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IN THE SUPREME COURT OF FLORIDA

LAZARO GONZALEZ,

Petitioner,

VS. CASE NO. 93,648

THE STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

On Review from the District Court of Appeal,
Third District Court, State of Florida
DCA Case No. 96-24186

Lazaro Gonzalez

In Proper Person
D.C. # 196774
Glades Correctional Institution
500 Orange Avenue Circle
Belle Glade, Fl. 33430-5221

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PREFACE

In this merits brief, the Petitioner, Gonzalez, will be referred to as "Gonzalez." The Respondent will be referred to as the "State."

Attached to this brief is a copy of the slip opinion of the Third District Court of Appeal. Citations to the slip opinion will be referred to by the abbreviation "Slip Op." followed by the appropriate page number(s).

CERTIFICATE OF FONT AND TYPE SIZE

Gonzalez has utilized 10 point Brougham typeface in preparing this brief.

QUESTION PRESENTED

WHETHER A DEFENDANT MAY LATER ATTACK AS INVOLUNTARILY ENTERED AN UNFULFILLED SPECIFIC PERFORMANCE PLEA AGREEMENT ON THE GROUND THAT IT WAS INDUCED BY AFFIRMATIVE MISREPRESENTATION BY DEFENSE COUNSEL AND THE TRIAL COURT?

STATEMENT OF THE CASE AND FACTS

1. Gonzalez was charged by information in the Eleventh Judicial Circuit with one count of "trafficking cocaine" in violation of s.813.135(1)(b)1.c., Fla. Stat. (1995), and one count of "possession of cocaine" in violation of s.813.13(6)(a), Fla. Stat. (1995).

2. Gonzalez entered into a substantial assistance agreement wherein he would plead guilty to trafficking in cocaine and "provide substantial assistance to the State by providing information that would lead to a prosecutable offense against another trafficker, and to appear at the sentencing hearing." Slip. Op. at 1-2. In exchange, Gonzalez would receive a guidelines sentence. It was further agreed that if Gonzalez failed to appear for sentencing, he would be sentenced to thirty years with a minimum mandatory term of fifteen-years.

3. When Gonzalez failed to provide substantial assistance or appear for sentencing, Slip. Op. at 2., he was sentenced to thirty years in prison with a fifteen-year minimum mandatory provision, a $250,000.00 fine, and a $12,500.00 surcharge.

4. Gonzalez filed a timely postconviction motion pursuant to Rule 3.850, Fla.R.Crim.P., challenging the original plea as involuntarily entered because of the affirmative misrepresentations by both his attorney and the trial court that he was facing a maximum potential sentence of life imprisonment.

5. The trial court denied Gonzalez' motion and he sought review in the District Court of Appeal, Third District. After briefing, the Third District, in a two-to-one decision, affirmed the trial court stating:

> [Gonzalez] is precluded from collaterally attacking his plea bargain because he failed to abide by the terms to which he agreed. ... An evidentiary hearing would be a waste of judicial resources; in light of [Gonzalez'] failure to abide by his portion of the bargain, his claim of prejudice is without merit.

Slip. Op. at 1-2.

6. FLETCHER, J., entered an extensive written dissenting opinion. Slip. Op. 3-9.

7. This Court granted Gonzalez' petition for review, and this merits brief follows.

SUMMARY OF ARGUMENT

The court below held Gonzalez' "plea bargain" is not subject to collateral attack since he did not abide by its terms. But Gonzalez does not attack the plea bargain. Instead, he attacks the voluntariness of his plea of guilty. Both court and counsel misadvised him of the maximum sentence were he to refuse the State's bargain and exercise his right to jury trial. But for this misadvice, Gonzalez alleges, he would never have accepted the plea bargain.

Not one case cited in the opinion below involved a challenge to the voluntariness of a guilty plea. The idea that plea bargains are governed by general principles of contract law actually undermines the disposition below as "mutual assent" is essential to a valid contract. The notion that one who fails to abide by a plea bargain may never challenge the voluntariness of his guilty plea leads to the absurd proposition that failing to honor a plea bargain estops a defendant from challenging his plea as entered involuntarily--even if extracted using thumbscrews.

Prejudice results where, as here, there is a reasonable basis to conclude the defendant was misled by a judge's misstatement or where, but for counsel's misadvice, there is a reasonable probability the defendant would not have entered the plea. If the court's misadvice as to the maximum term Gonzalez was facing does not alone vitiate the plea, he should at least be accorded an evidentiary hearing at which to show he was denied the effective assistance of counsel in deciding whether to enter a plea of guilty.

