ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JAMES L. COTTLE,

Petitioner,

v. Case No. 91,822

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S MERITS BRIEF

On Review from the District Court of Appeal
of the State of Florida
Fifth District

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STATEMENT OF THE CASE AND FACTS

The State offers the following additional facts which are relevant and important to the issues raised by the defendant, and are needed in order to provide a full and fair account of the case.

Prior to the defendant's trial, the State filed and served a notice of its intent to seek habitual offender status and sentence upon the defendant's conviction. (A.11). After trial, the defendant was convicted as charged: burglary of a conveyance and felony petit theft. (A.16).

At his sentencing hearing, the trial court identified and accepted certified copies of judgments and sentences which verified that the defendant qualified as an habitual felony offender. (A.3-9). The judge found that the defendant had been convicted of 13 felonies, stating:

> THE COURT: I find that Mr. Cottle meets the criteria set forth in Florida Statute 775.084. He has been convicted of at least two prior felonies. In this case, he had been convicted of a forgery, uttering a forged instrument, burglary of a conveyance, burglary of a conveyance, burglary of a conveyance, escape, fraudulent use of a credit card, dealing in stolen property and sale, purchase or delivery of cocaine.
>
> The last felony convictions being fraudulent use of a credit card in 1995 and two counts of burglary of a conveyance and two counts of petty theft in September of 1994, specifically September 24th

> which is within the five years of the date of the commission of this offense.
>
> **I further find that classifying the Defendant as a habitual felony offender is necessary in order for the protection of society.**

(emphasis added) (A.11-12).

When the prosecutor made reference to a plea offer that was made before trial, defense counsel stated to the court that he had related the offer to the defendant when the offer was made. (A.13). The plea offer was limited to the State's offer that it would not seek to habitualize the defendant if he plead guilty to the charges. (A.13). Defense counsel advised the court that, at the time he told the defendant the plea offer, the defendant "denied breaking in the car and wanted a trial." (A.14).

At the conclusion of the hearing on the habitual notice, the trial court sentenced the defendant to 10 years on each count, to run concurrent to each other and consecutive to any other active sentence. (A.16-18). He was specifically sentenced as an habitual felony offender. (A.16-17).

The defendant filed a direct appeal from his judgment and sentence. The Public Defender's Office filed an *Anders* brief, and the defendant filed a *pro se* Initial Brief. (B,C). In his brief, the defendant raised six issues, including a claim relating to trial counsel's failure to inform him of a plea offer. (C.23). The defendant's judgment and sentence was *per curiam* affirmed by

the Fifth District Court of Appeal. *Cottle v. State*, 676 So.2d 432 (Fla. 5th DCA 1996).

The defendant then filed a motion for post conviction relief under Fla.R.Crim.P. 3.850. (D). In his 3.850 motion, the defendant claimed that his trial counsel was ineffective for several reasons. Among those reasons was the defendant's argument that his trial counsel failed to communicate to him the plea offer made by the State. (D.2). In that motion, the defendant alleges that "[i]f such an offer was presented to Defendant, he would have accepted such an offer." (D.2). The defendant did not allege or show that the sentence would have been different had he been given the opportunity to enter a plea pursuant to the State's offer.

The trial court denied the 3.850 motion, attaching portions of the record to support that denial. (E)(attachments omitted). The defendant appealed. The Fifth District Court of Appeal affirmed the trial court's denial of the motion, addressing only the claim that trial counsel failed to relay the plea offer. *Cottle v. State*, 700 So.2d 53 at 54 (Fla. 5th DCA 1997). The defendant subsequently sought this court's jurisdiction regarding that claim.

SUMMARY OF ARGUMENTS

At the outset, the State respectfully asserts that jurisdiction was improvidently granted in this case, and the court's exercise of jurisdiction should be reconsidered. In the *Cottle* decision, the district court addressed the prejudice requirement by referring to the failure to "allege that the trial court would have accepted the plea agreement". The use of those words did not create any new standard or additional element of proof. It merely articulated the long-standing requirement that a defendant show prejudice, using the specific facts presented by the defendant in his particular case. The record now before the court shows that there is no direct and express conflict since the district court correctly applied and expressed the proper test.

The plea offer in the instant case would have required the defendant to plea to the charges, and then the State would not have sought an habitual offender sentence. Because there was no offer to reduce the charges or drop a charge, nor an offer for a specific sentence, the defendant could show no prejudice unless he could show that the trial judge would have accepted the State's recommendation. The district court's decision applies the prejudice requirement to the facts of the defendant's case. The decision, therefore, does not create conflict.

Additionally, the trial court trial court already examined the record and found no deficient performance by trial counsel. At the

sentencing, defense counsel stated that he had relayed the plea offer to the defendant. The trial court attached that portion of the record to its order denying post-conviction relief, finding that the record refuted the defendant's claim that his attorney failed to relay the plea offer. So, the trial court has already determined that defense counsel's representation was not ineffective.

