IN THE SUPREME COURT OF FLORIDA

JORGE E. GONZALEZ,

Petitioner,

vs.

HARRY K. SINGLETARY, *Sec.,*

Florida Department of Corrections,

Respondent,

_____/

CASE NO: 93,547

THIRD DCA NO: 98-444

L.T. CASE NO: 92-31611

PETITIONER'S INITIAL BRIEF ON THE MERITS

INVOKING DISCRETIONARY REVIEW TO RESOLVE CERTIFIED CONFLICT BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, OF FLORIDA

JORGE GONZALEZ, *Petitioner*, **Pro se**
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PRELIMINARY STATEMENT

In this brief, the petitioner, **JORGE E. GONZALEZ,** will be referred to by name or as the petitioner. The respondent will be referred to as the State. Citations to the original one and two volume record on review will be made by letter "R" and the appropriate page number.

STATEMENT OF THE CASE

Petitioner seeks discretionary review of the district court of appeals ruling denying, in part, his Petition for Habeas Corpus for Belated Appeal of his judgment of conviction, and Belated Appeal of the Denial of his Motion for Post-conviction Relief filed pursuant to Fla.R.Crim.P., Rule 3.850 in this cause wherein the Third District court certified direct conflict with the First and Fourth district courts of appeal of Florida.

1. The appellant was arrested on September 9, 1992 as a result of an alleged domestic violence dispute with his then, ex-wife. **(Appendix "A)**

2. On September 14, 1992, the state filed in the trial court, an information charging him with numerous violations of Florida laws.

3. On or about August 18, and 19, 1993, a jury trial was conducted before the Honorable Roberto M. Pineiro, Circuit Court Judge, for the Eleventh Judicial Circuit in, and for Dade County Florida.

4. At the conclusion of the jury trial, appellant was found guilty of Kidnapping *Without* a Weapon, in violation of §787.01 Fla. Stat., and Battery, as lesser included in violation of §784.03. On October 20, 1993, appellant was sentenced by the Honorable Roberto M. Pineiro, Circuit Court Judge in this cause as follows:

> Count #1 of the information: Kidnapping *Without* Weapon.
>
> Sentence imposed: Thirty (30) years state prison to be followed by five (5) years probation.
>
> Count #3 of the information: Battery (as lesser included)
>
> Sentence imposed: Six month state prison.

6. On November 19, 1993 a timely notice of appeal was filed in the Third District Court of Appeals of Florida, appealing the order of the lower court rendered on October 20, 1993. (See Case No 93-2791 **(Appendix "B")**

7. The statement of judicial acts to be reviewed were as follows:

(1) The denial by the trial court of the defendant's motion for judgment of acquittal at the close of the state's case.

(2) The denial by the trial court of the defendant's motion for judgment of acquittal at the close of all the evidence.

(3) The denial by the trial court of the defendant's motion for new trial.

(4) Failure of the trial court to declare a mistrial during the opening and closing arguments of the prosecutor.

(5) The trial court's instructions to the jury.

8. Counsel for the defendant filed his initial brief of appellant on April 28, 1994 therein, counsel for the appellant presented the following claims for proper review. **(Appendix "C")**

(1) Did the trial court commit reversible error in making contact with the jury during deliberation without the defendant and his counsel being present.

(2) In a supplemental brie filed on June 7, 1994, the following claim for review was presented. The trial court committed reversible error by sentencing the defendant outside the Florida Sentencing Guidelines *without* reasons for departure.

The state filed its response. **(Appendix "D")**

On June 21, 1994, the Third District Court of Appeals reversed and remanded defendant's case for a new trial. *See* Gonzalez v. State, 638 So.2d 199 (Fla 3d DCA 1993)

9. On November 2, 1994 appellant, being represented by his court appointed counsel Public Defender Rashad El-Amin, and on the advice of his counsel, negotiated a plea and entered his plea of guilty to the charge of Kidnapping *Without* a Weapon, and Battery. Thereupon was subsequently sentenced as follows: **(Appendix "F")**

Count #1: Kidnapping *Without* a Weapon

Sentence imposed: Fifteen (15) years state prison, to be followed by Five (5) years probation.

Count #3: Battery

Sentence imposed: Time Served. **(Appendix "G")**

10. On January, 1995, the appellant filed in the trial court, from South Florida Reception Center an unartfully drafted motion *titled* "Defendant's Motion For Post-Conviction Relief, pursuant to Fla.R.Crim.P., Rule 3.800(a). **(Appendix "H")**

11. On February 3, 1995, the appellant filed by mail, from Hamilton Correctional Institution where he had been transferred to from South Florida Reception Center, a motion *titled* "Motion For Voluntary Dismissal of Action without Prejudice". **(Appendix "I")**

12. In the above motion the appellant set forth the reasoning as to why he moved the court to dismiss the action without prejudice. In page #6 of the motion he clearly stated that the motion was NOT to be interpreted as a Rule 3.850 motion for post-conviction relief, but a Rule 3.800(a) "Motion For Correction Of Sentence".

13. On March, 1995, the appellant, after receiving no response from the court regarding his "Motion For Voluntary Dismissal Without Prejudice", filed by mail from Hamilton Correctional Institution a "Notice Of Inquiry".

14. On March 15, 1995, the appellant, through the institution's mail-room, received two (2) pieces of "Legal Mail". Both items were from Harvey Ruvin, Clerk of court in Miami, Florida.

