IN THE SUPREME COURT OF FLORIDA

Case No. 01-1811
Lower Case No. 3D01-1180

FRITZ MAJOR,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, FRITZ MAJOR, was the DEFENDANT below and the Respondent, THE STATE OF FLORIDA, was the PROSECUTION below. In this brief, the parties will be referred to as they stood in the proceedings below.

The symbol "R" will refer to the record on appeal.

STATEMENT OF THE CASE AND FACTS

The State agrees with the Petitioner's statement of the case and facts.

POINT ON APPEAL

THE LOWER COURT CORRECTLY DECIDED THAT NEITHER A TRIAL COURT NOR COUNSEL IS REQUIRED TO ADVISE A DEFENDANT WHAT PENALTY HE CAN EXPECT TO RECEIVE FOR CRIMES NOT YET COMMITTED

SUMMARY OF ARGUMENT

The State contends that the Third District Court of Appeal was correct when it decided that a trial court or counsel has no duty to advise a defendant at the time of his plea that his sentence for future crimes not yet committed could be enhanced as a result of the pending plea. Long standing principles as well as well-settled case law support the proposition that a trial court is under no duty to advise a defendant of collateral consequences of his plea. The test announced in *Zambuto v. State*, and accepted unanimously by the district courts of appeal should be adopted by this court to reach the conclusion that the consequence in question is collateral because it is not a definite, immediate or an automatic consequence from a plea.

Defendant's argument that enhanced punishment due to recidivism should be treated as a deportation consequence fails for following reasons. Primarily, the consequence of deportation has never been deemed to be a direct consequence of a plea; it is simply a collateral consequence that because of its harsh punishment, is one that requires forewarning. That being said, enhanced punishment for recidivism is likewise a collateral consequence, but is distinctly different from deportation in that it is a less severe and, arguably a reasonable punishment.

Finally, Florida courts as well as Federal courts have consistently held that a trial court is under no duty to warn of

enhanced punishment due to recidivism. Moreover, the principle is supported by sound public policy that the judicial system desires to discourage rather than encourage the evils of recidivism.

ARGUMENT

THE LOWER COURT CORRECTLY DECIDED THAT NEITHER A TRIAL COURT NOR COUNSEL IS REQUIRED TO ADVISE A DEFENDANT WHAT PENALTY HE CAN EXPECT TO RECEIVE FOR CRIMES NOT YET COMMITTED

It is the State's position that the lower court correctly decided that "[n]either the court nor counsel is required to advise a defendant what penalty he can expect to receive for crimes not yet committed." *Major v. State*, 790 So.2d 550, 551-52 (Fla. 3d DCA 2001). In the case below, Defendant's federal sentence was enhanced, on the basis of his 1993 state conviction, from 210 months to 364 months. (R. 57,58,60,65). Defendant entered a plea of no contest to aggravated assault with a handgun on February 3, 1993. (R. 13-16,30). The query before this Court is decidedly simple: "Whether the trial court or counsel have a duty to advise a defendant that his plea in a pending case may have sentence enhancing consequences if the defendant commits a new crime in the future."

To resolve the issue, it is beneficial to look to well settled case law. In *State v. Ginebra*, 511 So.2d 960, 961 (Fla. 1987), this Court unequivocally held "that the trial court judge is under no duty to inform a defendant of the collateral consequences of his guilty plea." The particular consequence examined in *Ginebra* was whether a trial court had the duty to inform a defendant that his

plea could subject him to deportation.[1] Although not enumerating an exhaustive list, the Court noted "that there are numerous other collateral consequences of which a defendant does not have to be knowledgeable before his plea is considered knowing and voluntary." *Id.* at 962. Consequently, the particular issue to be resolved in this regard is whether advising a defendant that committing future crimes could subject him to greater punishment is a collateral consequence or a direct consequence of his plea. The State submits that long standing jurisprudential principles as well as established case law dictate the conclusion that it is a collateral consequence rather than a direct consequence of a guilty or nolo contendere plea.

