IN THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

CHRISTOPHER GIVENS,
Petitioner,

vs. **Case Number 05-2002-CF-64383-AXXX**

STATE OF FLORIDA,
Respondent.
_____/

GIVENS'S REQUEST FOR PERMISSION TO AMEND 3.850 MOTION AND PROPOSED FIRST AMENDMENT TO MOTION PURSUANT TO RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE, TO VACATE JUDGEMENT AND SENTENCE AND SUPPORTING MEMORANDUM OF LAW

COMES NOW CHRISTOPHER GIVENS (hereinafter "Givens" or the "Defendant,") by his undersigned counsel, pursuant to Rule 3.850(a)(1) and (6), Florida Rules of Criminal Procedure, and requests permission to amend his pending 3.850 motion and files his proposed first amendment to his previously filed motion to include the following additional claim.

Defendants are entitled to amend 3.850 motions at any time before expiration of the two year statutory time period for filing such motions so long as the court has not already ruled on the merits of the original motion. The Florida Supreme Court has held:

> Here, the record indicates that Gaskin filed an initial rule 3.850 motion in March 1995, almost eight months prior to the two-year statutory

> period within which to file such motions. Before the trial court ruled on the original motion and before the termination of the statutory time limit, Gaskin filed an amended motion asserting five new allegations. Thus, both the original and amended 3.850 motions were filed within the statutory two-year time limitation. Under these circumstances, it was error for the trial court not to consider the merits of the new allegations.

Gaskin v. State, 737 So.2d 509, 517-518 (Fla..1999).

Gaskin was subsequently receded from on other grounds but continues to be controlling precedent for the proposition that a defendant has an absolute right to amend a 3.850 motion at any time before it has been ruled on on the merits and so long as the amendment is filed within the two year time limit for the motion:

> The instant motion alleged new grounds for ineffective assistance of counsel. The state argues that the trial court properly determined that Hyacinthe abused the post-conviction process by raising new claims, even though none of Hyacinthe's prior motions were determined on the merits. We disagree.
>
> The abuse of process doctrine does not apply where the trial court has not previously ruled on the merits of a post-conviction claim in the case and the movant seeks to raise new claims in a different motion. See *Christopher v. State*, 489 So.2d 22, 24 (Fla.1986) (discussing the abuse of process doctrine and the adoption of rule 3.850(f)). As noted by Hyacinthe in his response to this court, a 3.850 movant has the right to amend or supplement a motion at any time within the two-year time limit as long as the trial court has not yet ruled on the merits of the motion. *Gaskin v. State*, 737 So.2d 509 (Fla.1999), receded from on other grounds, *Nelson v. State*, 875 So.2d 579 (Fla.2004); *Harris v. State*, 826 So.2d 340 (Fla. 2d DCA 2002). Hyacinthe's motion was not successive because the prior motions were not determined on the merits. See also *Mancebo v. State*, 931 So.2d 928 (Fla. 3d DCA 2006).

> We reverse the summary denial of the motion for post-conviction relief and remand for the trial court to consider the motion on its merits.

Hyacinthe v. State, 940 So.2d 1280, 1280-1281 (Fla. 4th DCA 2006).

The Fifth District Court of Appeals follows this precedent and applies this rule:

> Our courts have consistently ruled that a defendant is entitled to have the trial court rule on an amended rule 3.850 motion when the motion is filed before the date that the trial court enters a ruling on the merits of the defendant's original motion, provided that the amended motion was filed within the rule's two-year time limit and does not raise successive claims. See *Gaskin v. State*, 737 So.2d 509 (Fla.1999); *Smith v. State*, 987 So.2d 724 (Fla. 5th DCA 2008); *Oxendine v. State*, 824 So.2d 1022 (Fla. 5th DCA 2002).

Harris v. State, 993 So.2d 1176, 1177 (Fla. 5th DCA 2008).

Accordingly, Givens respectfully requests this honorable Court permit the following amendment.

GIVENS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY COUNSEL'S ADVICE TO REJECT A PLEA OFFER FROM THE STATE, WHEN COUNSEL MISTAKENLY ADVISED GIVENS CONCERNING THE PENALTIES APPLICABLE TO THE OFFENSES WERE GIVENS TO NOT ACCEPT THE OFFER, AND HAD GIVENS BEEN GIVEN PROPER ADVICE HE WOULD HAVE ACCEPTED THE STATE'S OFFER AND RECEIVED A LESSER SENTENCE THAN THAT IMPOSED WHEN HE PLED STRAIGHT UP TO THE COURT WITHOUT BENEFIT OF THE OFFER.

STATEMENT OF FACTS

Givens alleges that until shortly before he entered his straight up, unconditional guilty pleas to counts one and two in this case, the State had continued to hold open an offer to settle all of his pending felony charges for concurrent 15 year sentences, subject only to the condition that the burglary of a dwelling charge would be sentenced as a prison releasee reoffender ("PRR") sentence, meaning the sentence would be served day for day for the full fifteen years. This offer was first made by Assistant State Attorney Russell K. Bausch, and was later maintained by Assistant State Attorney Kelly Jo Heiser after she replaced Mr. Bausch on the case. As late as July 27, 2004, 16 days before the guilty pleas, the state's offer was still open. In a July 27, 2004 memorandum to the file, defense counsel XXXXXXX XXXXXXX noted that the offer was to remain open until the next pretrial conference, Thursday, August 5, 2004. The memo to file notes that defense counsel XXXXXXX intended

to call the client to discuss the offer.[1]

Defense counsel and Givens did discuss the offer over the telephone before the offer expired. As he had from the very first time the offer was made, defense counsel advised against accepting the offer, stating that he would never agree to his client pleading out to the maximum.