15. In one envelope, the appellant received what is *titled* "Order Denying Motion For Post-Conviction Relief" pursuant to Rule 3.850. Signed by the Honorable Ellen L. Leesfield and dated February 21, 1995, with a certificate of service by Frankie Hamilton, Deputy Clerk, and dated March 2, 1995. This article of mail was originally mailed by the Clerk of the court to appellant's at South Florida Reception Center and had to be forwarded to Hamilton Correctional Institution wherein appellant is incarcerated. **(Appendix "J")**

16. In the other envelope, the appellant received what is *titled* "Criminal Division Certified Records Search", and informs the appellant:

> Our records indicate that a motion for Voluntary Dismissal of Action Without Prejudice has not been filed with our office in case No: 92-31611.

This was in response to the appellant's "Notice of Inquiry" above.

17. On the 17th of March, 1995 appellant filed from Hamilton Correctional Institution a "Motion For Rehearing" moving the circuit court by way of rehearing to vacate its order dated February 21, 1995 with certificate of service dated March 22, 1995 setting forth the reasons for his motion. **(Appendix "K")**

18. On September 22, 1995, after various "Notices of Inquiry" were filed in the trial court by appellant without a response. He filed a motion pursuant to Fla. Judicial Admin. Rule 2.050(f) compelling a response from the court regarding his "Motion For Rehearing".

19. On October 24, 1995, the trial court denied appellant's "Motion for rehearing" pursuant to Rule 3.850(g). **(Appendix "L")**

20. On the 4th day of November, 1995 appellant filed a timely "Notice of appeal" to the Third District Court of Appeals of Florida appealing the final Order denying appellant's misconstrued motion for post-conviction relief, and rehearing pursuant to Fla.R.Crim.P. Rule(s)

3.850 and 3.850(g) respectively. **(Appendix "M")**

21. The nature of the order appealed is the denial of:

(1) The refusal to acknowledge defendant's "Motion For Voluntary Dismissal Of Action Without Prejudice" filed February 3, 1995, and, again supplied as an exhibit with the "Motion For Rehearing" filed March 17, 1995, and allow the action to be dismissed without prejudice for proper refiling

(2) The court's construing the motion filed pursuant to Rule 3.850 Fla.R.Crim.P. when, in fact, such was filed pursuant to Rule 3.800(a) Fla.R.Crim.P.

(3) The court denying the motion pursuant to Rule 3.850 Fla.R.Crim.P. and not attaching portions of the record to refute defendant's claims.

22. On November 28, 1995, the Third District Court of Appeals of Florida acknowledged receipt of the "Notice of appeal" and assigned it a case number (95-03347).

23. On December 13, 1995, the Third district Court of Appeals of Florida issued a Per Curiam with opinion, vacating the denial of appellant's "Motion For Post-Conviction Relief without prejudice through the jail house "Mailbox" pursuant to Hagg v. State, 591 So.2d 614 (Fla. 1992) *See also* Gonzalez v. State, 664 So.2d 74 (Fla. 3rd DCA 1995). **(Appendix "N")**

24. On October 22, 1997, appellant filed in the trial court from Hamilton Correctional Institution his "Motion For Post-Conviction Relief" pursuant to Fla. R.Crim.P. Rule 3.850. alleging the following four grounds: **(Appendix "O")**

1. THE COURT COMMITTED ERROR WHEN IT FAILED TO GRANT MOTION OF ACQUITTAL ON INSUFFICIENCY OF THE EVIDENCE AS TO THE CHARGE OF KIDNAPPING.

2. THE COURT ABUSED ITS DISCRETION BY IMPOSING DEPARTURE SENTENCE WITHOUT A WRITTEN STATEMENT. SENTENCED THE DEFENDANT WITH AN INCORRECTLY CALCULATED SCORESHEET, AND ERRONEOUSLY CLASSIFIED THE SEVERITY OF THE OFFENSE.

3. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY FAILING TO PURSUE A VIABLE DEFENSE THEORY OF VOLUNTARY INTOXICATION. BUT FOR COUNSEL'S ADVICE DEFENDANT WOULD NOT HAVE ENTERED HIS GUILTY PLEA.

4. COUNSEL WAS INEFFECTIVE IN HIS TRIAL REPRESENTATION OF THE DEFENDANT.

Each ground set forth facts on which appellant based his claims in the accompanying "Memorandum Of Law" in support of his motion for post-conviction relief. Eight (8) exhibits were attached to support appellant's arguments.

25. On February 2, 1998, appellant received through the mail room at Hamilton Correctional Institution a court Order *titled* "Order Denying Defendant's Motion For Post-Conviction Relief" pursuant to Fla.R.Crim.P., Rule 3.850. Appellant's motion was denied as untimely and successive. Yet the trial court ruled on each and every viable claim presented by the appellant in his motion for post-conviction relief. **(Appendix "P")**

26. On February 17, 1998 petitioner filed his petition for writ of Habeas Corpus in the Third district court.

27. On April 17, 1998 the Third district court of appeals denied in part petitioner's motion for belated appeal. Gonzalez v. State, 23 Fla.L.Weekly D1578 (Fla. 3d DCA *Opinion filed April 17, 1998).*

28. On July 23, 1998 petitioner filed his notice to Invoke discretionary Jurisdiction.

29. On August 5, 1998 this Honorable Court issued its Order Postponing Decision on Jurisdiction and Briefing Schedule ordering petitioner to submit his Initial Brief on the Merits by August 31, 1998.

There are no other pending motions either in State or Federal Courts with regards to this case. This petition for belated appeal.

STATEMENT OF THE FACTS

Hialeah police officer Ricardo Garcia answered a domestic violence call . At the scene, the officer found the defendant's ex-wife Virginia Gonzalez and their son. Ms. Gonzalez's face was bruised and swollen, and showed difficulty in breathing.

