IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STEVEN JAYSON BURNETTE,
Petitioner,

vs.

Case No: 16-2002-CF-13126-AXXX-MA
Division: CR-G

STATE OF FLORIDA,
Respondent.
_____/

BURNETTE'S MOTION PURSUANT TO RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE, TO VACATE JUDGEMENT AND SENTENCE AND SUPPORTING MEMORANDUM OF LAW

COMES NOW **STEVEN JAYSON BURNETTE,** by his undersigned counsel, WILLIAM MALLORY KENT, pursuant to Rule 3.850(a)(1) and (6), Florida Rules of Criminal Procedure, and moves this Honorable Court to vacate the judgement and sentence in this case, and in support would show the following:

(1) The Judgment or Sentence under Attack and the Court Which Rendered the Same.

Judgment and sentence of fifteen years imprisonment as a Prison Releasee Reoffender was imposed on April 6, 2005 in this case by this Court.

(2) Whether There Was an Appeal from the Judgment or Sentence and the Disposition Thereof.

An appeal is currently pending. A motion has been filed at the First District Court of Appeals requesting permission to temporarily relinquish jurisdiction for the limited purpose of this Court considering this motion.

(3) Whether a Previous Postconviction Motion Has Been Filed, and If So, How Many.

No previous post-conviction motion has been filed.

(4) If a Previous Motion or Motions Have Been Filed, the Reason or Reasons the Claim or Claims in the Present Motion Were Not Raised in the Former Motion or Motions.

There has been no prior motion.

(5) The Nature of the Relief Sought.

Petitioner Burnette requests this Honorable Court vacate his judgement and sentence. Additionally, Burnette requests this honorable Court exercise its inherent equitable authority and restore the parties to their status *quo ante*, and direct that the State allow Burnette to accept the one year county jail term offer made prior to the trial of this case and which was rejected solely as a result of the misadvice of counsel complained of herein.

(6) A Brief Statement of the Facts (And Other Conditions) Relied on in Support of the Motion.

Burnette alleges that before trial, the State offered a sentence of twelve months in county jail in exchange for a guilty plea. Burnette alleges that his trial counsel, Assistant Public Defender Michelle Kalil ("Kalil"), was ineffective during the plea negotiation because she failed to advise Burnette that he could face an enhanced sentence of a minimum mandatory fifteen years imprisonment as a Prison Releasee Reoffender ("PRR") if he rejected the offer. Burnette also alleges that he would have accepted the plea offer had he been properly advised of the possible penalties and that acceptance of the offer would have resulted in a lesser sentence of twelve months in county with

no PRR designation.

Burnette has obtained a free and voluntary sworn statement from Kalil supporting his allegations herein. Kalil's sworn statement supports each essential allegation contained herein. A true and correct copy of Kalil's sworn statement is hereunto annexed as Exhibit A and by this reference made a part hereof.

This is a facially sufficient claim of ineffective assistance of counsel. *Roundtree v. State*, 884 So.2d 322 (Fla. 2nd DCA 2004) (Defendant's allegations of ineffective assistance of counsel were sufficient to state *prima facie* claim of ineffective assistance of counsel in postconviction proceedings, and thus defendant was entitled to evidentiary hearing if record did not refute claim; defendant alleged that counsel was ineffective during plea negotiations because she failed to advise defendant that he could face enhanced sentence as a Prison Release Reoffender if he rejected State's offer.);[1] *See also Reed v. State*, 903 So.2d 344 (Fla. 1st DCA 2005) (Post-conviction movant was entitled to hearing, or to attachment of record, on his claim that his trial counsel was ineffective for misinforming him that two of five drug charges against him would be dropped, where movant asserted that he rejected state's plea offer of five years' imprisonment because of such misadvice, that he would have accepted plea offer if not for counsel's misadvice, and that he received sentence of 65 years' imprisonment following trial.); *See also Murphy v. State,* 869 So.2d 1228 (Fla. 2nd DCA 2004). A petitioner states a facially sufficient claim under Rule 3.850 if he alleges:

> 1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced, (2) defendant would have accepted the plea offer but for the inadequate notice, and (3) acceptance of the State's plea offer would have resulted in a lesser sentence.' " *Murphy v. State,* 869 So.2d 1228, 1229 (Fla. 2d DCA 2004)

[1] A copy of each case cited herein is attached for the convenience of the Court and counsel.

(quoting *Cottle v. State,* 733 So.2d 963, 967 (Fla.1999)).

Smith v. State, ___ So.2d ___, 2005 WL 2140189, *1 (Fla. 2nd DCA 2005).

Accordingly, this Court must either summarily grant this motion or conduct an evidentiary hearing then grant the motion.

Although a petitioner under Rule 3.850 is not required to file supporting affidavits in order to make a *prima facie* showing to entitle him to relief or an evidentiary hearing (*Roundtree*, 884 So.2d at 323), in this case Burnette has filed a supporting sworn statement of his trial counsel. *See* Exhibit A hereto. Accordingly, Burnette has presented more than a *prima facie* case, Burnette has submitted evidence which if not conclusively refuted entitles him to relief. Therefore, based on the attached sworn statement of Kalil, unless the State files a responsive affidavit *conclusively refuting Kalil's sworn statement*, which, of course, it cannot do, Burnette is entitled to summary relief.

Conclusion

Accordingly, Burnette respectfully requests this Honorable Court vacate his judgment and sentence. Burnette further requests this honorable Court exercise its inherent equitable authority and restore the parties to their status *quo ante*, by directing the State to allow Burnette to accept the one year county jail term offer made prior to the trial of this case, an offer which was rejected solely as a result of the misadvice of counsel complained of herein. *See Beach v. Great Western Bank*, 670 So.2d 986, 995 (Fla. 4th DCA 1996) (the goal should always be "to restor[e] the parties to the status quo ante").