One of the purposes for the plea colloquy between the court and the defendant is to ensure that the defendant understands the consequences of his plea. *State v. Fox*, 659 So.2d 1324, 1327 (Fla. 3d DCA 1995)(*citing Trenary v. State*, 473 So.2d 820, 822 (Fla. 2d DCA 1985), *review denied*, 486 So.2d 598 (Fla. 1986)). However, a judge is required to inform a defendant only of the direct consequences of his plea and is under no duty to apprise him of any collateral consequences. *Id.* (*citing Ginebra*, at 961-62). A direct

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[1] Fla.R.Civ.P. 3.172(c)(viii) now requires judges presiding at plea colloquies to inform the defendant pleading guilty or nolo contendere that, if they are not a United States citizen, their plea subjects them to deportation subject to the laws and regulations of the Immigration and Naturalization Service; thus superseding *Ginebra* to the extent of any inconsistency. *State v. Abreu*, 613 So.2d 453 (Fla. 1993).

consequence is one that has a 'definite, immediate, and largely automatic effect on the range of the defendant's punishment.' *Id.* (*quoting Zambuto v. State*, 413 So.2d 461, 462 (Fla. 4th DCA 1982) (*citations omitted*)). Put slightly differently, "[t]he distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Zambuto* at 462(citations omitted)(adopting the fourth circuit's definition of a "direct consequence" of a plea, *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir.) *cert. denied*, 414 U.S. 1005, 94 S.Ct. 362, 38 L.Ed.2d 241 (1973)). A defendant need not be advised of all collateral consequences of his plea, or of all "possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty. *Id.*(*citations omitted*).

There can be no question that enhancement for crimes not yet committed cannot reasonably be called a definite, immediate and automatic effect of punishment. The court below logically articulated that:

> future sentence enhancement for a later crime is not a direct consequence of a plea at all, but is instead contingent first on the defendant's voluntary decision to commit another crime; second, on whether the new crime is one capable of having enhanced sentencing; and third, on the prosecutor's discretionary decision whether to seek enhancement. Future sentence enhancement is plainly

> a collateral consequence, not a direct consequence, of the defendant's plea in the earlier case.

Major, at 552.

The rule enunciated in *Zambuto* and followed by the lower court is one that has found wide acceptance from Florida district courts of appeal. *See Daniels v. State*, 716 So.2d 827, 828 (Fla. 4th DCA 1998)(reiterating rule that to determine whether defendant's plea is voluntary, trial court is required to inform defendant only of "direct consequences" of plea, which are definite, immediate, and largely automatic effects, and is under no duty to advise defendant of any collateral consequences); *Watrous v. State*, 793 So.2d 6 (Fla. 2d DCA 2001)(adopting *Zambuto* definition); *Cruz v. State*, 742 So.2d 489, 490 (Fla. 3d DCA 1999)(same); *Whipple v. State*, 789 So.2d 1132 (Fla. 4th DCA 2001)(same); *Boutwell v. State*, 776 So.2d 1014 (Fla. 5th DCA 2001); *Pearman v. State*, 764 So.2d 739, 741 (Fla. 4th DCA 2000); *State v. Stapleton*, 764 So.2d 886, 887 (Fla. 4th DCA 2000); *Simmons v. State,* 611 So.2d 1250, 1254, n.4 (Fla. 2d DCA 1992); *Blackshear v. State*, 455 So.2d 555(Fla. 1st DCA 1984).