Ms. Gonzalez testified at trial that she, and the defendant had been divorced since *1990*. On the day prior to the incident, the defendant Jorge E. Gonzalez came to her house in order to visit with their son. The following day the defendant called her because he wanted to take their son fishing on board a charter vessel. Ms. Gonzalez suggested he not take their son out on the boat and agreed to the defendant's visit with the child. The defendant accepted the suggestion. Ms. Gonzalez took the child to the defendant's home. She was waiting in her car when the child told her that the defendant wanted to talk to her. When she arrived at the front door to the home, the defendant pulled her inside and locked the front door. Ms Gonzalez noticed an object near the front door covered with a blanket and saw that it was a rifle. The defendant pushed her into the living room while telling her that she was going to die. The defendant asked Ms. Gonzalez to write a suicide note.

Ms. Gonzalez had a pocket knife in her possession which she opened, she lunged at the defendant and stabbed him, grabbing hold of the rifle. After a brief struggle, the defendant recovered control of the rifle and ordered Ms. Gonzalez to sit down. Eventually, the defendant began to weaken and was having difficulty breathing. The stab wound had punctured a lung on the defendant. The defendant asked Ms. Gonzalez to help him to the bathroom. She then took the rifle, placed it in a closet and left the house.

SUMMARY OF ARGUMENT

In this case, the Third District court of appeal held that a defendant who pleads guilty, that at the plea colloquy, he expressly waived his right to direct appeal, and that the defendant's motion failed to alleged with specificity any of the limited exceptions dictated by Robinson v. State, 373 So.2 898 (Fla. 1979) necessary for an appeal from a guilty plea" should preclude him from obtaining belated appeal of his judgment of conviction.

The decision of the District court is cannot be reconciled with the previous decisions of this Court in Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969); Robinson v. State; supra; Amendment to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996)*(On reh'g)(*Committee note indicating that the revision was intended to reinstate the procedure set forth in Baggett. *Id at* 807 wherein practical difficulties have arisen confronting any **pro se** litigants attempting to marshall legal issues necessary to entitle him or her to the one and only appeal an indigent has as of right" from a conviction, and is in direct conflict with the decision of the First district court of appeals of Florida in Trowell v. State, 706 So.2d 332 (Fla. 1st. DCA 1998)*(en banc) review granted (Fla. No: 92- 393 March 5, 1998);* Owens v. State, 643 So.2d 643 So.2d 105 (Fla. 1st. DCA 1994); and with the Fourth distinct court decisions in Faircloth v. State, 661 So.2d 1292 Fla. 4th DCA 1995); and Gunn v. State, 612 So.2d 643 (Fla. 4th DCA 1993) specifically rejecting the Third district court's contention that the defendant must make a preliminary showing of arguable points on the merits in order to be entitled to appeal.

Thus, the petitioner contends that the decision of the District court expressly and directly conflicts, and cannot be reconciled with, the previous decisions of this Court, and with the First and

Fourth District Courts of appeal of Florida as a matter of law.

By contrast, the material facts in this case substantially differ from the authorities cited by the district court because petitioner's plea of guilty if *fundamentally* erroneous and *constitutionally* invalid which implications are established in the plea colloquy, and are precisely the claims the decisions in Trowell; Owens; Faircloth; and Gunn; seek to safeguard.

This Honorable Court should correctly interpret the decisions of the First and Fourth district courts to apply to instances *(as here)* where counsel's erroneous legal advice, coupled by his failure to timely file a notice of appeal, have resulted in an involuntary plea of guilty with fundamental and constitutional implications.

This Honorable Court has Jurisdiction to resolve the conflict that currently exists between the district courts by quashing the decision of the Third district court in this case, and in the interest of justice, petitioner's plea should be treated as a nullity. The conviction based on such a plea should be vacated with instructions to allow the petitioner plead to the lesser included offense of false imprisonment.

Finally, this Honorable Court should recognize the prejudice and manifest injustice suffered by the petitioner based upon the material facts found on the face of the record in this case, and it has the moral and legal obligation to correct the injustice.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has Discretionary Jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V § 3(b)(3) Fla. Const. (1980); Fla. R.App.P., Rule 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST AND FOURTH DISTRICT COURT OF APPEALS IN TROWELL v. STATE, 706 So.2d 332 (Fla. 1st. DCA 1998)*(en banc), review granted* (Fla. No: 92-393 March 5, 1998); OWENS v. STATE, 643 So.2d 105 (Fla. 1st. DCA 1994); FAIRCLOTH v. STATE, 661 So. 2d 1292 (Fla. 4th DCA 1995); AND GUNN v. STATE, 612 So.2d 643 (Fla. 4th DCA 1993) RESPECTIVELY AS A MATTER OF LAW.

MAY IT PLEASE THE COURT

The Third district court denied, in part, petitioner's motion for belated appeal of his judgment of conviction, and belated appeal of the denial of his motion for post conviction relief pursuant to Fla.R.CrimP., rule 3.850 finding that the *substance* of his motion failed to allege with specificity any of the limited exceptions dictated by Robinson v. State, 373 So.2d 898 (Fla. 1979), *citing* Gonzalez; Loadholt v. State, 683 So.2d 956 (Fla. 3rd DCA 1996) Rule 9.140(b)(2)(A)-(B); *Cf.* Harriel v. State, 23 Fla.LWeekly D967 (Fla. 4th DCA *Opinion filed April 15, 1995*)(Evaluating the limited right to appeal from a plea of guilty or nolo contendere).

The district court's decision in this case is inconsistent with previous decisions of this Honorable Court and other district courts of appeal as a matter of law: *See e.,g.,* Baggett; Robinson; Fla.R.App.P., 9.140(j)(5)(dealing with petitions for belated appeal which included Committee Note indicating that the revision was intended to reinstate the procedure set forth in Baggett: *id at* 807;

and is in direct conflict with Trowell; Owens; Faircloth; and Gunn; supra.

