IN THE SUPREME COURT OF FLORIDA

JAMES COTTLE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

_____/

Case No.: 91,822

PETITIONER'S AMENDED BRIEF ON THE MERITS

**From the Fifth District Court of Appeal-
Conflict Jurisdiction**

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PRELIMINARY STATEMENT

Petitioner, James L. Cottle, was the Appellant before the Fifth District Court of Appeal and the Defendant in the Circuit Court proceedings. Respondent, the State of Florida, was the Appellee before the Fifth District Court of Appeal and prosecuted Petitioner in the Circuit Court. The record on appeal sent to the Fifth District Court of Appeal contains the pleadings filed in the Circuit Court. The Record, prepared as a summary record — denial of Rule 3.850 Fla.R.Crim.P. motion, is not numbered consecutively. Therefore, Petitioner will designate any references to the record as R and by describing the pleading referred to, followed by the appropriate page number (e.g. R. 3.850 motion page 3, R. Order Denying Motion for Post Conviction Relief, page 2).

STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Seventh Judicial Circuit, St. Johns County, sentenced Petitioner to 10 years as an habitual offender for burglary of a conveyance and felony petit theft, after a jury trial. (R. Motion for Post Conviction Relief page 1)(hereinafter "Motion") Petitioner later filed a motion for post-conviction relief alleging, inter alia, that trial counsel failed to relay a pretrial plea offer to Petitioner. (R. Motion, pg. 2) The motion for post-conviction relief alleged:

> During the sentencing hearing in this case, the State noted to the Judge that Defendant was offered the opportunity to enter a plea. Defendant immediately informed the Court that his attorney had not presented a plea offer to him. Defendant stated he would have plea bargained. **See** Appendix I, transcript of sentencing hearing. Trial counsel stated he had a note in his file which stated that on May 2, 1995, "ask the Defendant the State would do no `bitch (habitual offender?), plea as charged, but that's over now." Defendant reiterated that trial counsel did not offer a plea bargain to him. Trial counsel stated he related the above statement to Defendant on May 2, 1995. Defendant again stated that trial counsel did not relay any plea offer. Trial counsel stated his note on May 2, 1995 said Defendant denied breaking in the car and wanted a trial. Defendant again repeated that trial counsel did not relay any plea offers. The plea offer apparently was for a non-habitual offender sentence. If such an offer was presented to Defendant, he would have accepted such an offer. (R. Motion, page 2)

The Motion referred to the transcript of the sentencing hearing (attached to the 3.850 motion as Appendix I) The transcript stated:

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.

(R. Motion — Appendix I)

The State filed a response to Petitioner's motion for post-conviction relief. (R. State's Response to Defendant's Motion for Post-Conviction Relief) The Circuit Court denied Petitioner's motion for post-conviction relief. (R. Order Denying Motion for Post-Conviction Relief) Petitioner raised other grounds which are not relevant to this appeal. As to the allegation of the failure to relay the plea offer, the trial court found that the sentencing transcript conclusively showed that Petitioner deserved no relief because trial counsel stated his file indicated he related the plea offer. (R. Order, page 1)

Petitioner filed his appeal of the denial of his motion for post-conviction relief. The Fifth District Court of Appeal treated the appeal as a summary proceeding. Respondent, the State of Florida, filed a response, pursuant to an order to show cause, to Petitioner's appeal. (attached as Appendix I) Respondent argued the record demonstrated conclusively that Petitioner should not receive relief.

The Fifth District Court of Appeal ruled that Petitioner failed to allege that the trial court would have accepted the offer, if the parties had presented the offer to the Court. (Appendix II, Opinion of September 5, 1997) The Court did not hold that Petitioner should not get relief because the record demonstrated no entitlement to relief.

Petitioner later filed his notice to invoke jurisdiction with a jurisdictional brief. This Court accepted jurisdiction on February 11, 1998.

SUMMARY OF THE ARGUMENT

The decision in this case conflicts with 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). These cases hold, that in a case involving a claim of ineffective assistance of claim for failure to relay a plea offer, the Defendant must allege: 1) failure to relay a specific offer; 2) Defendant would have accepted the offer; 3) the offer would have resulted in a lesser sentence.