ARGUMENT

QUESTION PRESENTED

WHETHER A DEFENDANT MAY LATER ATTACK AS INVOLUNTARILY ENTERED AN UNFULFILLED SPECIFIC PERFORMANCE PLEA AGREEMENT ON THE GROUND THAT IT WAS INDUCED BY AFFIRMATIVE MISREPRESENTATION BY DEFENSE COUNSEL AND THE TRIAL COURT?

The court below held that Gonzalez' "plea bargain" is not open to attack since he did not abide by the terms of the bargain. Slip. Op. at 1. At the outset, Gonzalez wishes to distinguish a "plea bargain" from a "plea of guilty."

Black's Law Dictionary (6th ed.) defines "plea bargaining" as "[t]he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty." Id. at 1152. A "plea of guilty" is a "confession of guilt in open court." Id. Thus, a plea of guilty underlies, or is a component of, a plea bargain.

I. Plea Bargain as Contract

Though the majority opinion cites to cases which stand for the proposition that plea bargains are governed by general contract principles, those cases are distinguishable in that none involves a challenge to the voluntariness of a plea of guilty. Madrigal v. State, 545 So.2d 392 (Fla. 3d DCA 1989)(attacked plea bargain, not voluntariness of guilty plea); State v. Frazier, 697 So.2d 944 (Fla. 3d DCA 1997)(involved State violation of plea bargain, not voluntariness of guilty plea); Novaton v. State, 610 So.2d

726, 728 (Fla. 3d DCA 1992)(courts have "upheld otherwise arguably defective sentences when they have been voluntarily accepted by the defendant as part of a mutually advantageous agreement with the State")(e.s.), affirmed, 634 So.2d 607, 609 Fla. 1994)("Novaton neither requests that the agreement be vacated nor claims that it was invalid because not voluntarily and intelligently entered into."). The majority opinion's focus on the validity of the "plea bargain" overlooks both established principles of contract law and the constitutional requirement that a "plea of guilty" be intelligent and voluntary.

Essential principles of contract law actually undermine the basis for the majority decision. It is essential to the creation of a contract that there be a "mutual assent." Without a meeting of the minds, there can be no enforceable contract. The rule of mutual assent implies that the assent of each party has been freely given. Thus, a contract entered into by one as a result of duress or undue influence, or procured by fraud or mutual mistake, lacks the essential element of real assent and may be avoided by the injured party. 11 Fla.Jur.2d Contracts §§ 21,23 (1997). See Slip. Op. at 8 n.2 (FLETCHER, J., dissenting). 1/

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1. But cf. Peavy v. U.S., 31 F.3d 1341, 1346 (6th Cir. 1994)("Because a guilty plea involves the waiver of fundamental constitutional rights, the analogy to a traditional contract is not complete, 'and application of ordinary contract law principles to a plea agreement is not always appropriate.' [c.o.] Unlike the private contract situation, the validity of a bargained guilty plea depends...upon the voluntariness and intelligence with which the defendant--and not his counsel--enters the bargained plea.")

II. Voluntariness of Guilty Plea

The general principle of assent applies also to the entry of a plea of guilty in a criminal case, where the conditions for a valid plea "presuppose fairness in securing agreement between an accused and a prosecutor .... The plea must, of course, be voluntary and knowing." Santobello v. New York, 404 U.S. 257, 261-262 (1971). Moreover,

> [a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. [Citations omitted]. A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009.

Tolar v. State, 196 So.2d 1, 7 (Fla. 4th DCA 1967)(quoting Machibroda v. United States, 368 U.S. 487, 493 (1962)). See also Brown v. State, 422 So.2d 1056, 1057 (Fla. 4th DCA 1982)("It is blackletter law that a plea of guilty 'must not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance.'").

Thus, in Holt v. State, 653 So.2d 1120 (Fla. 2d DCA 1995), where a defendant was faced with inducements much like those made to Gonzalez by court and counsel, the District Court held that "[t]he misinformation allegedly provided

by trial counsel could have persuaded [the defendant] to enter into the plea agreements." 653 So.2d at 1121.