The decision of the district court in this case cannot be reconciled with previous decisions of this Honorable Court and with the First and Fourth district courts of appeal as a matter of law which are of the firm belief that the only relevant inquiry, once a request for belated appeal is made, is whether the defendant was informed of his or her right to an appeal and thereafter timely made a request for an appeal to his or her attorney or other appropriate person. *See e.,g.,* Baggett; Rule 9.140(j)(5); and Trowell; *id at* 337. Specifically rejecting the district court's contention that the defendant most make a preliminary showing of arguable points on the merits in order to be entitled to an appeal.

It is uncertain in this case whether petitioner's court appointed attorney filed an Anders[1] brief. In its response, the state argued that 1) petitioner had pled guilty and thus had waived all defects in the proceeding; 2) that he was presenting a new issue without a prior ruling of the circuit court; and 3) that his rule 3.850 motion for post conviction relief was untimely because petitioner had over eleven months from the date of the district court's Mandate on December 13, 1995 to resubmit his rule 3.850 motion.

The district court concluded that under Robinson; foreclosed appeals from matters which transpired prior to the plea but did not prevent a defendant from raising four distinct matters; (1) subject matter jurisdiction; (2) illegality of the sentence; (3) failure of the government to abide by the plea agreement; and (4) the voluntary and intelligent character of the plea. *See* Amendments to

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[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) which establishes a procedure under which counsel appointed to represent an indigent defendant on appeal from a conviction and sentence can satisfy the Attorney's ethical obligation of adequate representation where the Attorney can identify no meritorious issues on appeal.

the Florida Rules of Appellate Procedure, 685 So.2d 775 *(Citing* Robinson, 373 So.2d at 902); Rule 9.140(b)(2)(B). Because petitioner failed to allege with specificity any of the Robinson matters his belated appeal was denied. *See* Gonzalez; Loadholt; *Cf.* Harriel.

In Gonzalez, the district court held that "Where a defendant has pled guilty or no contest, he cannot undo the waiver of the right to appeal by simply asserting that he asked defense counsel to appeal. He must show that his appellate issue falls with-in one of the Robinson, exceptions, and that there is record support for it. If the defendant cannot meet these threshold requirements, then the remedy is an ordinary motion for post conviction relief under rule 3.850. Gonzalez *Id at* 976.

In Harriel; the district court held that if the defendant were to allege a sentencing error, it may not be raised for the first time on appeal but must be brought to the attention of the trial court, either at the time of sentencing or by motion to correct the sentence, pursuant to Fla.R.Crim.P., rule 3.800(b). *(Citations omitted)* since no such motion was filed in this case thus, because there was no preserved issue, the appeal should be dismissed. Harriel; *at* D968 The district court further held that the state may move to dismiss an appeal from a plea of guilty or nolo contendere without reservation, on the basis that the issues identified in Robinson, are *not* implicated, with sufficient references to the record to support its position and the appellant may file a response. We can then review the record to determine whether the appellant made a motion to withdraw the plea[2] to preserve the issue of voluntariness of the plea and violation of the plea agreement or filed a motion to correct a sentencing error. If no motions have been filed, we will determine whether the other Robinson, issues of subject matter jurisdiction or illegality of sentence exist. If they do not, we will dismiss the

[2] *See* **rule3.171(1)**

appeal as frivolous. If they do, we will deny the motion to dismiss, and the appellant can file a brief, Anders or otherwise. If the state does not file a motion to dismiss an appeal from a plea of guilty or nolo contendere,we will examine the record and brief, whether it be filed by an indigent or non-indigent, to determine whether a Robinson, issue exists which has been properly preserved. *(Citation omitted)* In line with Thompson, 23 Fla.L.Weekly D216, we will summarily affirm the appeal pursuant to Fla.R.App.P., rule 9.315. If we do not find that a Robinson; issue exists and no preserved sentencing error is present. If we find such an issue and it has been preserved, we will treat the issue as in any other comparable appeal. Harriel; *Id at* D969. By contrast, the material facts in this case highly differ from the authorities cited by the district court because petitioner's plea of guilty is fundamentally erroneous and constitutionally invalid which implications are established by the plea colloquy, and are precisely those which the decisions in Trowell; Owens; Faircloth; and Gunn; seek to safeguard.

Thus, the Third district court certified direct conflict with Trowell; Owens; Faircloth; and Gunn. For reasons explained below, petitioner respectfully submits that this Honorable Court should grant discretionary review and resolve the conflict by quashing the decision of the Third district court in this case.

In the decision of the district court reported as Trowell; the First district court of appeal is of the firm belief that the only relevant inquiry, once a request for belated appeal is made, is whether the defendant was informed of his or her right to appeal and thereafter, timely made a request for an appeal to his or her attorney or other appropriate person. If the appeal proceeds from the entry of an unconditional guilty or nolo contendere plea, it may, due to failure to submit any issue cognizable under Robinson; eventually result in dismissal by an *appellate* court, but issues of merit are not

required as a precondition to appeal. Any procedure to the contrary is a clear violation of the constitutional requirements of substantial equality and fair process for the indigent and affluent alike, under Rodriguez; Douglas; and Anders.[3] *See* Trowell, 706 So.2d at 337; and *n.* 5 therein.

This interpretation is consistent with the decisions set forth in Baggett v. Wainwright, 229 So.2d 239 (Fla.1969); Rule 9.140(j)(5); Owens; Faircloth; Gunn; supra.