In this case, the Fifth District Court of Appeal held that Petitioner had to allege, in addition to the above-listed matters, that the trial court would have accepted the offer. This requirement is an impossible burden because the trial court never learned of the offer. If the trial court never learned of the offer, how can a defendant prove the court would have accepted it? The decision below puts the court in an awkward position, after the fact, and makes the court a witness.

The decision in this case will permit ineffective assistance of counsel to go uncorrected. If counsel fails to relay a plea offer and the court never learns of it, then a defendant could be denied his right to have all plea offers relayed to him. The decision below creates an unfair and impossible burden of proof. This Court should disapprove of the decision in this case and approve Seymore v. State, supra.

I.

The decision below incorrectly decided that a defendant must allege the trial court would have accepted a plea offer (in a case alleging failure to relay a plea offer as ineffective assistance of counsel) because such proof is logically impossible and contrary to 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) and; Abella v. State, 429 So. 2d 774 (Fla. 3d DCA 1983)

A. Jurisdiction

1. Conflict on same question of law.

This Court properly accepted jurisdiction in this case. Respondent argued before the Fifth District Court of Appeal that this cause did not expressly conflict with the above-cited cases. However, each of the above cases held that in a case alleging ineffective assistance of counsel for failure to relay a plea offer, a prima facie case existed if the defendant alleged: 1) failure to relay a plea offer; 2) Defendant would have accepted the plea offer and; 3) the plea would have resulted in a lesser sentence. Seymore v. State, 693 So. 2d 647 (Fla. 1st DCA 1997), See also, Lee v. State, 677 So. 2d 312 (Fla. 1st DCA 1996); Hilligenn v. State, 660 So. 2d 361 (Fla. 2d DCA 1995) and; Abella v. State,

429 So. 2d 774 (Fla. 3d DCA 1983). In this cause, the Fifth District Court of Appeal added another necessary allegation: the trial court would have accepted the offer.

The opinion in this case does expressly conflict with the above-cited cases. The decision below added an extra allegation for a prima facie case alleging ineffective assistance of counsel where there is a failure to relay a plea offer: proof that the trial court would have accepted the offer. The First, Second and Third District Courts of Appeal have not required such an allegation to establish a prima facie case. A direct or express conflict for jurisdiction of this Court under Article V must be on the same question of law. The decision in this case and the cases cited above all involve the same question of law: the necessary allegations to establish a prima facie case of ineffective assistance of counsel where there is a failure to relay a plea offer.

2. Alternative Reason to Deny Motion for Post-Conviction Relief.

Appellee may argue that this Court should not exercise its discretionary jurisdiction in this case because there is an alternative reason (other than the reason used by the decision on review) to deny the motion for post-conviction relief. The trial court found that the record conclusively demonstrated Petitioner

should not receive relief. The State of Florida argued this position at the trial and appellate levels.

The record below does not demonstrate conclusively that Petitioner should not receive relief. Although Petitioner and his counsel made statements about the plea offer on the record, there was no formal evidentiary hearing. Petitioner did not get an opportunity to investigate the statements made by his counsel; Petitioner did not get the opportunity to cross-examine counsel by his statements. Trial counsel stated his file records indicated he advised Petitioner of the plea offer. During the course of the appellate proceedings, the undersigned counsel received a copy of trial counsel's notes. Counsel realizes this is not a part of the record below. However, these notes do not conclusively show that trial counsel relayed the plea offer to Petitioner and Petitioner rejected it. The notes contain an offer -- there is no note that Petitioner rejected it. Counsel cites this example only to demonstrate why casual statements do not substitute for an evidentiary hearing. The trial court must determine these matters of fact as well as credibility (Petitioner disputed his counsel's representations) at a hearing.

The plea transcript does not conclusively show Petitioner is not entitled to relief because the trial court merely took trial counsel's representation at face value without the benefit of a full evidentiary hearing — hearing both sides and all the evidence. Consequently, the record does not conclusively show Petitioner should not receive relief. Therefore, this Court must determine

whether the Fifth District Court of Appeal correctly decided that Petitioner should not receive an evidentiary hearing because he failed to allege the trial court would have accepted the plea offer.

