IN THE SUPREME COURT OF FLORIDA

ROBERT EY,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

Case No.: SC03-2161

DCA Case No.: 2D03-2811

INITIAL BRIEF
OF PETITIONER ROBERT EY

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STATEMENT OF THE CASE AND FACTS

1. Background

On April 10, 2000, Petitioner Robert Ey pled no contest in Case Number 99-21195 in Pinellas County. (R 3, 4).[1] While the charge originally was a misdemeanor petit theft, it was enhanced to a third degree felony due to the number of his prior theft offenses.[2] (R 6, 29, 49); Fla. Stat. § 812.014(3)(c). An assistant public defender represented Mr. Ey at the plea hearing, although there was little or no communication with this attorney prior to the plea. (R. 7, 12). Mr. Ey was placed on twelve months probation at that time. (R 4, 32).

Soon after being placed on probation, Mr. Ey was arrested (Pinellas Case Number 00-7093) for a separate crime that had originated prior to the plea in Case Number 99-21195. (R 14). While the charge in that case was burglary, Mr. Ey ultimately pled no contest to the lesser charge of attempted burglary on October 21, 2003.[3] (A C).

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[1] Citation to the Record shall be in the form (R #), with # as the page. Citation to the Appendix shall be in the form (A #), with # as the tab number.

[2] Although the date of Mr. Ey's alleged theft is absent from the Record, he contends that his arrest occurred on November 24, 1999. The offense date could impact whether voluntary intoxication is a permitted defense.

[3] This statement of fact is taken from a partial transcript dated October 21, 2003, that Mr. Ey attached to his addendum filed with this Court on February 2, 2005, which he filed in response to this Court's January 5, 2005, Order. The transcript date is later in time than Mr. Ey's present postconviction motion. The State has

Separately, after his no contest plea in Case Number 99-21195, Mr. Ey had also been arrested on other charges, which resulted in Pinellas Case Number 00-9494. (R 14, 21). Importantly, the Information for Case Number 00-9494 reveals that, like in Case Number 00-7093, some of these crimes were allegedly committed prior to Mr. Ey's plea in Case Number 99-21195.[4] (R 35); (A D). In Case Number 00-9494, Mr. Ey was charged with three counts of dealing in stolen property (second degree felony) and one count of possession of heroin (third degree felony). (A D). Two of the dealing in stolen property counts allegedly occurred on December 7, 1999, and April 5, 2000. (A D). Mr. Ey ultimately received habitual felony offender status in Case Number 00-9494 on all counts, except the heroin possession (R 9, 10, 17, 21, 22) (A C).

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not disputed or objected to Mr. Ey's inclusion of the partial transcript. Citation to this Court's case file should be permitted in this case in furtherance of clarity and the interests of justice. If this Court elects not to consider this partial transcript, the Record still reveals that this crime occurred prior to the plea in Case Number 99-21195, see (R 14), but the nature of that charge and its disposition is not revealed within the Record.

[4] The clearest statement of this fact is taken from the Information attached to Mr. Ey's response filed January, 26, 2005 in this Court, which he filed in response to this Court's January 5, 2005, Order. Again, the State has not disputed or objected to the inclusion of this paper. Only the first page of the Information was attached, so even this document does not reveal the date of the crime for count three – that count which the transcript referenced in footnote 3 resulted in the thirty year sentence. If the Court does not wish to consider the first page of the Information, the Record reveals that Mr. Ey was convicted on charges that he contends occurred prior to the plea in Case Number 99-21195. (R 14, 58).

Prior to pleading no contest in Case-Number 99-21195, Mr. Ey informed his counsel of several matters, including:

1. that he was under investigation for alleged crimes previously committed; (R 14, 58)

2. that he had a strong voluntary intoxication defense that he wished to pursue at trial, including being intoxicated on the day of the theft offense due to doctor prescribed medications he received after a surgery; (R 7, 8, 13); and

3. that his prior theft offenses constituting the basis to make this misdemeanor theft charge a felony did not qualify because one conviction was uncounseled and therefore involuntary and the others were from the same day. (R 6-7).

