

IN THE SUPREME COURT OF FLORIDA

GERALD LYNN BATES,

Petitioner,

v.

CASE NO. SC02-1481

1D01-1149

STATE OF FLORIDA,

Respondent.

-----/

ON DISCRETIONARY REVIEW FROM  
THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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SECOND JUDICIAL CIRCUIT

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STATE OF FLORIDA,	:	
	:	
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REPLY BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. The Answer Brief of respondent will be referred to as "AB."

## II ARGUMENT

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCE-ENHANCING CONSEQUENCES OF A DEFENDANT'S PLEA FOR FUTURE CRIMINAL BEHAVIOR IN AN OTHERWISE FACIALLY SUFFICIENT MOTION ARE COGNIZABLE AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The issue before the lower tribunal was whether petitioner had set forth a claim for relief where he alleged that his counsel had misadvised him as to the ramifications of his 1990 plea to possession of cocaine, which was used in 1994 as a predicate offense to impose an habitual offender life sentence.

Respondent has not disputed that the 1990 conviction for possession of cocaine was one of the two predicate offenses used to support petitioner's status as an habitual offender and his present life sentences (AB at 1).

Respondent has not disputed that the standard of review in this case is de novo, since this case involves only a question of law (AB at 4).

Respondent has not disputed that where an attorney offers affirmative misadvice on some collateral matter (such as possible deportation or involuntary civil commitment as a sex offender or eligibility for gain time or registration as a sex offender) and the defendant relies on that misadvice in deciding whether to enter a plea, then the defendant has

suffered harm (AB at 8-9).

However, respondent argues that affirmative misadvice concerning the effect of a conviction on future habitualization is "too attenuated" to be relied upon (AB at 6). But respondent has failed to show how this type of affirmative misadvice is any different from affirmative misadvice concerning possible deportation or involuntary civil commitment as a sex offender or eligibility for gain time or registration as a sex offender.

All of these consequences, whether one characterizes them as "direct" or "collateral," flow from the entry of the plea. Some of these may also be "too attenuated" from the plea, but that does not matter, because the courts have recognized that if the defendant relies on his attorney's affirmative misadvice, that he will not be subject to these various consequences, then he is entitled to relief when he realizes that he is subject to these various consequences. See the cases cited in the Initial Brief:

State v. Leroux, 689 So. 2d 235 (Fla. 1997) (deportation); LaMonica v. State, 732 So. 2d 1175 (Fla. 4<sup>th</sup> DCA 1999) (sex offender registration); Ray v. State, 480 So. 2d 228 (Fla. 2<sup>nd</sup> DCA 1985) (gain time); and Roberti v. State, 782 So. 2d 919 (Fla. 2<sup>nd</sup> DCA 2001) (Jimmy Ryce commitment).



Respondent distinguishes these cases on the basis that they are contrary to "public policy" (AB at 8). There are no public policy interests harmed by granting relief in these cases, unless as a matter of public policy we want to encourage defense lawyers to lie to their clients. To the contrary, public policy should favor trust in the criminal justice system to ensure that a particular criminal defendant enters his or her plea voluntarily, so that the conviction will become final and not subject to collateral attack.

This Court has set forth rules to guarantee that a defendant's plea is voluntary, Fla. R. Crim. P. 3.172, and placed the burden on the trial judge to ensure that it is voluntary, Fla. R. Crim. P. 3.170(k). If this Court is to decide cases solely on public policy, then we might as well discard these rules and all of the substantial body of case law regarding the voluntariness of a plea and the substantial body of case law regarding the role of defense counsel in rendering effective assistance of counsel to the client.

The state's reliance on public policy improperly denigrates petitioner's constitutional rights. See Wood v. Strickland, 420 U.S. 308 (1975). A plea of guilty is more than a grumbling admission of misconduct. It involves the waiver of important constitutional rights under the Fifth and

Fourteenth Amendments to the United States Constitution. Boykin v. Alabama, 395 U.S. 238 (1969). Competent counsel must be provided to a defendant in order for him or her to decide whether it is in his or her best interests to enter a plea. Brady v. United States, 397 U.S. 742 (1970).

It is essential that counsel render competent advice in order for the plea to be deemed voluntary. McMann v. Richardson, 397 U.S. 790 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970). Where counsel renders affirmative misadvice, counsel cannot by definition be competent under the Sixth Amendment to the United States Constitution and so the voluntariness of the plea becomes suspect and the defendant can easily allege prejudice from his counsel's misadvice. Hill v. Lockhart, 474 U.S. 52 (1985).