B. The decision below created an impossible and unfair burden of proof for a defendant alleging ineffective assistance of counsel for failure to relay a plea offer.

The Fifth District Court of Appeal held that Petitioner's allegations were insufficient because he did not allege the trial court would have accepted the plea offer. Such allegation in this case was impossible because the trial court never learned of the plea offer. If the trial court never learned of the offer, then how can Petitioner prove the trial court would have accepted it? Petitioner understands he must demonstrate prejudice to warrant relief under a Rule 3.850 Fla.R.Crim.P. motion. However, the other District Courts of Appeal do not require an allegation that the trial court would have accepted the offer. See, Seymore v. State, 693 So. 2d 647 (Fla. 1st DCA 1997) The proof of prejudice is the failure of counsel to relay an offer to the Defendant.

From a practical viewpoint, the decision below creates an impossible burden of proof and will prevent a Defendant from getting relief from ineffective assistance of counsel. In many cases, the fact of a plea offer and its rejection will be a part of

the record. Therefore, under such circumstances, the problem presented by this case will not be present.

Under the circumstances of this case, Defendant will not be able to correct ineffective assistance of counsel. Assume the State relays an offer to defense counsel. Defense counsel for whatever reason does not relay the offer to defendant. The case proceeds to trial. Prior to trial, the trial court does not inquire whether any plea offers were rejected by the Defendant. (The undersigned counsel has appeared before judges in the Fourth Judicial Circuit who routinely make such an inquiry.) Later, Defendant alleges that counsel failed to relay a plea offer. Under the decision below, counsel would have to allege that the trial court would have accepted an offer never made to the court. How does Defendant prove this? Does the defendant put the trial court in the awkward position of saying it would have accepted a plea offer never made after a trial and sentence based upon that trial? This position would, in essence, make the court a witness.

In the decision below, the Fifth District Court of Appeal acknowledged that if Petitioner had not been aware of the plea offer, then the trial court also might not have been aware of it. The Court then acknowledged it would be difficult to establish prejudice. The Court below did speculate on how the trial court might not have accepted the plea offer — the trial court might have sentenced Petitioner to a same ten year term as he received — ten years as an habitual offender (however, the plea offer was ten years non-habitual offender, which could be less than the ten years

as an habitual offender). The Fifth District Court of Appeal curiously decided Petitioner cannot prevail because it is speculation whether the trial court would have accepted the offer — the Court then itself speculates on how the trial court could have sentenced Petitioner in such a way so as to remove any prejudice.

Petitioner agrees that all of these matters — whether the court would have accepted the plea or how the court could have sentenced Petitioner — are speculation. For this precise reason, this Court should reject the decision below. As the question of whether the court would accept a plea never made to it will always be speculation, adoption of the standard enunciated by the Fifth District will permit ineffective assistance of counsel to go uncorrected.

Trial counsel has a legal and ethical duty to relay a plea offer to a Defendant. Failure to relay a plea offer is prima facie ineffective assistance of counsel. Seymore v. State, supra; Hilligenn v. State, supra. The only practical way to ensure that a defendant may challenge such ineffective assistance of counsel is to not require an allegation that the trial court would have accepted a plea offer never made to it.

Trial courts could easily avoid the situation presented by this case (discovery of the alleged failure to relay a plea offer after trial) by asking on the record, before trial if any offers have been made and rejected prior to the trial. If this Court adopts the standard used by the First and Second District Courts of

Appeal, it will ensure that all counsel perform their duty of relaying plea offers to all defendants. Otherwise, counsel could render ineffective assistance of counsel and defendants could not enforce their constitutional right to effective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984) and Knight v. State, 394 So. 2d 997 (Fla. 1981).

CONCLUSION

This Court should disapprove of the decision below and quash it; the Court should adopt the standards of pleading enunciated in Seymore v. State, 693 So. 2d 647 (Fla. 1st DCA 1997).

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail this 26th day of February, 1998 to Rebecca Roark Wall, Assistant Attorney General, 444 Seabreeze, 5th Floor, Daytona Beach, Florida 32118.

Attorney

IN THE SUPREME COURT OF FLORIDA

JAMES COTTLE,
Petitioner,

v.