We would urge the Court to adopt the Fourth Circuit's definition of direct consequence announced in *Zambuto* and unanimously followed by the district courts. We note that adopting such a rule would not be inconsistent with this Court's holdings in *Ginebra, supra; Ashley v. State,* 614 So.2d 486 (Fla. 1993); *Wood v. State*, 750 So.2d 592 (Fla. 1999); and *Perry v. State,* 786 So.2d 554 (Fla. 20001). In *Ginebra*, the court pronounced a seemingly narrow

definition of direct consequence when it stated that "[d]eportation is not direct consequence of a guilty plea because the trial court judge, whether state and federal, has no authority concerning deportation matters." *Ginebra,* at 961. As the second district pointed out in *Watrous, supra*, this definition may no longer be sound in light of the *Ashley* decision. *Watrous*, 793 So.2d at 7. In *Ashley*, the Court held that a defendant must be made aware of the possibility and reasonable consequences of habitualization prior to entering a plea. *Ashley*, 614 So.2d at 490. Although not directly deciding whether habitualization was direct or collateral in nature, the court implicitly held that habitualization and ineligibility for certain gain time are direct consequences of a plea. *Watrous,* at 7("We conclude that the broader definition of direct consequences followed by the federal courts and adopted by the Fourth District is more consistent with the result reached in *Ashley*. 'The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'"); *Freels v. State*, 701 So.2d 1207, 1208-09 (Fla. 1st DCA 1997)(finding *Ashley* "could not be logically reconciled with *Ginebra*" where Ashley transformed special gain time and early release consequences to equal footing with direct

consequences of a plea contrary to *Ginebra* which referred to gain time consequences as collateral in nature).

Additionally, *Ashley* can be harmonized to the instant case, where in *Ashley,* the Court addressed penalties flowing from a defendant's pending case rather than penalties from a crime not expected to occur. Defendant's proposition that *Ashley* and *Ginebra* somehow negatively affected the current analysis should be rejected. Both *Ashley* and *Ginebra* addressed specific issues, i.e. habitualization and deportation, and do not directly bear on the particular issue of recidivism. Similarly, neither case overrule the unanimously accepted test for determining whether a consequence is direct or collateral. That being said, it is evident that the *Zambuto* test is one that provides direction in the instant case. And as previously discussed, under the *Zambuto* analysis, clearly enhancement for recidivism is not a direct, immediate and automatic result of a guilty or nolo contendere plea.

Moreover, contrary to the Defendant's position, the proposition cited in *Ginebra* that deportation consequences of a plea are collateral is still viable and has never been overruled or altered. *Major,* 790 So.2d at 552 ("That part of *Ginebra* remains good law."); *State v. Richardson*, D2001 WL 361759,(Fla. 3d DCA 2001) ("The Florida Supreme Court has not explicitly receded from *Ginebra*."); *Freels*, 701 So.2d at 1208. Requiring trial judges to advise defendants of the deportation consequences did not magically

transform it into a direct consequence, rather deportation was found to be of such a harsh nature that is a collateral consequence that necessitates forewarning. Indeed, the penalty of deportation has been recognized as often far more extreme than the direct consequences which may flow from a plea of guilty to an offense. *Peart v. State*, 756 So.2d 42, 52 (Fla. 2000)(deportation of a person from the United States often is just as harsh as other consequences, if not more so); *Peart v. State* 705 So.2d 1059,1063 n. 2. (Fla. 3d DCA 1998)("The immigration consequences of a felony conviction have become increasingly harsh. A person who has lived in this country with his or her family for many years may consider deportation a far more draconian punishment than a brief period of incarceration."); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433 (1947)(deportation has been said to be "the equivalent of banishment," "a savage penalty," "a life sentence of exile"); *Edwards v. State*, 393 So.2d 597, 598 (Fla. 3d DCA 1981).

Contrastly, enhanced punishment due to recidivism is not such a collateral consequence requiring similar treatment as deportation. Therefore, a trial court would be under no duty to advise of such a consequence. "We believe that the possibility of enhanced future sentences has an even more attenuated connection to the disputed plea than do the other collateral consequences deemed sufficiently harmful to the defendant to permit vacation of his plea." *Rhodes v. State*, 701 So.2d 388, (Fla. 3d DCA 1997).

