IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v.

PAUL LEROUX,

Respondent.

Case No. 86,052

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the Appellee in the Fourth District Court of Appeal. The Respondent, **PAUL LEROUX**, was the Appellant in the Fourt District Court of Appeal. The parties will be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

On October 3, 1991, Respondent pled guilty to second degree murder with a firearm, pursuant to a negotiated plea with the State, and was sentenced to fifteen years' imprisonment with a three-year minimum mandatory (Appendix 1). On June 14, 1995, the Fourth District Court of Appeal, with Judge Stone dissenting, reversed the trial court's summary denial of Respondent's 3.850 motion and remanded to the trial court for an evidentiary hearing because, according to the majority, the plea colloquy did not conclusively refute Respondent's allegation that his negotiated plea was a product of trial counsel's alleged promises concerning the amount of the sentence he would actually serve and his elgibility for gain time (Appendix 2).

The Fourth District stated and held as follows:

> In this case, defendant was asked by the trial court whether anyone "had promised [him] anything to get [him] to [plea]?" By responding in the negative to the trial court's question, defendant generally denied the existence of other promises that led him to plead, but did not specifically deny whether any additional promises were made to him concerning the terms of the plea, other than those discussed in the colloquy.
>
> * * * * * *
>
> When accepting a plea, trial courts are well advised at a minimum to ascertain whether any promises were made to a defendant concerning the sentence apart from those discussed during the plea colloquy.
>
> * * * * * *
>
> Careful examination of the transcript attached to the motion for post-conviction relief convinces us that there is nothing which conclusively refutes defendant's allegation that trial counsel affirmatively misinformed him that he would serve four years or less of the fifteen-year sentence...

(citation omitted) (Appendix 2).

On July 7, 1995, Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction, and on July 14, 1995, Petitioner timely filed its Brief on Jurisdiction (Appendix 3). On November 7, 1995, this Honorable Court entered an order accepting jurisdiction and dispensing with oral argument (Appendix 4). This brief on the merits follows.

SUMMARY OF THE ARGUMENT

A defendant's negative response, during a plea colloquy, to the trial court's inquiry of the defendant as to whether anyone had promised the defendant anything to get him to plea is sufficient to conclusively refute the defendant's subsequent allegation in a post-conviction motion that his negotiated plea was a product of trial counsel's alleged promises. The Fourth District Court of Appeal's opinion in Leroux v. State, Case No. 95-1019 (Fla. 4th DCA June 14, 1995), erroneously concluded, based upon a particular set of facts in the cases it cited rather than upon any legal reasoning in those cases, that only a plea colloquy where the defendant has stated that no promises had been made to him "other than the plea-negotiated sentence promise" can conclusively refute a subsequent claim that his trial counsel had made certain promises to him (Appendix 1). Respondent's statement during the plea colloquy that nobody promised him anything to get him to plead must be presumed true and considered all-encompassing. This Honorable Court should decline the Fourth District's "invitation" to distinguish between a "general" question and a "more narrow and precise" question regarding promises made to a defendant, and reject its holding that only such a "narrow and precise" question is sufficient to conclusively refute a defendant's subsequent allegation that, but for trial counsel's promises, he would not have pled guilty. A number of cases in this jurisdiction and outside this jurisdiction show that the majority's reasoning strictly requiring such a "narrow and precise" question is legally flawed and unsupported by any authority.

ISSUE

A DEFENDANT'S NEGATIVE RESPONSE, DURING A PLEA COLLOQUY, TO THE TRIAL COURT'S INQUIRY OF THE DEFENDANT AS TO WHETHER ANYONE HAD PROMISED THE DEFENDANT ANYTHING TO GET HIM TO PLEAD IS SUFFICIENT TO CONCLUSIVELY REFUTE THE DEFENDANT'S SUBSEQUENT ALLEGATION IN A POST-CONVICTION MOTION THAT HIS NEGOTIATED PLEA WAS A PRODUCT OF HIS TRIAL COUNSEL'S ALLEGED PROMISES.