Respectfully submitted,

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EXHIBIT A
KALIL'S SWORN STATEMENT

Copy of Cases Cites

Supreme Court of Florida.
James L. COTTLE, Petitioner,
v.
STATE of Florida, Respondent.
No. 91,822.

April 8, 1999.

Defendant, who was convicted of burglary of motor vehicle and felony petit theft and sentenced as habitual felony offender, moved for postconviction relief claiming ineffective assistance of counsel for failure to convey state's plea offer. Trial court's summary denial was affirmed by the District Court of Appeal, 700 So.2d 53, finding that claim was legally insufficient for failure to show that trial court would have approved plea offer. On review based on direct and express conflict, the Supreme Court held, as an apparent matter of first impression, that defendant did not have to prove that trial court would have actually accepted plea arrangement offered by state.

District Court of Appeal judgment quashed and case remanded.

Wells, J., dissented and filed an opinion in which Harding, C.J., concurred.

Overton, Senior Justice, dissented and filed an opinion in which Harding, C.J., and Wells, J., concurred.

West Headnotes

[1] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases
Colloquy at sentencing did not conclusively demonstrate that defendant was not entitled to relief on grounds of ineffective assistance of counsel for failure to convey plea offer made by state; there was no indication that trial court conducted hearing or otherwise factually resolved defendant's claim that he was not told of plea offer and defense counsel's claim that he informed defendant, and colloquy was not substitute for hearing. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases
Ineffective assistance of counsel analysis, that claimants must show deficient performance and subsequent prejudice resulted from deficiency, extends to challenges arising out of plea process; plea process is critical stage in criminal adjudication and warrants same constitutional guarantee of effective assistance as trial proceedings. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases
Defense attorneys have a duty to inform their clients of plea offers. West's F.S.A. RCrP Rule 3.171(c)(2).

[4] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases
Defendant claiming ineffective assistance of counsel for failure to convey plea bargain did not have to prove that trial court would have actually accepted plea arrangement offered by state. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 273.1(2)
110k273.1(2) Most Cited Cases

[5] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases
Inherent prejudice results from defendant's inability, due to counsel's neglect, to make informed decision whether to plea bargain, and such prejudice exists independently of objective viability of the actual offer. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases
Ineffective assistance of counsel claimants, alleging that defense counsel failed to convey plea arrangement to defendant, are held to strict standard of proof. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases
Defendant claiming ineffective assistance of counsel for failure to convey plea arrangement must prove that counsel failed to communicate a plea offer, that had defendant been correctly advised he would have accepted plea offer, and that his acceptance of the state's plea offer would have resulted in a lesser sentence. U.S.C.A. Const.Amend. 6.
***964** James T. Miller, Jacksonville, Florida, for Petitioner.

Robert A. Butterworth, Attorney General, and Rebecca Roark Wall, Daytona Beach, Florida, for Respondent.

PER CURIAM.

We have for review *Cottle v. State,* 700 So.2d 53 (Fla. 5th DCA 1997), based on direct and express conflict with the decisions [FN1] in *Seymore v. State,* 693 So.2d 647 (Fla. 1st DCA 1997); *Hilligenn v. State,* 660 So.2d 361 (Fla. 2d DCA 1995); and *Abella v. State,* 429 So.2d 774 (Fla. 3d DCA 1983). At issue is whether the Fifth District erred in holding that ineffective assistance claims

pertaining to an unrelated plea offer must allege that the trial court would have accepted the terms of offer to be legally sufficient. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We quash *Cottle* and approve the opinions in *Seymore, Hilligenn,* and *Abella.*

FN1. Petitioner also cites *Lee v. State,* 677 So.2d 312 (Fla. 1st DCA 1996), as a basis of conflict.

PROCEEDINGS BELOW

Petitioner James L. Cottle was convicted for burglary of a motor vehicle and felony petit theft and sentenced to concurrent ten-year terms as a habitual felony offender for the two third-degree felonies. *Cottle,* 700 So.2d at 54. Adjudication as a habitual felony offender limits Cottle's eligibility for parole or early release. The State had previously offered to forego habitualization in return for a guilty plea by Cottle. At sentencing, the prosecution informed the court that Cottle had been given the opportunity to accept a plea offer and avoid habitual status. *Id.* However, Cottle immediately denied being apprised of the plea offer and asserted that he would have accepted the plea offer if given such an opportunity. *Id.* Counsel for Cottle disputed this claim and asserted the existence of a note indicating that he had notified petitioner of the offer, who refused it and maintained his innocence instead. The trial court rejected Cottle's attempt to avoid habitualization.

[1] After an unsuccessful direct appeal, petitioner filed a rule 3.850 motion seeking relief on the grounds that his counsel had been ineffective in not conveying the ***965** State's plea offer to him. The trial court summarily denied relief, finding that the "files and records conclusively show that the defendant is entitled to no relief as to this allegation." [FN2] The Fifth District did not rule upon the reason given by the trial court for its summary denial but affirmed the order, holding that petitioner's claim was legally insufficient because it failed to allege the trial court would have approved of the terms of the plea offer. *Cottle,* 700 So.2d at 55.

FN2. At sentencing the following colloquy took place when the State asserted as an additional ground for habitualization that Cottle had turned down a plea offer that would have avoided habitualization:
MR. MEREDITH: Your Honor, let the record also reflect that the Defendant was given the opportunity to enter a plea to the charges, guilty as charged without being adjudicated -
THE DEFENDANT: No. Excuse me.
MR. MEREDITH:--and the State seeking no habitualization.
THE DEFENDANT: I was never presented by my lawyer to the plea bargain deal, never once.
MR. WOOLBRIGHT: My first note was -
THE DEFENDANT: He took me straight to trial. I would have plea bargained.
MR. WOOLBRIGHT: I have a note on 5-2-95, ask the Defendant, State would do no 'bitch, plea as charged, but that's over now. I believe that note-- that is my writing. That note was if he plead right then, they would not have 'bitched him. THE DEFENDANT: I was never offered a plea bargain from nobody in this county.