Defense counsel's focus during his discussion of the state's offer was the refusal of the state to agree to withdraw the PRR requirement. Defense counsel advised Givens that it was possible for the judge in his discretion to not impose the PRR if the defense gave the judge a basis to depart from the PRR sentence. Defense counsel wrote a letter to Assistant State Attorney Heiser dated August 3, 2004, rejecting the state's offer and in that letter the focus was on the state's insistence on the PRR sentence. Defense counsel's letter to ASA Heiser fails to mention the habitual offender thirty year maximum penalty and instead only argues that there was appellate uncertainty about the then state of the application of the PRR sentence to Givens, and for this and other reasons argued that the state should withdraw its insistence on the PRR sentence.

The state refused to back off its PRR sentence and instead of then accepting the state's offer, defense counsel persisted in advising Givens to reject the offer and

[1] Givens was incarcerated at that time.

instead plea straight up to the court. Givens continued to follow his counsel's advice.

At no time during the discussion of the state's offer did defense counsel explain to Givens that his maximum exposure was thirty years imprisonment as an habitual offender ("HO"). Based on the advice from his defense counsel, Givens rejected the state's fifteen year PRR offer.

When Givens rejected the state's 15 year PRR offer, he did not know that the judge in fact had no discretion to depart below the mandatory 15 year PRR sentence, so long as the state established the predicate requirement for the PRR. There had never been any dispute that Givens met the legal requirements for the PRR sentence, so if in fact the judge could not in his discretion depart below the PRR sentence, without an agreement from the state to drop the PRR requirement, Givens could not avoid the PRR sentence. Had Givens known that he would have accepted the state's 15 year PRR offer.

When Givens rejected the state's fifteen year PRR offer he did not know that by doing so he exposed himself to a thirty year HO sentence, and had he known this, he would have accepted the state's 15 year PRR offer.[2]

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[2] This assertion proves itself: if the PRR is mandatory and the judge has no discretion to depart below it, then what possible strategic purpose could have existed in rejecting the state's 15 year PRR offer? That is, in a straight up plea to the court the court could not undercut the state's offer - - the sentence could not be any better than the offer - - and instead could only be worse - - as in fact it turned out to be,

Givens alleges that his defense counsel was ineffective during the plea negotiation, because he failed to advise Givens that there was no way to obtain a better sentence by a straight up plea than was being offered by the state in its proposed plea agreement, and instead could at best get the same sentence by a straight up plea as was being offered in the state's proposed plea agreement, and that by not accepting the proposed plea agreement the defendant would be subjecting himself to the potential of an HO sentence double that of the offer.

Givens alleges that he would have accepted the state's 15 year PRR plea offer had he been properly advised of the possible penalties and that acceptance of the state's offer would have resulted in a lesser sentence than what resulted rejecting the offer and making instead a straight up plea, by which he was sentenced not to the 15 years PRR sentence the state offered but sentenced to 30 years as an HO with a 15 year PRR minimum mandatory.

MEMORANDUM OF LAW

This is a facially sufficient claim of ineffective assistance of counsel. In *Murphy v. State*, 869 So.2d 1228, 1229 (Fla. 2nd DCA 2004), the court held:

> 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

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thirty years HO with the 15 year PRR mandatory minimum.

> 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.

See also, 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.);[3] *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

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

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 *Morgan v. State*, 991 So.2d 835 (Fla. 2008) (holding that defendant states a facially sufficient 3.850 claim if defendant alleges that counsel advised defendant to reject a plea offer and in so doing misinformed the defendant concerning the penalties attendant upon rejection of the plea offer), approving *Young v. State*, 608 So.2d 111 (Fla. 5th DCA 1992) (held that to be entitled to postconviction relief, defendant who claimed that he was denied effective assistance of counsel when defense counsel failed to inform him of terms of plea bargain prior to trial was required to prove counsel failed to communicate plea offer or misinformed him concerning penalty he faced, that had he been correctly advised he would have accepted plea offer, and that his acceptance of state's plea offer would have resulted in lesser sentence).

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) (quoting *Cottle v. State,* 733

So.2d 963, 967 (Fla.1999)).

Smith v. State, 909 So.2d 972 (Fla. 2nd DCA 2005).

Conclusion

Accordingly, Givens respectfully requests this Honorable Court vacate his judgment and sentence. Givens 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 Givens to accept the fifteen year PRR 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,

THE LAW OFFICE OF
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Oath of Petitioner

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.[4]

_____

CHRISTOPHER GIVENS

Christopher Givens is in custody at Central Florida Reception Center in Orlando, Florida, a distance of 300 miles round trip from counsel's office in Jacksonville, Florida. It is impossible to obtain his personal signature on this motion prior to its filing due to the distance from Jacksonville, where counsel is located, to the place of his incarceration. A duplicate counterpart copy of this motion is being sent to Mr. Givens for him to personally sign under oath and will be filed within 30 days from today's date. Under *Hickey v. State*, 763 So.2d 1213 (Fla. 1st DCA 2000), *Barfield v. State,* 671 So.2d 820 (Fla. 1st DCA 1996) and *Melton v. State,* 720 So.2d 577 (Fla. 1st DCA 1998), this Court is required to allow petitioner not less than 30 days to file the verification by petitioner.