On October 3, 1991, Respondent pled guilty to second degree murder with a firearm, pursuant to a negotiated plea with the State, and was sentenced to fifteen years' imprisonment with a three-year minimum mandatory (Appendix 1). On June, 14, 1995, the Fourth District Court of Appeal, with Judge Stone dissenting, reversed the trial court's summary denial of Respondent's 3.850 motion and remanded to the trial court for an evidentiary hearing because, according to the majority, the plea colloquy did not conclusively refute Respondent's allegation that his negotiated plea was a product of trial counsel's alleged promises concerning the amount of the sentence he would actually serve and his elgibility for gain time (Appendix 2).

The Fourth District stated and held as follows:

> In this case, defendant was asked by the trial court whether anyone "had promised [him] anything to get [him] to [plea]?" By responding in the negative to the trial court's question, defendant generally denied the existence of other promises that led him to plead, but did not specifically deny whether any additional promises were made to him concerning the terms of the plea, other than those discussed in the colloquy.
>
> * * * * * *
>
> When accepting a plea, trial courts are well advised at a minimum to ascertain whether any promises were made to a defendant concerning the sentence apart from those discussed during the plea colloquy.

* * * * * *

> Careful examination of the transcript attached to the motion for post-conviction relief convinces us that there is nothing which conclusively refutes defendant's allegation that trial counsel affirmatively misinformed him that he would serve four years or less of the fifteen-year sentence...

(citation omitted) (Appendix 2).

Petitioner submits that this Court should reverse the Fourth District's decision in Leroux, as the majority's opinion has erroneously concluded, based upon a particular set of facts in the cases it has cited rather than upon any legal reasoning in those cases, that only a plea colloquy where the defendant has testified that no promises had been made to him "other than the plea-negotiated sentence promise" can conclusively refute a subsequent or belated claim that his trial counsel had made certain promises to him (such as promising the amount of sentence he would serve). This Honorable Court should respectfully decline the Fourth District's "invitation" to distinguish between a general, yet specific, question or inquiry into any potential promises made to a defendant (i.e. whether **anyone** had promised the defendant **anything** to get him to plea) and, in the words of the majority in Leroux, a "more narrow and precise"question or inquiry into any potential promises made to a defendant (i.e. whether any promises had been made to the defendant other than the plea-negotiated sentence).

In Pierce v. State, 318 So. 2d 501 (Fla. 1st DCA 1975), the appellant sought to have his convictions for rape and robbery overturned because, inter alia, his guilty plea was induced by coercion and promises made to him by his court-appointed counsel. The First District stated and held as follows:

> [The appellant's] allegations of coercion and unfulfilled promises are

> completely unsupported by the record. To the contrary, when the appellant and his co-defendant were specifically asked by the trial court if any promises had been made to them or if they had been pressured or coerced into pleading guilty by anyone, they replied in the negative.
>
> As the record indicates...that the plea was not the product of coercion or promises, we affirm the lower court's judgments and sentences.

(emphasis added). Id. at 502.

In Garcia v. State, 228 So. 2d 300 (Fla. 3d DCA 1969), the Third District affirmed the trial court's denial of the appellant's motion for post-conviction relief, which motion alleged as follows: that contrary to what the appellant had stated at the time he pled guilty to rape, his plea was not free and voluntary, but was made because he had been told by his attorney that (1) the attorney had an understanding with the prosecutor that if appellant pled guilty the sentence imposed would be twenty years, but that otherwise the prosecutor would seek the death penalty; and (2) his attorney had informed him that upon being questioned by the court he should not reveal such promise, and had coached him as to the answers he should give to questions put to him in court regarding his change of plea. The plea colloquy was set forth in the Third District's opinion, and it reflected in pertinent part that the appellant was questioned as follows with regard to any promises that may have been made to him:

> Mr. Carricarte [Prosecutor]: Did anyone threaten you in any way---
>
> Mr. Garcia [Appellant]: No, sir.
>
> Mr. Carricarte: []---or force you to plead guilty to the charge?
>
> Mr. Garcia: No, sir.
>
> Mr. Carricarte: Did anyone promise you any kind of special consideration to cause you to plead guilty to the charge of rape?

Mr. Garcia: No, sir.