In response to Mr. Ey's statements and questions, Mr. Ey's attorney from the public defender advised Mr. Ey, among other things, that:

1. Mr. Ey's plea could not be used to enhance the penalty for the crimes that he was under investigation (R 21, 58);

2. Mr. Ey's plea in the case could never be used to enhance the penalty because, as a felonized misdemeanor, it was already an enhanced penalty (R 6, 13); and

3. voluntary intoxication was not a legal defense to the theft charge (R 7, 13).

On July 30, 2000, Mr. Ey was booked on violating his probation in Case Number 99-21195. (R 15).

On August 30, 2000, Mr. Ey received notice in Case Number 00-9494 that the State was seeking an enhanced penalty pursuant to section 775.084, Florida

Statutes – habitual felony offender. (R 22). The felony conviction in Case Number 99-21195 was one of the necessary bases the trial court used to conclude Mr. Ey was a habitual felony offender and to impose habitual felony offender punishment in Case Number 00-9494. (R 9, 17-18).

On November 28, 2001, Mr. Ey ultimately received a thirty year sentence in Case Number 00-9494, instead of the thirty month guideline sentence, on account of the enhancement due to the plea and felony conviction in Case Number 99-21195. (R 2, 5, 18, 34-35) (A C). The thirty year sentence was beyond the statutory maximum for the second degree felony in 00-9494 that he ordinary could have received without being found a habitual felony offender. (R 5, 6).

2. Mr. Ey's actions to challenge his plea in Case Number 99-21195

Mr. Ey took immediate action to challenge his plea in Case Number 99-21195. On April 17, 2000, Mr. Ey told his assistant public defender that voluntary intoxication due to doctor prescription was a valid defense in Florida after learning it himself after the plea. (R 7, 13-14). That assistant public defender declined Mr. Ey's request to appeal, instead counseling Mr. Ey that the assistant public defender could and would file a motion to withdraw the plea. (R 7, 14).

Unfortunate for Mr. Ey, the assistant public defender waited until June 6, 2000, to file the motion to withdraw the plea in Case Number 99-21195, which at

that point was untimely. (R 5, 7, 14). That motion was denied as untimely the next day. (R 5).

At that point, the assistant public defender agreed to file a postconviction motion in Case Number 99-21195 to challenge the plea. (R 9, 14, 15). Mr. Ey reminded his attorney of the need to file the postconviction motion when the attorney's investigator visited with Mr. Ey while he was in custody. (R 14). The investigator typed that reminder into his computer notes. (R 14). That assistant public defender, however, did not file the agreed-to postconviction motion. (R 8, 9, 14, 15). Instead, that assistant public defender sought to withdraw. (R 16).

While still represented by the public defender, Mr. Ey filed a pro se motion to withdraw his plea. (R 5, 9, 15, 48). The trial court denied Mr. Ey's postconviction motion without prejudice on November 7, 2000, advising Mr. Ey to file a rule 3.850 motion. (R 5, 9, 15, 48). Importantly, Mr. Ey specifically alleged that he never received a copy of that Order until July 14, 2002. (R 19). Instead, the assistant public defender admonished Mr. Ey for filing pro se motions while represented by counsel. (R 9, 15). Interestingly, the assistant public defender remained as counsel until November 30, 2000, after the date the trial court denied Mr. Ey's pro se motion to withdraw his plea. (R 12). The trial court's order does not indicate it was served on Mr. Ey's counsel. (R 48).

In November 2000, Mr. Ey also filed a pro se motion for postconviction relief pursuant to 3.850 challenging the plea in Case Number 99-21195. (R 5, 16). That motion was denied on March 25, 2002 as facially insufficient because it was not sworn. (R 5, 23). Mr. Ey filed for rehearing, which was denied.[5] (R 5) (A E).

