good faith to preserve the integrity and reputation of justice.

In conclusion, Appellant waives no Constitutional Rights, or his rights pursuant to Arizona Constitution, or his rights to Arizona Revised Statutes and Rules of Crim. Procedure, or Federal Rules of Crim. Procedure.

-V-

RELIEF SOUGHT

Appellant on March 2, 1983, entered an agreement that was had by State advocates, to wit; Jerry Landau (County Attorney), and Luis Kame (Defense Counsel). Luis Kame submitted a frivilous sentence memorandum that was false and without merit; he didn' even have said memo in Court until after the day of the Court Order, March 30, 1983. Jerry Landau did not respond at all to the Court Order. Judge Seidel declared in CR-130463, Count 2, I was charged with violating A.R.S. Section 28-692.02; Which was false and without merit; thereby falsifying court records, and rendering the proceeding a farce. Appellant in CR-130463, Count 2, was charged with violating A.R.S. 28-692, 28-692.01, 13-707, 13-802, and 13-604.01. See Record on Appeal, Complaint and Information.

The gross neglect of duty by Judge Seidel, Jerry Landau, and Luis Kame resulted in a miscarriage of justice; and as a result prejudice to the defendant/appellant.

The agreement did not comply with Arizona Revised Statutes, and rendered same false; thereby, rendering the sentence had on April 12, 1983 a farce and a sham, and a mockery to our justice system.

The Record on Appeal will reflect the issues broughtforth, by the Appellant, as true; and Appellant offers same as, "proof of evidence."

The Appellant was denied due process and equal protection of the laws, and effective assistance of counsel pursuant to the United States Constitution, Arizona Constitution, Ariz. Rules of Crim. Proc., Fed. Rules of Crim. Proc., and Arizona Revised Statutes.

Appellant was denied due process, equal protection, and effective assistance of counsel on Appeal; Court erred in not noticing parties, Clerk of Courts did not conform to Statutes in transmittal of Records,

Records were not complete, records were false: Appellant's counsel submitted a frivilous Anders brief that did not have merit; counsel via letter ordered me to communicate with the court, when there was a COURT ORDER that I could not; Luis Kane submitted a frivilous motion to withdraw, that had no merit for the reasons declared within; for these reasons and the reasons declared in appellant's opening brief, the Appellant prays for relief.

Whereas, the Appellant PRAYS The HONORABLE COURT to VACATE the sentence had on April 12, 1983 and dismiss the plea with PREJUDICE; or RESPECTFULLY request such other and further relief the COURT deems appropriate that best serves the interst of JUSTICE.

Respectfully submitted this 13th day of December, 1983.

FRANK B. DAVIS JR. (pro se)

Copies of the foregoing mailed
this 13th day of December, 1983 to:

COURT OF APPEALS
Division One
State Capitol
Phoenix, Arizona 85007

Mr. William J. Schafer III
Chief Counsel Criminal Division
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Mr. James R. Rummage
Deputy Public Defender
132 South Central Ave.
Phoenix, Arizona 85004

Subscribed and sworn to before me
this 13 day of December, 1983

Notary Public

My Commission Expires Nov. 30, 1986

commission expires

APPELLANT'S INDEX

ORIGINAL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. FRANK BALDWIN DAVIS JR., Appellant.	No. 1 CA-CR 7124 Maricopa County Superior Court Nos. CR-130463 and CR-131190

SUPPLEMENT TO APPELLANT'S
OPENING BRIEF
DATED: DEC.13, 1983

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED JAN 6 1984

GLEN D. CLARK, CLERK
By _____

FRANK B. DAVIS JR.
(pro per)
P.O. BOX 38630
FLORENCE, ARIZONA 85232

TABLE OF CITATIONS

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. FRANK BALDWIN DAVIS JR., Appellant.	No. 1 CA-CR 7124 Re: SUPPLEMENT ARGUMENT TO (Pro Per) OPENING BRIEF FILED ON DECEMBER 13, 1983.

COMES NOW THE APPELLANT, FRANK BALDWIN DAVIS JR. (pro per), and bringsforth the following issues and clarification of issues presented on Dec.13, 1983 to the Court of Appeals; pursuant to the recent Court ORDER for the Appellant to file an Opening Brief on or before Jan.5, 1984; this argument to be incorporated and attached to the Brief filed on Dec.13, 1983, and both to be at bar for opening arguments purposes on direct appeal.

The Appellant respectfully submits the following Memorandum of Points and Authorities:

ISSUE (1). Ineffective counsel, Luis Kame; On Nov.23, 1982, Luis Kame filed a Notice of Appearance (Record,CR-130463,p.4) to appear for the defendant. On Feb.7, 1983 said counsel submitted several motions to the trial court, one was a motion to Amend Conditions of Release, see (Record, CR-130463,M.E.,p.8). Judge Seidel set 2/16/83 at 9:00a.m. for said hearing, see (Record, 130463,M.E.,p.8a). NOTE: This is the first approach Luis Kame made to amend my release conditions. I requested him to submit a motion in writing at Arraignment pursuant to 17 ARS, Rule 14.3b but he did not apply the statute as I requested.

On Feb.16, 1983,at 9:00 a.m., the hearing to Amend the Conditions of Release was had before Judge Seidel. Luis Kame submitted arguments to

support the motion he had filed on Feb.4, 1983. (Record,130463,p.33).

I will try to reconstruct the record on that date with my own minutes, as follows:

Luis Kame stated the court should consider a low bond if any, or to follow the AID report; that there was no victims to the accident, or any injuries; that the defendant had strong community ties; had employment to go to, as a journeyman carpenter; was going to get married as his fiance was pregnant; and these arrest was a result of a disease. Basically he submitted what was in the motion for release. Judge Seidel asked if the court was binding to the lower court. Kame informed the court that was the purpose of this hearing to reconsider the release conditions imposed by the lower court.

Here I ask the Court of Appeals, rather I inform the Court Judge Seidel doesn't even know what his very basic duties are on the bench pursuant to 17 ARS, Rules of Crim. Proc., Rule 7.4(b) Subsequent Review of Conditions; and ARS 13-1577 (Supp.1972).

To continue: Jerry Landau informed the court he did not have time to respond to the motion; he declared the motion only alleged the defendant has community ties, and nothing about presumption of innocence was stated in the motion; the instant case was before the court as a result of a disease, and yet DWI was a crime, a serious crime. Again, Jerry Landau informed the court he didn't have time to respond to the motion. Here Judge Seidel agreed and informed Luis Kame to file another motion so the County Attorney could respond. See Record on Appeal (CR-130463,m.e.,p.8b). Judge Seidel ORDERED denying Defendant's Motion to Amend Conditions of Release as to CR 131188 and CR 131190 with leave to refile; also the Court will see where an argument was presented to the Court. Luis Kame, for the defendant, offered absolutely no objection, nor did I as I wasn't aware of the statutes at this time, as I was re-

presented by counsel. Here the Judge permitted Jerry Landau to respond to the motion, after Landau declared he did not have time to respond. That was the purpose of the court ORDER for leave to refile, which is in the record. Also, I DEMAND the Reporter's Transcripts be delivered-up to suppot this claim.