* * * * * *

Mr. Carricarte: Has anyone whomsoever, the police, the defense attorney, the State Attorney's Office, promised you any kind of special consideration for changing your plea from not guilty to guilty?

Mr. Garcia: No, sir.

Id. at 302.

The Third District held that the trial court properly found that the appellant's bare allegations were conclusively refuted by the record, which clearly showed the voluntariness of the appellant's plea. Id. at 305. The court also explained that a guilty plea entered in the face of statements by the trial court as to the consequences to a defendant of such a plea is not necessarily involuntary even if, as alleged by the appellant in Garcia, a defendant had understood the prosecutor had agreed with his attorney that the plea would bring about a lesser sentence. Id.

A number of cases outside this jurisdiction also show that the majority's reasoning in Leroux is legally flawed and unsupported by any authority holding that such a "narrow and precise" question or inquiry, as strictly required by the majority, is necessary to conclusively refute subsequent and belated allegations of promises made by trial counsel. In Guyon v. State, 776 S.W.2d 907 (Mo. App. 1989), the defendant alleged in his post-conviction motion and on appeal that his trial counsel promised, or informed, him that his sentences would run concurrently with a sentence from a prior conviction, thus rendering his plea of guilty involuntary. The motion court denied the defendant's claims without a hearing. Id. at 908. The Court of Appeals, in holding that the defendant's allegations were refuted by the record of the plea proceeding, quoted in relevant part from said plea

proceeding:

> THE COURT: Has anyone made any promises or threats to induce you to plead guilty here, today?
>
> MR. GUYON [DEFENDANT]: No.

Id.

In Reeder v. State, 712 S.W.2d 431, 433 (Mo. App. 1986), the Court of Appeals explained and held in relevant part as follows:

> Movant's third point is that he did not voluntarily, knowingly and intelligently plead guilty. His argument centers on the allegation that he was promised sentences which would run concurrently. Movant is entitled to an evidentiary hearing on the issue of the voluntariness of his plea where the record of the guilty plea proceeding does not conclusively show that his plea was made voluntarily and intelligently. Orr v. State, 607 S.W.2d 187, 188(Mo. App. 1980). The record of the guilty plea reveals that the court questioned movant extensively to determine if he understood the nature of the offense with which he was charged; if he was satisfied with his attorney's representation; if promises or threats had induced him to plead guilty.... Movant specifically responded that he knew his sentences could run "one after another" and that he had not been promised anything in return for his guilty plea. The record was sufficient to establish the voluntariness of movant's guilty plea. Movant's third point is denied.

(emphasis added).

In Flowers v. State, 421 N.E.2d 632, 633-635 (Ind. 1981), the Indiana Supreme Court explained and held in relevant part as follows:

> Defendant first contends that his guilty plea was not voluntary because it was induced by a promise of leniency. He claims that his attorney promised that he would receive a sentence less than the sentence received by his accomplice, Armour, who received thirteen years.
>
> * * * * * *

> We find no merit to defendant's contention.* * * Here, the written plea agreement clearly stated that the prosecutor would make no recommendation to the court as to the length of the sentence the court should impose. The court informed defendant that he could be sentenced to as much as thirty years in prison without violating the agreement. The court had the following exchange with defendant and his co-defendant, Guthrie:
>
> > COURT: "Are either of you entering this plea because of any threats or promises that have been made to you?"
> >
> > MR. FLOWERS: "No, sir."
> >
> > MR. GUTHRIE: "No, sir."
> >
> > * * * *
>
> Thus, the record clearly shows that there was no suggestion of leniency of sentencing presented to the court at the time of the plea bargain hearing.
>
> * * * * * *
>
> The record in this case shows that the trial court specifically asked petitioner whether any promises had been made to him and received a negative answer.* * *
>
> In this case, there was no evidence of any promises or threats being made to induce the guilty plea. In fact, there was a specific written statement that the state made *no* recommendation regarding sentencing.* * * We find no error in the trial court's determination that petitioner's guilty plea was knowingly and voluntarily given.

(emphasis added).