Although the Baggett, decision flowed from a jury trial and it involves the question whether through state action petitioner was deprived of, or inadequately afforded, the assistance of counsel for the purpose of directly appealing his conviction. Baggett; *Id at* 241. This Honorable Court did not make the distinction of whether the same result would have been reached had Baggett's conviction had flowed from a plea of guilty or nolo contendere. However, in the recent Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996)*(On reh'g)*(Committee Note indicated that the revision was intended to reinstate the procedure set forth in Baggett; *id at* 807); *See* Rule 9.140(J)(5). Petitioner respectfully submits that this Honorable Court's decision in Baggett; and the First and Fourth district court's decisions in Trowell; Owens; Faircloth; and Gunn; should be correctly interpreted by this Honorable Court to safeguard implications *(as here)* where counsel's erroneous legal advice renders petitioner's plea of guilty fundamentally erroneous and constitutionally invalid.

It is axiomatic that the petitioner, on the legal advice of his court appointed attorney, entered his plea of guilty to the charged offenses of kidnapping §787.01 and battery §784.03 Fla. Stat. (1991). The material facts indicate that the trial court may have abused its discretion due to legal

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[3] Rodriguez v United States, 395 U.S. 327, 89 S,Ct. 1715, 23 L.Ed.2d 340 (1969); Douglas v. California, 372 U.S. 353, 83 S.Ct.814, 9L.Ed.2d 811 (1963)

confusion and legitimate disagreement that exists herein as to the legal issues contemporaneous with his plea of guilty which may be resolve in favor of petitioner, and which may constitute prejudice or manifest injustice. The questions raised by petitioner are: (1) whether the kidnapping and battery offenses are merely "degrees of the same offense as provided by statute", and whether multiple punishments or convictions are permitted as to come with in the exception in section 775.021(4)(b)2 to the legislative intent to convict and sentence for each criminal offense committed in the same criminal episode, (2) whether a conviction for battery, a *misdemeanor*, can act as predicate crime to support the primary charge of kidnapping as alleged in the information document, as to come with-in the legislature's intent of § 787.01, (3) whether defense counsel's erroneous legal advice rendered petitioner's plea of guilty involuntary and the sentence imposed as a result thereof, illegal as to come with-in the exceptions under Robinson, and whether by counsel's failure to file a timely notice of appeal, after specifically being instructed to do so, further vitiated petitioner's appellate rights entitling him to relief, and (4) whether based upon all of the above, petitioner's guilty plea should be treated as a nullity and the conviction based on such a plea should be vacated because it is fundamentally erroneous and constitutionally invalid.

Battery is a category 2 lesser included offense of kidnapping. *See* Standard Jury Instructions-Criminal-Amendment, (97-2) 23 Fla.L.Weekly (S)407 Supreme Court of Florida Case No: 91-815 July 16, 1998); *See also* Smith v. State, 687 So.2d 308 (Fla. 1st DCA 1997)(Battery is a misdemeanor and could not be predicate crime for attempted kidnapping, so that it was error to instruct that the defendant could be convicted of attempted kidnapping if defendant acted with intent to commit battery).

The petitioner entered his plea of guilty based upon the erroneous legal advice of his court

appointed attorney in that: 1) the battery conviction was a category two lesser included offense of kidnapping, 2) the statutory elements of battery were subsumed by the greater offense of kidnapping, and 3) battery cannot act as predicate crime to the primary charge of kidnapping. Therefore, convictions for both are improper. *See* J.M. v. State, 23 Fla.L.Weekly D835 (5th DCA Case No: 97-284 *Opinion filed March 27, 1998) citing to* Sirmons v. State, 634 So. 2d 153 (Fla. 1994). Here "the same force that was used to commit the battery was the same force used to commit the kidnapping. Petitioner's claim that he has been legally misadvised by his court appointed attorney, that as a result his plea was not intelligent or voluntarily made stands unrefuted because he relied on the affirmative advice of his court appointed attorney in making a decision to enter his plea constituting substantial prejudice. *See* Koneig v. Sate, 597 So.2d 256 (Fla. 1992)(Court accepting guilty plea must carefully inquire into defendant's understanding of the plea so that the record contains affirmative showing that the plea was intelligent and voluntary) *Id. at* 258. This claim was previously presented to, and dinied by, the trial court via petitioner's 3.850 motion for post conviction relief, and latter affirmed by the Third district court after it implicitly allowed petitioner to resubmit his 3.850 motion without prejudice, and without implicitly specifying time within which resubmitted motion was to be filed. Considereing the procedural hurdles petitioner has had to endure in order to present his due process violations due to counsel's failure to timely file a notice of appeal further adds to the prejudice sustained by him.

Only a voluntary and intelligent guilty plea is constitutionally valid. *See* Brady v. United State, 397 U.S. 742, 748; Koenig; supra. A plea is not intelligent unless defendant first receives real notice of the nature of the charge against him. Smith v. O'Grady, 312 U.S. 334; Before accepting a plea of guilty on no contest, it is the trial court's responsibility to determine "that the circumstances

surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness. Fla.R.crim.P., 3.170(k). We have recently noted that "[s]uch a procedure as a matter of federal constitutional mandate" Grathan v. State, 665 So.2d 348 (Fla. 1st DCA 1995) *Id. at* 351 *(Citations omitted);* Harris v. State, 660 So.2d 409 (Fla. 4th DCA 1995)(Plea may be withdrawn for good cause if defendant proves that the plea was entered without proper understanding of its nature and consequence). Petitioner's plea would be contrary to the Third district court's view, constitutionally invalid if he proved that his court appointed attorney misinformed him as to the elements of a § 787.01 offense. *Compare* Brady v. United States; supra,

Defendant's acquiescence to erroneous legal advice doest not bar his claim. There is nothing new about the principle that a plea must be knowing and intelligent, and because § 787.01(2),(3) by its terms applies *only* to felonies, it is inapplicable to situations where this Court decides the meaning of a criminal statute enacted by the legislature. Sirmons v. State, So. *2d Id.* at 155; *See* State v. Duggan, 685 So.2d 1210 (Fla. 1996)(If language of statute is clear and unambiguous, court must derive legislative intent from words used without involving rules of construction or speculating as to what legislature intended); Badaraco v. Sun Coast Towers V Associates, 676 So.2d 502 (Fla. 3d DCA 1996)(In matters of statutory construction, legislative intent is the polestar by which court must be guided).