Now I bring to the Court's attention 17 ARS Ann., Rule 35.1 (Motions: form, content and rights of reply); this rule is explicitly clear and the County Attorney should have submitted a reply within 5 days or the motion was deemed submitted before the court.

Now I bring to the Court's attention that Luis Kame submitted his motion to Amend Release on Feb.4, 1983; and the Clerk filed the same on Feb.7, 1983 at 11:21 A.M.; Jerry Landau for the State, should have responded no later than Feb.11, 1983, if the rule means 5 working days from the date Kame submitted his motion; or 5 working days from the date of filing, which would mean that Landau would have had to file a response no later than Feb.14, 1983 at 11:21 A.M.. THE RULE IS CLEAR AND UNAMBIGUOUS. The Judge and judicial advocates can't even apply the very basic Rules of ARIZONA REVISED STATUTES, creating fundamental error and plain error pursuant to Federal Rules of Crim. Proc., Rule 52(B), see Crim. Digest 1030(1).

I'll inform the Court we are in a Court of Law and we can dispense with generalizations as were not in a school room, we will apply ALL the LAWS of our CONSTITUTION, ALL UNITED STATES SUPREME COURT LAW, and ALL THE LAWS OF ARIZONA REVISED STATUTES.

Now I bring to the Courts attention that defendant's have a right to insist on procedural requirements. Government of Canal Zone v. P. Finto (1979) 590 F.2d 1344.

ISSUE (2) Improper conduct by prosecutor/falsification of records; and a class 5 felony by Jerry Landau, having been committed.

On Feb.16, 1983, at '4:43 P.M.' (emphasis), Jerry Landau filed a response to defendant's Motion to Amend Conditions of Release filed on Feb.4, 1983. SEE RECORD CR-130463,p.34, OPPOSITION TO MOTION TO AMEND CONDITIONS OF RELEASE. It is my belief that Landau conspired with the clerk of courts to insert this document in the Record on Appeal, so on the face of it, per se, it would appear he applied the statutes, which infact he still did not. Even assuming arguendo that it did transpire as to the Appellant's beliefs, is not necessary. As I will prove with the Record before the Court, negligence, misconduct, and a falsification of records, as follows:

JERRY LANDAU DID INFACT FILE HIS MOTION IN OPPOSITION TO AMEND CONDITIONS OF RELEASE APPROXIMATELY 8 HOURS AFTER THE HEARING WAS HAD AT 9;00 A.M. ON FEB.16, 1983, IN RESPONSE TO DEFENDANT'S MOTION FILED ON FEB.4, 1983.

NOW read the third paragraph, pg.1, of Landau's motion. Landau stated, "The State has alluded to in the Defendant's memorandum. . . . . ". This statement was false as Landau referred DIRECTLY to the defendants motion before Judge Seidel at 9:00 A.M., Feb.16, 1983. At that hearing Landau also stated, "the motion said nothing about presumption of innocence." Landau also referred DIRECTLY to other issues in our motion on that date. Again refer to the same para., Landau states, "In the present case, there has been a previous finding that the proof is evident, or the presumption great and the defendant was admitted to bail on a previous charge (CR-130463), when arrested for offenses in CR-131188 and CR-131190. The Defendant is, therefore, not eligible for bail."

Again, Landau falsified this record as NEVER did the state show the proof is evident or the presumption is great that the defendant committed a felony while released on bond, nor will the record show any such finding, now or ever, unless falsified. The reason why Landau had this inserted in the record on appeal, is because of my arguendo on Feb.25, 1983,

which the Appellant will bring to the Courts attention shortly.

NOW I will point out it was absolutely mandatory to have possession of the transcripts of hearings on Feb.16 and Feb.25, 1983 to support my claims; that way there would be absolutely no discrepancies in the record to support my claims; now there is a possible chance that the transcripts will be falsified and completely adverse to my claims.

Again, Appellant will point out the letter by James Rumage, Public Defender, Appellant's Index, D1, Brief filed Dec.13, 1983. The last state-in his letter he declared I could request the court to prepare transcripts when there is a standing COURT ORDER I CANNOT COMMUNICATE WITH THE COURT. See the COURT ORDER in Appellant's Index, C.

Improper conduct of prosecutor is highly prejudicial error requiring reversal to avoid a miscarriage of justice to preserve the integrity or reputation of the justice system. U.S. v. Segna (1977) 555 F.2d 226, Crim. Law 1030(1); U.S. v. Krasn (1980) 614 F.2d 1229; U.S. v. Mills (1979) 597 F.2d 693; U.S. v. Flores-Elias (1981) 650 F.2d 1149.

> Under plain error standard, a criminal conviction will be reversed when there has been highly prejudicial error effecting substanial rights; it must be a situation where reversal is necessary to preserve the integrity and reputation of the judicial process, or to prevent a miscarriage of justice. U.S. v. Hall 650 F.2d 994.

Also, plain error requiring reversal is misconduct of trial court depriving constitutional rights or statutory rights. Fed. Crim. Law, 1037(1); C.J.S. 1673(8)p.1131, Constitutional Right.

The aforesaid Cases and Law is to be applied to the illegal plea agreement, and advocates Kane and Landau, and the Court for accepting the agreement rendering the hearing a farce, and as a result and unlawful sentence that did not conform strictly to statutes.

NOW I bring to the COURTS ATTENTION, Record on Appeal, CR-130463,M.E. (9), Feb.25, 1983. Appellant is going to reconstruct a record of the events on that date, as follows:

ISSUE (3) Criminal Contempt; Change of Judge for Cause; falsification of records.

On Feb.25, 1983 I motioned to dismiss all three cause nos. for the following reasons: For not having received adequate and effective assistance of counsel pursuant to 17 ARS, Rule 6.1a; that I did not consult sufficiently in advance of a proceeding, in private with Luis Kane on Jan.31, Feb.7, and Feb.16, 1983; and that my consultation with counsel consisted of, in the open court, with court in session, while on an MCSO chain with other prisoners.

> NOTE: If any further litigation is had in furtherance of COURT of Appeals, I DEMAND that Hon. John H. Seidel's docket, div. 27-I be delivered-up with all persons names on said docket that was on the MCSO chain; to take depositions from the same, as they also thought it to be a farce of how I was being represented, as Kane and I did have quite a heated discussion over the same issue.