MR. WOOLBRIGHT: And I related that to him on 5-2-95.
THE DEFENDANT: I got this fraudulent use of a credit card in Jacksonville and I told the detective where I got the credit card and told him the whole thing. You can even speak to him about it because he knows. I was never offered no deal. My dad even talked to Tom Cushman after the sentence, after I was found guilty in trial.
MR. WOOLBRIGHT: Your Honor, I have -
THE DEFENDANT: I never took nothing to trial and you can see in the scoresheet I ain't never hurt nobody, I am not violent.
MR. WOOLBRIGHT: Your Honor, my note on 5-2-95 related to he denied breaking in the car and wanted a trial.
THE COURT: I understand that, and of course no one is required to plea bargain.
THE DEFENDANT: I was never offered one.
THE COURT: I understand that. They are not required to offer one to you.
We agree with Cottle that this colloquy does not conclusively demonstrate that he is entitled to no relief. There is no indication in the record that the trial court ever conducted a hearing or otherwise factually resolved Cottle's claim that he was not told of the plea offer, and the colloquy itself is insufficient to serve as a substitute for a hearing. Of course, claims of ineffectiveness of counsel must be raised in a postconviction proceeding for the very reason that an evidentiary hearing may be required to resolve such factual disputes.

INEFFECTIVE ASSISTANCE OF COUNSEL

[2] The primary guide for ineffective assistance claims is the United States Supreme Court's hallmark opinion in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (adopted by this Court in *Downs v. State,* 453 So.2d 1102 (Fla.1984)). *Strickland* held that claimants must show both a deficient performance by counsel and subsequent prejudice resulting from that deficiency to merit relief. *Id.* at 687, 104 S.Ct. 2052. In conducting this two-prong test, the court essentially decides whether the defendant's Sixth Amendment right to a fair trial has been violated. *Id.* at 684, 104 S.Ct. 2052. This analysis extends to challenges arising out of the plea process as a critical stage in criminal adjudication, which warrants the same constitutional guarantee of effective assistance as trial proceedings. *See Hill v. Lockhart,* 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *see also Santobello v. New York,* 404 U.S. 257, 260, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (recognizing plea bargaining as "an essential component of the administration of justice").

The first prong of the *Strickland* analysis requires a showing of a deficient performance. The defendant must show that counsel did not render "reasonably effective assistance." 466 U.S. at 687, 104 S.Ct. 2052. The appropriate standard for ascertaining the deficiency is "reasonableness under prevailing professional norms." ***966***Id.* at 688, 104 S.Ct. 2052. The caselaw uniformly holds that counsel is deficient when he or she fails to relate a plea offer to a client. *United States v. Rodriguez Rodriguez,* 929 F.2d 747, 752 (1st Cir.1991). Federal courts are "unanimous in finding that such conduct constitutes a violation" of the right to effective assistance. *Barentine v. United States,* 728 F.Supp. 1241, 1251 (W.D.N.C.1990), *aff'd,* 908 F.2d 968 (4th Cir.1990); *see also United States ex rel. Caruso v. Zelinsky,* 689 F.2d 435, 438 (3d Cir.1982) (noting that failure to inform client

"constitutes a gross deviation from accepted professional standards"). State courts have also consistently held that this omission constitutes a deficiency. *Lloyd v. State,* 258 Ga. 645, 373 S.E.2d 1, 3 (1988); *see Rasmussen v. State,* 280 Ark. 472, 658 S.W.2d 867, 868 (1983) (finding duty to notify because any plea agreement is between accused and prosecutor); *State v. Simmons,* 65 N.C.App. 294, 309 S.E.2d 493 (1983) (holding that such an allegation ordinarily states a claim).

Many courts have cited the American Bar Association Standards for Criminal Justice as confirmation that the failure to notify clients of plea offers falls below professional standards. *See, e.g., Lloyd,* 373 S.E.2d at 2. The ABA standards require defense attorneys to "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor." *ABA Standards for Criminal Justice: Prosecution Function and Defense Function,* stds. 4- 6.2(b)(3d ed.1993). The commentary to standard 4-6.2 states:

> Because plea discussions are usually held without the accused being present, the *lawyer has the duty to communicate fully to the client the substance of the discussions. ... It is important that the accused be informed both of the existence and the content of proposals made by the prosecutor;* the accused, not the lawyer, has the right to decide whether to accept or reject a prosecution proposal, even when the proposal is one that the lawyer would not approve.

Id. (emphasis added.) The Georgia Supreme Court in *Lloyd* noted *Strickland* 's suggestion that the ABA standard would provide an appropriate guide for "[p]revailing norms of practice," although it did not constitute dispositive proof. 373 S.E.2d at 2. California's highest court has stressed counsel's "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on the important decisions and to keep the defendant informed of important developments in the course of the prosecution." *In re Alvernaz,* 2 Cal.4th 924, 8 Cal.Rptr.2d 713, 830 P.2d 747, 754 (1992) (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052).

[3] Although this Court has not explicitly enunciated this rule in the caselaw, it has approved the proposition that defense attorneys have the duty to inform their clients of plea offers. *See* Fla. R.Crim. P. 3.171(c)(2) (mandating that counsel advise of "(A) all plea offers; and (B) all pertinent matters bearing on the choice of which plea to enter"). Florida caselaw has heretofore consistently relied on a three-part test for analyzing ineffective assistance claims based on allegations that counsel failed to properly advise the defendant about plea offers by the State. *See Lee v. State,* 677 So.2d 312 (Fla. 1st DCA 1996); *Seymore v. State,* 693 So.2d 647 (Fla. 1st DCA 1997); *Hilligenn v. State,* 660 So.2d 361 (Fla. 2d DCA 1995); *Abella v. State,* 429 So.2d 774 (Fla. 3d DCA 1983). Each of these cases hold that a claim must allege the following to make a prima facie case: (1) counsel failed to relay a plea offer, (2) defendant would have accepted it, and (3) the plea would have resulted in a lesser sentence.