Nonetheless, there are significant fundamental hurdles to consideration of the merits of petitioner's claim, which can be attacked on collateral review only if it was first challenged on direct review. Since petitioner did not appeal his plea due to counsel's failure to file a timely notice of appeal, and his motion for post conviction relief was denied by district court as untimely. Therefore,

he should be given the opportunity in the interest of justice[4] to present the legal basis for his claim.

The allegations filed by the state in this case specifically charged in the information document that petitioner without lawful authority did then and there forcibly, secretly, or by threat, confine, abduct, or imprison another person to wit: Virginia Gonzalez, his ex-wife, against the person's will, with the intent to commit or facilitate the commission of *"any"* felony, to wit: aggravated battery and/or aggravated assault, and/or retaliation against a witness, and/or to inflict bodily harm upon or to terrorize the victim or any other person, and during the commission of this act or acts, the defendant carried, displayed, used, threatened, or attempted to use a weapon to wit: a firearm and/or a rifle in violation of §§ 787.01 and 775.087 Fla. Stat. (1992). The jury 's findings on *specific* verdict forms was guilty as to kidnapping *without* a weapon and battery, a lesser included offense of both, aggravated battery and kidnapping. This claim has *fundamental* and *Constitutional* implications and is not waived by his guilty plea, and his conviction should be vacated.

It has long been recognized that a plea of guilty does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process" Smith v. O'Grady; supra. Petitioner contends that on remand, and prior to entering his guilty plea, he was not provided with a copy of the information document which charged him with aggravated battery and/or aggravated assault, and/or retaliating against a witness, and/or inflict bodily harm upon or to terrorize the victim or any

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[4] *See* D.D.W. v. State, 686 So.2d 747 (Fla. 2nd DCA 1997(Whether a defendant should be permitted to withdraw a plea is a question addressed to the discretion of the trial court; however, the court's discretion is constrained by the interests of justice. *Id at* 748. (Citations omitted).

other person. But petitioner was acquitted of all of these felony charges on a previous trial. This circumstance standing alone, give rise to the presumption that the defendant was not properly informed of the legal nature of the charge against him. Henderson v. Morgan, 426 U.S. 637, 647 (1976) *Id. at* 650 (White; J., concurring); Goodwin v. State, 593 So.2d 211 (Fla.1992)(issue is moot when controversy has been so fully resolved that judicial determination can have no actual effect). Such a plea may be withdrawn upon a showing of good cause. Harris; supra.

Formally, the state could not possibly use the same information to re-charge the petitioner, *see* Gaston v. State, 682 So.2d 581 (Fla. 2nd DCA 1996) on remand because this would have had significant hurdles to consideration under double jeopardy issues, since petitioner had already been tried and acquitted of these charges on a previous trial. An attempt to recharge petitioner under the same information as originally filed after he was acquitted of the underlying felony offenses to support a legal conviction under the kidnapping statute[5] would be a violation of due process. Smith v. O'grady; supra.

In not providing petitioner with an amended version of the charging document specifically delineating the charges for which he was entering his plea further adds to the prejudice sustained by petitioner in acquiescing to the erroneous legal advice by his court appointed advocate.[6]

In other words, petitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged, and therefore, his plea of guilty constitutionally invalid. A plea of guilty entered by one not fully

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[5] *See* § 787.01

[6] *See* Duggan; Badaraco v. Sun Coast Towers V Associates; supra.

aware of the direct legal consequences of the plea is involuntary in a constitutional sense by misrepresentation.

Brady's plea was intelligent because, although later judicial decisions included that at the time of his plea he "did not correctly asses every relevant factor entering into his decision" McMann, *Id. at* 757, he was advised by competent counsel, was in control of his mental facilities and "was made aware of the nature of the charge against him.

At bar, by contrast, petitioner contends that on remand he was expecting a more favorable result in this case, and because he was misinformed as to the true nature of the charge against him. The claim specifically made here is that petitioner's plea of guilty is not knowing and intelligent. As enumerated in Smith v. O'Grady; supra, the legal foundation upon which petitioner based his decision to enter his guilty plea is legally erroneous and it is inapplicable to this case which this court must decide whether a criminal statute[7] enacted by the legislature intended to include a *misdemeanor,* battery conviction to act as predicate crime to support the kidnapping conviction, and whether based upon this material fact, constituted prejudice or manifest injustice thereby, casting reasonable doubt on the voluntariness of his plea before it can legally determine whether petitioner is indeed, entitled to appeal his plea of guilty. This distinction between a misdemeanor and a felony is an important one and specifically clarifies the intent of the legislature.[8] The erroneous legal advice received by petitioner from his court appointed attorney necessarily carry a significant risk that he stands convicted of a crime that may not have occurred. *See* Tubb v State, 174 So.325, 128 Fla. 190

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[7] § 787.01

[8] *See* note 7 supra.