After the public defender was relieved on November 30, 2000, conflict counsel was appointed. (R 12, 16). Mr. Ey requested that his conflict counsel assist him with his postconviction challenge to the plea in Case Number 99-21195, but she declined. (R 16). Mr. Ey's next counsel likewise declined to assist him with his pending postconviction motion. (R 17). Mr. Ey then was again represented by the public defender's office, albeit by a different assistant public defender. (R 12, 18, 23). It appears that Mr. Ey contends this assistant public defender also agreed to file the postconviction motion, but she did not file it. (R 23, 24).

In addition to his filings at the trial court, Mr. Ey sought relief at the Second District. He filed a petition for writ of habeas corpus in Case Number 2D02-2667. On July 17, 2002, the Second District denied that petition without prejudice to any right Mr. Ey had to file a "belated" 3.850 in the trial court. (R 46). He also sought

[5] The State filed in this Court what the State contends is the trial court docket in Case Number 99-21195, in response to this Court's Order dated January 5, 2005. That docket printout fixes the date of the trial court's order denying rehearing as May 20, 2002. (A E). Mr. Ey stated in his instant motion the rehearing order was rendered on April 14, 2002. (R 5). This discrepancy is not relevant for the Court's purposes.

permission to file a belated appeal in Case Number 99-21195, which the Second District denied. (R 50, 52).

3. The instant 3.850 motion.

Following the Second District's invitation to file a 3.850 motion in the trial court, Mr. Ey on August 7, 2002 filed the instant 3.850 motion. (R 4). At the same time, he filed a memorandum of law. (R 21). He also filed an "Added Ground to 3.850" on August 8, 2002. (R 23). Mr. Ey specifically referenced rule 3.850(b)(3) in that added ground. (R23).

The trial court summarily denied the motion, ruling that Mr. Ey was beyond the two-year time period to file such a motion. (R 3) (A A). The trial court noted that Mr. Ey should have filed a habeas corpus challenging counsel's failure to pursue the 3.850 within the two-year time limit. (R 3) (A A).

Mr. Ey timely appealed the trial court's order. On appeal, the Second District affirmed. (R 55-56) (A B); Ey v. State, 870 So. 2d 64 (Fla. 2d DCA 2003). That court certified the following question of great public importance:

> WHETHER ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCING 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.

On November 22, 2003, Mr. Ey timely petitioned this Court for review. After this Court released its decision in Bates v. State, 887 So. 2d 1214 (Fla. 2004), this Court requested the parties to address the affirmative misadvice claim in relationship to that decision. See Order dated Jan. 5, 2005. Mr. Ey pro se as well as the State filed responses.

After this Court released its decision in State v. Dickey, 928 So. 2d 1193 (Fla. 2006), this Court entered a show cause order why Mr. Ey's case was not controlled by Dickey. See Order dated July 28, 2006. Again, Mr. Ey pro se as well as the State filed responses. Mr. Ey in his response unequivocally provided that the charges were known to Mr. Ey's counsel prior to Mr. Ey's plea. Mr. Ey stated in pertinent part:

> 2. However, this case differs in that it was not a FUTURE crime in question, but ongoing pending charges from alleged crimes committed PRIOR to the conviction in which the affirmative misadvice provided to the Defendant by counsel and the Defendant told counsel prior to the plea of the pending charges and counsel verified them through the Pinellas State Attorney's Office.
>
> 3. Even though the actual charges were not placed on the Defendant until 12 days after the April 10th, 2000 plea on this case, the crimes allegedly committed by the Defendant in the charges were prior to April 10th, 2000.

(Ey response filed Aug. 9, 2006).

On April 12, 2007, this Court accepted jurisdiction, dispensed with oral argument, and appointed undersigned counsel to represent Mr. Ey before this Court pro bono. This Initial Brief is filed pursuant to the Court's Order.