To continue: Never once did counsel consult with me prior to a proceeding, and after each hearing counsel stated he would be out to the jail to consult with me, which, DID NOT OCCUR. Also, counsel motioned for change of judge from Judge Coulter without having consulted with me first or given any reasons thereof. On Feb.7, 1983 Luis Kane, counsel hand-delivered 6 motions to this division and to C.A., Jerry Landau, and one was a motion to Amend Conditions of Release. The Court had me delivered-up on Feb.16 th to hear said motion. County Attorney objected to said motion, as he declared he did not have enough time to respond to the motion, and yet on the other hand the court permitted the state to respond, further causing prejudice to the defendant. Pursuant to 17 ARS Rules of Crim. Proc. only 5 days prior notice be given for a motion and the county attorney was given approx.12 days. That the state informed the court that the defendant stated in his motion that this instant case was before the court because of a disease, and yet DWI was a crime, a serious crime. That the defendant only alleged community ties and nothing pertained to the presumption of guilt. If the Court or county attorney

would have researched the cases cited in the Defendant's Motion for Release, State v. Martin, 5 Ariz. App. 525, or Gusich v. Bbies, 72 Ariz. 309; the Court and County Attorney would have to take into considersation the MOTION as having been submitted in good faith and to hear same. Defendant further alleges that counsel for the defendant raised no objection as to the proceedings on Feb.16, in this instant case; and on this date, the defendant, a layman, and not a professional as you Your Honor, the County Attorney, and counsel for the defendant is raising these objections for the record and I waive no rights, and will exaust ALL remedies NOW and on APPEAL to insure I have received due process and equal protection of the Laws of Our Constitution. If a Motion to Dismiss is not granted than the least desirable alternative to release the defendent on bond be granted. Approx. a year ago Your Honor, I thoroughly researched the Canons of Judicial Ethics and Rules governing Attorney's Code of Professional Responsibility; therefore, I further request this matter be forwarded to the Presiding Judge of Superior Court, Judge Darickson, as I'm citing you Your Honor, pursuant to 17 ARS, Rule 33.4 for Criminal Contempt, because your conduct has been so contumacious and rebellious it has not afforded the defendant a fair and impartial hearing officer, and I request the Presiding Judge to set a hearing expeditiously as possible or within a reasonable amount of time, not to be excluded under Rule 8, Speedy Trial, as the prejudice was not incurred on behalf of the defendant; and the motions setforth on this calendar be continued UNTIL AFTER THE CONTEMPT HEARING, thank you Your Honor, and I smiled at Jerry Landau, which he didn't like very much.

The Court ordered me to comply with Rule 10.1 and submit a affidavit no later than Feb.28, 1983 at 4:00 P.M.. I OBJECTED and informed the Court that this WAS Friday and the 28th was Monday, and we only received legal material on Friday's at Durango, and I could not comply with the

ORDER and that I just submitted an Oral Affidavit to the Court, and I objected to any further proceedings in this division.

> NOTE: I do have grievances that I filed at the Durango Detention Facility on Feb.28, 1983 and informed the legal services that I was under Court ORDER to prepare documents. I received no response, other than they moved me to Towers Jail. I will forward a copy of same to the Court as soon as I receive meaningful access to the law library pursuant to Bounds v. Smith, 97 S.Ct. 1491 (1977).

I demanded the instant case be turned over to the Presiding Judge immediately. The Court had no further jurisdiction in the matter accept to turn the case over to the Presiding Judge. I MADE ABSOLUTELY NO MOTION FOR AN EXTENSION OF TIME, OTHER TO CONTINUE FOR PURPOSES OF TURNING THE CASE OVER TO THE PRESIDING JUDGE. This is why the clerk falsified the minute entry (M.E.), (9), Record, CR-130463. So on the face of the record it would look as though I waived my right to Challenge the Judge for Cause, by permitting,the proceeding to continue in Seidel's court.

The Judge further ordered other matters be set in his division in which he did not have the authority to do.

> Challenged judge had no jurisdiction to rule on motion for change of judge for cause and should have transferred case to presiding judge. State v. Garcia (1977) 114 Ariz. 317, 560 P.2d 1224.

> Also, pursuant to Rule 10.1(B). . . . . Allegations of interest or prejudice which prevent a fair and impartial hearing or trial may be preserved for appeal.

> Also, pursuant to 17 ARS, Rule 10.6 Duty of judge upon filing of motion or REQUEST under Rules 10.1 or 10.2
>
> When a motion or REQUEST for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be necessary in the interest of justice before the ~~judgxxx~~ action can be transferred to the presiding judge.

Also, A motion for change of judge is timely ONLY if filed within ten days after discovery of grounds for change. (Id). State v. Lucas (App. 1979) 123 Ariz. 39, 597 P.2d 192.

The judge was creating a manifest injustice ORDERING the defendant

not to comply with the 10 day time limit pursuant to the statutes and numerous case law. As the discovery of grounds for change was the hearing on Feb.16, 1983, and the judge was ordering me to apply the ten day time limit approx. 13 days after the grounds for change existed.

> The matter of disqualification of a judge should not be viewed from its most technical aspects, but rather from standpoint of substance. State v. Miranda (1966) 3 Ariz. App. 550, 416 P.2d 444.

That is why it is absolutely mandatory to have true certified transcripts of the record on Feb.16 and Feb.25, 1983; to support my claims declared herein.

> While a "record of sufficient completeness" to permit proper consideration of a defendant's claims on appeal does not translate automatically into a complete verbatim transcript, the state must provide a full verbatim record when that is nesessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way. State v. Stolze (1975) 112 Ariz. 124, 539 P.2d 881.
> Destitute defendant's must be afforded as adequate appellate review as defendant's who have money enough to buy transcripts; in terms of the trial record, this means that the state must afford the indigent a record of sufficient completeness to permit proper consideration of his claims. Id.
>
> It is the duty of counsel who raises objections on appeal to see that the record before the Supreme Court contains the material to which he takes exception. State v. Bojorquez (1975) 111 Ariz. 549, 535 P.2d 6, 78 A.L.R.3d 1135.

Apparently the very basic Arizona Rules of Crim. Proc, that supposedly competent counsels and judges are so vague to,adhere too, that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process. Baggett v. Bullitt, 84 S.Ct. 1316, 377 U.S. 360, 12 L.LEd 2d. 377.

James Rummage rendered himself ineffective as he wouldn't pursue my Appeal or order transcripts I requested. So much fundamental error and plain error has occured throughout this insatant case, CR-130463, CR-131190, and CR-131188 that it has substantially impaired the rights of the defendant/appellant.

ALL the aforementioned leads up to why a hastily prepared, and an

illegal plea agreement was had on 3/2/83, and as a result an illegal sentence had on 4/12/83.

On 2/28/83 at Durango Jail, I filed a grievance because we was only receiving legal materials once a week at the facility, on Fridays; and this was hindering me preparing for court, and I was under a court order. As a result I was taken to the Towers Jail facility.

On 3/1/83, defendant's counsel, Luis Kame came to Towers Jail and hand delivered to me severral allegations of priors, allegations of committing a felony while released on bond, and an Amended Information where the state was seeking 4 counts in Cr-130463. He informed me that if I didn't accept a plea agreement of a stipulated 4 year 'soft time' term (Record,130463, p.42,no.4) the state was seeking flat time pursuant to 13.604.01, and consecutive sentences, seeking approx. 21 years. Which I do have a copy of Kame's hand written notes to that effect, but do not have the wherewith-all at this time to forward a copy to the Court. By the way, I informed Judge Seidel on 2/25/83 of the same, and this was another reason I was seeking to terminate present counsel, as Kame approached me once before with a 6 year term plea agreement.