PREJUDICE

Under *Strickland,* claimants must, of course, also demonstrate that counsel's omission was prejudicial to their cause. Typically, claimants must show that "counsel's ***967** errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687, 104 S.Ct. 2052. However, courts have held that where counsel failed to disclose a plea offer, the

claim is not legally insufficient merely because the claimant subsequently received a fair trial. *People v. Curry,* 178 Ill.2d 509, 227 Ill.Dec. 395, 687 N.E.2d 877, 882 (1997); *In re Alvernaz,* 8 Cal.Rptr.2d 713, 830 P.2d at 753 n. 5 (noting that no court has found a valid claim to be "remedied by a fair trial"). In lieu of a "fair trial" test for prejudice, the Supreme Court has crafted a test for claims of ineffective assistance arising out of the plea stage. For example, the Court has held that a claimant must demonstrate that "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S. at 59, 106 S.Ct. 366.

Where the defendant was not notified of a plea offer, courts have held that the claimant must prove to a "reasonable probability that he [or she] would have accepted the offer instead of standing trial." *State v. Stillings,* 882 S.W.2d 696, 704 (Mo.Ct.App.1994) (rejecting claim where evidence showed appellant would have refused to plead guilty if made aware of plea offer); *see also State v. James,* 48 Wash.App. 353, 739 P.2d 1161, 1167 (1987) (requiring a "reasonable probability that but for an attorney's error, a defendant would have accepted a plea agreement").

FLORIDA CASES

As noted above, before *Cottle,* and consistent with the practice in the federal courts and other state courts, courts in this state have recognized claims arising out of counsel's failure to inform a defendant of a plea offer, and have required a claimant to show that: (1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced, (2) defendant would have accepted the plea offer but for the inadequate notice, and (3) acceptance of the State's plea offer would have resulted in a lesser sentence. *See Young v. State,* 608 So.2d 111, 113 (Fla. 5th DCA 1992) (citing *United States ex rel. Caruso v. Zelinsky,* 689 F.2d 435, 437 (3d Cir.1982)); *accord Rosa v. State,* 712 So.2d 414, 415 (Fla. 4th DCA 1998); *Gonzales v. State,* 691 So.2d 602, 603 (Fla. 4th DCA 1997); *Van Dyke v. State,* 697 So.2d 1015, 1015 (Fla. 4th DCA 1997); *Seymore v. State,* 693 So.2d 647, 647 (Fla. 1st DCA 1997); *Lee v. State,* 677 So.2d 312, 313 (Fla. 1st DCA 1996); *Steel v. State,* 684 So.2d 290, 291-92 (Fla. 4th DCA 1996); *Hilligenn v. State,* 660 So.2d 361, 362 (Fla. 2d DCA 1995); *Graham v. State,* 659 So.2d 722, 723 (Fla. 1st DCA 1995); *Wilson v. State,* 647 So.2d 185, 186 (Fla. 1st DCA 1994) (finding the foregoing elements stated "colorable ground for relief"); *Majors v. State,* 645 So.2d 1110, 1110 (Fla. 1st DCA 1994) (finding a "sufficient" basis for an evidentiary hearing); *Ginwright v. State,* 466 So.2d 409, 410 (Fla. 2d DCA 1985) (remanding because the "allegations, if true, may be found by a trier of fact to constitute a substantial omission by defense counsel"); *Young v. State,* 625 So.2d 906 (Fla. 2d DCA 1993); *Martens v. State,* 517 So.2d 38, 39 (Fla. 3rd DCA 1987), *review denied,* 525 So.2d 879 (Fla.1988). [FN3] *But see Zamora v. Wainwright,* 610 F.Supp. 159, 161 (S.D.Fla.1985) (noting that claim of failure to plea bargain must allege the State would have offered plea and court would have accepted it). [FN4]

> FN3. This approach comports with our postconviction rule, which states: "Unless the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the court shall order ... action as the judge deems appropriate." Fla. R.Crim. P. Rule

3.850(d); *State v. Leroux,* 689 So.2d 235, 236 (1996)(stating that "under the express provisions of rule 3.850, relief may be summarily denied where the record *conclusively* refutes such a claim").

FN4. In *Zamora,* the federal district court found that the contemporaneous law in Florida required a showing of trial court approval, concluding that:
The Florida courts have already stated, *as a matter of law,* that in order to establish ineffective assistance of counsel for failure to plea bargain a defendant must establish not only that the prosecutor would have offered a plea but also that such a plea arrangement would have been acceptable to the court.
Id. at 161. The federal court did not cite authority for this proposition, although the assertion followed a statement that the state appellate court in *Zamora v. State,* 422 So.2d 325 (Fla. 3d DCA 1982), had rejected the claim on this basis. Interestingly, the Third District did not address the point nor did it cite any authority for this novel requirement. The *Zamora* court, instead of announcing a new element of the ineffective assistance claim, decided the merits of a claim that involved a peculiar twist of the ordinary allegation that counsel failed to plea bargain. *Id.* at 327. It qualified its ultimate holding by emphasizing the distinctive nature of the case:
Zamora's detention and indictment were widely followed by the media and the case readily became a cause celebre. The state attorney publicly announced he would seek the death penalty. In this hapless position, Zamora's defense counsel did not inaugurate an attempt to plea bargain. There was evidence before the trial court that the assistant state attorneys directly responsible for Zamora's prosecution would have been willing to consider a plea to second degree murder in lieu of proceeding to trial on the first degree murder charge. The flaw in this argument is simply that the assistant state attorneys were never shown to have any authorization whatsoever to conclude such a negotiation. Furthermore, even after a plea negotiation has been agreed upon, it must still be ratified by the court. This powerful case, magnified by media attention and public clamor and the state attorney's announced intention to seek the death penalty, makes it entirely too imponderable to consider whether plea negotiations would have been fruitful.
Id.