Likewise, in State v. Leroux, 689 So.2d 235 (Fla. 1996), this Court, citing Thompson v. State, 351 So.2d 701 (Fla. 1977), cert. denied, 435 U.S. 998 (1978), noted that "[m]isrepresentation by counsel as to the length of a sentence ... can be the basis for postconviction relief in the form of leave to withdraw a guilty plea." 689 So.2d at 236. The Leroux Court "recognize[d] the proposition that a defendant invariably relies upon the expert advice of counsel concerning sentencing in agreeing to plead guilty." 689 So.2d at 235 (emphasis added). Accord: Cobb v. State, 582 So.2d 81 (Fla. 1st DCA 1991)(defendant alleging reliance on counsel's advice that she would receive death penalty if she did not enter plea was entitled to evidentiary hearing); Johnson v. State, 523 So.2d 755 (Fla. 2d DCA 1988)("Before a plea of guilty may be considered entirely voluntary, the accused must be made aware of the consequences of accepting or foregoing the plea bargain offered."); Ward v. State, 433 So.2d 1221 (Fla. 3d DCA 1983)(defendant could withdraw plea where counsel told him he was facing death penalty should he go to trial though death was not an available sentence); Stott v. State, 701 So.2d 917 (Fla. 4th DCA 1997)(allegation that defense counsel told defendant he would receive minimum sentence of 15 years if he did not accept plea bargain required evidentiary hearing); Montgomery

v. State, 615 So.2d 226 (Fla. 5th DCA 1993)(when no evidentiary hearing is held, allegations of attorney misadvice as to length of sentence must be accepted as true except to extent conclusively refuted by record).

The lower court's contention that a defendant's violation of a plea bargain forecloses any challenge to the voluntariness of a guilty plea leads to absurd results. By necessary implication, such reasoning leads to the specious conclusion that a defendant who later violates a plea agreement would be estopped from challenging his plea of guilty as entered involuntarily--even if the State had extracted it by holding a gun to his head.

III. Required Advice

Due process requires a court accepting a plea of guilty to carefully inquire into the defendant's understanding of the plea so that the record contains an affirmative showing that the plea was intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238 (1969). Because a guilty plea has serious consequences for the accused, the taking of that plea "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." Boykin, 395 U.S. at 243-44.

Florida Rule of Criminal Procedure 3.172 provides basic procedures designed to insure that a defendant's rights are fully protected when he enters a plea to a criminal charge. The rule specifically provides that "the trial judge should,

when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands ... the maximum possible penalty provided by law." Rule 3.172(c)(1).

IV. Maximum Misadvice

The transcript of the plea hearing does not show Gonzalez was properly advised of the maximum penalty for the first-degree felony of trafficking in cocaine under s.893.135(1)(b)1.c., Fla. Stat. Instead of advising Gonzalez of the maximum 30-year sentence applicable to such an offense, s.775.082(3)(b), Fla. Stat., the trial court in effect stated Gonzalez faced prison for the rest of his life.

The trial court's on-the-record misadvice as to the maximum potential penalty provided by law, unobjected to by counsel, lends support to Gonzalez' allegation of misadvice as to the maximum potential sentence he was facing if he exercised his right to jury trial. [2] Thus, regardless of whether he "reneged on his portion of the bargained-for agreement," Slip. Op. at 2, if the entry of Gonzalez' plea of guilty was involuntary due to the less-than-life-sentence inducement, he is entitled to withdraw it.

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2. "The statements of a judge, the one person in the courtroom given special deference by the parties, may have a special luster of authoritativeness they should otherwise lack, even where the judge couches them in legalese and disclaimers." Leto v. State, 658 So.2d 1108, 1110 (Fla. 4th DCA 1995). See also Mantle v. State, 592 So.2d 1190, 1193 (Fla. 5th DCA 1992)("[I]f the record reveals a reasonable basis to conclude that a defendant was misled by a statement at the plea hearing made by the judge or by one or both of the attorneys (defense counsel or prosecutor) he should be permitted to withdraw his plea and go to trial.").

V. Prejudice

The District Court's conclusion that "defendant's claim of prejudice is without merit," Slip. Op. at 2, is not grounded in any evidence. It is bottomed on the erroneous assumption that Gonzalez' motion attacked the plea bargain rather than the voluntariness of his plea of guilty, and alone supported the lower court's conclusion that "[a]n evidentiary hearing would be a waste of judicial resources." Id.