Defendant correctly observes that *Ginebra* did not either explicity or implicitly adopt or approve the conceptualization of collateral consequences as a definite immediate and largely automatic effect on the range of a defendant's punishment. However, he fails to mention, as well, that neither *Ginebra* or any other supreme court case has rejected the definition. It is our position that the *Zambuto* standard unanimously followed by the district courts of Florida is a viable way to define collateral vs. direct consequences.

Similarly, adopting the *Zambuto* test can be easily reconciled with *Wood* and *Perry*. In *Wood,* the movant alleged that his attorney failed to advise him at the time that he entered his plea that it could be used against him as a prior offense in federal court. *Wood* solely addressed the procedural aspects of the movant's claim, i.e. whether his petition was subject to a two-year time limit; and did not determine that, on the merits, a claim of failure to advise of collateral consequences of a plea, would merit post-conviction relief.[2] *Smith v. State*, 26 Fla.L.Weekly D864 (Fla. 4th DCA March 28, 2001). Essentially *Wood* gave a green light for defendants who are not in custody to allege through a writ of error coram nobis claims of newly discovered evidence. *Wood* does not preclude the State from raising the argument that the law does not entitle

[2] Following remand from this Court, the trial court denied Wood's petition for error coram nobis, which was later per curiam affirmed by the First District Court of Appeal.

defendants to any relief on the merits. Similarly, *Perry* relying on *Wood*, only states that a defendant has a right to make a coram nobis claim on this issue, not that he is entitled to any relief, much less an evidentiary hearing.

Again, the court below accurately resolved the seeming quagmire that *Perry* raises.

> We must, however, address a seemingly contrary statement in . . . *Perry*. . . [where] Florida Supreme Court said:
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> > The second element requires that a defendant be sufficiently informed so that he or she understands the consequences of his or her plea--that the defendant realizes the decision to plead guilty waives some of his or her constitutional rights, like the right to a jury trial, as well as other significant consequences. *Williams*, 316 So.2d at 271. This Court accordingly has permitted a writ of error coram nobis where the petitioner asserted he was not informed his plea could constitute a "prior offense" in subsequent proceedings. *See Wood v. State*, 750 So.2d 592 (Fla.1999). *See also Peart v. State*, 756 So.2d 42 (Fla.2000) (permitting a writ of error coram nobis where petitioners asserted they were not informed that deportation was a possible consequence of their pleas).
>
> We conclude that the foregoing portion of the *Perry* decision is dictum. The actual issue in *Perry* was whether the defendant had truly been guilty of grand larceny when he took a motorcycle temporarily for a "joyride." *Id*. at S254. There was no issue in *Perry* regarding future recidivism. *Perry*'s claim was that under the facts of the case, he was not guilty of a felony at all. *Id*. at S255. The *Perry* decision relies on *Wood*. But the only issue in *Wood* was whether Wood's petition for writ of error coram nobis was subject to a two-year time limit. 750 So.2d at 595. In footnote three of *Wood*, the court specifically declined to reach any other issue than the question of timeliness. *Id*. at 595 n. 3.

As the lower court concluded, neither *Wood* nor *Perry* overrule the longstanding line of cases that hold that neither a defense

attorney nor the trial court is required to warn a defendant of sentence enhancing consequences that his plea will have as to any future crimes defendant may commit; neither does the trial court or defense counsel have a duty to anticipate a defendant's recidivism as it is a collateral consequence of the plea.[3] *Melvin v. State*, 2001 WL 1192106 (Fla. 3d DCA Oct. 10, 2001); *Dixson v. State,* 785 So.2d 744 (Fla. 3d DCA 2001); *Bethune v. State*, 774 So.2d 4,5 (Fla. 2d DCA 2000); *Ford v. State*, 753 So.2d 595 (Fla. 3d DCA 2000); *Sherwood v. State*, 743 So.2d 1196, 1197 (Fla. 4th DCA 1999); *Rhodes*, 701 So.2d at 389; *State v. Fox*, 659 So.2d 1324, 1327 (Fla. 3d DCA 1995); *Sherwood v. State*, 743 So.2d 1196, 1197 (Fla. 4th DCA 1999); *Bartz v. State*, 740 So.2d 1243, 1245 (Fla. 3d DCA 1999). Therefore, although, according to *Wood* and *Perry*, a defendant is entitled to bring a coram nobis claim, the law is clear that he is not entitled to any relief where the trial court has no duty to warn a defendant of sentence enhancing consequences of his plea.