(Fla. 1937); Noel v. State, 705 So.2d 648 (Fla. 4th DCA 1998)(defendant who was acquitted of underlying felony of escape could not be convicted of third-degree felony); Hornsby v. State, 680 So. 2d 598 (Fla. 2d DCA 1996); Biglow v. State, 683 So.2d 176 (Fla. 3rd DCA 1996); Robinson v. State, 667 So.2d 384, 386 (Fla.1st DCA 1995). For under our state system it is the legislature, and not the courts, which can make conduct criminal. U.S. v. Lanier, 520 U.S. ---; ----;, n. 6 (1997) (Slip. op; at 8, n.6 U.S. v. Hudson 7 Cranls. 32 (1812) Accordingly, it will be inconsistent with the doctrinal underpinnings of appellate review to preclude petitioner from relying Brady; Smith v. O'grady; and Koenig; supra. in support of his claim that his guilty plea was constitutionally invalid.

Though petitioner's claim is not barred because it has fundamental and constitutional implications, there are nonetheless significant hurdles to its consideration on the merits. Although current case law have strictly limited the circumstances under which a guilty plea may be attacked on appeal or on collateral review. Robinson; supra. "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been represented by competent counsel, may not be collaterally attacked". Marby v. Johson 467 U.S. 504, 508 (1984) *(Footnote omitted),* and even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. *See* Robinson v. State, 659 So.2d 472 (Fla. 2d DCA 1995). In this case petitioner not only recieved erroneous legal advice from his court appointed attorney, but also was precluded from attacking the voluntariness and intelligence of his guilty plea on direct review due to counsel's failure to file motion to withdraw plea, not only that he could appeal, but by also failing to file a timely notice of appeal after specifically being instructed to do so. In so doing, defense counsel restricted and violated petitioner's appellate rights and his present claims are properly before this Honorable Court for review, based on the record created at

the plea colloquy.

The argument that it was error for defense counsel, the court and the prosecutor, all endeavoring under erroneous legal precedents as to the statutory elements of section 787.01 is most certainly contrary to the legislature's intent. This claim should be reviewed by this Honorable Court in light of its fundamental and constitutional implications established in the plea colloquy. "has probably resulted in the conviction for a crime that did not occurred. Tubb; Smith; Noel; Horsby; Biglow; Robinson; supra; and the sentence imposed therefor, illegal.

The trial court failed to address this issue because petitioner failed to raise it at the plea colloquy[9], base on his defense advocate's advice. *See* Koenig; However, this inadvertence should not be considered a waiver of this claim. Accordingly, it would be appropriate to remand this case to permit petitioner to attempt to make a showing of actual prejudice or manifest injustice on this claim.

The present case is here before this Court because of the limited exceptions in Robinson; and it is the foundation upon which the Third district court denied petitioner's motion for belated appeal. In Herderson v. Morgan, 426 U.S. 637, 644 (1976), the United States Supreme Court held that where neither the indictment, defense counsel, nor the trial court explained to the defendant that intent to kill was an element of second-degree murder, his plea to that offense was involuntary" A plea, the Court explained, can "not be voluntary *in the sense* that it constitue[s] an intelligent admission that he committed the offense unless the defendant recieve[s] ' real notice of the true nature of the charge against him, the first and most universally recognized requirement of due

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[9] *See* (Appendix "F" Plea Colloquy Pg. #5)

process' " *Id. at* 645, *quoting* Smith v. O'Grady, 312 U.S. 329, 334 (1991).

It is well established that "when this Honorable Court construes a statute; it is explaining its understanding of what the statute has meant continuously since the date when it became law" See State v. Iacovone, 660 So.2d 1371 (Fla. 1995), thus, every time this court resolves a circuit split regarding the elements of a crime defined by statute, most if not all defendants who pleaded guilty in those circuits on the losing end of the split will have confessed *"involuntary"* having been adviced by the court, or by their counsel, that the law was what (as it turns out) it was not- or even (since this would suffice for application of Iacovone) merely *not* having been advised that the law was (as it turns out it was. Indeed the later basis for *"involuntariness"* (mere lack of "real notice of the charge against him", might be available even to those defendants pleading guilty in the circuits on the winning side of the split.

It is this Honorable Court's responsibility to say what the intent of a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A Judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Rivers v. Roadway Express Inc, 511 U.S. 298 313, 313 (1994) Under standard rules of construction, " it is our primary duty to give effect to the legislative intent; and if a literal interpretation leads to an unreasonable result, plainly at variance with the purpose of the legislation as a whole, we must examine the matter further". Statutes, as a rule, "will not be interpreted so as to yield an absurd result" Iacovone v. State, 660 So.2d 1371 *Id. at* 1373. *(Citations omitted)* When interpreting statute, courts must determine legislative intent from plain meaning of statute. Duggan v. State, 685 So.2d 1210 *Id. at* 1212.

Thus, on remand in 1994 when petitioner was advised by the trial judge, by his own lawyer,

and by the prosecutor that battery, a *misdemeanor*, could act as predicate offense to support the primary charge of kidnapping under § 787.01, he received critically incorrect legal advice. Contrary to Williams v. State, 23 Fla.L.Weekly D1909 (Fla. 2d DCA *Case No: 98-02480 Opinion filed August 14, 1998),* counsels failure to timely file notice of appeal precluded petitioner from appealling those errors which would invalidate the plea itself. The fact that all of his advisers acted in good faith reliance on existing precedent does not mitigate the impact of that erroneous advice. Its consequences for the petitioner herein were just as severe, and just as unfair, as if the court and counsel had knowingly conspired to deceive him in order to induce him to plead guilty to a crime he did not commit. It is interesting to note at this juncture, that the petitioner does not condone domestic violence. Indeed, he is of the firm belief that those who physically abuse their spouses should be punished to the full extent of the law. Neither is he advocating that the guilty should go free. Indeed, the guilty must be punish under the law. But he or she should be punish for the crime he or she committed, and not for a crime that is contrary to state, and constitutional law.

