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IN THE SUPREME COURT OF FLORIDA

JAMES L. COTTLE,
Petitioner,

v.

Case No.: 91,822

STATE OF FLORIDA,
Respondent.

_____/

PETITIONER'S REPLY BRIEF

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

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STATEMENT OF THE CASE AND FACTS

Petitioner accepts Respondent's statement.

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.

Appellee argues there is no conflict between this cause and the cases cited above. To support this argument, Appellee argues the decision below was correct. Consequently, Appellee avoids the question of whether this cause conflicts with 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).

The Fifth District Court of Appeal in this cause decided that in a claim of ineffective assistance of counsel for failure to relay a plea offer the defendant must prove: 1. there was a plea offer which would have resulted in a lesser sentence; 2. Defendant would have accepted the offer and; 3. the trial court would have accepted the offer (even though the trial court was not aware of the offer). Lee, Seymore, Hilligenn, and Abella do not require

proof that the trial court would have accepted the offer. Consequently, there is a direct conflict because this cause adds an element not required by the cases cited above.

In Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960), this Court noted that there was a conflict where the application of the rules of law in two different cases would produce two different results (where the facts are substantially similar in the two cases). Obviously, the same rule of law should apply in all similar cases. The conflict jurisdiction of this Court exists to enforce this principle. This cause unquestionably meets the test described above. Under Lee, Seymore, Hilligenn and Abella, Petitioner would have alleged a prima facie case of ineffective assistance of counsel. Under the decision in this cause, Petitioner failed to allege a prima facie case. There is a direct conflict because there are two different results under the same set of facts — failure to relay a plea offer.

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

In the appeal before the Fifth District Court of Appeal, the State argued the record conclusively showed Petitioner should not receive relief. Respondent confirms this argument. The record below does not conclusively show Petitioner should not get relief. The trial court below gave Petitioner no opportunity to rebut, challenge or contradict his attorney's statement that he did, in fact, relay the plea offer. The transcript does not conclusively

demonstrate no entitlement to relief because the issue is in conflict and Petitioner did not have an opportunity to prove his case. The trial court automatically accepted counsel's word as true without conducting a formal hearing. Respondent's argument renders Rule 3.850 meaningless and deprives Petitioner of the minimal requirements of due process — the right to present evidence at a hearing and question the witness against him and present documentary evidence.

Respondent's argument will result in the following scenarios: Only defendants who could prove the trial judge would have accepted the offer will be able to allege ineffective assistance of counsel by failure to relay a plea offer. In the real world, this rule will apply to no one. If a trial judge rejects an offer, (Petitioner assumes that the defendant will learn of it from the Court) then the fact that the attorney failed to relay it is irrelevant. If the trial court accepts the offer, then surely the trial court will advise Defendant of the acceptance. Respondent's position will not apply to the very class of cases Rule 3.850 should cover: those cases where counsel renders ineffective assistance of counsel by not relaying a plea offer and the trial court never learns of this and accordingly Defendants receive a higher sentence after trial, then they would have if they took 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.**

Respondent argues Petitioner cannot be prejudiced (by a lesser sentence) because the trial court could have rejected the offer or imposed an habitual offender sentence. This is rank speculation. Petitioner agrees he cannot eliminate these possibilities. Petitioner cannot exclude them because they are speculative. For this very reason, the burden suggested by Respondent is impossible to meet. How can a defendant prove a judge would have accepted an offer which the judge never learned of in the case? If this Court adopts Respondent's position, then some defendants will not be able to correct ineffective assistance of counsel. Petitioner implores this Court to consider the practical effects of the decision in this case.

CONCLUSION

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

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail this 6th day of April, 1998 to Rebecca Roark Wall, Assistant Attorney General, 444 Seabreeze, 5th Floor, Daytona Beach, Florida 32118.

Attorney