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IN THE

SUPREME COURT OF THE STATE OF FLORIDA

MILTON THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 76,825
DCA NO. 89-1564

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida. The Respondent was the Appellee and the Prosecution, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

R = Record on Appeal

SR = Supplemental Record on Appeal (Presentence Investigation)

RB = Respondent's Answer Brief

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts contained in his Initial Brief on the Merits.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO WITHDRAW HIS NOLO CONTENDERE PLEA AFTER THE STATE BREACHED ITS PLEA AGREEMENT.

Petitioner primarily relies upon his Initial Brief for a thorough discussion of the issues for review wherein Respondent urges this Court to quash the decision of the Fourth District Court of Appeal as it is in express and direct conflict with Lee v. State, 501 So.2d 591 (Fla. 1987), Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988), and State v. Newsome, 549 So.2d 818 (Fla. 2d DCA 1989).

Respondent argues that the State Department of Corrections cannot be deemed an agent of the state as that agency "is totally independent and acts as a separate agency from the State Attorney's Office" (RB 5). This assertion is utterly without merit. See Lee v. State, 501 So.2d 591 (Fla. 1987).

This reasoning is especially faulty in light of Respondent's acknowledgement that law enforcement agencies are, in fact, agents of the state. The Department of Corrections is a state agency, one of the executive departments created pursuant to the Florida Constitution. Ch. 945, Fla. Stat.; Art. IV, § 6, Fla. Const. On the other hand, there are literally hundreds of law enforcement agencies in the state that are under the authority of the state of Florida as well as a multitude of counties and municipalities. Obviously these departments could also be said to be totally independent agencies and operating separately from the state attorney's office. But if all law enforcement officers are "agents

of the state," surely State Department of Corrections probation officers must also be considered agents or representatives of the state. In actuality, these probation officers work just as closely with the state attorney's office, if not more so, than the myriad of law enforcement officers.

This Court's decision in Lee v. State, 501 So.2d 591, 593 (Fla. 1987), unequivocally holds that a sentencing recommendation by any representative or agent of the state which is contrary to the state's plea bargain agreement constitutes a breach of the agreement if the inconsistent recommendation is communicated to the court in any manner, whether in a presentence investigation report (PSI) or in open court. This is reflected in the Court's analysis:

> In his dissent in the case sub judice Judge Ervin takes the position that 'a breach [of the plea agreement] occurs if any representative of the government fails to honor a plea bargain agreement entered into between the state and the defense, particularly if it influences a consequence not contemplated by the agreement.' 490 So.2d at 84, (Ervin, J., concurring in part and dissenting in part). Under Florida Rule of Criminal Procedure 3.171, the prosecuting attorney represents the state in all plea negotiations. We agree with Judge Ervin, that once a plea bargain based on a prosecutor's promise that the state will recommend a certain sentence is struck, basic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state's recommendation.

Id. at 593 (emphasis supplied). Therefore, this Court's analysis makes it clear that, indeed, a defendant is entitled to claim foul, as Respondent puts it, when a sentencing recommendation contrary to that agreed upon by the state in a plea bargain is communicated

to the court. This is so, because, as this Court holds, "the persuasive effect of the bargained for recommendation is lost" when that occurs. Lee v. State, 501 So.2d at 593.

Petitioner also finds it significant that the Respondent has chosen to overlook the fact that the state also breached its plea agreement by failing to reaffirm it when the probation officer sought the state's sentencing recommendation for inclusion in the PSI. The PSI states, "ASA Keith Pickering will hold comments until sentencing" (SR 5). If the prosecutor had advised the probation officer of the recommended sentence called for by the plea bargain, it is certainly highly likely that the probation officer may have also recommended that the court sentence Petitioner in accordance with the plea agreement, even while reporting the actual guidelines range.

In addition, the Respondent has failed to address the fact that although Respondent asserts that the state affirmed its plea agreement recommendation, the notations on the PSI that were made by the trial court reflect that the court received a totally different impression of the state's position.[1] As it is the prosecutor's recommendation to the trial court with all the force of the "state" behind it that the Petitioner thought he was receiving in return for his plea, what the court perceived the state's position to be is thus critical.

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[1] The handwritten notes state: "(State stands silent)" and "Thought he was 1st grid (indecipherable) not agree on 4 mons j. prob. + rest." and "defendant has extensive prior record that (indecipherable) weren't aware of" (SR 5).

Further, it was made clear to the court that the state was not really urging the court to sentence Petitioner in accordance with its previous plea agreement. This is apparent as even when the state very grudgingly finally agreed to recommend the four months, the prosecutor repeatedly told the court that the state would not agree to the court using that recommendation as a reason to depart from the guidelines recommended range (R 19-20). If the state did not agree to the court going below the guidelines, the court could not legally impose sentence in accordance with the plea agreement between the state and the defense. Thus, any recommendation the state may grudgingly[2] have made for four months, after standing silent, was worthless to Petitioner and certainly was not the bargained-for benefit to which he was entitled.

The decision of the fourth district must be quashed and remanded with directions that Petitioner be permitted to withdraw his plea, if he still desires to do so.

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[2] Or, as the fourth district characterized it, "albeit reluctantly." Thomas v. State, 566 So.2d 613, 614 (Fla. 4th DCA 1990).

CONCLUSION

Based on the Initial Brief on the Merits and the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District and remand this cause with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Senior Assistant Attorney General Joan Fowler and Assistant Attorney General Patricia G. Lampert, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 11th day of June, 1991.

Susan D. Cline

Of Counsel