As the Court can see by Luis Kame's letter of 3/1/83, he had conspired with County Attorney, Jerry Landau to cover-up for himself and the States misfeasances already incurred, as item no. 6 in his letter will clearly point out.

> (6) Defendant will not file his motions for Change of Judge, Change of Attorney, and whatever other motions he mentioned at the hearing of Friday, February 25, 1983.

NOR DID DEFENDANT'S COUNSEL OR THE COURT INFORM THE DEFENDAT HE WOULD BE WAIVING ANY ARGUMENT FOR CHANGE OF JUDGE PURPOSES, BY FURTHER APPEARING BEFORE THE COURT IN THIS DIVISION.

I will point out for the record that this letter of Kame's is proof that he or the county attorney did not conform strictly to ARS 28-692(C and D). Also, if the plea had of been legal they did not conform to No.4, as the Appellant is definitly NOT DOING A 'SOFT TIME' sentence.

Thereby rendering the sentence ambiguous and excessive, in not constructing a agreement in compliance to the statutes and Kane's letter.

The purpose of the illegal agreement was to technically dismiss themselves from any further legal obligation because of my citation of Criminal Contempt, Change of Judge for Cause, Change of Attorney, Motion to dismiss wih prejudice on Feb.25, 1983.

Appellant has already broughtforth the argument the state used a means of oppression to induce a guilty plea, by detaining the appellant on a no bond status, UNTI AFTER HAVING PLED GUILTY AND ONLY THEN WAS THE DEFENDANT RELEASED.

FURTHER, Jerry Landau, for the State used a fradulent means to induce a guilty plea by presenting to defense counsel, allegations of priors, that were MALICIOUS. Luis Kane should have conscientiously examined the allegations of priors but DID NOT. AS A MATTER OF FACT, Kane was part of this fraudulent scheme to induce a guilty plea because of his own oversights, and negligence.

SEE, Record CR-130463,p.39; ALLEGATION OF PRIOR AND/OR REPETITIVE CONVICTIONS. In the last para. Landau stated, " The Maricopa County Attorney alleges any conviction which arises from CR 131188 and CR 131190 as a prior or repetitive conviction for sentencing purposes in CR 130463."

NOW I bring to the Courts ATTENTION the offense in CR-130463 was on Sept.26, 1982, and CR-131190 was on Nov.21, 1982, and the offense in CR-131188 was Dec.8, 1982. NOW I bring to the Courts ATTENTION that Landau seeked to apply State v. Hannah, 128 Ariz. 575, in this fraudulent document, and rendered himself incompetent in the interpretation of the SUPREME COURT decision as follows:

> The central principle THE CHIEF JUSTICES' applied in the Hannah case are relatively straightforward, and any person of common

intelligence could ascertain the ruling setdown, except Jerry Landau. I concur with the Supreme Court decision in the Hannah case. It need not be necessary to have a conviction for a prior offense to enhance the punishment of the principle offense; In fact, the conviction for the prior offense was Oct.22, 1979, approx. 73 days after the principle offense of Aug.10, 1979. However, the date of the offense for the conviction on Oct.22, 1979 WAS ON NOV.2, 1978, WHICH WAS PRIOR TO THE DATE OF THE PRINCIPLE OFFENSE ON AUG.10, 1979. Thereby, it is ABSOLUTELY MANDATORY for a prior conviction allegation TO HAVE COMMITTED AN OFFENSE ON A DATE PRIOR TO THE DATE OF THE SUBSEQUENT OR PRINCIPLE OFFENSE.

The reason for the aforesaid argument is to prove Jerry Landau's negligence, misconduct, and attempt at a malicious prosecution to induce a guilty plea. Again, he did the same in CR-131190, Record,p.18; this document is partially true; but, it was not conceivably possible for CR-131188 to be a prior to CR-131190. CR-131188 occurred on Dec.8, 1982 approx. 17 days after CR-131190 on Nov.21, 1982. It is my contention that Luis Kane conspired with the state to cover-up this misfeasance. This is another reason for the illegal plea agreement. So now I've just submitted more proof from the record that fundamental error and plain error did occur substanially impairing the rights of the defendant and prejudicing the same. A fraudulent means was used to induce a guilty plea.

> Guilty plea procurred by fraud or duress is ground for setting aside judgment on plea of guilty. State v. Jennings (1968) 104 Ariz. 3, rehearing 104 Ariz. 159, 449 P.2d 938.
>
> Showing that plea of guilty was induced by fraud or duress is ground for setting aside a judgement on the plea. State v. Murray (1966) 101 Ariz. 469, 421 P.2d 317.

Again, Appellant must apply the plain error standard and cite the improper conduct of the prosecutor is highly prejudicial error requiring reversal, refer to UNITED STATES SUPREME COURT cases on page 5 of this brief. Further, I beleive that all the priors the State was using against me for sentencing purpose were frivilous, as pursuant to 28-692 (D) the only priors to be used for sentencing purpose were for a violation of 28-692 (AorB). Thereby, this statute is so ambiguous for sentencing purposes, that the state alleged numerous priors, other than described in the provision of

of this statute, which the State absolutely did not apply.

> U.S. Wash, 1964. A law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. Baggett v. Bullitt 84 S.Ct. 1316, 377 U.S. 360, 12 L.Led 2d 377

ISSUE (3) Misfeasance;Violation of Arizona Revised Statutes

Pursuant to the illegal plea agreement, Record CR-130463,p.43 and CR-131190, Record,p.19; provision 8 in both plea agreements are explicitly clear as follows:

> The parties hereto fully and completely understand. . . . . .and that the court need not accept either the stipulation or recommendation but is bound only by the limits set forth in paragraph one AND THE APPLICABLE STATUTE.

There is absolutely no doubt the court did not conform strictly to statutes and apply the provisions in 28-692(C); as the state in order to induce a guilty plea dismissed Ct 11 of CR-130463 and CR-131188; so in effect what has occurred is the state used malicious priors, a no bond status until after pleading guilty, and the dismissal of charges to adduce a guilty plea; ALL to cover-up for my personal accusations on Feb.25, 1983. Now I bring to the Courts attention a highly prejudicial statement by Judge Seidel that was the furtherance of the malfeasances in this instant case. SEE Reporter's Transcripts 3/2/83,p.19, lines 19-23. The judge stated, "I found in the past that good counsel can usually come up with a legal way of accomplishing a desired result, and so you and Mr. Landau since at least on this issue I presume you're on the same side, maybe you can do something."

Kame did okay, he submitted a false, fraudulent, and utterly ridiculous sentence memorandum to the court, that was a complete mockery to our justice system. Its the Appellant's contention that Judge Seidel was aware of the same and that was the purpose of him designating them under 28-692.02 and declaring that section contained no prohibition to dismissal of

those charges. See Reporter's Transcripts,p.40. Now I must point out to the Court the following:

> Specification of an offense constitutes a charge of that offense and all offenses necessarily included therein. State v. Kidd (App,1977) 116 Ariz.479.