In Calhoun v. State, 418 A.2d 1241, 1244-45 (Md. App. 1980), the Court of Special Appeals explained and held in relevant part as follows:

> In the first of a two-pronged attack on his guilty plea, the defendant asserts that the trial court did not comply with Md. Rule 731 because

> the record does not show that his pleas were "fully voluntary where the questioning only concerned promises or threats made in order to obtain his guilty plea."
>
> The record of the August 7, 1979 proceedings, in which the pleas were entered, discloses that defendant, in a lengthy colloquy with the court, acknowledged that he was pleading guilty because he was, in fact, guilty; that no promises or threats had been made as an inducement for the pleas* * * Nothing in the record remotely suggests that the guilty pleas were anything but intelligently and voluntarily entered in accordance with Md.Rule 731.

(emphasis added) (citations omitted).

In Commonwealth v. O'Brien, 417 A.2d 236, 238 (Pa. Super. 1979), the Superior Court of Pennsylvania explained and held in relevant part as follows:

> Defendant also claims that he was induced to plead guilty by his trial attorney's promises to him that he would receive hospitalization if he pled guilty. At the November 9, 1977 hearing [on defendant's motion to withdraw plea] defendant's attorney testified that he never made such a promise to the defendant or his father. He merely stated that if he [the attorney] were the trial judge he would order defendant hospitalized. He never represented to them that the trial judge would do so. We hold that under these circumstances no promise had been made to defendant regarding this claim. The record of the guilty plea colloquy also belies this contention as the court below was extremely careful in ascertaining of defendant whether any promises had been made to him and the defendant replied in the negative.

(emphasis added). See also People v. Longendyke, 391 N.Y.S.2d 733 (1977).

The foregoing cases make clear that a trial court's inquiry of a defendant during a plea colloquy as to whether **anyone** has promised him **anything** to get him to plead is sufficient to conclusively refute a defendant's subsequent or belated allegation that, but for trial counsel's promises to him, he would not have pled guilty. Petitioner recognizes the cases relied upon by the Fourth District in Leroux, but submits that those cases clearly do not stand for the proposition that

a trial court's inquiry to a defendant during a plea colloquy as to whether **anyone** has promised him **anything** to get him to plead is not sufficient to conclusively refute a defendant's subsequent or belated allegation that, but for trial counsel's promises to him, he would not have pled guilty. In Steele v. State, 645 So. 2d 59 (Fla. 4th DCA 1994), Zaetler v. State, 627 So. 2d 1328 (Fla. 3d DCA 1993), and Colon v. State, 595 So. 2d 271 (Fla. 2d DCA 1992), the particular facts consisted of the respective defendants denying that any promises had been made to them other than the terms of the plea bargain; however, these cases plainly do not create, as the Fourth District has in Leroux, a new legal principle or rule that such a "narrow and precise" question is necessary, and required, to refute a defendant's subsequent or belated allegation that, but for trial counsel's promises to him, he would not have pled guilty.

Furthermore, Petitioner notes that the Fourth District's reliance upon Steele in Leroux is legally flawed. The majority, in citing Steele, reasoned that "[w]hen accepting a plea, trial courts are well advised **at a minimum** to ascertain whether any promises were made to a defendant concerning the sentence apart from those discussed during the plea colloquy" (bold emphasis added). Leroux v. State, Case No. 95-1019 (Fla. 4th DCA June 14, 1995) (Slip Opinion at 3). However, Steele plainly makes clear that such a "narrow and precise" question is not required to conclusively refute allegations of prior promises on the part of trial counsel:

> [W]e agree with the second district in *Carmichael v. State*, 631 So. 2d 346 (Fla. 2d DCA 1994), which announced in dicta, that it would be preferable for a trial court to ask a specific question as to promises concerning gain time:
>
> > It would be a simple matter during the plea dialogue to have the defendant affirm under oath that no one, especially the defendant's counsel, has made any promises concerning eligibility for any form of early

> release authorized by law and the actual amount of time to be served under the sentence to be imposed. It would also be beneficial to have the defendant further acknowledge the absence of such promises in a written plea form, if one is routinely used by the judge.
>
> Although we are not holding that such an inquiry is required, *see Dolan v. State*, 618 So. 2d 271, 273 n. 2 (Fla. 2d DCA 1993), such a procedure would add little to the burdens of the trial bench and would hopefully result in facilitating summary disposition of this type of case at the trial and appellate levels...