Here, petitioner certainly was prejudiced by his attorney's misadvice in 1990, since he received habitual offender life sentences for his crimes in 1994, based in part on his plea to possession of cocaine in 1990, instead of a sentence under the sentencing guidelines. See Appendix B to the Initial Brief.

Respondent's main argument is that to grant relief to petitioner is contrary to public policy because it would encourage him and others to commit future crimes. Chief Judge

Allen, dissenting below, had trouble following this logic:

I confess some difficulty in following this logic. I can easily understand how giving a defendant this information might discourage him from entering a plea, but I have difficulty understanding how it might encourage him to commit crimes in the future. What seems to be at the root of the majority's reasoning is its disapproval of the appellant's thought processes in deciding whether to enter his plea. Although I make no effort to offer moral justification for the thoughts that might have passed through the appellant's mind as he decided whether to enter a plea or proceed to trial, I cannot help but observe that the majority has suggested a more complex meaning for the term "involuntary plea" than I have previously understood. The majority creates two classifications of involuntary pleas, those that are involuntary by virtue of appropriate considerations (and thus entitled to legal remedy) and those that are involuntary by virtue of inappropriate considerations (and thus entitled to no legal relief). Because I do not understand the Sixth Amendment rights to trial by jury and effective assistance of counsel to be limited in this fashion, I cannot join the majority in this departure from settled law.

Bates v. State, 818 So. 2d 626, 632 (Fla. 1<sup>st</sup> DCA 2002).<sup>1</sup>

Actually, it would be more logical to say that, if an attorney misadvises the client that a particular conviction could never be used to enhance a future sentence, the client

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<sup>1</sup>Judge Northcutt agrees with Chief Judge Allen. See Stansel v. State, 27 Fla. L. Weekly D1947 (Fla. 2<sup>nd</sup> DCA Aug. 28, 2002).

would believe that he or she could commit further crimes without fear of receiving an enhanced sentence. Since the purpose of the habitual offender statute is to punish recidivism, Eutsey v. State, 383 So. 2d 219 (Fla. 1980), that purpose is thwarted if the attorney misadvises the defendant that he or she cannot be punished in the future as a recidivist.

As Justice Shaw noted, dissenting in Major v. State, 814 So. 2d 424 (Fla. 2002), Florida has recently enacted various enhancement statutes which rely on prior convictions to permit a judge to impose lengthy sentences, and it is beneficial to society as well as to the defendant that he or she not be misadvised concerning the possible ramifications of the plea:

Because of the extraordinarily onerous consequences of sentencing enhancement, I question whether a plea of guilty or nolo contendere can be "knowing and intelligent" if a defendant is not told beforehand of those consequences by either the court or counsel.

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The criminal law in Florida, on the other hand, has changed dramatically during this period. The Legislature has enacted sundry laws that have had a major impact on the "reasonable consequences" of a guilty or nolo plea. Some of these changes affecting a defendant's liberty interest are clearly as significant as the possibility of deportation.

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In light of these changes in the law, I question whether a plea of guilty or nolo contendere can be truly "knowing and intelligent" if a defendant is not apprised beforehand of the reasonable consequences of sentencing enhancement.

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It is very much in society's interest - it seems to me - to provide more not less information in such cases. **More information not only will ensure the knowing and intelligent nature of the resulting plea but also will inform the defendant of the adverse consequences of further criminal conduct.**

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Where, however, a collateral consequence is unusually severe, courts also should inform a defendant of that consequence. Sentencing enhancement is such a consequence. Under the enhancement schemes noted above, prior convictions can result in extraordinarily onerous prison terms.

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Just as courts must inform defendants of the possibility of deportation and the reasonable consequences of habitualization, so too courts should inform defendants of the reasonable consequences of sentencing enhancement in general.

Major v. State, *supra*, 814 So. 2d at 432, 434, 435-36;

underlined emphasis in original; bold emphasis added.

Everything Justice Shaw said in Major regarding the failure to

advise a defendant of the reasonable consequences of the plea is even more true where the attorney misadvises the client.

If this Court accepts the view of respondent and the majority below, and decides this case solely on public policy, then we will end up with two bodies of case law regarding the voluntariness of a plea and the role of defense counsel in rendering effective assistance of counsel to the client. If "public policy" (whatever that is) would favor the defendant receiving some kind of relief from his attorney's misadvice, then the courts will allow the claim to proceed; but if "public policy" (whatever that is) would say the defendant may never receive any kind of relief from his attorney's misadvice, then the courts will not allow the claim to proceed.