Case No.: 91,822

STATE OF FLORIDA,
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APPENDIX TO PETITIONER'S AMENDED BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1997

JAMES L. COTTLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO. 97-1798

Opinion filed September 5, 1997

3.850 Appeal from the Circuit Court
for St. Johns County,
Robert K. Mathis, Judge.

James T. Miller of James T. Miller, P.A.,
Jacksonville, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Jennifer Meek, Assistant
Attorney General, Daytona Beach, for Appellee.

COBB, J.

James L. Cottle appeals the summary denial of his motion for post conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. On July 6, 1995, Cottle was sentenced to concurrent ten-year terms as a habitual felony offender for the third degree felonies of burglary of a motor vehicle and felony petit theft. In his 3.850 motion, Cottle raised four grounds of ineffective assistance of counsel, only one of which merits discussion. Cottle claimed that trial counsel failed to relay a plea offer, to-wit: in exchange for guilty pleas to the charged offenses, the state would not

seek sentencing under the habitual offender statute. Cottle alleges that he would have accepted this plea offer.

At sentencing, the prosecutor noted that Cottle was offered a plea. Cottle at that point asserted that his attorney had not presented any plea offer. Defense counsel represented to the court that he had a note in his file which indicated that on May 2, 1995, he informed Cottle that the state would not habitualize him if he entered a plea as charged. That note also indicated that Cottle denied breaking into the car and stated that he wanted a trial.

In Young v. State, 608 So. 2d 111 (Fla. 5th DCA 1992), Young was convicted of capital sexual battery after trial. Young claimed in his 3.850 motion that defense counsel did not present to him a plea offer by the state to a reduced charge and specific sentence, and further alleged that he would have accepted the plea offer and would have received a lesser sentence. This claim was deemed legally sufficient to require further proceedings. However, two of the three judges on the panel concurred specially, emphasizing that defendant must specifically prove that the trial court would have accepted the plea to the lesser charge, including the recommended sentence.

If a defendant is required to prove a fact at an evidentiary hearing, it must be alleged in the 3.850 motion. Cottle did not allege that the trial court would have accepted the plea agreement. At the time Cottle was sentenced, the court as well as the prosecutor could initiate habitual offender proceedings. See generally Young v. State, 22 Fla. L. Weekly S384 (Fla. July 3, 1997) (only prosecutor can initiate habitual offender proceedings, but this holding is not to be applied to cases which are final, or in pending cases where issue was not preserved). The judge could have rejected any decision by the state not to initiate habitual offender proceedings, and served the notice of intent himself.

Our court has noted that there is a strict standard of pleading and proof in these types of cases because a defendant who elects to go to trial and receives a sentence greater than the plea offer by the state has nothing to lose by alleging that he was not properly advised. Young, 608 So. 2d at 112-113. If a defendant was not aware of a plea offer, in many cases it would not have been brought to the court's attention either. In those cases, whether or not the court would have accepted such a plea offer, had it been tendered, would be a matter of pure speculation. Substantial prejudice resulting from ineffective assistance of counsel would be difficult to establish. See generally, Knight v. State, 394 So. 2d 997 (Fla. 1981).

In Young, this court noted that the initial brief on direct appeal contained an assertion, not disputed by the state, that the trial judge had tentatively approved the proposed plea offer. Young, 608 So. 2d at 113. Young is therefore distinguishable, because Cottle has not alleged that the judge approved of the plea offer before trial, or was even aware of it. Young is also distinguishable, because it was alleged that the proposed plea offer was to a reduced charge and specific sentence, which did not carry a mandatory term. In the instant case, the plea offer did not involve a lesser charge, or a specific term of years regarding the sentence. As Cottle was convicted of two third degree felonies, the court could not have imposed concurrent ten-year terms, absent the habitual offender classification. However, the court could have imposed consecutive five-year terms, also totaling ten years. Cottle did not allege that his guideline scoresheet would have required a lesser sentence.

Because Cottle did not allege that the trial court would have accepted the terms of the alleged plea offer, specifically the promise not to seek habitualization, and failed to establish that his sentence

under the plea would in fact have been for a lesser term of years, his claim is legally insufficient. The order denying relief is affirmed.

AFFIRMED

GRIFFIN, CJ. and ANTOON, J. concur.