[4] Form of unnotarized oath permitted under Rule 3.987, Florida Rules of Criminal Procedure.

COPY OF CITED CASES

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.

District Court of Appeal of Florida,

Fifth District.

Terry Lee YOUNG, Appellant,

v.

STATE of Florida, Appellee.

No. 92-1110.

Oct. 30, 1992.

Following remand, 579 So.2d 380, defendant convicted of sexual battery upon a person less than 12 years old petitioned for postconviction relief. The Circuit Court, Orange County, Michael F. Cycmanick, J., denied relief, and defendant appealed. The District Court of Appeal, Griffin, J., held that to be entitled to postconviction relief, defendant who claimed that he was denied effective assistance of counsel when defense counsel failed to inform him of terms of plea bargain prior to trial was

required to prove counsel failed to communicate plea offer or misinformed him concerning penalty he faced, that had he been correctly advised he would have accepted plea offer, and that his acceptance of state's plea offer would have resulted in lesser sentence.

Reversed and remanded.

Diamantis, J., filed specially concurring opinion in which Goshorn, C.J., joined.

West Headnotes

KeyCite Citing References for this Headnote

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1511 Counsel

110k1519 Effectiveness of Counsel

110k1519(8) k. Plea.

(Formerly 110k998(8))

To be entitled to postconviction relief, defendant who claimed that he was denied effective assistance of counsel when defense counsel failed to inform him of terms of plea bargain prior to trial was required to prove counsel failed to communicate plea offer or misinformed him concerning penalty he faced, that had he been correctly advised he would have accepted plea offer, and that his acceptance of state's plea offer would have resulted in lesser sentence than sentence he received at trial. West's F.S.A. RCrP Rules 3.170(g), 3.850; U.S.C.A. Const.Amend. 6.

*111

(Cite as: 608 So.2d 111, *111)

Terry Lee Young, Raiford, pro se.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Bonnie Jean Parrish, Asst. Atty. Gen., Daytona Beach, for appellee.

GRIFFIN, Judge.

This is the appeal of the summary denial of a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. We reverse.

Appellant has raised nineteen grounds in his pro se motion for post-conviction relief, only one of which has substance. In ground 17, appellant asserted that trial counsel rendered ineffective assistance by:

failing to convey a plea bargain negotiation consisting of three (3) years imprisonment followed by ten (10) years probation and in following, [sic] convey a latter *112

(Cite as: 608 So.2d 111, *112)

[sic] plea bargain negotiation to the Defendant consisting of five (5) years imprisonment with no mention of probation while counseling the Defendant that he was charged with a second (2d) degree felony and faced a potential seven and one half (7 1/2) years maximum imprisonment ...

In his prayer for relief, appellant asserted:

The second [plea offer] consisted in terms of five (5) years imprisonment with no mention of probation, which was applied against a counseled seven and one half (7 1/2) years maximum imprisonment potential and therefore was not entered into. (emphasis in original)

The crime with which appellant was charged, and subsequently convicted at trial, was sexual battery of a child under age twelve, a capital offense. At sentencing, appellant complained about his trial counsel's failure to communicate plea offers and misinformation about the sentence he faced. Over the state's objection the trial court refused to sentence the defendant under the controlling statute, which required a minimum mandatory term of 25 years, instead sentencing him under the guidelines to ten years imprisonment with ten years probation. On appeal, this sentence was vacated, State v. Young, 579 So.2d 380 (Fla. 5th DCA 1991), and, as instructed, on remand the lower court sentenced defendant to the 25 year minimum mandatory term.

Courts appear uniformly to hold that the failure of trial counsel to communicate or to

communicate correctly the facts and merits of a plea bargain offered by the state may warrant relief to a criminal defendant. Davis v. State, 559 So.2d 630 (Fla. 4th DCA 1990); Martens v. State, 517 So.2d 38 (Fla. 3d DCA 1987), rev. denied, 525 So.2d 879 (Fla.1988); Ginwright v. State, 466 So.2d 409 (Fla. 2d DCA 1985). See also Turner v. Tennessee, 858 F.2d 1201 (6th Cir.1988), vacated on other grounds, 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989); Johnson v. Duckworth, 793 F.2d 898 (7th Cir.), cert. denied, 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367 (1986); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir.1982); Beckham v. Wainwright, 639 F.2d 262 (5th Cir.1981); Williams v. Arn, 654 F.Supp. 226 (N.D.Ohio 1986); United States v. Turchi, 645 F.Supp. 558 (E.D.Pa.1986), affirmed, 815 F.2d 697 (3rd Cir.1987); Elmore v. State, 285 Ark. 42, 684 S.W.2d 263 (1985); Davis v. State, 559 So.2d 630 (Fla. 4th DCA 1990); Martens v. State, 517 So.2d 38 (Fla. 3d DCA 1987), rev. denied, 525 So.2d 879 (Fla.1988); Ginwright v. State, 466 So.2d 409 (Fla. 2d DCA 1985); People v. Saunders, 135 Ill.App.3d 594, 90 Ill.Dec. 378, 482 N.E.2d 85 (1985); Young v. State, 470 N.E.2d 70 (Ind.1984); State v. Kraus, 397 N.W.2d 671 (Iowa 1986); People v. Carter, 190 Mich.App. 459, 476 N.W.2d 436 (1991), appeal denied, 439 Mich. 944, 482 N.W.2d 712 (1992); People v. Alexander, 136 Misc.2d 573, 518 N.Y.S.2d 872 (1987); State v. Simmons, 65 N.C.App. 294, 309

