**ORIGINAL**



IN THE SUPREME COURT OF FLORIDA

JAMES L. COTTLE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

_____/

Case No.: 91,822

**PETITIONER'S BRIEF ON JURISDICTION**

ON REVIEW FROM THE FIFTH
DISTRICT COURT OF APPEAL

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## STATEMENT OF THE CASE AND FACTS

The opinion of the Fifth District Court of Appeal below contains the relevant facts for this appeal. (See Appendix I - Opinion of Fifth District Court of Appeal and Order Denying Motion for Rehearing and Request for Certification). On September 5, 1997, the Fifth District Court of Appeal issued its opinion. On October 6, 1997, it issued an order denying Petitioner's Motion for Rehearing and Request for Certification.

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850, Fla.R.Crim.P. Petitioner raised several issues but the Fifth District Court of Appeal addressed only one issue in its opinion: trial counsel failed to relay a plea offer to Petitioner — in exchange for a guilty plea to the charged offenses, the State would not seek sentencing under the habitual offender statute. Petitioner alleged that he would have accepted this plea offer.

The Fifth District Court of Appeal held that Petitioner's claim was legally insufficient because he failed to allege that the trial court would have accepted the plea offer. Petitioner filed a motion for rehearing and request for certification. (Appendix II — Motion for Rehearing and Request for Certification) Petitioner alleged that the decision in this case directly conflicted with the decision in Seymore v. State, 693 So. 2d 647 (Fla. 1st DCA 1997); Lee v. State, 677 So. 2d 312 (Fla. 1st DCA 1996); Hilligenn v. State, 660 So. 2d 361 (Fla. 2d DCA 1995); Abella v. State, 429 So. 2d 774 (Fla. 3d DCA 1983) These cases held that if a defendant alleged that counsel failed to relay a plea offer which the

defendant would have accepted (and which would have received a lesser sentence)then the Defendant had made a sufficient prima facie claim of ineffective assistance of counsel.

Petitioner also alleged that the standard established by the Fifth District Court of Appeal could be an impossible burden for a defendant; Petitioner also alleged trial counsel could be ineffective and a defendant could not have an effective remedy under the standard established in this case. Petitioner also argued that how could he allege the trial court would have accepted the plea offer, when the offer was not relayed to the defendant? If the offer was not relayed to the defendant, then the court may never learn of the plea offer. A defendant may suffer under this standard even if the trial court would have accepted the offer. Petitioner asked the Fifth District to certify this cause to this Court or to rehear and reconsider its decision. The Fifth District Court of Appeal denied Petitioner's motions without reason or comment.

## SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review this cause pursuant to Rule 9.030(a)(2)(A)(iv) Fla.R.App.P. The decision in this case directly conflicts with the decisions in Seymore v. State, 693 So. 2d 647 (Fla. 1st DCA 1997); Lee v. State, 677 So. 2d 312 (Fla. 1st DCA 1996) and Hillgenn v. State, 660 So. 2d 361 (Fla. 2d DCA 1995).

I.

**The decision in this case directly conflicts with decisions of the First and Second District Courts of Appeal on the issue of what must a defendant allege in an ineffective assistance of counsel claim involving failure to relay a plea offer.**

The decision in this case directly conflicts with the decisions in Seymore v. State, 693 So. 2d 647 (Fla. 1st DCA 1997); Lee v. State, 677 So. 2d 312 (Fla. 1st DCA 1996) and Hillgenn v. State, 660 So. 2d 361 (Fla. 2d DCA 1995). These cases did not hold, like this case, that a defendant must allege that the trial court would have accepted a plea offer which defendant alleges defense counsel failed to relay to defendant. These cases do not require such an allegation because it may be impossible to prove such a fact, even if the trial court would have accepted the offer. These cases reflect the common sense reasoning that a defendant will not be able to prove such a fact because if the plea offer was not relayed to defendant for acceptance of rejection, the trial court would never have learned of the offer. Then how can a defendant prove the court would have accepted the offer?

The decision in Seymore, supra, Lee, supra, and Hilligenn, supra, held that if the defendant alleged 1) counsel failed to relay a plea offer; 2) defendant would have accepted the offer and; 3) if accepted, the offer would have resulted in a lesser sentence than the sentence actually imposed upon the defendant, then there was a sufficient facial allegation of ineffective assistance of counsel. The decision in this case directly

conflicts with these cases because this case requires the additional allegation that the trial court would have accepted the offer.

The decision in this case will deny a defendant his constitutional right to allege and prove ineffective assistance of counsel for failure to relay a plea offer. Under the standard enunciated by the Fifth District Court of Appeal, no defendant who is unaware of a plea offer will be able to allege ineffective assistance of counsel. A trial court must be aware of a plea offer before the court can accept or reject it. If the court accepts the offer, the court will determine if the defendant will accept or reject it. However, if the State and defense counsel engage in plea negotiations, but the defense counsel does not relay the offer to the defendant, then the trial court (as in this case) may never learn of the offer. This Court should resolve the conflict between this case and Seymore, Lee, and Hilligenn and correct the fundamentally flawed and unfair decision in this cause.

## CONCLUSION

This Court should accept jurisdiction in this case to resolve the conflict between this case and Seymore v. State, 693 So. 2d 647 (Fla. 1st DCA 1997); Lee v. State, 677 So. 2d 312 (Fla. 1st DCA 1996) and Hillgenn v. State, 660 So. 2d 361 (Fla. 2d DCA 1995).

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 10th day of November, 1997 to Jennifer Meek, Assistant Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Fl 32118.

Attorney