

**FILED**

SID J. WHITE

AUG 13 1998

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

LAZARO GONZALEZ,

CASE NO. \_\_\_\_\_

Petitioner,

93,648

VS.

THE STATE OF FLORIDA,

Respondent.

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PETITIONER'S JURISDICTIONAL BRIEF

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

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## PREFACE

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

Gonzalez is submitting an appendix herewith which contains the district court's opinion therein. Citations to this appendix will be referred to by the symbol "App." followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

1. On August 20, 1996, Gonzalez was charged by information in the Eleventh Judicial Circuit Court with one count of "trafficking cocaine" in violation of s.893.135(1)(b)1.c., Fla. Stat. (1995), and one count of "possession of cocaine" in violation of s.893.13(6)(a), Fla. Stat. (1995).

2. On August 28, 1996, Gonzalez entered into a "substantial assistance plea" to which it was agreed that Gonzalez would plea guilty to trafficking in cocaine (400 grams or more, but less than 150 kilograms), in exchange for a guideline sentence (App. 1-2). It was further agreed between the parties that if Gonzalez failed to appear for sentencing on the date set by the court, he would be sentenced to thirty years in the State Prison with a minimum mandatory prison sentence of fifteen years.

3. Gonzalez failed to provide "substantial assistance" or to "appear for sentencing on the date set by the court" (App. 2).

4. Gonzalez was sentenced on October 30, 1996, to thirty years in prison with a fifteen year minimum mandatory provision, along with a \$250,000.00 fine, plus \$12,500.00 surcharge.

5. Gonzalez did not prosecute a direct appeal.

6. On September 16, 1998, Gonzalez filed a postconviction motion pursuant to Rule 3.850, Fla.R.Crim.P..

In said motion, Gonzalez challenged the voluntariness of his plea, based upon the fact that he relied upon his attorney and the trial court's "affirmative misrepresentations" that he was facing a potential maximum sentence of life imprisonment, thereby, inducing him to assent to the plea agreement.

7. The trial court denied Gonzalez' motion and he sought appellate review in the District Court of Appeal, Third District.

8. After submission of brief's by Gonzalez and the State, the Third District affirmed the trial court's order in a written per curiam opinion. The Hon. Judge Fletcher entered a written dissent. The basis for the majority affirmance was stated that: "[Gonzalez] is precluded from collaterally attacking his plea". The majority opinion further held that: "[a]n 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" (App.1-2).

9. Notice to invoke the discretionary jurisdiction of this court was timely filed pursuant to the "mailbox rule" on July 30, 1998.

### SUMMARY OF THE ARGUMENT

In this case, the district court of appeal held that a plea agreement is not subject to collateral attack. The district court's expression of law contained in the majority opinion is in direct conflict with the holding in Holt v State, 653 So.2d 1120 (Fla. 2d DCA 1995), and the established principles just recently expounded upon by this Court in State v Leroux, 689 So.2d 235 (Fla. 1996), where the court recognized that postconviction relief in the form of leave to withdraw a plea can be granted on the basis of counsel's misrepresentation about the length of a sentence.

This Court has jurisdiction and should exercise it in order to create stability in law amongst the district court of appeals of Florida.

### 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. 9.030(a)(2)(A)(iv).

## ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN HOLT V STATE, 653 So.2d 1120 (Fla. 2d DCA 1995), AND THE ESTABLISHED PRINCIPLES OF LAW IN THIS COURT'S DECISION IN STATE V LEROUX, 689 So.2d 235 (Fla. 1996).

The District Court of Appeal, Third District, held that Gonzalez' plea agreement is not subject to collateral attack because Gonzalez did not abide by the terms of the agreement (App. 1). In support of this proposition, the majority opinion cites to cases expressing the broad principle that contract law applies to plea agreements (App. 2).

In contrast, the District Court of Appeal, Second District, in Holt v State, 653 So.2d 1120 (Fla. 1995), was faced with an identical claim as Gonzalez', and held that:

..."The misinformation allegedly provided by trial counsel could have persuaded Holt to enter into the plea agreement."

Id. Holt, 653 So.2d at 1121.

Likewise, this Court in State v Leroux, 689 So.2d 235 (Fla. 1996), expounded upon the established principles, or point of law, that a plea agreement may be subject to collateral attack, and expressly held that:

..."Misrepresentation 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."

Id. Leroux, 689 So.2d at 236.



The Court went on to use for example, the Second District's holding in Trenary v State, 453 So.2d 1132 (Fla. 2d DCA 1984), where they relied upon Supreme Court precedence stating:

..."The law is well settled that if a defendant enters a plea in reasonable reliance on his attorney's advice, which in turn was based on the attorney's honest mistake or misunderstanding, the defendant should be allowed to withdraw his plea. Costello v State, 260 So.2d 198 Fla. 1972); Brown v State, 245 So.2d 41 (Fla. 1971). ..."

Id. Leroux, 689 So.2d at 237.

These cases stand for the well known point of law that plea agreements assented to based upon material "misrepresentations" by defense counsel, if proven, are subject to collateral attack in the form of leave to withdraw the plea agreement. The potential maximum sentence a defendant is facing, is always, a material factor to be considered prior to waiving fundamental constitutional rights and entering a plea agreement.

The Third District's ruling that the plea agreement in this case is not subject to collateral attack is in express and direct conflict with the Second District and this Court's rulings on the same expression of law.

Moreover, these type of error's always occur prior to the formal entry of a plea, thus, any ensuing agreement is not knowingly and voluntarily entered.

Finally, Gonzalez submits that the people of the State of Florida rely upon stability in the law, therefore, this

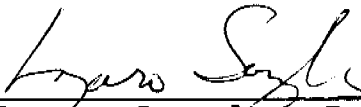
Court should exercise its jurisdiction by accepting this case for review, in order to resolve this conflict on the same point of law.

#### CONCLUSION

WHEREFORE, based upon the foregoing facts, authorities, and argument, Gonzalez urges this Honorable Court to grant review in this case.

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was furnished to: Erin E. Dardis, Assistant Attorney General at 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 6 day of August, 1998.

  
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