S.E.2d 493 (1983); Commonwealth v. Copeland, 381 Pa.Super. 382, 554 A.2d 54 (1988), appeal denied, 523 Pa. 640, 565 A.2d 1165 (1989); Pennington v. State, 768 S.W.2d 740 (Tx.App.1988); State v. James, 48 Wash.App. 353, 739 P.2d 1161 (1987); Tucker v. Holland, 174 W.Va. 409, 327 S.E.2d 388 (1985); State v. Ludwig, 124 Wis.2d 600, 369 N.W.2d 722 (1985).

Most of these courts have not addressed directly the peculiar problems and potential for abuse inherent in the circumstance where a criminal defendant has received a fair trial and a lawful sentence but then seeks post-conviction relief claiming that before trial a plea offer more favorable than his sentence had not been communicated to him or he had been misadvised concerning the penalty he faced. The situation in such a case is unlike one where appellant claims he was induced to accept a plea based on some alleged error or omission of counsel, for that defendant can expect nothing better than a trial on the charge and a lawful sentence, if convicted. In a case such as this, on the other hand, a defendant who elects to go to trial and receives a sentence greater than the plea offered by the state has nothing to lose by alleging he was not properly advised. Perhaps in tacit recognition of this problem, courts have been

exacting in what a defendant*113

(Cite as: 608 So.2d 111, *113)

is required to claim, and, ultimately, to prove, in such cases.

In Zelinsky, one of the leading cases, a claim for ineffective assistance of counsel was held to be adequate where it was alleged that a specific plea offer had not been communicated to the defendant; that, had it been communicated, it would have been accepted, and had it been accepted, defendant's sentence would have been less. 689 F.2d at 437. In contrast, in Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir.1991), cert. denied, 505 U.S. 1223, 112 S.Ct. 3038, 120 L.Ed.2d 907 (1992), the court found the prisoner's application for relief to be inadequate because he never claimed that he would have accepted the plea; he merely alleged that he "would have had to be insane not to." These cases illustrate that the required showing of "prejudice" FN1 will be strictly applied in such cases. In such circumstances, the claim of prejudice should be positive, specific and factual. FN2

FN1. See Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

FN2. Florida law is in accord. In Duggan v. State, 588 So.2d 1054 (Fla. 1st DCA 1991) the defendant claimed that he was induced to enter into a plea agreement based on his counsel's erroneous advice concerning gain time. The court refused to require an evidentiary hearing finding the allegation of ineffective assistance facially insufficient because the defendant failed to allege that if he had been correctly advised he would not have entered his plea. Id.

In the brief filed on behalf of appellant in the direct appeal, counsel set forth the following, citing to the record:

The state attorney, Ms. Mills who tried the case informed the court that she recalled speaking with Mr. Shumaker, and that the notes in the file reflect that Judge Belvin Perry had approved an offer of attempted sexual battery which would have been a first-degree felony and believed the offer was around three years incarceration followed by ten years probation with extensive counseling. (emphasis in original).

The state did not dispute this recitation of the contents of the record; rather the state urged such issues were more properly raised in a Rule 3.850 motion. In the context of the proceedings in this court, therefore, we conclude that this pro se appellant's allegations are barely sufficient to warrant a hearing to determine what the facts are. Appellant must prove his counsel failed to communicate a plea offer or misinformed him concerning the penalty he faced,FN3 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.FN4

FN3. As previously noted, appellant's offense carried a minimum mandatory sentence. Further, any purported offer for a plea to a lesser offense was subject to court approval. Fla.R.Crim.P. 3.170(g).

FN4. Because of the procedural posture of this case, we pretermit consideration of the appropriate remedy if the appellant is successful in his claim of ineffective assistance of counsel. We note that a California appellate court has recently decided this issue in a lengthy opinion that discusses the few cases that have tackled the remedy problem. People v. Pollard, 2 Cal.App.4th 1090, 282 Cal.Rptr. 588, rev. granted, 286 Cal.Rptr. 778, 818 P.2d 61 (1991).

REVERSED; REMANDED.

GOSHORN, C.J., concurs.

DIAMANTIS, J., concurs specially with opinion in which GOSHORN, C.J., concurs.

DIAMANTIS, Judge, concurring specially.

I concur in the majority opinion. However, I would emphasize that appellant must specifically prove that the trial court would have accepted a plea to a lesser included offense and would have accepted the plea offer regarding the negotiated sentence as required by rules 3.170(g) and 3.172(f) of the Florida Rules of Criminal Procedure.

GOSHORN, C.J., concurs.

Supreme Court of Florida.

