

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,150

THE STATE OF FLORIDA,

Petitioner,

vs.

GERARDO FUNDORA,

Respondent,

FILED

JUL 13 1987

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

On November 18, 1986, Gerardo Fundora filed a motion for post-conviction relief, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, seeking to vacate his prior guilty plea on charges of attempted first degree murder and armed robbery. (A. 1).<sup>1</sup> The motion and supporting memorandum of law asserted that the guilty plea was involuntary due to the failure of the trial court or defense counsel to advise Fundora that deportation was a possible consequence of the guilty plea. (A. 9-11). The trial court, the Eleventh Judicial Circuit in and for Dade County, Florida, summarily denied the motion, without an evidentiary hearing, on December 17, 1986. (A. 12). Fundora appealed to the Third District Court of Appeal. (A. ).

On January 23, 1987, the Third District issued an order directing the State to show cause why the relief sought by Fundora should not be granted. (A. 14). The State's

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<sup>1</sup> This Court's order of June 19, 1987 directed that the State serve its Brief on the Merits by July 14, 1987, and that the Third District Court of Appeal transmit the record by August 10, 1987. Fundora had previously appealed a circuit court order summarily denying the Rule 3.850 motion. On such appeals, the circuit court submits the motion and order to the District Court of Appeal without any formal record or index. Therefore, as of the writing of this Brief neither lower court has ever prepared an index or a formal record, and record citations cannot be included in the Brief at this time. Accordingly, Petitioner's Appendix has included all documents that will ultimately be included in the record, and referrences are made to the Appendix to this Brief.

response noted that the State disagreed with the Third District's opinion in Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), in which the Third District held that the failure of counsel to advise a defendant of the potential collateral consequence of deportation could render a guilty plea involuntary. (A. 15). The State's response also noted that this court had accepted for review the case of State v. Ginebra, Case No. 69,283, which had an inter-district conflict on the Edwards issue. The State's response attached and incorporated its Brief on the Merits in Ginebra. (A. 17, 19) The State's response also argued that the Rule 3.850 motion did not state grounds for relief as it did not allege that had Fundora received proper advise regarding deportation he would have gone to trial. Finally, the State's response asserted, as a practical matter, that due to the status of relations between Cuba and the United States, deportation was nothing more than an unlikely possibility.

On February 24, 1987, the Third District issued an opinion which stated.

Fundora appeals from a summary denial of his Florida Rule of Criminal Procedure 3.850 motion. We find that 1) appellant's contentions, that his counsel was ineffective in failing to inform Fundora of the possibility of deportation as a result of his guilty pleas and that his pleas were made involuntary as a result of this lack of information, are valid grounds for collateral relief from his guilty pleas, see Ginebra v. State, 490 So.2d 467 (Fla. 3d DCA

1986); Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), and 2) appellant sufficiently alleges facts which, if proven, would support his prayer for relief. Since the trial court failed to attach those portions of the record which would demonstrate that Fundora is not entitled to relief, we

Reverse and remand for further proceedings in accordance with Ginebra, Edwards, and Rule 3.850.

(A. 40).

The State then filed a Notice to Invoke Discretionary Jurisdiction (A. 41) and a motion for stay pending review. (A. 42). The Third District granted the motion to stay issuance of the mandate. (A. 44).

POINT INVOLVED ON APPEAL

WHETHER THE LOWER COURT ERRED IN HOLDING THAT THE FAILURE TO ADVISE A DEFENDANT OF THE COLLATERAL CONSEQUENCE OF DEPORTATION CAN RENDER A GUILTY PLEA INVOLUNTARY.

## SUMMARY OF ARGUMENT

Fundora filed a Rule 3.850 motion alleging ineffective assistance of counsel and involuntariness of a guilty plea due to the failure of counsel to advise him of the collateral consequence of deportation. The trial court summarily denied the motion and the third district reversed for an evidentiary hearing, or for attachment of records to repudiate the merits of the claim. In light of this Court's recent opinion in State v. Ginebra, the trial court's order was proper, as the motion failed to allege grounds for relief. The third district's order should therefore be quashed.

ARGUMENT

PURSUANT TO THIS COURT'S OPINION IN  
STATE V. GINEBRA,        SO.2D        (FLA.  
JULY 2, 1987), ALLEGATIONS THAT  
DEFENSE COUNSEL FAILED TO ADVISE A  
DEFENDANT OF THE COLLATERAL  
CONSEQUENCE OF DEPORTATION DO NOT  
CONSTITUTE INEFFECTIVE ASSISTANCE OF  
COUNSEL AND DO NOT RENDER A GUILTY  
PLEA INVOLUNTARY.

This Court's recent opinion in State v. Ginebra,  
       So.2d        (Fla. July 2, 1987), is dispositive of the  
issue in the instant case. Ginebra held that the failure to  
advise a defendant of the collateral consequence of  
deportation does not constitute ineffective assistance of  
counsel and does not render a guilty plea involuntary. This  
Court specifically disapproved of the Third District's  
opinion in Edwards v. State, 393 So.2d 597 (Fla. 3d DCA  
1981). Edwards formed the basis for the Third District's  
opinions in both Ginebra and the instant case. The instant  
case is identical to the situation in Ginebra. Therefore,  
the Rule 3.850 motion did not allege facts which, if proven,  
would entitle Fundora to relief. The trial court's summary  
denial of the Rule 3.850 motion was proper. Accordingly, the  
decision of the district court below should be quashed.

**CONCLUSION**

Based on the foregoing, the decision of the district court below should be quashed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **MICHAEL ALLEN, ESQ.**, Public Defender's Office, P.O. Box 671, Tallahassee, Florida 32304 on this 13 th day of July, 1987.



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**RICHARD L. POLIN**  
Assistant Attorney General

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