The prejudice which must be shown where defense counsel has provided affirmative misadvice concerning the consequences of a guilty plea has nothing to do with the plea bargain. Instead, the requisite prejudice is shown where there is a reasonable probability that but for counsel's misadvice, the defendant would not have entered a plea of guilty. Hill v. Lockhart, 474 U.S. 52 (1985). 3/

Florida Rule of Appellate Procedure 9.140(i) requires that "[u]nless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing."

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3. The prejudice necessary to show that the trial court's misadvice mandates withdrawal of a plea was discussed in Simmons v. State, 489 So.2d 43, 44 (Fla. 4th DCA 1986):

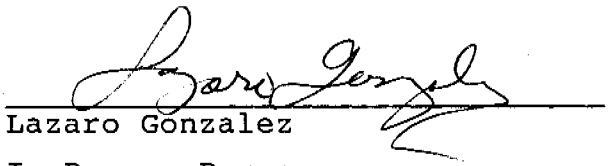
> We do not think it a sufficient showing of lack of prejudice that the defendant cannot prove in retrospect that, had he been properly advised, he would not have entered the plea. Such a burden, involving speculation after the fact by the defendant, the State, and the court, is heavier than rule 3.172 or the case law requires. The question is whether the defendant has been prejudiced in fact because the required information was not available to him.

Thus, where a defendant alleges his plea of guilty was entered due to erroneous advice by court or counsel concerning the "maximum possible penalty provided by law," Rule 3.172(c)(1), an evidentiary hearing is required and--far from a "waste of judicial resources"--may reveal that the defendant was "prejudiced by an honest misunderstanding which contaminated the voluntariness of the plea[]." Thompson v. State, 354 So.2d at 701. See, e.g., Bennett v. State, 24 Fla. L. Weekly D61 (Fla. 5th DCA Op. filed Dec. 18, 1998)("Bennett asserts that his counsel misadvised him as to the maximum sentence he faced when entering his plea, and that absent counsel's misadvise, he would not have entered his plea. The record and testimony adduced at the evidentiary hearing ... support Bennett's assertion. Accordingly we reverse for Bennett to be allowed to withdraw his plea and proceed to trial.").

CONCLUSION

In sum, Gonzalez has alleged that court and counsel's misadvice as to the maximum possible penalty should he refuse the State's specific performance plea bargain rendered his plea of guilty unintelligent and, therefore, involuntary. If the trial court's misadvice does not alone vitiate the plea, Gonzalez should at least be accorded an evidentiary hearing at which to show he was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16(a) of the Florida Constitution.

Respectfully submitted this 20 day of January, 1999.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was furnished to: Erin E. Dardis, Assistant Attorney General at The Office of the Attorney General, Department of Legal Affairs, 444 Brickel Avenue, Suite 950, Miami, Fl. 33131 by deposit in the U.S. Mail this 20 day of January, 1999.

Lazaro Gonzalez

In Proper Person
D.C. # 196774

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1998

LAZARO GONZALEZ,	**	
Appellant,	**	CASE NO. 98-128
vs.	**	LOWER TRIBUNAL NO. 96-24186
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed July 15, 1998.

An Appeal from the Circuit Court for Dade County, Victoria Platzer, Judge.

Lazaro Gonzalez, in proper person.

Robert A. Butterworth, Attorney General, and Erin E. Dardis, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., JORGENSON, and FLETCHER, JJ.

PER CURIAM.

Defendant appeals from an order denying his motion for postconviction relief. We affirm.

Defendant is precluded from collaterally attacking his plea bargain because he himself failed to abide by the terms to which he agreed. Defendant agreed to provide substantial assistance to the

State by providing information that would lead to a prosecutable offense against another trafficker, and to appear at the sentencing hearing. He did neither. Having reneged on his portion of the bargained-for agreement, he is estopped from seeking to void the plea. See Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), aff'd, 634 So. 2d 607 (Fla. 1994); State v. Frazier, 697 So. 2d 944 (Fla. 3d DCA 1997) (holding that rules of contract law apply to plea agreements); Madrigal v. State, 545 So. 2d 392, 395 n.2 (Fla. 3d DCA 1989)(bargained-for pleas are similar to private contracts).

An evidentiary hearing would be a waste of judicial resources; in light of defendant's failure to abide by his portion of the bargain, defendant's claim of prejudice is without merit.

Affirmed.

SCHWARTZ, C.J., and JORGENSON, J., concur.

FLETCHER, JUDGE (dissenting).

Lazaro Gonzalez appeals the denial, without evidentiary hearing, of his motion for post-conviction relief filed under Florida Rule of Criminal Procedure 3.850. I would reverse and remand with directions to the trial court to hold an evidentiary hearing on his motion.