ISSUE (4) False and fraudulent sentence memorandum:

Luis Kame's memorandum is in Record, CR-130463,p.44. On,p.2, lines 10-16; Kame states, "The state will move to dismiss a third and separate case . . . .". Here Kame intentionally omitted CR-130463 CT 11, and was only referring to CR-131188, to mislead the Court.

In lines 21-25; he states, "A.R.S. 28-692(C) DOES NOT PROHIBIT DISMISSAL OF A CHARGE OF VIOLATING A.R.S. 28-692.02 PURSUANT TO A PLEA AGREEMENT ENTERED INTO BETWEEN THE STATE OF ARIZONA AND A DEFENDANT." This is absolutely false, as you couldn't have a violation of the .02 provision, unless you had a violation of 28-692 (A or B), then this would incorporate 28-692(C).

Further he states, "A.R.S. 28-692.02, the offense with which Defendant in the instant case is charged. . . ." Here he made more false statements as I was not charged only with the .02 section. Then he explains the (A) section knowingly omitting, ". . . . . or a person who has never applied for or obtained an operator's or chauffer's license... . . . who commits a second offense in violation of 28-692, is guilty of a class 5 felony. . ."

NOW I bring to the Courts attention, that the appellant had a prior conviction of 28-692 on May 27, 1982 (Record,130463,p.19a), and DID NOT APPLY for an operator's license. Therefor, I should have benn charged with the .02 provision in CR-130463, and NOT 2 counts and later amended to 4 counts as the State did; infact this was a furtherance to compound injury to the defendant to induce a guilty plea. The State had no lawful authority to allege 4 counts against the defendant in violation of 28-692 A and B. INFACT, Jerry Landau did this intentionally to place the defendant

in a state of duress to enter an illegal plea agreement.

I was not aware of the context of the statutes until the Appellant was forced to proceed pro per and diligently investigate the instant case at bar; as I was represented by supposedly competent counsel. As it was I had many/numerous defenses to bringforth that Luis Kame never conscientiously presented and only served one purpose, and that was tp protect his peers misconduct (other judicial advocates).

NOW, a violation of 28-692, one must refer to the .01 provision for classification purposes; then to the .02 provision for increased punishment, clasification purposes. These statutes are explicitly clear and unambiguous and one does not need to resort to secondary rules of statutory construction. O'Malley Lumber Company v. Riley, 126 Ariz. 166 (App.1980).

Jerry Landau and Luis Kame, and NOT THE DEFENDANT rendered themselfs incompetent in the construction of the statutes; they did in many instances and did not apply the very basic rules of Ariz. Rules of Crim. Proc.; and knowingly, willfully and maliciously resulted to fraud and deceit to prosecute the defendant; whereas, the Appellant's offer of proof is the Record on Appeal.

NOW, Kame further falsified his memo on pg.4, lines 5-9; He states, "A.R.S. 28-692.02 refers to 28-692 only for purposes of defining the type of behavior. . . ." Again, 28.692.02 is explicitly clear and you must ABSOLUTELY have a violation of 28-692; and 28-692 is a definite criminal offense and being convicted thereof, and not a definition of behavior as Kame so falsely stated. The statute is EXPLICITLY CLEAR and in order to violate the .02 you must have had to violate 28-692(A) or (B), and this would incorporate the 28-692 (C); whereas, it is expressly disallowed to dismiss a violation of 28-692, in return for a plea of guilty to another offense of 28-692. WHICH THE STATE DID AND DID NOT HAVE THE AUTHORITY TO DO.

NOW on page 4, lines 24-25 Kane by his own statements declares the statute as being ambiguous; he states,"If the legislature's intent with respect to 28-692.02 is not clear, then this case represents an oppurtunity for the court to inform the legislature that an ambiguity exists in the statute." He's not even absolutely sure of the existing statute himself, and by his own admissions this renders the statute as being ambiguous. As in, State v. Phelps 12 Ariz. App. 83, Constitutional Law p.425, 62(2); if intent isn't clear in statutes and is ambiguous then it is a constitutional violation.

> U.S. WASH. 1964. A law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. Baggett v. Bullett 84 S.CT. 1316, 377 U.S. 360, 12 L.LED2d 377.

Also, Judge Seidel declared this statute ambiguous or he wouldn't have requested a sentence memorandum to begin with. This statute is clear and unambiguous and the only purpose for Kane's false memo was to cover-up for negligence of all judicial advocates was [redacted] so the State would adhere to an illegal plea agreement.

Further, Kane's memo on p.5, lines 11-15; he states, "First, A.R.S. 28-692 (C)(2) will be disposed of as. . . is not applicable. . .as a misdemeanor or other petty offense is not being sought." THIS WAS TRUE.

HOWEVER, lines 16-24 are completely false as he implemented the provisions in (C)(2) to apply arguendo to the (C)(1) provision; In lines 21-24 he states, "This limitation, however, is operative when the original offense is 'sought to be reduced' in exchange for a plea of guilty or no contest. Such is not the case in the case before the court."(emphasis). The provisions in the (C)(2) prohibited a reduced charge ; and the provision prohibits the outright dismissal of a charge in (C)(1), in return for a guilty plea. WHICH THE STATE DID TO INDUCE A GUILTY PLEA.

IN Kane's CONCLUSION he states, "These provisions are not contrary to any public policy nor violative of any statutes." WHICH IS ABSOLUTELY

FALSE, AS IT IS IN VIOLATION OF ARIZONA REVISED STATUTES, CODE OF JUDICIAL ETHICS AND CODE OF PROFESSIONAL RESPONSIBILITY.

Also, Kame violated a court order and did not have this frivilous memo in court pursuant to the court order, as he submitted the same on March 30, 1983, the day after the court order, and Landau did not respond at all.

ISSUE (5). VIOLATION OF THE SIXTH AMENDMENT

Appellant filed a timely Notice of Appeal on April 29, 1983. Pursuant to 17 ARS Rules of Crim. Proc., Rule 31.11 Perfection of the appeal, reads as follows:

> No new matter, other that a petition for post-conviction relief not precluded under Rule 32.2, may be filed in the trial court by any party to an appeal later than 15 days after the record on appeal has been filed.

NOW one must refer to CR-150463 to see when the record on appeal was filed, which was May 12, 1983. Nor was I noticed pursuant to Rule 31.10 or Rule 35.6 which is mandatory by the Clerk.

Trial court did not have jurisdiction to ORDER Luis Kame to withdraw on June 12, 1983, which was approx. 35 days after the record on appeal was filed. INFACT, trial court did not have the authority to permit Kame to withdrew anyway for the reasons declared in Kame's motion. The trial court and Kame's conduct left the Appellant without counsel, on appeal.

Luis Kame would have been precluded by law for ethicals reasons to represent the Appellant, but NOT FOR HIS REASONS FALSELY STATED IN HIS MOTION. Appellant has a constitutional right to counsel on appeal, pursuant to Douglas v. California 83 S.Ct. 814(1963). In that right would mean to include effective assistance of counsel.

Appellant was left without counsel to apply the Ariz. Rules of Crim. Proc. effectively. Also, the provision of free transcripts and records of prior proceedings is constitutionally required for indigents under Griffin v. People of the State of Illinois 76 S.Ct. 585, 351 U.S. 12.