SUMMARY OF THE ARGUMENT

Mr. Ey alleged three instances of his counsel's affirmative misadvice that resulted in him pleading to a felony petit theft charge in Case Number 99-21195. Had counsel not incorrectly advised Mr. Ey, he would not have pled no contest, and he would have gone to trial and would likely have been acquitted. The three specific incorrect statements made by Mr. Ey's counsel at the time of Mr. Ey's plea in Case Number 99-21195 were:

1. Mr. Ey's plea could not be used to enhance the penalty for the crimes that he was under investigation for having previously allegedly committed;

2. Mr. Ey's plea in the case could never be used to enhance the penalty because, as a felonized misdemeanor, it was already an enhanced penalty; and

3. voluntary intoxication was not a legal defense to the theft charge.

Each of these statements was in error.

The State successfully sought to identify Mr. Ey as a habitual felony offender and sentenced him to thirty years under the habitual felony offender statute in Case Number 00-9494 on the basis of the felony conviction in Case Number 99-21195. Without the felony conviction in Case Number 99-21195, the State would not have been able to enhance Mr. Ey's sentence in Case Number 00-9494 from the statutory maximum of fifteen years to the thirty years he actually

received. If the conviction in Case Number 99-21195 falls, so does the habitual felony offender designation and sentence.

Case law from the United States Supreme Court requires that a plea be voluntary and intelligent. Where a defendant does not comprehend the true potential punishment based on counsel's affirmative misadvice, the plea is involuntary and therefore unconstitutional. The Court has established a two-prong test for courts to evaluate Sixth Amendment ineffective assistant of counsel claims where the defendant pleads to a charge – the defendant must show deficient performance as well as prejudice. Here, Mr. Ey correctly alleged both of these prongs, and is therefore entitled to an evidentiary hearing.

The first two claims of counsel's affirmative misadvice are related. Those claims involve counsel's affirmative misadvice about the sentencing enhancing effect the plea may have on the sentences in other crimes previously committed but not yet charged (where counsel knows of the existence of those previous alleged crimes). That situation is different than this Court's decision in Dickey v. State, 928 So. 2d 1193 (Fla. 2006), which addressed the situation of crimes committed in the future. Because counsel's misadvise relating to crimes already allegedly committed renders a plea involuntary, Mr. Ey is entitled to an evidentiary hearing on these claims.

The third claim involves counsel's affirmative misadvice that voluntary intoxication by doctor prescribed medicine was not a defense to the theft charge. This claim is not dependent on the first two issues, and this Court can grant relief on this issue even if it decides against Mr. Ey on his first two issues.

Theft is a specific intent crime to which voluntary intoxication historically applied. Although the Legislature mostly abolished the voluntary intoxication defense, the Legislature specifically authorized the intoxication defense where, as in Mr. Ey's case, a doctor prescribed medicine that caused the intoxication at the time of the offense. Mr. Ey is entitled to an evidentiary hearing on this claim.

Finally, Mr. Ey timely filed his postconviction motion. Even if he did not, Mr. Ey would still be entitled to an evidentiary hearing on his claim that his attorney agreed to file timely a postconviction motion but failed to do so.

This Court should quash the decision for review and remand with instructions that the trial court conduct an evidentiary hearing on Mr. Ey's ineffective assistance of counsel claims.

STANDARD OF REVIEW

Mr. Ey's postconviction motion alleges ineffective assistance of claims without any record attachments refuting his contentions. To the extent the Record does not refute his contentions, courts must accept them as correct. This Court

must resolve as a matter of law whether Mr. Ey's postconviction motion states at least one claim of ineffective assistance of counsel. See Dickey v. State, 928 So. 2d 1193, 1198 (Fla. 2006). The de novo standard applies.