Thomas J. MORGAN, Petitioner,

v.

STATE of Florida, Respondent.

No. SC06-2350.

July 10, 2008.

Rehearing Denied Sept. 19, 2008.

Background: After affirmance of defendant's convictions for two counts of aggravated assault with a weapon, 818 So.2d 519, defendant filed motion for postconviction relief, alleging his trial counsel was ineffective in advising him to reject a plea offer. The Circuit Court, 17th Judicial Circuit, Broward County, Alfred J. Horowitz, J., summarily denied relief. Defendant appealed. The District Court of Appeal affirmed and certified a conflict of appellate authorities. Review was granted.

Holdings: The Supreme Court, Quince, C.J., held that:

(1) a defendant is entitled to an evidentiary hearing on a motion for postconviction

relief alleging that trial counsel was ineffective in advising defendant to reject a plea offer, unless the motion, files, and records in the case conclusively show that defendant is entitled to no relief, or defendant's claim is legally insufficient, abrogating Gonzales v. State, 691 So.2d 602, Smith v. State, 825 So.2d 1012, and Szymanowski v. State, 771 So.2d 10, and

(2) in the case at bar, defendant postconviction claim was facially insufficient.

Opinion of District Court of Appeal approved in part and disapproved in part.

Wells, J., filed an opinion concurring in result only, in which Cantero and Bell, JJ., concurred.

West Headnotes

[1] KeyCite Citing References for this Headnote

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1920 k. Plea.

To assert a claim that was counsel was ineffective in advising defendant to reject a plea offer, defendant must allege and prove that: (1) counsel failed to convey a plea offer or misinformed defendant concerning the possible sentence he faced; (2) defendant would have accepted the plea but for counsel's failures; and (3) acceptance of the plea would have resulted in a lesser sentence than was ultimately imposed. U.S.C.A. Const.Amend. 6.

[2] KeyCite Citing References for this Headnote

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)3 Hearing and Determination

110k1651 Necessity for Hearing

110k1652 k. In General.

A defendant is entitled to an evidentiary hearing on a postconviction relief motion unless: (1) the motion, files, and records in the case conclusively show that the defendant is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. West's F.S.A. RCrP Rule 3.850.

[3] KeyCite Citing References for this Headnote

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)2 Affidavits and Evidence

110k1613 k. Burden of Proof.

110 Criminal Law KeyCite Citing References for this Headnote

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)2 Affidavits and Evidence

110k1616 Sufficiency

110k1617 k. In General.

When the defendant files a motion for postconviction relief, the defendant bears the burden of establishing a prima facie case based upon a legally valid claim, and mere conclusory allegations are not sufficient to meet this burden. West's F.S.A. RCrP Rule 3.850.

[4] KeyCite Citing References for this Headnote

110 Criminal Law

110XXIV Review

110XXIV(M) Presumptions

110k1144 Facts or Proceedings Not Shown by Record

110k1144.17 k. Judgment, Sentence, and Punishment.

In cases where there has been no evidentiary hearing on the defendant's motion for postconviction relief, the postconviction appellate court must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. West's F.S.A. RCrP Rule 3.850.

[5] KeyCite Citing References for this Headnote

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1651 Necessity for Hearing
110k1655 Particular Issues
110k1655(6) k. Counsel.

A defendant is entitled to an evidentiary hearing on a motion for postconviction relief alleging that trial counsel was ineffective in advising defendant to reject a plea offer, unless the motion, files, and records in the case conclusively show that defendant is

entitled to no relief, or defendant's claim is legally insufficient; abrogating Gonzales v. State, 691 So.2d 602, Smith v. State, 825 So.2d 1012, and Szymanowski v. State, 771 So.2d 10. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.

[6] KeyCite Citing References for this Headnote

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1651 Necessity for Hearing
110k1655 Particular Issues
110k1655(6) k. Counsel.

Defendant's postconviction claim of ineffective assistance of counsel, alleging trial counsel was ineffective in advising defendant to reject a plea offer, was facially insufficient, and thus, defendant was not entitled to an evidentiary hearing on the claim; while defendant alleged that counsel advised him that she felt she could win

at trial or get a reduced offense, that counsel urged him to reject the plea offer, that he did, that he received a greater sentence after trial than he would have received if he had accepted the plea offer, and that he would have accepted the plea offer had he known that counsel would not win, he did not contend that counsel failed to communicate a plea offer or misinformed him concerning the penalties, nor did he specify some deficiency on the part of counsel, e.g., there was no allegation that counsel's assessment of chances of success at trial was unreasonable under the facts and circumstances of the case or that counsel had not investigated or otherwise was not familiar with the case. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850. *836

(Cite as: 991 So.2d 835, *836)

Bruce S. Rogow and Cynthia E. Gunther of Bruce S. Rogow, P.A., Fort Lauderdale, FL, for Petitioner.

Bill McCollum, Attorney General, Tallahassee, FL, Celia Terenzio, Senior Assistant Attorney General, Bureau Chief, and Mark J. Hamel, Assistant Attorney General, West Palm Beach, FL, for Respondent.

*837

(Cite as: 991 So.2d 835, *837)

QUINCE, C.J.