***968** *CURRY*

The Illinois Supreme Court recently discussed the issue before us and rejected the additional mandatory requirement for such claims of proof of court acceptance of a plea offer after extensively reviewing the law of other jurisdictions and finding the consensus weighed against such a requirement. *Curry,* 227 Ill.Dec. 395, 687 N.E.2d at 889-90. The *Curry* court, in rejecting such a requirement, reasoned that it "is at odds with the realities of contemporary plea practice and presents inherent problems of proof." *Id.,* 227 Ill.Dec. 395, 687 N.E.2d at 890 (citation omitted). The court found that "the majority of cases from other jurisdictions do not require a defendant to prove that the trial judge would have accepted the plea agreement". *Id.*, 227 Ill.Dec. 395, 687 N.E.2d at 889; *see, e.g., Turner v. Tennessee,* 858 F.2d 1201, 1207 (6th Cir.1988), *vacated on other grounds,* 492 U.S.

902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989); *Caruso,* 689 F.2d at 438 n. 2; *Williams v. State,* 326 Md. 367, 605 A.2d 103, 110 (1992); *Commonwealth v. Napper,* 254 Pa.Super. 54, 385 A.2d 521, 524 (1978); *Judge v. State,* 321 S.C. 554, 471 S.E.2d 146, 148-49 (1996).

In *Turner,* the Sixth Circuit also rejected the notion that claimants must establish that the trial court would have approved the plea offer. 858 F.2d at 1207. While the court recognized that court approval was a necessary precedent to a binding plea, it uncovered "no case or statute that imposes such a requirement, and we think it unfair and unwise to require litigants to speculate as to how a particular judge would have acted under particular circumstances." *Id.*

Other courts have also noted that due to the speculative nature of this counter-factual inquiry, it would be extremely difficult to resolve. *See, e.g., Napper,* 385 A.2d at 524. The burden may not be justifiable, moreover, considering the gravity of the constitutional right deprived when counsel fails to inform a criminal defendant of a plea offer. *Id.* As an alternative to the requirement, the *Napper* court viewed any uncertainty of court approval in light more favorable to the claimant. *Id.* The court observed:

> [W]e cannot be sure that the trial court ... would have accepted the plea bargain. These uncertainties, however, in no way affect the fact that counsel, for no good reason, failed to take action that ***969** arguably might have furthered appellant's interests. In other words: It cannot be denied that upon proper advice, appellant might have accepted the offered plea bargain; nor that, while a court may reject a plea bargain, as a practical matter-especially in crowded urban courts-this rarely occurs.

Id.

CONCLUSION

[4][5][6][7] We agree with the holding in *Curry* and other decisions rejecting a requirement that the defendant must prove that a trial court would have actually accepted the plea arrangement offered by the state but not conveyed to the defendant. Those courts have correctly noted that any finding on that issue would necessarily have to be predicated upon speculation. In essence, the holdings of these cases suggest, and we agree, that an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea bargain, which exists independently of the objective viability of the actual offer. *Cf. Hill,* 474 U.S. at 56-57, 106 S.Ct. 366 (reasoning that the validity of plea bargain hinged on the defendant's informed volition); *see also United States v. Day,* 969 F.2d 39, 43 (3d Cir.1992) (reasoning that defendant has a right to an informed decision to plea bargain); *Williams,* 605 A.2d at 110 (noting that courts presume prejudice from the inference that a "defendant with more, or better, information, would have acted differently").

That is not to say, however, that a defendant making such a claim does not carry a substantial burden. [FN5] In its earlier opinion in *Young,* the Fifth District properly emphasized that claimants are held to a strict standard of proof due to the incentives for a defendant to bring such a post trial claim. 608 So.2d at 112-13. Consistent with the prior Florida caselaw we have discussed above,

the Fifth District instructed: "Appellant must prove his counsel failed to communicate a plea offer ..., that had he been correctly advised he would have accepted the plea offer, and that his acceptance of the state's plea offer would have resulted in a lesser sentence." *Id.* at 113. We agree that these are the required elements a defendant must establish in order to be entitled to relief. [FN6]

> FN5. Indeed, a factual issue appears to exist in this case since Cottle's trial lawyer has already gone on record as claiming that he did convey the state's offer to the defendant. *See supra* note 2.
>
> FN6. If the claim is sufficiently alleged, the court should order an evidentiary hearing. *Steel,* 684 So.2d at 291-92 (noting that an evidentiary hearing is "necessary to establish the terms of the plea offer, when the offer was made, and whether the pre-trial offer was more favorable than the sentence defendant received"). On the other hand, the State may rebut the allegations by citing "oral statements to the contrary as reflected in the transcript of a sentencing hearing, or by written statements to the contrary contained in a negotiated plea." *Eady v. State,* 604 So.2d 559, 560-61 (Fla. 1st DCA 1992). The resolution of a particular claim will, of course, rest upon the circumstances of that claim. Although not raised by the State or either the trial or appellate court, we note that Cottle has not expressly alleged in his postconviction petition that the plea offer by the State was for a more favorable sentence than he actually received. Because this omission has not heretofore been raised, Cottle should be given the opportunity to amend his petition when the case returns to the trial court.

In conclusion, we quash the decision under review and approve *Seymore, Hilligenn* and *Abella.* We remand this case for further proceedings consistent herewith.

It is so ordered.

SHAW, ANSTEAD, and PARIENTE, JJ., and KOGAN, Senior Justice, concur.

WELLS, J., dissents with an opinion, in which HARDING, C.J., concurs.

OVERTON, Senior Justice, dissents with an opinion, in which HARDING, C.J., and WELLS, J., concur.

***970** WELLS, J., dissenting.

I agree with the majority that there should be no requirement that the trial court would have accepted the terms of the alleged plea offer. The proof of what a trial judge "would have done" is necessarily speculative, hindsight looking, and problematic because of the disruptive effect to the judicial system of judges becoming witnesses in postconviction proceedings.