Courts should not decide the rights of individual litigants based upon some nebulous view of "public policy." Rather, cases should be decided on their facts, in light of protecting the defendant's constitutional rights. If an attorney gives his or her client a clear misstatement of the law or any other affirmative misadvice, then the client is entitled to relief, as the court stated in Ray v. State, *supra*, 480 So. 2d at 229:

[W]e perceive a difference between a

"judgment call," whereby an attorney offers an honest but incorrect estimate of what sentence a judge may impose, and a clear misstatement of how the law affects a defendant's sentence. **A criminal defendant is entitled to reasonable reliance upon the representations of his counsel** and, if he is misled by counsel as to the consequences of a plea, he should be permitted to withdraw that plea. (emphasis added).

Finally, respondent claims that the two Fourth District cases, which hold that affirmative misadvice may lead to a claim for relief, are contrary to the state's idea of what public policy should be and were wrongly decided (AB at 10).

In Smith v. State, 784 So. 2d 460 (Fla. 4<sup>th</sup> DCA 2000), the defendant entered a plea in 1994 to aggravated battery and three misdemeanors in exchange for a sentence of time served. The aggravated battery conviction was later used to declare him to be an habitual violent offender on a subsequent crime.

Mr. Smith filed a motion for postconviction relief and alleged that his attorney on the 1994 aggravated battery had told him that crime could never be used as a prior conviction in state or federal court. He further alleged that he would not have entered a plea if he had known that the aggravated battery could be used to enhance a sentence for a subsequent crime. The Fourth District held that his allegations had set forth a

claim for relief. *Accord: Jones v. State*, 814 So. 2d 446 (Fla. 4<sup>th</sup> DCA 2001).

In *Love v. State*, 814 So. 2d 475 (Fla. 4<sup>th</sup> DCA 2002), the defendant entered a plea in 1987 in state court to attempted trafficking in cocaine. In 1995, he was sentenced in federal court for a new crime, and the 1987 conviction was used to enhance his federal sentence.

Mr. Love filed postconviction motions alleging that his attorney on the 1987 Florida crime affirmatively misadvised him that a plea of nolo contendere was not the same as a plea of guilty, and that a nolo plea could not be used against him in any future proceedings. He also alleged that he would not have entered his plea to the 1987 Florida crime if he had known the full consequences of his plea.

The Fourth District held that Mr. Love's allegation of affirmative misadvice from his counsel had set forth a claim for relief. *Accord: Murphy v. State*, 820 So. 2d 375, 376 (Fla. 4<sup>th</sup> DCA 2002): "affirmative misadvice, regarding even collateral consequences of a plea, may form the basis for withdrawing the plea."

In both *Smith* and *Love*, the defense attorneys gave their clients affirmative misadvice. If this Court agrees with the state that these cases were wrongly decided, then this Court



will announce to the defense bar that it is perfectly acceptable to lie to a client in order to motivate the client to enter a plea. Such an announcement would be contrary to the interests of the criminal justice system.

The Fourth District's view on misadvising a defendant about the use of his plea to enhance future sentences is consistent with the existing body of case law on voluntariness of pleas. If an attorney misadvises his or her client that a plea to a particular crime will never be held against the client in the future, and the client relies on that misadvice in deciding whether to enter a plea, then the client is entitled to relief.

The situation from the viewpoint of the voluntariness of the plea is no different than if the attorney misadvised the client that he or she could not be deported, would receive gain time, would not have to register as a sex offender, or could not be committed under the Jimmy Ryce Act. In all of these cases, the affirmative misadvice may have led to an involuntary plea. But without granting the client at least an evidentiary hearing on the claim, we will never know.

The contrary view of the First and Third Districts is illogical and not consistent with the criminal justice system's goal of having voluntary pleas and effective defense

attorneys.

This Court must hold that where a defendant alleges that his attorney's affirmative misadvice (that a plea cannot be used to enhance a future sentence) caused him to enter the plea, he is entitled to relief. This Court must answer the certified question in the affirmative and grant petitioner an evidentiary hearing on his facially valid claim for relief.

### III CONCLUSION

Based upon the arguments presented here, as well as those contained in the Initial Brief, petitioner respectfully asks this Court to hold that he has set forth a claim of relief since his attorney affirmatively gave him misadvice regarding the ramifications of his 1990 plea to possession of cocaine. Thus, the lower tribunal's opinion must be quashed, and this Court must order that petitioner is entitled to an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Trisha E. Meggs, Assistant Attorney General, The Capitol, Tallahassee, Florida; and to petitioner, #295638, Apalachee CI East, 35 Apalachee Drive, Sneads, Florida 32460; on this \_\_\_ day of September, 2002.

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P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New  
12 point type.

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P. DOUGLAS BRINKMEYER