This case is before the Court for review of the decision of the Fourth District Court of Appeal in Morgan v. State, 941 So.2d 1198 (Fla. 4th DCA 2006). The district court certified that its decision is in direct conflict with the decision of the Third District Court of Appeal in Gomez v. State, 832 So.2d 793 (Fla. 3d DCA 2002), and Sharpe v. State, 861 So.2d 483 (Fla. 3d DCA 2003). We have jurisdiction. See art. V, §

3(b)(4), Fla. Const. For the following reasons, we approve the result reached by the district court in Morgan but hold that if a legally sufficient claim of ineffective assistance of counsel is alleged based on counsel's advice to reject a plea offer, a defendant may be entitled to a postconviction evidentiary hearing.

FACTS AND PROCEDURAL HISTORY

On November 27, 2000, Thomas Morgan was charged with two counts of aggravated assault with a weapon. The State offered Morgan a sentence of five years' imprisonment in exchange for a guilty plea. Defense counsel told Morgan he could win at trial, or at worst be convicted of a lesser offense. See Morgan, 941 So.2d at 1198. Defense counsel encouraged Morgan to decline the State's offer and proceed with trial. Morgan followed his counsel's advice and proceeded to trial. At trial, a jury convicted Morgan of two counts of aggravated assault with a weapon. The trial court adjudicated Morgan guilty and sentenced him as a habitual felony offender to two concurrent terms of ten years in prison with five-year mandatory minimums as a prison releasee reoffender. On direct appeal, the Fourth District Court of Appeal affirmed Morgan's convictions and sentences. See Morgan v. State, 818 So.2d 519 (Fla. 4th DCA 2002).

In August 2003, Morgan filed with the trial court a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 alleging eight claims for relief. As his fourth claim, Morgan alleged ineffective assistance of trial counsel based on counsel's advice concerning the plea offer. Morgan claimed that his counsel's deficient performance prejudiced his defense. More specifically, Morgan said that based on his counsel's assurances that she would win at trial, he declined the State's plea offer and proceeded to trial. He argues that had he known that his counsel would not win at trial, he would have accepted the State's offer of five years' imprisonment. The trial court summarily denied relief on all claims presented, including the ineffective assistance of counsel claim.

The Fourth District Court of Appeal affirmed the trial court's denial of relief and certified conflict with the Third District Court of Appeal on the issue of whether a defendant is entitled to an evidentiary hearing when claiming ineffective assistance of counsel based on trial counsel advice to reject a plea offer because counsel believed the defendant could win or do better going to trial. In Morgan and Gonzales v. State, 691 So.2d 602 (Fla. 4th DCA 1997), the Fourth District held that the defendant was not entitled to an evidentiary hearing on such a claim. See Morgan, 941 So.2d at 1198-99; Gonzales, 691 So.2d at 604. In contrast, the Third District in

Sharpe and Gomez held that a defendant is entitled to an evidentiary hearing on this type of ineffective assistance of counsel claim. See Sharpe, 861 So.2d at 484; Gomez, 832 So.2d at 794.

Morgan petitioned this Court for discretionary review, and we accepted review to resolve the conflict which exists between the two district courts of appeal.

*838

(Cite as: 991 So.2d 835, *838)

ANALYSIS

The District Courts

Each Florida district court of appeal has addressed in the context of an ineffective assistance of counsel claim the rejection of a plea offer on the advice of counsel, and whether the trial court should have granted the defendant an evidentiary hearing on

such a claim. In Williams v. State, 924 So.2d 897 (Fla. 1st DCA 2006), the defendant claimed ineffective assistance of counsel because his counsel failed to convey to him the statutory maximum for the crime charged prior to his rejection of the State's plea offer. The State offered three years on a charge of sale or delivery of cocaine. After conviction at trial, the defendant was sentenced to twelve years, a term within the statutory maximum of fifteen years. The district court remanded for an evidentiary hearing after finding there was nothing in the trial court's order that conclusively refuted this claim.

The Second District Court of Appeal addressed a similar issue in Dines v. State, 909 So.2d 521 (Fla. 2d DCA 2005). Dines filed a motion for postconviction relief alleging six claims of ineffective assistance of counsel. He alleged, inter alia, that trial counsel was ineffective for misinforming him about his potential prison exposure prior to rejecting the State's plea offers. The trial court summarily denied the claim. The Second District affirmed the summary denial finding the claim facially deficient because Dines did not allege any deficiency in counsel's performance. The district court reasoned:

To state a claim under Strickland, the defendant must assert more than merely that counsel advised against accepting a plea, that the defendant took the advice, and that

ultimately a greater sentence was imposed. On its face, such an allegation identifies no failing on counsel's part. Rather, some specific deficiency must be alleged: for instance, that counsel advised the client to reject the plea without preparing or knowing the operative facts of the case, or that counsel neglected to identify the material legal issues, or that counsel otherwise did not fully perform as a lawyer. Mr. Dines has made no such allegation; thus, his first ground failed to state a facially sufficient claim.

Dines, 909 So.2d at 523. [FN1]

FN1. Later, in Beasley v. State, 964 So.2d 213 (Fla. 2d DCA 2007), the district court, in reversing the denial of postconviction relief, cited to this Court's opinion in Cottle v. State, 733 So.2d 963 (Fla.1999), which lays out the requirements that must be met in order to demonstrate ineffective assistance of counsel for advising a defendant to reject a plea offer.