James Rummage refused to order transcripts I requested and that was the purpose of his letter in Appellant's Index Opening brief of Dec.13, 1983, labeled (D1). Again, Judge Seidel entered a COURT ORDER that I cannot communicate ~~ith~~ with the court.

INFACT, pursuant to 17 ARS, Rule 26.11 "Comments" pg. 628 reads as follows: The defendant's trial counsel, whether private or appointed has a duty under Rule 6.3(B) to advise his client whether or not an appeal would be beneficial and to continue representing the defendant if an appeal is taken, unless he shows good cause why he should be allowed to withdraw.

One things for certain Kame wasn't about to admit on record because of his conduct an illegal plea agreement was had, He should have been permitted to withdraw for ethical reasons, other than the reasons he declared in his motion to Withdraw. That in itself is further proof the appellant was left without counsel on appeal. INFACT, Kame conspired with Judge Seidel to be permitted to withdraw, because they was both aware of the misfeasance they created.

INFACT, it was approx. 75 days after I filed a Notice of Appeal that I even heard anything from an attorney. WHICH I ABSOLUTELY OBJECT TO as I do have the right to insist on procedural requirements pursuant to Government of Canal Zone v. P.Pinto (1979) 590 F.2d 1344.

ISSUE (6) NONCOMPLIANCE TO RULES OF CRIM. PROC..

Pursuant to 17 ARS Ann., Rule 31.9 Transmittal of record;

(c) Extention and reduction of time for the Transmittal of the record. The Appellate Court, on a showing of good cause, may grant one extentsion of the time for transmitting the record which shall not exceed 20 days or it may require the record to be transmitted at any time within the prescribed period. A copy of the order issued under this section shall be sent to the parties, the clerk of the trial court, and to the appropriate reporter or reporter's. Effective Aug.1, 1975.

Now one must refer to Rule 31.9a Time for Transmission. The record on appeal shall be transmitted to the Appellate Court within 45 days after the filing of the notice of appeal.

ONE must refer to the Appellant's Notice of Appeal filed on April 29,

1983. (Record,CR-130463,p.46). We can dispose of CR-130463 for this argument, as it can easily be determined that particular was transmitted in the proper time frame.

HOWEVER, one must refer to (Record, CR-131190,p.23) Notice of Appeal by the Defendant dated April 29, 1983. The cause Nos. at the top of the page are clear, CR-130463, CR-131190, and CR-131188; for argument purposes we'll even go by the date of filing May 4, 1983; which would mean that the last day the Clerk would have had to transmit the record in CR-131190 would be July 8, 1983. The statutes are explicitly, clear and the Appellate Court may grant one extension of time not to exceed 20 days, on a showing of good cause, and all partise will be noticed. Again, the statutes were not complied with and the Appellant was denied due process and equal protection pursuant to our constitution.

Not only was the Record in CR-131190 not transmitted in time it was' nt even certified until Aug.29, 1983, approx. 51 days after the last day due of July 8, 1983.

> APPELLANT DOES OBJECT TO ANY FURTHER LITIGATION, AND WILL NOT WAIVE ANY ARGUMENTS NOW OR IN THE FUTURE BECAUSE OF JUDICIAL ADVOCATES FAILURE TO APPLY THE STATUTES.

Further, the State of Arizona Department of Corrections is denying the Appellant adequate legal library facilities; as the Appellant was placed in isolation on Dec.15, 1983. Appellant has filed grievances to the same and has not received any effective results. I have sent numerous kite orders to CSO Kangas and same has refused to respond.

> The Supreme Court, Mr. Justice Marshall, held that the fundamental constitutional right of access to courts requires prison authorities to assist inmates in preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. Bounds v. Smith 97 S.Ct. 1491 (1977).

If The Court of Appeals is in awe to my paramount preparation, the reason for it is because my wife delivered to me a personal file of legal

materials on Nov.20, 1983; which is on record here at ASP Central Unit.

One more argument that is paramount; Appellant could not proceed by way of Rule 24.2, because Luis Kane left the Appellant without counsel on Appeal. Nor could the Appellant proceed by way of Rule 32, as James Rummage left the Appellant without counsel on Appeal.

Thereby, The Appellant respectfully request THE HONORABLE COURT to vacate the judgment and sentence had by the State on Mar.2 and April 12, 1983, perspectively. SAME ORDER TO TRANSPIRE IMMEDIATELY.

Appellant, Respectfully request the COURT to suspend 17 A.R.S., Rule 31.21 (Manner of filing and service; copies) pursuant to Rule 31.20 (Suspension of the rules); as Appellant does not have the where-with-all to apply Rule 31.21. I do have two copies, to which I will send one to the Attorney General's Office. I had to borrow enough carbon paper to do this. Thereby, the Appellant respectfully request the Court to order the Clerk to make the appropriate copies to forward to the proper parties.

Respectfully submitted this 5th day of January, 1984.

FRANK B. DAVIS JR. (pro per)

Copies of the foregoing mailed
this 5th day of January, 1984 to:

COURT OF APPEALS
Division One
State Capitol
Phoenix, Arizona 85007

Mr. William J. Schafer III
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Subscribed and sworn to before me
this 5th day of January, 1984

Notary Public

My Commission Expires April 28, 1987

commission expires

ORIGINAL

BC

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, -vs- FRANK BALDWIN DAVIS, JR., Appellant.	)	NO. 1 CA-CR 7124 MARICOPA COUNTY SUPERIOR COURT NO. CR-130463 and CR-131190

APPELLEE'S ANSWERING BRIEF

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3-13-84

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court lack the jurisdiction to consider this appeal?

2. Although he plea is contrary to the prohibition of Ariz.Rev.Stat.Ann. § 28-692(C) where appellant agreed, where he failed to object and where the error was to his benefit, is reversal required?

3. Was trial counsel ineffective?

4. Has appellate counsel been ineffective?

5. Has appellant been subjected to double jeopardy or double punishment?

6. Is appellant without counsel on appeal?

7. Did the prosecutor engage in misconduct?

8. Should the trial court have withdrawn?

9. Did appellant receive full presentence credit?

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STATEMENT OF THE CASE

On December 8, 1982, an information was filed in Maricopa County Superior Court charging appellant with: Count I, driving while under the influence of intoxicating liquor or drugs (hereinafter referred to as DWI), while license suspended, cancelled, revoked, or refused, a class 5 felony; and Count II, DWI with two or more prior convictions for DWI, a class 5 felony. This accusation was assigned the number 130463. On January 4, 1983, the state filed an allegation of six prior felony convictions, and on February 18, 1983, an allegation of a prior for any conviction obtained in CR-131188 and/or CR-131190.

On January 19, 1983, a second information was filed under No. CR-131190, accusing appellant with DWI while license suspended, canceled, revoked or refused, a class 5 felony. To this, the state added an allegation of committing a felony while released on bond or own recognizance, on February 3, 1983; an allegation of the six prior felony convictions noted in CR-130463; and an allegation of priors concerning CR-131188 and CR-130463.