Furthermore, there is no additional remedy for this court to provide to the defendant in the instant case. He received a full and fair trial on the charges. The jury found him guilty, and he received a lawful sentence. The defendant received the benefit of his constitutional right to a fair trial.

Nor is there any need for any further evidentiary hearing in this case. The trial court already attached portions of the record which showed that the defendant's attorney did in fact advise him of the plea offer. Therefore, there is no further need to examine the prejudice prong.

ARGUMENT

POINT ON REVIEW

THE DISTRICT COURT CORRECTLY AFFIRMED THE TRIAL COURT'S DENIAL OF POST CONVICTION RELIEF SINCE THE DEFENDANT HAD FAILED TO ESTABLISH THAT HIS SENTENCE UNDER THE PLEA OFFER WOULD IN FACT HAVE BEEN FOR A LESSER TERM OF YEARS.

CONFLICT JURISDICTION At the outset, the State respectfully asserts that this court's decision to grant jurisdiction in the instant case should be reconsidered. The record now before the court shows that there is no direct and express conflict which warrants this court's attention. What is evident, both on the face of the opinion and on the record, is that the trial court correctly applied the proper test for a claim of ineffective assistance of counsel.

This case involves a defendant who received a full and fair trial, and was convicted of all charges. After trial, he claimed that trial counsel never relayed a plea offer which was made by the State prior to trial, and therefore, was ineffective. The defendant claims that if he had known of the plea offer, he would have taken it and received a lesser sentence. The trial court found that trial counsel had **not** failed to relay the plea offer and, therefore, there was no deficient performance.

The appellate court affirmed the trial court's denial of relief, and specifically found that the defendant had failed to show prejudice because he did not allege that the trial court would have accepted the plea deal. Under the facts of this case, the district court's statement of that requirement -- that the defendant show the court would have accepted the plea deal -- was an articulation of the prejudice prong of the ineffective assistance test. As such, it did not create any new requirement. It simply applied the standard test for ineffective assistance of counsel and applied it to the specific facts of this case.

It has been established in each appellate court in Florida that in order to adequately state a claim for relief, a defendant must allege that 1) his counsel failed to communicate a plea offer, or misinformed him concerning the penalty he faced, 2) that had he been correctly advised, he would have accepted the plea offer, and 3) that his acceptance of the State's plea offer **would have resulted in a lesser sentence.** *See Young v. State*, 608 So.2d 111 (Fla. 5th DCA 1992).

Florida courts use the *Strickland* test, as articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), when determining ineffectiveness claims. *Kennedy v. State*, 547 So.2d 912 (Fla. 1989). The *Strickland* test requires a defendant to show, first, that trial counsel's performance was deficient, and second, that the deficient performance prejudiced

the defendant. Both prongs must be met in order for a court to find grounds for relief. Therefore, a Florida court considering a claim of ineffectiveness of counsel need not address the prejudice issue if it finds that there was not deficient performance. Of course, it also means that a court "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Kennedy, supra* p. 7 at 914.

The United States Supreme Court has provided a clear analysis to use in assessing possible prejudice in claims of ineffective assistance of counsel. In *Lockhart v. Fretwell*, 113 S.Ct. 838 (1993), the Court emphasized that "the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.'" *Id.* at 842 (citing to *Strickland*). The Court went on to say that, therefore, "'the right to the effective assistance of counsel is recognized **not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.** Absent some effect of challenged conduct on the reliability of the **trial process**, the Sixth Amendment guarantee is generally not implicated.'" (emphasis added) *Id.* (quoting *United States v. Cronic*, 466 U.S. 648 ((1984).

The Court explained the it was that concern -- to protect the fundamental right to a fair trial -- that led the Court to formulate the *Strickland* two-prong test. The Court stated

> [A] criminal defendant alleging prejudice must show "that counsel's

> errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant **the defendant** a windfall to which the law does not entitle him.

(internal cites omitted)(emphasis added) *Id.* at 843. The Court emphasized that the very "touchstone" of ineffectiveness claims is "the fairness of the adversary proceeding". *Id.* If the trial is a fair one, a defendant "has no entitlement to the luck of a lawless decisionmaker". *Id.*[1]

Florida courts apply the *Strickland* test in cases where a defendant claims ineffective assistance of trial counsel for failing to effectively relay a plea offer. In each of those cases, the reviewing court requires a defendant to make a showing of both prongs -- deficient performance and prejudice. When one of the prongs is not met, the court need not address the other. *See Young, supra* p. 7; *Wilson v. State*, 647 So.2d 185 (Fla. 1st DCA

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[1]The defendant in the instant case received a full and fair jury trial. That conviction was affirmed on appeal. *Cottle v. State*, 676 So.2d 432 (Fla. 5th DCA 1996). The defendant is not now arguing that his trial was unfair or that trial counsel was ineffective in his performance at trial. He received all of the Sixth Amendment guarantees to a fair trial, including effective counsel during trial.