In several cases concerning attorneys advising their clients to reject plea offers, the

Third District has held that a defendant is entitled to an evidentiary hearing on a claim of ineffective assistance. See Yanes v. State, 960 So.2d 834 (Fla. 3d DCA 2007); Sharpe, 861 So.2d at 484; Gomez, 832 So.2d at 794. The defendant in Gomez filed a postconviction motion alleging ineffectiveness of counsel because counsel advised the defendant to reject a plea offer from the State because counsel assured him that a pending motion to suppress would be granted. The trial court summarily denied the claim, but the district court reversed for an evidentiary hearing or other appropriate relief.

Then, in Sharpe the court cited to its earlier Gomez opinion in addressing the issue of whether a defendant can ever state a claim for ineffective assistance of counsel based on counsel's advice to reject a plea offer when counsel has informed the defendant of the maximum sentence he faces. The court indicated that the Third District does not take the position espoused *839

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in Gonzales that no claim of ineffective assistance is viable under these circumstances. More recently, in Yanes, the Third District reiterated its position that these claims require an evidentiary hearing in the trial court.

Beginning with Gonzales, the Fourth District has held that claims by defendants alleging ineffective assistance of counsel based on counsel's advice to reject a plea offer were not capable of being evaluated under Strickland, and therefore the defendant was not entitled to an evidentiary hearing on the claim. In Gonzales the defendant alleged counsel advised him to reject a favorable plea offer from the State because counsel said she would win the case. In affirming the trial court's summary denial of the claim, the district court said:

We do not, therefore, believe that the allegation of ineffective assistance of counsel in this case is capable of being evaluated by any "objective" standard of reasonable as contemplated by Strickland. It was, rather, a tactical or strategic decision, which cannot be the basis of an ineffective assistance of counsel claim. Accordingly, even if appellant could prove his allegation, it would not entitle him to relief.

Gonzales, 691 So.2d at 604.

After Gonzales, in Morgan, the case that is now before this Court, Smith v. State, 825

So.2d 1012 (Fla. 4th DCA 2002), and Szymanowski v. State, 771 So.2d 10 (Fla. 4th DCA 2000), the court cited with approval its earlier Gonzales opinion. Specifically, in Smith and Szymanowski, the court cited Gonzales for the proposition that a claim involving the rejection of a plea and proceeding to trial is tactical or strategic and cannot be the basis of an ineffective assistance of counsel claim. See Smith, 825 So.2d at 1013; Szymanowski, 771 So.2d at 11. It is interesting to note that in Garcia v. State, 736 So.2d 89 (Fla. 4th DCA 1999), the court again cited to Gonzales for the same proposition but ultimately found Garcia had stated a valid claim for relief based on our decision in Cottle v. State, 733 So.2d 963 (Fla.1999).

The Fifth District Court of Appeal in Colon v. State, 909 So.2d 484 (Fla. 5th DCA 2005), also addressed an ineffective assistance of counsel claim based on counsel's advice to reject a plea offer. The defendant claimed he relied on trial counsel's assurance of an acquittal at trial in turning down a plea offer. The trial court summarily denied the claim as insufficient and without merit. The Fifth District disagreed and remanded for an evidentiary hearing because the record did not conclusively refute the allegation. See id. at 490. The court in Young v. State, 608 So.2d 111 (Fla. 5th DCA 1992), also remanded the case for an evidentiary hearing based on a claim that counsel was ineffective when he failed to convey a plea offer

by the State, an offer that was substantially less than the twenty-five years he received after trial.

This Case

[1] The Fourth District in Morgan affirmed the trial court's denial of postconviction relief on Morgan's claim that counsel was ineffective for advising him to reject a plea offer based on assurance of a win at trial. In affirming the denial of relief, the court cited to Gonzales. The court in Gonzales held that claims of ineffective assistance of counsel based on advice to reject a plea offer could not be the basis for an ineffective assistance of counsel claim. We disagree and reaffirm the requirements that a defendant must allege and prove in order to be entitled to relief based on ineffective assistance of counsel for advising a defendant to reject a plea offer. The defendant must allege and prove that (1) counsel failed to convey *840

(Cite as: 991 So.2d 835, *840)

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a plea offer or misinformed the defendant concerning the possible sentence he faced, (2) the defendant would have accepted the plea but for counsel's failures, and (3) acceptance of the plea would have resulted in a lesser sentence than was ultimately imposed. See Cottle, 733 So.2d at 967.

This Court's Cottle decision was based on both federal and Florida case law. We grounded the opinion on Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), [FN2] and Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In Strickland the United States Supreme Court said that in ineffective assistance of counsel claims the defendant must demonstrate both that counsel's performance was deficient and that he was prejudiced by the deficient performance. Thereafter in Hill the Court indicated that the Strickland standard and analysis should be applied to claims of ineffective assistance that arise in the plea context. We said that the plea process is a critical stage of the criminal proceeding, and therefore the defendant is entitled to the effective assistance of counsel at that stage also.

FN2. See Downs v. State, 453 So.2d 1102, 1106-09 (Fla.1984), for this court's discussion and agreement with the Strickland analysis.