Apparently, although not contained in this record on appeal but referenced throughout this record, a third information was filed on January 19, 1983, charging appellant with a third DWI while license revoked, suspended refused or canceled, a class 5 felony, in CR-131188. (See Appendix, Appellant's Supplemental Opening Brief.)

On March 2, 1983, appellant and the state entered into a plea agreement whereby:

1. Appellant would plead guilty to count one as charged in CR-130463, DWI, a class 5 felony with one prior felony conviction;

2. Appellant would plead guilty to DWI, a class 5 felony with one prior felony conviction in CR-131190;

3. Appellant would receive a prison sentence of 4 years in each cause;

4. The sentences in each cause would be served concurrently;

5. Appellant would be granted a presentence bond;

6. CR-131188 would be dismissed;

7. All allegations of prior convictions would be dismissed except one;

8. The allegations of committing a felony while on bond or O.R. would be dismissed in CR-131190.

(Plea Agreements, filed Mar. 2, 1983.)

The trial court reviewed the agreements with appellant, advised appellant of the potential consequences, of the special sentence and release conditions, of the rights involved and waived by pleading guilty, and established the absence of force, threats or promises. (R.T. of Mar. 2, 1983, at 4-17; 20-21.) Appellant pled guilty to both charges, the court established a factual basis for each

charge and found each plea to have been made knowingly, intelligently and voluntarily. (Id. at 8; 15-17; 22; 31-32.)

On April 12, 1983, the trial court entered judgment and imposed sentence. For aggravating circumstances, the court noted appellant's six prior felony convictions. (R.T. of Apr. 12, 1983, at 38.) Sentences of 4 years in prison were imposed on each conviction, to be served concurrently. (Id. at 39.) All remaining terms of the plea agreement were carried out.

On May 4, 1983, appellant filed a notice of appeal in both CR-130463 and CR-131190. (Notices, filed May 4, 1983.) A review of the calendar for 1983 clearly reflects that both notices were untimely filed, thereby depriving this Court of appellate jurisdiction.

On September 28, 1983, counsel for appellant filed an opening brief in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Appellant responded pro per with a supplemental opening brief received by this office on December 16, 1983, and an additional supplement received on January 6, 1984. On January 20, this Court ordered appellee to respond by filing an answering brief.

ARGUMENTS

I

THIS COURT IS NOT VESTED WITH THE JURISDICTION TO CONSIDER THIS APPEAL BECAUSE OF THE UNTIMELY FILING OF THE NOTICE OF APPEAL IN EACH CAUSE.

Ariz.Rev.Stat.Ann. § 12-120.21 grants the sole jurisdiction for any appellate court to review a judgment or sentence. Rule 31.3, Arizona Rules of Criminal Procedure, establishes a predicate to that review; the filing of a notice of appeal within 20 days after the entry of judgment and sentence with exceptions not applicable to this cause. This time limit is jurisdictional; failure to perfect the appeal on time deprives this Court of jurisdiction except to enter an order to dismiss the appeal. Matter of Appeal in Maricopa County, Juvenile Action No. JS-834, 26 Ariz.App. 485, 549 P.2d 580 (1976).

Judgment of conviction and imposition of sentence occurred on April 12, 1983. (Minute Entry of Apr. 12, 1983.) The notices of appeal were filed on May 4, 1983. (Notices, filed May 4, 1983.) A review of the calendar for 1983 reflects that May 4, a Wednesday, was 22 days after April 12, a Tuesday. There is no way the 20 day period could be extended by 2 days, such as by holiday or weekend. The notices were not timely. The time limits are jurisdictional. Without jurisdiction, this Court must dismiss the appeal.

NOTE

In both the supplemental brief and the supplement to the supplement, appellant rambles on about several issues. Appellee will attempt to respond to the general areas addressed in appellant's briefs.

II

THE DISMISSAL OF CR-131188 WAS TO APPELLANT'S BENEFIT, THEREFORE NOT PREJUDICIAL AND NOT REVERSIBLE.

Appellant raises an issue concerning the validity of his guilty plea. As noted in the Statement of Facts, appellant was charged in CR-130463, 131188 and 131190 with DWI while license suspended, canceled, revoked, or refused, in violation of Ariz.Rev.Stat.Ann. §§ 28-692 and -692.02. Each charge related to a different offense. A plea agreement led to appellant entering a plea of guilty, as charged, in 130463 and 131190, and the dismissal of 131188.

As noted by appellant, Ariz.Rev.Stat.Ann. § 28-692(C) prohibits dismissal of any DWI (1) in return to a plea of guilty or no contest to any other offense by the person charged, or (2) for the purpose of pursuing any misdemeanor or petty offense . . . unless there is insufficient legal or factual basis. Because of this statutory prohibition and the disregard of same by the prosecutor in the instant circumstances, appellant argues that the pleas in CR-130463 and 131190 are null and void.

The trial court recognized the problem and ordered counsel to file memoranda on the issue. (R.T. of Mar. 2, 1983, at 18-19.) Appellant's trial counsel filed memoranda which suggested two ways to bypass the legislation found in Ariz.Rev.Stat.Ann. § 28-692(C). First, appellant was charged under 28-692.02 which is not affected by 28-692(C); second, the legislature really did not intend for the statute to apply where the accused was going to plead to DWI and not a lesser offense. (Defendant's Sentencing Memorandum, filed Mar. 30, 1983.) The court adopted the first explanation; that since the charge was pursuant to Ariz.Rev.Stat.Ann. § 28-692.02, there is no prohibition to dismissal. (R.T. of Apr. 12, 1983, at 40.)

This is a very troublesome issue. On the one hand, appellant freely and willingly bargained for and received a benefit which resulted from disregarding a stautory prohibition. Should appellant now receive appellate relief for taking advantage of the system a second time?

Appellee cannot, in good faith, subscribe to the basis upon which the court ruled nor to the argument made by defense counsel concerning the legislative intent regarding Ariz.Rev.Stat.Ann. § 28-692(C). First, the offense or substantive crime is DWI. Ariz.Rev.Stat.Ann. § 28-692(A) and (B) criminalize physical control of a vehicle while under the influence or while there is 0.01 percent alcohol

in the blood. Ariz.Rev.Stat.Ann. § 28-692.01 classifies the various degrees of offenses and establishes penalties. Ariz.Rev.Stat.Ann. § 28-692.02 increases the punishment where the DWI offense is committed when the offender's driver's license is suspended, canceled, revoked or refused. Therefore, § 28-692.02 is not definitive of a separate criminal offense; it merely classifies conduct and enhances a penalty, similar to Ariz.Rev.Stat.Ann. § 13-604. The crime is not driving with a suspended license, it is driving while intoxicated. If the license is suspended, etc. and one drives under the influence, the penalty is enhanced.

Secondly, counsel's interpretation of legislative intent is not reflected in the statutory wording nor in the statutory history. Subsection (C) prohibits a dismissal for either a plea to any other offense or for pursuing a misdemeanor arising from the same conduct. It would appear that the state here agreed to dismiss the DWI in CR-131188 for a plea to the offenses in CR-131190 and 130463. The fact that the latter offenses are the same as the former is not addressed by the statute.