ARGUMENT

At its core, Petitioner Robert Ey's case presents the issue of whether criminal defendants are entitled to rely on the advice they receive from their attorneys. Conceptually, our system requires adversarial testing. Defendants should be allowed, indeed, even encouraged to rely on their attorney's advice to permit adequate adversarial testing. Most defendants are unskilled in the law.[6]

The Sixth Amendment's requirement for the State to provide counsel who represent and advise their clients competently should be at the forefront of this Court's attention while addressing Mr. Ey's case. The integrity of the system depends on it as recognized by then-Chief Judge Blue when he succinctly stated that it was "bad public policy" for courts to appear to approve of affirmative misadvice by criminal defense attorneys, especially where the State pays for that criminal defense attorney. See Alexander v. State, 830 So. 2d 899, 900 (Fla. 2d DCA 2002) (Blue, C.J., concurring).

Mr. Ey is entitled to an evidentiary hearing on several points in his pro se 3.850 motion for various reasons, each of which would be sufficient on its own. Each error and claim of ineffective assistance of counsel challenges Mr. Ey's plea in Case Number 99-21195 to a felony petit theft. That felony conviction subsequently was used as a qualifying offence to determine Mr. Ey was a habitual

[6] This Court's appointment of pro bono counsel to represent Mr. Ey reflects the system's need for attorneys.

felony offender and permitted the trial court to sentence him as a habitual felony offender in Case Number 00-9494. Without the felony conviction in Case Number 99-21195, Mr. Ey could not have been habitualized in Case Number 00-9494 and the imposed thirty year sentence would be illegal because it would have been beyond the statutory maximum. See § 775.082(3)(c), Fla. Stat. (providing maximum prison time for second degree felony is fifteen years).

The Second District in the decision for review certified the following question as one presenting a matter of great public importance:

> WHETHER ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCING 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.

Ey v. State, 870 So. 2d 64 (Fla. 2d DCA 2003). That precise question recently was answered in the negative in State v. Dickey, 928 So. 2d 1193, 1194 (Fla. 2006).

One of the issues in Mr. Ey's case, however, presents a slightly separate issue, which this Court appears to want to address in this particular case.[7] Thus, the question should be rephrased as follows:

[7] After this Court released Bates v. State, 887 So. 2d 1214 (Fla. 2004), and again after Dickey, this Court released orders asking the parties to address Mr. Ey's case in relationship to those decisions. The Court accepted jurisdiction and appointed counsel after the receiving the Dickey responses.

WHETHER ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCING ENHANCING CONSEQUENCES OF A DEFENDANT'S PLEA IN A CASE WOULD HAVE ON PRIOR CRIMES THE DEFENDANT COMMITTED THAT ARE KNOWN BY TRIAL COUNSEL BEFORE TO THE PLEA ARE COGNIZABLE AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

This Court has jurisdiction. See art. V, § 3(b)(4), Fla. Const. In addition to answering this question in the affirmative, this Court should address and rectify the other errors Mr. Ey presents. This Court has the authority to do this. Because Mr. Ey functionally would be left with no remedy if this Court did not act, this Court should exercise its discretion here and address those errors.

I. MR. EY'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE BY AFFIRMATIVELY MISADVISING MR. EY THAT HIS PLEA IN CASE NUMBER 99-21195 COULD NOT BE USED TO ENHANCE A SENTENCE FOR A CRIME TRIAL COUNSEL KNEW MR. EY HAD ALREADY ALLEGEDLY COMMITTED.

Mr. Ey is entitled to an evidentiary hearing because he correctly alleged that counsel was ineffective, and the Record does not conclusively refute the claim.

A. Governing law.

A trial court must ensure through an affirmative showing that a plea is voluntary and intelligent prior to accepting it. See Boykin v. Alabama, 395 U.S. 238 (1969). This is because several important federal constitutional rights are implicated, such as the privilege against compulsory self-incrimination, the right to

trial by jury, and the right to confront one's accusers. Id. at 243. "[I]ncomprehension, . . . might be a perfect cover-up of unconstitutionality" and therefore, a plea based on incomprehension is involuntary. Id. at 242-43. In fact, the Supreme Court recently reminded that "[a] plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" Bousley v. United States, 523 U.S. 614, 618 (1998) (emphasis added).