However, I would approve rather than quash the decision of the Fifth District because of its

determination that "Cottle did not allege that his guideline scoresheet would have required a lesser sentence." The majority acknowledges that to be legally sufficient, Cottle's claim had to "allege that his acceptance would have resulted in a lesser sentence." Therefore, the majority's decision is erroneous in quashing the Fifth District's decision. I am concerned that the majority's quashing of the district court will confuse whether Cottle's motion was properly denied for that reason.

HARDING, C.J., concurs.

OVERTON, Senior Justice, dissenting.

I concur in the dissent of Justice Wells and write further to express my concern that the majority has not discussed the expressed finding by the trial judge that the plea offer had been conveyed. The trial judge made the following expressed finding in this case:

> The Defendant's first allegation is that his trial counsel failed to relay a plea offer to him. At the Defendant's sentencing hearing he denied that his attorney presented a plea offer to him. His attorney stated at that time that the notes in his file indicated he related the plea offer to the Defendant on May 2, 1995, and that the Defendant denied breaking into the car and wanted a trial. A copy of pages 13 and 14 of the Defendant's sentencing hearing held July 6, 1995, is attached hereto as Exhibit # 1. The files and records conclusively show that the Defendant is entitled to no relief as to this allegation.

It is clear from the record at the initial sentencing that this issue was raised and rejected by the trial judge. This is an issue that was raised in the initial trial and sentencing proceedings and should have been raised on appeal. It was rejected by that trial judge. A 3.850 proceeding is not intended to give a defendant a second bite at the apple. That is what this defendant seeks and that is what the majority is providing this defendant. There is clearly no justification to give this defendant another hearing on this issue.

HARDING, C.J., and WELLS, J., concur.

733 So.2d 963, 24 Fla. L. Weekly S166

District Court of Appeal of Florida,
Second District.
Charles Kenneth MURPHY, Appellant,
v.
STATE of Florida, Appellee.
No. 2D03-4304.

March 26, 2004.

Background: Defendant filed motion for postconviction relief from his grand theft conviction and sentence as habitual felony offender (HFO), alleging ineffective assistance of counsel. The Circuit Court, Lee County, James R. Thompson, J., summarily denied motion. Defendant appealed.

Holding: The District Court of Appeal, Villanti, J., held that motion was facially sufficient to warrant evidentiary hearing.
Reversed and remanded.

West Headnotes

[1] Criminal Law 1655(6)
110k1655(6) Most Cited Cases
Defendant alleged facially sufficient claim of ineffective assistance of counsel so as to warrant evidentiary hearing on his motion for postconviction relief from grand theft conviction; defendant alleged that his counsel neglected to inform him of the habitual felony offender (HFO) penalties he could face if he rejected State's plea offer and proceeded to trial, that he would have accepted the plea offer had he been properly advised of these penalties, and that acceptance of the offer would have resulted in a lesser sentence of three years' probation with no HFO penalties. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.

[2] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases
Defense counsel can be ineffective in failing to properly advise the defendant of a plea offer. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 1167(5)
110k1167(5) Most Cited Cases
A defendant is inherently prejudiced by his inability, due to his counsel's neglect, to make an informed decision whether to plea bargain. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 641.13(5)
110k641.13(5) Most Cited Cases

When the alleged ineffectiveness of counsel concerns the rejection of a plea offer, the defendant must prove that: (1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced; (2) defendant would have accepted the plea offer but for the inadequate notice; and (3) acceptance of the State's plea offer would have resulted in a lesser sentence. U.S.C.A. Const.Amend. 6.
***1228** Prior report: 837 So.2d 979.

VILLANTI, Judge.

Charles Kenneth Murphy appeals the summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm three of Murphy's claims without discussion, but we reverse and remand for further proceedings on his fourth claim.

On October 12, 2001, a jury convicted Murphy of grand theft, and the trial court sentenced him as a habitual felony offender (HFO) to forty-eight months in prison. In his motion, Murphy alleged that before trial, the State offered a sentence of three ***1229** years' probation in exchange for his plea. Murphy alleged that his trial counsel was ineffective during the plea negotiation because he failed to advise Murphy that he could face HFO penalties if he rejected the offer.

[1][2][3][4] Defense counsel can be ineffective in failing to properly advise the defendant of a plea offer. *Eristma v. State,* 766 So.2d 1095 (Fla. 2d DCA 2000). A defendant is inherently prejudiced by his inability, due to his counsel's neglect, to make an informed decision whether to plea bargain. *Cottle v. State,* 733 So.2d 963 (Fla.1999). When the alleged ineffectiveness concerns the rejection of a plea offer, the defendant must prove: "(1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced, (2) defendant would have accepted the plea offer but for the inadequate notice, and (3) acceptance of the State's plea offer would have resulted in a lesser sentence." *Id.* at 967.

Here, Murphy alleged that his counsel neglected to inform him of the HFO penalties he could face if he rejected the plea offer and proceeded to trial. He also claimed that he would have accepted the plea offer had he been properly advised of these penalties and that acceptance of the offer would have resulted in a lesser sentence of three years' probation with no HFO penalties. Therefore, Murphy alleged a facially sufficient claim of ineffective assistance of counsel. *See id.* Accordingly, we reverse and remand for the trial court to hold an evidentiary hearing on this claim.

Affirmed in part; reversed in part; and remanded.

STRINGER and KELLY, JJ., Concur.

869 So.2d 1228, 29 Fla. L. Weekly D767

District Court of Appeal of Florida,
First District.
Forrest P. REED, Appellant,
v.
STATE of Florida, Appellee.
No. 1D04-4901.

June 13, 2005.

Background: Following his conviction of sale of cocaine, possession of cocaine with intent to sell, and possession of marijuana with intent to sell, and his receipt of 65-year sentence, movant sought vacation, setting aside, or correction of sentence. The Circuit Court, Jackson County, William L. Wright, J., summarily denied petition, and petitioner appealed.

Holding: The District Court of Appeal held that movant was **entitled** to hearing on his claim of affirmative **misadvice of counsel**.
Affirmed in part; reversed in part; remanded with directions.