The state appears to have entered the plea agreement in violation of Ariz.Rev.Stat.Ann. § 28-692(C). Appellant was obviously induced to enter the agreement by this condition to dismiss CR-131188. The issue becomes one of remedy.

Ariz.Rev.Stat.Ann. § 28-692 does not provide for sanctions for violation of (C). Nor does any case law. It is clear that the state's misconduct inured to appellant's benefit, not his detriment. Therefore, appellant was not prejudiced. It is unusual that appellant raises the issue on appeal. If this Court rules the state's conduct to be null and void, the plea agreements in CR-130463 and 131190 must be invalidated. If the agreements are invalidated, appellant is back where he was before his change of plea -- reinstatement of CR-131188, all alleged prior convictions and the allegations of committing a felony while released. See plea agreements, paragraph no. 4, page 2. Absent fundamental error and prejudice to defendant, a reversal is not proper. See State v. Sorrell, 132 Ariz. 328, 645 P.2d 1242 (1982).

It can also be argued that appellant clearly waived this issue for appeal. Both he and counsel were made aware of the problem. The court inquired into the propriety of the plea. Not only did counsel not object to the dismissal, he argued in favor of it. Failure to object waives the right to appeal absent fundamental error. State v. Sorrell, supra. This was not fundamental error.

If this Court rejects the absence of prejudice and failure to object arguments and finds the dismissal of CR-131188 to have constituted reversible error, the only

remedy is to reverse the convictions and remand the case for reinstatement of CR-131188, all allegations of prior convictions and all allegations of committing a felony while released on bond or O.R.

III

TRIAL COUNSEL WAS NOT INEFFECTIVE.

Appellant makes several allegations of ineffective assistance of trial counsel. The test is whether, under the circumstances, the attorney showed minimal competence in representing the criminal defendant. State v. Watson, 134 Ariz. 1, 653 P.2d 351 (1982). The burden is on the defendant to show less than minimal competence by a preponderance of the evidence.

Without reviewing every step taken in appellant's defense which, in the circumstances, led to a very favorable plea agreement, appellee submits that appelalnt has failed to carry his burden. Moreover, appellant's claims of ineffective assistance are generally directed to conduct that took place before the change of plea. As such, the claims are waived by the plea. State v. Davis, 134 Ariz. 87, 654 P.2d 21 (Ct.App. 1982). There is no support for appellant's claims of ineffective assistance of counsel.

IV

APPELLATE COUNSEL IS NOT INEFFECTIVE.

Appellant also contends that appellate counsel is ineffective. Failure to raise frivolous issues on appeal does not constitute ineffective representation.

V

ARIZ.REV.STAT.ANN. § 28-692 IS NOT VIOLATIVE OF DOUBLE PUNISHMENT, DOUBLE JEOPARDY OR EQUAL PROTECTION.

Appellant argues that Ariz.Rev.Stat.Ann. § 28-692 violates the double punishment provisions of Ariz.Rev.Stat.Ann. § 13-116 and, as charged, violates his double jeopardy rights. In CR-130463, appellant was originally charged with DWI while license suspended, etc., and Count II, DWI with two or more convictions. (Information, filed Dec. 8, 1982.) Notwithstanding the validity of the original charge, it was amended by the plea agreement and appellant pled guilty to that charge, DWI while license suspended, etc. There was no double jeopardy or punishment by the amended charge.

Appellant's equal protection argument is likewise without merit because of the change of plea.

VI

APPELLANT IS REPRESENTED BY COUNSEL ON APPEAL.

Appellant contends that he was and is without counsel on appeal. This claim is belied by the record.

VII

THERE IS NO EVIDENCE OF PROSECUTOR MISCONDUCT.

Appellant contends that the prosecutor failed to file memoranda ordered by the court and falsified the record on many occasions. Regardless of the prosecutor's choice of filing a memo or the date of items in the record, appellant fails to reflect how he has been prejudiced. His argument is without merit.

VIII

APPELLANT'S CHALLENGE TO THE TRIAL COURT WAS WITHDRAWN.

Prior to his change of plea, appellant orally filed several pro per motions, including one to change the judge. (Minute Entry of Feb. 25, 1983.) At the change of plea, he withdrew this motion, as well as several others. (Minute Entry of Mar. 2, 1983; R.T. of Mar. 2, 1983, at 3-4.)

IX

APPELLANT RECEIVED ALL PRESENTENCE CREDIT DUE.

A review of the record reflects that appellant was arrested in CR-130463 and November 13, 1982, and released November 14. (Warrant, filed Dec. 2, 1982, and Release Order, filed Dec. 2, 1982.) In CR-131190, appellant was arrested and released on December 16, 1982. (Warrant, filed Jan. 13, 1983, and Release Order, filed Jan. 13,

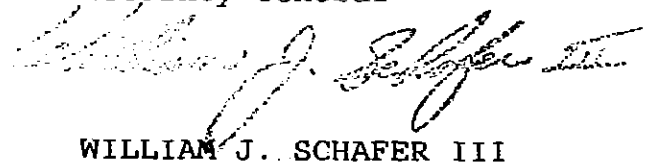
1983.) On January 6, 1983, appellant was taken into custody and held without bond. (Release Order, filed Jan. 13, 1983.) Appellant was granted bond release on March 2, 1983. (Release Order, filed Mar. 2, 1983.) There is no indication in this record how much, if any, time was spent in custody on CR-131188. This record reflects a total of 56 days spent in jail prior to sentencing on CR-130463 and 131190. The trial court credited each of appellant's sentences with 28 days. (R.T. of Apr. 12, 1983, at 39.) Appellant's claims of 68 days is not supported by the record.

CONCLUSION

This Court should dismiss the appeal for lack of jurisdiction. On the merits, appellant's position concerning the terms of the plea agreement is well taken. However, he has failed to preserve his right to have the issue considered and he has failed to show any prejudice. Insofar as the remedy is worse than the cure, reversal might not be a proper remedy. Appellant's remaining contentions are without factual or legal support. Appellee submits that the conviction should be affirmed, as well as the sentence. Appellant has not been aggrieved. Only the appellee loses and that was by its own choice.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



WILLIAM J. SCHAFER III
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Criminal Division

R. WAYNE FORD
Assistant Attorney General

Attorneys for APPELLEE

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

R. WAYNE FORD, being first duly sworn upon oath, deposes and says:

That he served the attorney for the appellant in the foregoing case by forwarding two (2) copies of APPELLEE'S ANSWERING BRIEF, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

JAMES R. RUMMAGE
Deputy Public Defender
132 S. Central, 2nd Floor
Phoenix, Arizona 85004
Attorney for APPELLANT

this 17th day of February, 1984.

R. Wayne Ford
R. WAYNE FORD

SUBSCRIBED AND SWORN to before me this 17th day of February, 1984.

Elizabeth J. Bender
NOTARY PUBLIC

My Commission Expires:
July 17, 1986

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