Our case law make it perfectly clear that a guilty plea based on such misinformation is constitutionally invalid. Herderson v. Morgan, 426 U.S. 637, 644-645 (1976); Smith v. O'Grady; Koenig: supra. Petitioner's conviction and punishment on the kidnapping charge "is for an act that does not meet the legislature's intent". Smith; See Cf. State v. Connellly, 23 Fla.L.weekly D1610 (Fla. 5th DCA Case No: 97-668 opinion filed April 2, 1998). *(Question Certified)* There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and present[s] exceptional circumstances' that justify further review by this Honorable Court. *See* Davis v. United .States. 417 U.S. 333, 346-347 (1974) .

The state charges petitioner with "procedural bar" because he did not challenge his guilty

plea on the limited exceptions under Robinson; supra. This Honorable Court should not accept the district court's argument in light of appellant's counsel's failure to timely file a notice of appeal after being specifically instructed to do so. The district court, in its agreement with the state's argument therefore, place the burden once again on petitioner to demonstrate either "prejudice" or "manifest injustice" when in fact it was his advocate's ethical responsibility to safeguard his constitutional rights. The district court cites various authorities that support actually the contrary proposition: That a constitutionally invalid guilty plea may be set aside on collateral attack whether or not it was challenged on appeal.

The Judicial safeguards attendant to a guilty plea are designed to ensure that it is made voluntarily and intelligently. Williams v. State, 316 So.2d 267 (Fla. 1973) *citing to* Boykin v. Alabama; Because it waives a defendant's constitutional right to trial, and consents to judgment, it 'not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady; Koenig; supra; It has been well established that it reversible error for a trial judge to accept a guilty plea without first following the procedures dictated by Rule 3.170; 3.172. The question this opinion makes clear is that an ordinary rule violation must be challenged appeal. The only criterion for collateral review is that the error must be Jurisdictional or Constitutional. Decisions of the district courts that do not involve guilty pleas are not controlling. This Honorable Court has never held that the constitutionality of a guilty plea cannot be attacked collaterally unless it is first challenged on direct review. Moreover, as the facts of this case demonstrate, such a holding would be unwise and would defeat the very purpose of collateral review. A layman who justifiably relied on incorrect advice from the trial court and counsel in deciding to plead guilty to a crime that he did not commit will ordinarily continue to

assume that such advice was accurate during the time for taking an appeal. The injustice of his conviction is not mitigated by the passage of time. His plea should be treated as a nullity and the conviction based on such a plea should be vacated.

CONCLUSION

The law should not sanction a criminal defendant for his failure to make a proper objection in order to preserve an issue for review when he is being represented by competent counsel whose ethical duty it is to do so. Under these circumstances, the purpose of all criminal justice rules, practices and procedures is to secure the just determination of every case in accordance with the substantive law. While imperfect, our criminal justice system must provide a remedy to one in confinement under the misrepresentations and inefficiency of his attorney whether flowing from a jury trial or a plea of guilty. There is no better objective than to seek to do justice to an imprisoned person. Further, as practical matter, if relief from this obviously deficient performance is not given in this case, the defendant will, and should be able to obtain it from this Honorable Court. Whether he told his court appointed attorney to appeal from a guilty plea or not. Courts should be fair and practical and give relief as it is recognized as due.

In this case the substantive law is clear. This Honorable Court has Jurisdiction to resolve the conflict that currently exists, and in the interest of justice, to quash the decision of the district court below.

"We are continuously striving to achieve perfect justice, though being aware that this is a unatained goal. Perhaps our first Chief Justice John Marshall said it best when he said: We have indeed the best system of justice the world has ever known, the best the genius of man can create. But the framers of our constitution could not provide a remedy for its only flaw. That its administration is left to the touch of a human hand."

This case appears to be an example of what Justice Marshall meant. The frailties of human nature are as the viruses that cause the common cold. There are just too many and varied to be able

to provide an affective vaccine or cure. Thus, we find, at times, those who bastardize the laws and the constitution to respond to statements of public policy in order to achieve a desired result no matter what the result may be. This is not justice!

The foundation of the republic will never crack because government uphold the law and protect and defend the constitution as they are sworn to do. But that foundation will surely crumble if government uses its inherent power to violate the precept of its solemn oath for the constitution doest not exist for its own sake, but rather for the sake of those who it seeks to protect from abuse by government. The petitioner should not escape punishment, indeed he should be. However, he is entitled to a fair trial as every accused. This was not the final result of the Judicial Process in this case.

Because the record in this case already unambiguously demonstrates that the petitioner's plea of guilty to the kidnapping and battery charges under §§787.01; and 784.03 is invalid as a matter of State and constitutional law. This Honorable Court should resolve the current conflict that exists between the district courts by quashing the decision of the third district court in this case, and remand with directions to vacate his § 787.01 conviction and to allow him to plead to the lesser included charge of false imprisonment.

Respectfully submitted,

Jorge E. Gonzalez, Petitioner, **Pro se**
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S INITIAL BRIEF ON THE MERITS INVOKING DISCRETIONARY REVIEW TO RESOLVE DIRECT CONFLICT** has been furnished to counsel for respondent, Mr. Douglas Gurnic, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs at The 110 Tower, S.E. 6th Street, Fort Lauderdale, Florida, and to the Honorable Katherine Fernandez Rundle, State Attorney for the Eleventh Judicial Circuit, at E.R. Graham Building, 1350 N.W. 12th Avenue, Miami, Florida 33136-2111. Sent by U.S. Mail on this 27th day of August, 1998.

Jorge E. Gonzalez, petitioner, **Pro se**