Moreover, we agreed with the many district court of appeal cases that recognized ineffective assistance of counsel claims arising from counsel's failure to properly inform a defendant of a plea offer. Specifically, we quoted with approval the language from the Fifth District's Young opinion in which that court outlined the three requirements for a prima facie ineffectiveness claim in this context. We said:

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.

Cottle, 733 So.2d at 969. In footnote 6 we said that an evidentiary hearing should be

ordered if the claim is sufficiently alleged.

[2] [3] [4] [5] Thus, contrary to the language from Gonzales [FN3] and its progeny, a claim of ineffective assistance of counsel can be based on advice from counsel to reject a plea offer. The only question remaining in this case is whether the trial and district courts erred in failing to require an evidentiary hearing on this claim of ineffective assistance of counsel. In Hannon v. State, 941 So.2d 1109 (Fla.2006), we provided the following standard for determining whether an evidentiary hearing is required. We said:

FN3. Although the court in Gonzales was addressing a situation where the defendant was alleging his attorney said she could win the case, the language from Gonzales has been used in other cases that do not involve the attorney saying he could win the case at trial. See, e.g., Smith v. State, 825 So.2d at 1012 (where the defendant alleged his attorney did not tell him there was no defense to an armed trespass charge); Szymanowski v. State, 771 So.2d at 11 (where the defendant alleged ineffective assistance of counsel based on counsel's advice to reject a plea offer and counsel's failure to mount an intoxication defense).

[A] defendant is entitled to an evidentiary hearing on a postconviction relief *841

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motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record.

Id. at 1138 (quoting Freeman v. State, 761 So.2d 1055, 1061 (Fla.2000)). Thus, for the instant case, we must decide whether the motion, files, and records in the case conclusively show that Morgan is entitled to no relief, or whether Morgan's claim is

legally insufficient. Because there has been no evidentiary hearing in this case, the Court must accept Morgan's factual allegations to the extent that they are not refuted by the record.

[6] On this issue we find Morgan has not submitted a facially sufficient claim of ineffective assistance based on counsel's advice to reject a plea offer. In his motion for postconviction relief, Morgan alleged that counsel informed him of a plea offer from the State. He further alleged that counsel advised him that she felt she could win at trial or get a reduced offense. Counsel urged him to reject the plea offer, and he did. Lastly, Morgan alleged that he received a greater sentence after trial, and that he would have accepted the plea had he known that counsel would not win. Morgan does not contend that his counsel failed to communicate a plea offer or misinformed him concerning the penalties. Morgan has failed to allege any deficient performance on the part of counsel. The mere fact that Morgan did not prevail at trial does not translate into misadvice. Some specific deficiency on the part of counsel must be alleged. There is no allegation that counsel's assessment of the chances of success at trial was unreasonable under the facts and circumstances of this case or that counsel had not investigated or otherwise was not familiar with the case. Therefore, Morgan is not entitled to an evidentiary hearing because his claim is legally insufficient. See

Hannon, 941 So.2d at 1138. The trial court properly summarily denied postconviction relief. While we find affirmance of the trial court's denial was correct, we do not agree with the Fourth District's implicit reasoning that this type of claim cannot be the basis for ineffective assistance of counsel.

CONCLUSION

We therefore approve the result, affirmance of the denial of postconviction relief, reached by Fourth District but hold that a claim of ineffective assistance of counsel can be based on counsel's advice to reject a favorable plea offer. To the extent that the court in Morgan holds to the contrary based on Gonzales, we disapprove that portion of the opinion. We also approve the decisions in Gomez and Sharpe to the extent they are consistent with this opinion.

It is so ordered.

ANSTEAD, PARIENTE, and LEWIS, JJ., concur.

WELLS, J., concurs in result only with an opinion, in which CANTERO and BELL,

JJ., concur.

WELLS, J., concurring in result only.

I concur in result only because I conclude that the majority is correct in affirming the trial court's denial of postconviction relief, but I do not agree with the majority in its failing to approve the Fourth District Court of Appeal's decision in *842

(Cite as: 991 So.2d 835, *842)

Gonzales v. State, 691 So.2d 602 (Fla. 4th DCA 1997). I would approve Gonzales and Dines v. State, 909 So.2d 521 (Fla. 2d DCA 2005).

Gonzales and Dines deal with the precise issue that is involved in this case, whether the allegation that trial counsel advised the defendant that the defendant would win the case or receive a lesser sentence if the defendant went to trial is sufficient to state a postconviction claim for ineffective assistance of counsel. The courts in both

Gonzales and Dines answered that precise issue correctly in holding that such an allegation is not sufficient to allege ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Having answered that precise issue, there is no reason for the majority opinion to go any further. I am concerned that by going further and making what are only obiter dictum statements, the majority confuses what should be a straightforward answer to the issue in this case.

I believe that the correct answer is to approve Gonzales and Dines on the precise issue before us and to disapprove Sharpe v. State, 861 So.2d 483 (Fla. 3d DCA 2003), and Gomez v. State, 832 So.2d 793 (Fla. 3d DCA 2002), to the extent that they are read to be in conflict with Gonzales and Dines on this issue.

CANTERO and BELL, JJ., concur.

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, 2725 Judge Fran Jamieson Way, Building D, Viera, Florida 32940, attention, Russell K. Bausch, Esq., Assistant State Attorney, by Federal Express, Monday morning delivery, this 6th day of June, 2009.

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William Mallory Kent