Thomas, J., dissented with opinion.

West Headnotes

Criminal Law 🔑**1655(6)**
110k1655(6) Most Cited Cases
Post-conviction movant was **entitled** to hearing, or to attachment of record, on his claim that his trial **counsel** was ineffective for misinforming him that two of five drug charges against him would be dropped, where movant asserted that he **rejected** state's **plea offer** of five years' imprisonment because of such **misadvice,** that he would have **accepted plea offer** if not for **counsel's misadvice,** and that he received sentence of 65 years' imprisonment following trial. U.S.C.A. Const.Amend. 6; West's F.S.A. R.App.P.Rule 9.141(b)(2)(D).
***344** Appellant, pro se.

Charlie Crist, Attorney General; Alan R. Dakan, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant challenges the trial court's order summarily denying his motion alleging ineffective assistance **of counsel** filed pursuant to Florida Rule of Criminal Procedure 3.850. Because appellant has stated a facially sufficient claim that his **counsel** was ineffective in affirmatively misadvising

him as to the maximum sentence he would face if he went to trial, we reverse. We affirm all of the other issues raised without further discussion.

Following a jury trial, appellant was convicted of three counts of sale of cocaine, one count of possession of cocaine with intent to sell, and one count of possession of marijuana with intent to sell, and was sentenced to sixty-five years in prison. In his rule 3.850 motion, appellant alleges that his **counsel** was ineffective for misinforming him that the charges of possession of cocaine with intent to sell and possession of marijuana with intent to sell would be dropped. He alleges that, **due** to such **misadvice,** he **rejected** the state's **plea offer** of five years in prison because he thought he faced only three charges, rather than five. He asserts, further, that if **counsel** had told him before trial that the charges would not be dropped, he would have **accepted** the state's **plea offer**. The claim is facially sufficient. *See generally Steel v. State,* 684 So.2d 290 (Fla. 4th DCA 1996) ("[a] claim that misinformation supplied by **counsel** induced a **defendant** to **reject** a favorable **plea offer** can constitute actionable ineffective assistance **of counsel**").

The trial court denied appellant's claim based on a credibility determination, without an evidentiary hearing. ***345**Florida Rule of Appellate Procedure 9.141(b)(2)(D) requires reversal and remand for an evidentiary hearing unless the allegations are conclusively refuted by the record. Because there was no evidentiary hearing to determine the truthfulness of appellant's allegations, both the trial court and this court must **accept** those allegations as true. Instead, the trial court made a credibility determination. Accordingly, we reverse the summary denial of appellant's claim for ineffective assistance **of counsel** based on affirmative **misadvice.** On remand, the trial court may again summarily deny this claim provided that it attaches to its order portions of the record conclusively refuting it; otherwise, it shall hold an evidentiary hearing. In all other respects, the trial court's order is affirmed.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions.

WEBSTER and DAVIS, JJ., concur; THOMAS, J., dissents with written opinion.

THOMAS, J., dissents.

I respectfully dissent. I believe this is one of those rare cases in which the trial court and this court can determine that Appellant's ineffective assistance claim is "inherently incredible." Thus, summary denial of the claim is permissible. *See generally, McLin v. State,* 827 So.2d 948 (Fla.2002). Appellant was age 40 at first appearance in this case. He rejected a plea offer of five years in state prison, willingly risking exposure to 45 years in state prison. He thus concedes that he accepted the possibility of remaining in prison until reaching the age of 85. Appellant now essentially claims that he would have accepted the plea offer of five years if he had known that he was facing 65 years in state prison. This claim is inherently incredible on its face.

I acknowledge that a trial court generally may not make a credibility determination without conducting an evidentiary hearing. The court in *McLin* recognizes that there "may be cases where, from the face of the affidavit, it can be determined that the affidavit is 'inherently incredible.' " *Id.* at 955. Although the court in *McLin* declined to affirm a summary denial on that basis, there must be some cases in which such a determination may be made. I respectfully submit this is such a case.

903 So.2d 344, 30 Fla. L. Weekly D1474

District Court of Appeal of Florida,
Second District.
Randy ROUNDTREE, Appellant,
v.
STATE of Florida, Appellee.
No. 2D04-532.

Sept. 8, 2004.

Background: Following conviction for armed robbery, defendant filed motion for postconviction relief. The Circuit Court, Pasco County, Lynn Tepper, J., denied motion, and defendant appealed.

Holdings: The District Court of Appeal, Kelly, J., held that:
(1) defendant was entitled to evidentiary hearing on claim of newly discovered evidence;
(2) defendant's failure to attach supporting affidavits to motion did not require dismissal of motion; and
(3) defendant's allegations were sufficient to state prima facie claim of ineffective assistance of counsel.
Reversed and remanded.

West Headnotes

[1] Criminal Law 1655(1)
110k1655(1) Most Cited Cases
Defendant's allegations of newly discovered evidence were sufficient to state prima facie claim of newly discovered evidence, and thus defendant was entitled to postconviction evidentiary hearing; defendant alleged that his codefendant had just recently admitted that he had not testified on defendant's behalf because he had been coerced by the State. West's F.S.A. RCrP Rule 3.850.

[2] Criminal Law 1610
110k1610 Most Cited Cases
Defendant's failure to attach supporting affidavits to postconviction motion did not require dismissal of motion; rule of criminal procedure governing postconviction proceedings only required that defendant provide a brief statement of facts in support of motion. West's F.S.A. RCrP Rule 3.850.

[3] Criminal Law 1655(6)
110k1655(6) Most Cited Cases
Defendant's allegations of ineffective assistance of counsel were sufficient to state prima facie claim of ineffective assistance of counsel in postconviction proceedings, and thus defendant was entitled to evidentiary hearing if record did not refute claim; defendant alleged that counsel was ineffective during plea negotiations because she failed to advise defendant that he could face enhanced sentence

as a Prison Release Reoffender (PRR) if he rejected State's offer. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.