1994); *Steel v. State*, 684 So.2d 290 (Fla. 4th DCA 1996). Both prongs must be alleged and proven.

The defendant's burden of proof is -- and should be -- great, because once a defendant has been convicted, he has nothing to lose by saying that he would have taken a plea offer. As Judge Griffin pointed out in *Young*,

> Most [] courts have not addressed directly the peculiar problems and potential for abuse inherent in the circumstance where a criminal defendant has received a fair trial and a lawful sentence but then seeks post-conviction relief claiming that **before trial** a plea offer more favorable than his sentence had not been communicated to him or he had been misadvised concerning the penalty he faced. The situation in such a case is unlike one where appellant claims he was induced to **accept** a plea based on some alleged error or omission of counsel, for that defendant can expect nothing better than a trial on the charge and a lawful sentence, if convicted. In a case such as this, on the other hand, a defendant who elects to go to trial and receives a sentence greater than the plea offered by the state has nothing to lose by alleging he was not properly advised. Perhaps in tacit recognition of this problem, courts have been exacting in what a defendant is required to claim, and ultimately, to prove, in such cases.

(emphasis added) *Young, supra* p. 7. For the reasons expressed by Judge Griffin, a reviewing court **must** require a defendant to

properly and fully allege and prove his claim.

In the instant case, the district court properly required the defendant to allege that his sentence would have been less if he had accepted the plea. On the facts of this case, that meant that the defendant had to allege and prove that the trial court would have accepted the plea agreement. There were two reasons for this. First, the plea offer itself did not include a plea to a lesser charge -- it was a plea of guilty straight up to the charges.

Nor was there an offer to recommend a specific sentence. The State's only offer with regard to sentence was that the State would not itself seek an habitual sentence if the defendant plead guilty as charged. The actual sentence would have been up to the trial judge.

Second, at the time that the defendant's case was active, the state of the law with regard to habitual offenders was such that trial judges could initiate habitual proceedings on their own without the State filing a notice to seek habitual sentencing. *Cottle v. State*, 700 So.2d 53 (Fla. 5th DCA 1997); *Turcotte v. State*, 617 So.2d 1164 (Fla. 5th DCA 1993); *Toliver v. State*, 605 So.2d 477 (Fla. 5th DCA 1992), *pet. for rev. denied* 618 So.2d 212 (Fla. 1993). As this court well knows, that is no longer the state of the law -- the statute only allows the State Attorney's Office to initiate habitual offender proceedings. *See Young v. State*, 699 So.2d 624 (Fla. 1997). But at the time the defendant's case was

before the trial court, the trial judge himself could have conducted an habitual offender hearing, found that the defendant qualified as an habitual offender, and sentenced him as an habitual offender. Without a guarantee that the trial judge would not do that, the defendant could not show that his sentence would have been less even if he had taken the plea. Therefore, he could show no prejudice.

For these two reasons, the only way that the defendant could have alleged and shown prejudice was to show that the trial judge would have accepted the plea agreement. That is the only way that the defendant would have gotten a lesser sentence. Without alleging that the trial judge would have agreed to the plea offer, thereby agreeing **not** habitualize him, the defendant failed to make the necessary showing of prejudice.

In the *Cottle* decision, the district court addressed the prejudice requirement by referring to the failure to "allege that the trial court would have accepted the plea agreement". The use of those words did not create any new standard or additional element of proof. It merely articulated the long-standing requirement that a defendant show prejudice, using the specific facts presented by Cottle in his particular case.

The decision of the Fifth District is well-reasoned and fully comports with well-established law. Because the opinion did not create any new standard or additional element of proof, there is no

conflict between the Fifth District and any other court or opinion in the State. Without conflict -- both direct and express -- this court should not find jurisdiction to review the instant case.

NO DEFICIENT PERFORMANCE Additionally, there is no need for this court to review this case because the issue of prejudice does not even need to be addressed. The trial court made a determination, based on the record, that there was no deficient performance by trial counsel. Once the trial court found that there was no deficient performance, there was no need to address the prejudice requirement.

While the **appellate** court reached its determination by finding that the defendant failed to show prejudice -- the second prong of the ineffectiveness test -- the **trial** court addressed the first prong when it ruled on the 3.850 motion. After reviewing the claim and the record, the trial court determined that defense counsel's performance was not deficient.

At the sentencing hearing, after a full and fair trial, the defendant claimed that he had never heard the plea offer prior to his trial. (A.13-14). He told the judge that "[i]f I was offered a deal, I would have taken it instead of worrying about getting habitualized." (A.16). However, the defense attorney stated on the record that his file contained notes which indicated that he **had** relayed the plea offer to the defendant. (A.13).