Finally, as a matter of public policy, the State points out that declaring that a trial court should anticipate recidivism and

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[3] Federal courts have likewise held that a plea's possible enhancing effect on a subsequent sentence is merely a collateral consequence of the conviction; it is not the type of consequence about which a defendant must be advised before the defendant enters the plea. *United States v. Jordan*, 870 F.2d 1310, 1318 (7th Cir.), *cert. denied*, 493 U.S. 831, 110 S.Ct. 101, 107 L.Ed.2d 65 (1989); United *States v. Woods*, 870 F.2d 285, 288 (5th Cir.1989)("The sentencing court is not required 'to anticipate a defendant's recidivism.'").

warn Defendant's thereof is a dangerous message to convey to criminals. Rather than expect that they will offend again, the judicial system should anticipate that they will refrain from committing new crimes. As cogently expressed by the court below: "As a matter of common sense, a defendant is already under a legal duty not to go out and commit more crimes in the future, regardless of whether the penalty is "ordinary" or enhanced. The defendant can avoid further sentencing consequences, enhanced or otherwise, by refraining from committing new crimes." *Major*, at 551; *See also Rhodes*, 701 So.2d at 389("We should not encourage recidivism, even implicitly, by adopting a rule of law which requires a defense attorney or trial court to 'warn' a defendant of the sentence-enhancing consequences his plea will have as to any future crimes he may commit."); *Lewis v. United States*, 902 F.2d 576, 577 (7th Cir. 1990) ("It [the warning of future sentence enhancement] could even be viewed as an invitation to recidivism....").

Moreover, as the court in *Bismark v. State*, 26 Fla.L.Weekly D2198 (Fla. 2d DCA Sept. 12, 2001), observed that allowing defendants to withdraw their pleas would have a great effect on the proper administration of justice throughout the State:

> If we were to so hold, however, our ruling would have wide-ranging consequences. Most, if not all, of the defendants in this district who have taken advantage of the *Wood* window to make such claims would be entitled to evidentiary hearings. Of the appeals we have reviewed thus far, none of the trial court orders has denied these claims on the basis that they were conclusively refuted by the record. We have yet to see a transcript of a plea

> colloquy wherein the trial court advised the defendant of the future sentence- enhancing consequences of the plea or a standard plea form which included this warning. We suspect that after an evidentiary hearing many defendants making this claim might be entitled to withdraw their pleas.

Consequently, for the foregoing reasons, the State urges this Court to follow precedent, legal principles and sound public policy and answer the certified question in the negative to hold that the lower court properly concluded that a trial court is under no duty to inform a defendant at the time of his plea that his sentence for future crimes not yet committed could be enhanced as a result of the pending plea.[4]

CONCLUSION

[4] The State maintains its position that a trial court has no duty to advise a defendant that his conviction may be used to enhance a future sentence, however, if this Court disagrees, then the State submits that any change in Fla.R.Civ.P. 3.172 be applied proactively and not retroactively. *See Amendments to the Florida Rules of Criminal Procedure*, 536 So.2d 992 (Fla. 1988)(amending rules of criminal procedure by requiring trial judge to advise a defendant that entering his plea may subject him to deportation for sentences imposed after January 1, 1989).

Based upon the arguments and authorities cited herein, the appellee respectfully requests this Court answer the certified question in the negative and affirm the Third District Court of Appeal's opinion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed this ___ day of November 2001, to Bruce A. Rosenthal, Assistant Public Defender, 1320 NW 14th Street, Miami, Fl. 33125.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in 12 point Courier New Font.

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