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IN THE SUPREME COURT OF FLORIDA

CASE NO.

FILED
SID J. WHITE

THE STATE OF FLORIDA **MAY 18 1987**

Petitioner **CLERK, SUPREME COURT**

By _____
Deputy Clerk

vs.

HECTOR SALLATO,

Respondent.

* * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * *

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, the State of Florida, was the Appellant in the Third District Court of Appeal of Florida and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The Respondent, Hector Sallato, was the Appellee in the District Court of Appeal and the Defendant in the trial court. The parties will be referred to as they stand before this Court. The symbol "A" will be used to designate the Appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, Hector Sallato, is a citizen of Chile, South America. He is not, nor has he ever been, a United States citizen or person lawfully admitted for permanent residence in the United States. On January 7, 1982, an information was filed charging Respondent with Attempted Burglary of a Structure. On April 19, 1982, Respondent appeared before the trial court and pled guilty as charged in the information. The trial court placed Respondent on eighteen (18) months probation and an adjudication of guilt was withheld.

Several years later on March 25, 1986, Respondent filed a motion to vacate his guilty plea of April 19, 1982 on the basis that he was not advised by counsel of the consequences of his plea relative to his ability to become a resident in the United States. On April 11, 1986, a hearing was held on Respondent's motion (TR.1-22). On April 30, 1986, the trial court entered an order vacating Respondent's plea.

On May 13, 1986, the State timely filed its Notice of Appeal and this case was ultimately affirmed by the Third District Court of Appeal on April 21, 1987 (Appendix A). In its opinion, the Third District Court of Appeal relied upon its prior opinions in Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), Ginebra v. State, 498 So.2d 467 (Fla. 3d DCA 1986)¹, and Martinez v. State, 475 So.2d 1292 (Fla. 3d DCA 1985). The Third District Court of Appeal also cited to Rodriguez v. State, 487 So.2d 1224 (Fla. 4th DCA 1986) as authority for its decision, but acknowledged that its decision, as well as the above-referenced authorities, are in conflict with Hahn v. State, 421 So.2d 710 (Fla. 1st DCA 1982) (Appendix A).

¹ This Court heard oral argument in State v. Genebra, Case No. 69,283 on May 6, 1987. This Court accepted State v. Ginebra for discretionary review on the basis of conflict between the Third District Court of Appeal's decision in Ginebra v. State, 498 So.2d 467 and the decision of the First District Court of Appeal in Hahn.

ISSUE PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN STATE v. SALLATO, CASE NO. 86-1248 (FLA. 3d DCA APRIL 21, 1987) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN HAHN v. STATE, 421 SO.2d 710 (FLA. 1st DCA 1982)?

SUMMARY OF ARGUMENT

The decision of the Third District in the case sub
judice directly and expressly conflicts with the decision
of the First District in Hahn, thus the exercise of dis-
cretionary review in this cause is warranted. This Court
has already granted discretionary review based on this
identical conflict in State v. Ginebra, Case No. 69,283
(oral argument held May 6, 1987).

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN STATE v. SALLATO, CASE NO. 86-1248 (FLA. 3d DCA APRIL 21, 1987) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN HAHN v. STATE, 421 SO.2d 710 (FLA. 1st DCA 1982).

The issue, whether a counsel's failure to advise alien defendants of possible deportation consequences renders a guilty plea involuntary, has been addressed by the First and Third District Courts of Appeal with opposite results. Compare Hahn v. State, 421 So.2d 710 (Fla. 1st DCA 1982) and Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981).² In Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), the Third District held that failure to advise an alien defendant that his conviction might result in deportation pursuant to Federal Immigration Laws constituted ineffective assistance of counsel and, hence, rendered the defendant's guilty plea involuntary. Where

² Recently, in Casseus v. State, 12 F.L.W. 611 (Fla. 3d DCA February 24, 1987), the Third District adopted its holding in Ginebra and Edwards. Also, in Rodriguez v. State, 487 So. 2d 1224 (Fla. 4th DCA 1986), the Fourth District Court of Appeal adopted the holding of Edwards in its brief opinion. However, most recently, the Second District Court of Appeal rejected Edwards in its comprehensive opinion in Villavende v. State, 12 F.L.W. 702 (Fla. 2d DCA May 4, 1987).

an alien defendant alleges such a failure by counsel in his Rule 3.850 motion, the trial court must hold an evidentiary hearing to determine if the allegation is true, and if the defendant is actually going to be deported. Id. The subsequent opinions of the Third District in Martinez³, Ginebra, and Sallato (the instant case), merely reaffirmed its prior holding in Edwards.

In Hahn, the defendant, relying on Edwards, presented the identical argument to the First District. However, the First District rejected this argument and held that an attorney has no affirmative duty to advise an alien defendant of the deportation consequences which might result from a plea of guilty. The First District concluded its opinion by stating "[w]e acknowledge conflict with Edwards." Hahn, 421 So.2d at 710.

In view of the foregoing, it is clear that the decision of the Third District Court of Appeal in the case sub judice directly and expressly conflicts with the decisions of the First District in Hahn and the Second District in Villavende and, thus, the exercise of discretionary review in this cause is warranted.


³ In his special concurrence in Martinez, Chief Judge Schwartz stated his own opposition to the Edwards rule, and specifically recognized the conflict between the Third and First Districts, citing Hahn. Chief Judge Schwartz thus sided with then Chief Judge Hubbard, who entered a vigorous dissenting opinion in Edwards.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to grant discretionary review in this cause.


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 JURISDICTION was furnished by mail to BENNET LAPIDUS, ESQ., Abramson and Lapidus, P.A., 1320 South Dixie Highway, Suite 280, Coral Gables, Florida 33146, on this 15th day of May, 1987.


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