Defense counsel's notes revealed that the plea offer was to "plea as charged" and the State would not seek to habitualize the defendant. (A.13). Counsel then told the court, **"And I related that to him on 5-2-95."** (emphasis added) (A.13). Defense counsel further advised the court that when he related the offer to the defendant, the defendant "denied breaking in the car and wanted a trial." (A.14). The trial court proceeded to sentence the defendant.

Once the trial court had reviewed the record, it determined that trial counsel had in fact informed the defendant about the plea offer. The trial court denied the 3.850 motion and attached those portions of the sentencing transcript showing that the record refuted the claim. When the trial court attached the portions of the record which refuted the defendant's claim, there was no need to further address the claim.

In those myriad cases which address the issue of whether a defendant has made a facially sufficient claim for relief, the only relief granted by any reviewing court has been to send the case back to the trial court to either 1) conduct an evidentiary hearing, or 2) **attach portions of the record** which demonstrate that the defendant is not entitled to relief. *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); *Graham v. State,* 659 So.2d 722 (Fla. 1st DCA 1995); *Majors*

v. State, 645 So.2d 1110 (Fla. 1st DCA 1994). In the instant case, the trial court has already done exactly that.

The trial court attached the portion of the record which shows that defense counsel did in fact advise the defendant as to the terms of the State's plea offer. The record further shows that the defendant proclaimed his innocence and chose to go to trial rather than enter a plea to the charge. The record, therefore, clearly refutes the defendant's claim that his attorney was ineffective for failing to relay the terms of the State's plea offer.

Nor was there any need for an evidentiary hearing to further determine whether defense counsel was ineffective for failing to relay the offer. That information had already come out at the sentencing hearing. An evidentiary hearing would have been a waste of judicial resources. There was nothing more the trial court needed to do once it found that the claim was refuted by the record.

There is, therefore, no further relief to be granted the defendant. There is no need for an evidentiary hearing, since the trial court has already found that trial counsel's performance was not deficient. If there was no deficient performance, there is no need to reach the prejudice prong of the test, and no need to gather more evidence pertaining to the plea offer.

PROCEDURAL BAR Finally, the issue that is currently presented to this court was not properly before the district court on post-conviction review. The issue could have and should have been raised on direct appeal. The issue, in fact, **was** raised on direct appeal in the form of a "trial court error" claim. The record allowed the appellate court to review the claim based on the sentencing hearing. Because it could have been raised fully on direct appeal, it should have been raised then. Therefore, it was waived for further review of the issue.

Claims of ineffective assistance of trial counsel are generally not reviewable on direct appeal, but are properly raised in a motion for post-conviction relief. *Loren v. State*, 601 So.2d 271 (Fla. 1st DCA 1992). There are two main reasons for this rule -- 1) because the trial judge never had an opportunity to consider the claim, and 2) because the issue usually "involves collateral questions of fact that cannot be determined by the trial record." *Id.* at 272.

However, one of the two exceptions to the general rule "arises when the record is sufficient to allow determination of an effectiveness claim." *Id.* at 273; *Owen v. State*, 560 So.2d 207 (Fla. 1990); *Cody v. State*, 678 So.2d 9 (Fla. 1st DCA 1996); *Chery v. State*, 642 So.2d 1161 (Fla. 3d DCA 1994). In the instant case, the record is sufficient to allow a determination of the effectiveness claim.

The record clearly provided the sufficient evidence from which the trial court could determine that defense counsel had indeed relayed the offer and, therefore, there was no ineffectiveness. By raising the claim at his sentencing hearing, the defendant had preserved the claim for direct appeal.

On direct appeal, the defendant **did** raised an issue relating to his claim that trial counsel failed to relay the plea offer. He framed that issue as a trial court error for failing to inquire "as to counsel's failure to inform [the defendant] of a plea offer". (C.23). But the defendant clearly argued within that issue that his trial counsel was ineffective, citing to federal and State cases which address ineffectiveness claims. (C.24).

It is clear that the defendant **did** raise and argue the very same issue he raised again in his 3.850 motion. That issue has already been decided on direct appeal and is already law of the case.

The claim as raised and presented in the post-conviction motion, therefore, is one which was already raised and decided on direct appeal. The defendant is procedurally barred from raising it again in a post conviction motion. Therefore, it should not be before this court now. This court should find the issue was procedurally barred and dissolve jurisdiction.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully asks this court to uphold the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Merits Brief has been furnished by U.S. mail to **James T. Miller**, 233 E. Bay Street, Suite 920, Jacksonville, FL 32202, this 23rd day of March, 1998.

Rebecca Roark Wall

Rebecca Roark Wall
Of Counsel