(emphasis added).

Petitioner submits that a trial court's inquiry of a defendant during a plea colloquy as to whether **anyone** has promised him **anything** to get him to plead is sufficient, and has been held to be sufficient, to conclusively refute a defendant's subsequent or belated allegation that, but for trial counsel's promises to him, he would not have pled guilty, and respectfully requests that this Honorable Court decline to place form over substance regarding the subject inquiry. The Fourth District in Leroux explained that "[b]y responding in the negative to the trial court's question [of whether anyone had promised him anything to get him to plea], defendant generally denied the existence of other promises that led him to plead, but did not specifically deny whether any additional promises were made to him concerning the terms of the plea, other than those discussed in the colloquy." Slip Opinion at 2. This is pure speculation and legal fiction on the part of the majority, and it is not a proper, or legally tenable, basis for reversal of the trial court's summary denial of Respondent's 3.850 motion. The record clearly reveals that **nobody** promised Respondent **anything** to get him to plead in the instant case. Such a statement by Respondent clearly refutes his subsequent and belated allegations. As Judge Stone aptly stated in his dissent in Leroux:

> I recognize that there may be a difference between asking a defendant whether anything was promised to get the defendant to agree to a plea, and asking whether any additional promises were made to the defendant concerning the terms of the plea apart from those discussed during the taking of the plea. However, I fail to see what difference that difference makes in terms of eliciting a different response from a defendant vis-a-vis any promises made by his attorney with regard to gain time.* * * I cannot accept that defendants, under the tension of the circumstances, can be expected to distinguish one inquiry as being limited only to the agreed terms, exclusive of a gain time credit, and the other as referring to promises made by counsel as to gain time.

Slip Opinion at 5.

Petitioner believes that if the Fourth District's decision is approved, the words of Justice Clark, dissenting in Machibroda v. United States, 368 U.S. 487, 497, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962), would ring true regarding Rule 3.850 motions:

> The opinion is an invitation to prisoners, always seeking a sojourn from their keepers, to swear to "Munchausen" tales when self-interest readily leads to self-deception in § 2255 applications. Once the opinion goes the rounds of our prisons, we will likely be plagued with a rash of such spurious applications.

(emphasis added) (footnote omitted). The Fourth District's opinion is basically an invitation to all defendants who have pled guilty, and who stated during an on-the-record plea colloquy that **nobody** promised them **anything** to get them to plead, to get the proverbial "second bite of the apple" by affording them an all too easy avenue for the possible invalidating of convictions on pleas of guilty. While a guilty plea taken in open court is subject to collateral attack, "the defendant's representations during the plea-taking carry a strong presumption of verity and pose a 'formidable barrier in any subsequent collateral proceedings.'" Voytik v. United States, 778 F.2d 1306, 1308 (8th Cir. 1985) (quoting Blackledge v. Allison, 431 U.S. 63, 73, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136

(1977)). Respondent's statement during the plea colloquy in the instant case, as well as any defendant's assertion that **nobody** promised him **anything** to get him to plead, must be presumed true and considered all-encompassing. This Honorable Court should thus decline the Fourth District's "invitation" to distinguish between a "general" question and a "more narrow and precise" question regarding promises made to a defendant, and reject its holding that only such a "more narrow and precise" question is sufficient to conclusively refute a defendant's subsequent or belated allegation that, but for trial counsel's promises, he would not have pled guilty.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, Petitioner respectfully requests that this Honorable Court **REVERSE** the Fourth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Petitioner's Initial Brief on the Merits"has been furnished by U.S. Mail to: Bernard F. Daley, Esquire, Daley & Associates, Counsel for Respondent, at P.O. Box 1177, Tallahassee, Florida 32303, this 28TH day of November, 1995.

WILLIAM A. SPILLIAS
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SUPREME COURT OF FLORIDA

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APPENDIX PETITIONER'S INITIAL BRIEF ON THE MERITS