Gonzalez was charged with trafficking in 400 grams or more of cocaine, § 893.135(1)(b), Fla. Stat. (1995), and possession of cocaine. He entered into a written "substantial assistance" plea agreement [agreement] with the state under which the state agreed to waive the fifteen-year mandatory minimum sentence and the mandatory fine on the trafficking charge and to imposition of a Level 9 guidelines sentence (forty-nine to eighty-three months), provided Gonzalez gave information leading to a prosecutable case against another narcotics trafficker. As a part of the agreement it was provided that should Gonzalez fail to appear at the sentencing hearing to be set by the trial judge, he would be sentenced to thirty years in prison with imposition of the statutory fifteen-year mandatory minimum sentence and the mandatory fine. During the plea colloquy, the trial judge misinformed Gonzalez that the maximum sentence he could receive on the charges against him should he go to trial was "life imprisonment with a minimum mandatory of 15 years and a fine of two hundred fifty thousand dollars." In his 3.850 motion, Gonzalez stated under oath

that his trial counsel had previously told him that he could receive a life sentence should he go to trial and did not object when the trial court made the quoted statement about the statutory maximum sentence. He further alleged that he decided to enter the plea agreement based on the information given him by both the court and his trial counsel.

Gonzalez did not provide substantial assistance to the state and did not appear at the subsequent sentencing hearing. In accordance with the alternative provision of the agreement, he was sentenced to thirty years in prison with a fifteen-year mandatory minimum and the $250,000 mandatory fine.

In his motion for post-conviction relief, Gonzalez alleged, and the state did not dispute, that the correct statutory maximum sentence he could have received for the crime to which he pled, had he gone to trial, was, in fact, the sentence he ultimately received under the plea agreement: thirty years with a mandatory minimum fifteen years, not life in prison as the trial court and trial counsel told him it was. Gonzalez further alleged that he would not have pled guilty and entered into the agreement had he known of the lower maximum sentence he actually faced had he gone to trial. The trial court denied the motion without holding an evidentiary hearing thereon.

In the order on appeal, the trial court ruled that the motion would be denied because the mis-advice given regarding the statutory maximum sentence "did not prejudice" Gonzalez, and thus did not support his claim of ineffective assistance of counsel,

because "the record . . . is clear that the Defendant entered into the plea to avoid the fifteen (15) year minimum-mandatory sentence which would have been imposed had he been found guilty at trial." In support of this ruling, the trial court attached a copy of the transcript of the plea colloquy and the agreement to its order. Additionally, the trial court cited State v. Fox, 659 So. 2d 1324 (Fla. 3d DCA 1995), rev. denied, 668 So. 2d 602 (Fla. 1996) for its lack of prejudice ruling.

The transcript of the plea colloquy and the terms of the agreement do not clearly refute the defendant's allegations that his plea was not knowing and voluntary. Further the transcript does not clearly refute Gonzalez' allegations that he would not have entered into the agreement had he known that the thirty (30) years to which he agreed to be sentenced should he not attend the sentencing hearing, rather than life in prison as he was advised, was the applicable statutory maximum sentence. The state's waiver of the mandatory minimum sentence and fine was only one benefit Gonzalez considered in agreeing to the plea. The avoidance of a potential life sentence should he be unable or unwilling to provide the substantial assistance required for the mandatory minimum waiver appears to be just as important a consideration in the decision to plead guilty. The Fox decision cited by the trial court for its finding of lack of prejudice is factually distinguishable and not controlling in this case. In Fox, the trial court did not affirmatively misadvise the defendant of the maximum sentence and then ultimately sentence him to the actual

statutory maximum as a result of the plea bargain, as was done here. Instead, in violation of Florida Rule of Criminal Procedure 3.172,[1] the trial judge in Fox did not even discuss the statutory maximum sentence with the defendant (i.e., non-advice), and the sentence which the defendant ultimately received was considerably below the statutory maximum. Under those circumstances, this court found no prejudice caused by the non-advice as to the statutory maximum and thus no reversible error. See Fox, 659 So. 2d at 1327; Fla.R.Crim.P. 3.172(i); see also Baker v. State, 344 So. 2d 597 (Fla. 1st DCA 1977)(same).