***322** KELLY, Judge.

Randy Roundtree challenges the summary denial of his motion for postconviction relief filed pursuant to ***323**Florida Rule of Criminal Procedure 3.850. We affirm without comment as to grounds one, two, three, five, and six of the motion. Because Roundtree made facially sufficient claims for relief in grounds four and seven, we reverse and remand.

Roundtree was found guilty by a jury of armed robbery and sentenced to thirty years in prison as a Prison Releasee Reoffender (PRR).

[1][2] In ground four of his motion, Roundtree alleged that his codefendant had just recently admitted that he had not testified on Roundtree's behalf because he had been coerced by the State. Roundtree alleged that his codefendant would have testified that Roundtree had no role in planning or committing the robbery and that Roundtree had no knowledge that a robbery would take place. Roundtree alleged that this testimony would have refuted the State's argument that Roundtree acted as a lookout during the robbery. These allegations are sufficient to state a prima facie claim of newly discovered evidence. *See McLin v. State,* 827 So.2d 948 (Fla.2002); *Keen v. State,* 855 So.2d 117 (Fla. 2d DCA 2003). It appears that the trial court denied Roundtree's claim because he failed to attach an affidavit. However, rule 3.850 does not require the filing of supporting affidavits; it only requires a brief statement of facts in support of the motion. *See Valle v. State,* 705 So.2d 1331 (Fla.1997); *Smith v. State,* 837 So.2d 1185 (Fla. 4th DCA 2003). Accordingly, we reverse and remand for the trial court to hold an evidentiary hearing on this ground.

[3] In ground seven of his motion, Roundtree alleged that before trial, the State offered a sentence of fifty-four months in prison in exchange for a nolo contendere plea. Roundtree alleged that his trial counsel was ineffective during the plea negotiation because she failed to advise Roundtree that he could face an enhanced sentence as a PRR if he rejected the offer. Roundtree also alleged that he would have accepted the plea offer had he been properly advised of the possible penalties and that acceptance of the offer would have resulted in a lesser sentence of fifty-four months in prison with no PRR designation. This is a facially sufficient claim of ineffective assistance of counsel. *See Murphy v. State,* 869 So.2d 1228 (Fla. 2d DCA 2004). The trial court's order did not refute this claim. Accordingly, we reverse and remand for the trial court to reconsider the claim and either attach portions of the record that conclusively refute the claim or conduct an evidentiary hearing.

Reversed and remanded.

WHATLEY and SALCINES, JJ., concur.

884 So.2d 322, 29 Fla. L. Weekly D2029

District Court of Appeal of Florida,
Second District.
Ron B. SMITH, Appellant,
v.
STATE of Florida, Appellee.
No. 2D05-949.

Sept. 7, 2005.

Background: Following his criminal conviction and receipt of 30-year enhanced sentence, movant sought post-conviction relief. The Circuit Court, Pinellas County, Richard A. Luce, J., summarily denied motion, and movant appealed.

Holdings: The District Court of Appeal, Canady, J., held that:
(1) movant's claim that his sentence was vindictive was procedurally barred, and
(2) movant was entitled to hearing on his claim of ineffective assistance of trial counsel.
Affirmed in part, reversed in part, and remanded.

[1] Criminal Law 1429(2)

110k1429(2) Most Cited Cases
Post-conviction movant's claim that his sentence was vindictive was procedurally barred, where such claim could have been raised on direct appeal but was not.

[2] Criminal Law 1655(6)
110k1655(6) Most Cited Cases
Post-conviction movant was entitled to hearing on his claim of ineffective assistance of trial counsel, where movant alleged counsel's failure to advise him that he faced enhanced habitual felony offender and prison releasee reoffender sentence if he rejected state's 15.6-year plea offer, that he would have accepted plea offer but for inadequate advice of counsel, and that acceptance of plea offer would have resulted in lesser sentence than 30-year sentence he received. U.S.C.A. Const.Amend. 6.

CANADY, Judge.

***1** [1] Ron B. Smith appeals the summary denial of his postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850. As to Smith's first claim that his sentence was vindictive, we affirm the postconviction court's denial order because this claim could have been raised on direct appeal. *See McDonald v. State,* 751 So.2d 56, 58 (Fla. 2d DCA 1999). Because the postconviction court incorrectly determined that Smith's second claim was facially insufficient, we reverse and remand for further proceedings.

[2] Smith's second claim is that trial counsel was ineffective for failing to advise him that he faced an enhanced habitual felony offender and prison releasee reoffender sentence if he rejected the trial court's initial 15.6-year plea offer. Smith alleges that he would have accepted the trial court's 15.6-year initial offer if counsel had adequately advised him of the penalty he faced. Finally, Smith alleges that the trial court's 15.6-year plea offer would have resulted in a lesser sentence than the enhanced thirty-year prison sentence he received.

Smith's second claim is facially sufficient. A facially sufficient claim that counsel failed to inform a defendant of a plea offer requires the following showing: " '(**1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced, (2) defendant would have accepted the plea offer but for the inadequate notice, and (3) acceptance of the State's plea offer would have resulted in a lesser sentence**.' " *Murphy v. State,* 869 So.2d 1228, 1229 (Fla. 2d DCA 2004) (quoting *Cottle v. State,* 733 So.2d 963, 967 (Fla.1999)). Smith's claim contains each of those elements. Accordingly, the postconviction court erred in determining that the claims were facially insufficient.

On remand, if the postconviction court should again deny Smith relief on his second claim, then it should attach those records that conclusively refute his claim. Otherwise, the postconviction court should hold an evidentiary hearing.

Affirmed in part, reversed in part, and remanded.

DAVIS and KELLY, JJ., Concur.

--- So.2d ----, 2005 WL 2140189 (Fla.App. 2 Dist.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, Division CR-G, Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida, 32202; by U.S Postal Service, postage prepaid, this ____ day of October, 2005.

_____

William Mallory Kent