In Gonzalez' case, the trial judge did not simply fail to mention the maximum sentence during the plea colloquy -- she affirmatively misadvised the defendant as to what the maximum sentence was. This error was apparently compounded by Gonzalez' trial counsel, who allegedly also told him he was facing a possible

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[1] The relevant portion of the rule reads as follows:

> "(c) **Determination of Voluntariness.** Except when a defendant is not present for a plea, . . . the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, and the maximum possible penalty provided by law;
>
> . . . .
>
> (i) **Prejudice.** Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice."
>
> Fla.R.Crim.P. 3.172(c)(1), (i) (emphasis added).

life sentence should he go to trial on the charges. When Gonzalez agreed to plead guilty, he reasonably thought, given the affirmative information provided by the court and counsel, that the thirty years he could ultimately receive under the agreement, even if he totally failed to provide substantial assistance, was less than the statutory maximum he faced should he go to trial. When he was sentenced to thirty years, he was, in fact, sentenced to the maximum sentence, not a lesser sentence as he thought. Unlike the defendants in Fox and Baker, who ultimately received a sentence below the maximum for the charges to which they pled, the "bargain" Gonzalez thought he was receiving turned out to be no bargain at all. Gonzalez received the maximum allowable sentence even though he pled guilty thinking he could avoid receiving the statutory maximum. I believe that this court cannot conclude under these circumstances that Gonzalez' plea was knowing and voluntary or that no prejudice is shown by the mis-advice given him by the trial court and his attorney. See, e.g., Powell v. State, 670 So. 2d 1173 (Fla. 3d DCA 1996)(defendant entitled to evidentiary hearing on motion for post-conviction relief in light of affirmative mis-advice as to nature of guideline sentence); Johnson v. State, 523 So. 2d 755, 756 (Fla. 2d DCA 1988)(summary denial of 3.850 motion reversed where defendant's allegations that he pled to avoid a longer sentence, was misadvised on guidelines ranges, and, therefore, entered his plea without full understanding of his options were not conclusively refuted); Ward v. State, 433 So. 2d 1221, 1223-24 (Fla. 3d DCA 1983)(defendant could withdraw his plea

where defense counsel told him he was facing death penalty should he go to trial, but death was not an available sentence to the charge).[2]

The allegations contained in Gonzalez' sworn motion for post-conviction relief make a prima facie showing that the plea was not knowing and voluntary since it was entered in reliance on

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[2] The majority opinion misses the point. Citing factually distinguishable cases for the broad proposition that plea bargains are governed by general contract principles, the majority concludes that Gonzalez should not receive an evidentiary hearing on his 3.850 motion because he "reneged on his portion of the bargained-for agreement . . . ." I agree with the general proposition that contract law governs plea bargains. However, application of general contract principles to the allegations contained in Gonzalez's motion raise an important issue of whether there ever was a validly "bargained-for agreement" in this case.

Established contract principles support, rather than detract from, granting Gonzalez an evidentiary hearing on his motion. The affirmative mis-advice given to Gonzalez by the trial court and, allegedly, by his own counsel regarding the length of imprisonment he faced if he went to trial and was convicted arguably amounts to misrepresentation of a material fact. Under general contract principles, an agreement "negotiated" in reliance on a mistake of material fact or induced by a material misrepresentation is subject to rescission due to the absence of an important element of contract formation: mutual assent (a/k/a "meeting of the minds"). See generally 11 Fla.Jur.2d Contracts §§ 51-56 (1997); 36 Fla.Jur.2d Mistake (1997) and authorities cited therein.

If, as he contends in his motion, Gonzalez was under the mistaken impression (created by mis-advice of trial court and counsel) that, regardless of the nature of his performance or non-performance of the substantial assistance/hearing appearance provisions of the plea, he would still be assured of receiving a sentence well below the statutory maximum if he accepted the plea agreement, but this fact was not true, then his "acceptance" of the agreement in the first place was inadequate to form a binding contract. If the evidence presented at a hearing on remand would show such a mistake of material fact or inducement created by affirmative mis-advice from the trial court and his counsel, under general contract principles -- as well as the criminal law principle of "knowing and voluntary plea" -- Gonzalez would be entitled to withdraw his plea and proceed to trial.

affirmative mis-advice as to the maximum penalty the defendant faced should he go to trial. Because the order on appeal, the transcripts of the plea colloquy, and agreement attached thereto do not conclusively show that the defendant is entitled to no relief, I would reverse and remand this case to the trial court and direct that it conduct an evidentiary hearing on the motion for post-conviction relief.