A criminal defendant is entitled to an attorney. The Sixth Amendment provides not only a right to counsel to a criminal defendant, but it requires that such attorney provide competent representation. See Strickland v. Washington, 466 U.S. 668, 685-86 (1984). As the Court observed in Strickland:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland, 466 U.S. at 685 (emphasis added). Claims of ineffective assistance of counsel generally are viewed under the well-known two-prong analysis: deficient performance and prejudice. See id. at 687.

Where the alleged ineffectiveness relates to advice concerning a plea, there is a very closely related two-prong test. See Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). A petitioner must allege that counsel performed deficiently and that such

deficient performance "affected the outcome of the plea process." Id. at 59. This two-prong ineffective test is designed to determine whether a plea is voluntary; a plea is involuntary if it is outside the range of competence required of criminal attorneys. Id. at 56.

In following Strickland and Hill, this Court has held that a petitioner such as Mr. Ey demonstrates prejudice by showing "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." Grosvenor v. State, 874 So. 2d 1176, 1181 (Fla. 2004). Such a petitioner does not need to allege that petitioner would succeed at trial. See id. at 1180. Mr. Ey sufficiently alleged ineffectiveness.

1. The march to Dickey.

Two decades ago, this Court decided State v. Ginebra, 511 So. 2d 960 (Fla. 1987). The issue in Ginebra was whether a prisoner's ineffective assistance claim was legally sufficient where the prisoner's attorney failed to advise the prisoner that the plea could result in the prisoner's deportation. See id. at 960. In holding this claim to be legally insufficient for postconviction relief, this Court concluded that possible deportation was a collateral consequence of that plea, which the attorney did not need to advise the defendant. See id. at 962. Important to Mr. Ey's case, though, is footnote six, where this Court held that an issue "not presented in this case, and on which we express no opinion, concern the legal

effect of positive misadvice from counsel concerning deportation[.]" Id. at 962, n.6 (citation omitted). In other words, this Court did not address, and therefore Ginebra does not apply to, the situation of affirmative misadvice of trial counsel.[8]

Several years later, this Court decided Ashley v. State, 614 So. 2d 486 (Fla. 1993). The defendant in Ashley pled no contest to charges, and after the plea, the State filed notice of its intent to habitualize and seek an enhanced punishment on the charges to which the defendant has just pled. See id. at 487. The State contended that habitualization was a collateral consequence of the plea and therefore no notice was required prior to the plea. See id. at 487-88.

Despite the State's urging, this Court did not decide the case on the basis of "direct" versus "collateral" consequences, even though in a footnote it referenced these arguments. See id. at 489 n.5. Instead, this Court vacated the habitual offender sentence, concluding that for a plea to be intelligent and voluntary the defendant must know before the plea the maximum punishment and possibility of habitualization. See id. at 490-91. This Court re-confirmed in Major v. State, 814 So. 2d 424, 429 (Fla. 2002), that it resolved Ashley on the basis of the knowing and voluntary case law.

[8] The requirement to notify criminal defendants of possible deportation consequences is now mandated by rule adopted after Ginebra was decided. See Major v. State, 814 So. 2d 424, 427 n.2 (Fla. 2002).

In Major, this Court followed Ginebra. The defendant in Major maintained that counsel failed to inform him of the possible sentence-enhancing effect his plea in a pending case would have on future crimes. See id. at 425. This Court held that defense counsel did not need to advise the defendant of such possibility, noting that Ginebra controlled. See id. at 426. Importantly, like in Ginebra, the matter before this Court involved counsel's alleged failure to notify the defendant of some item and not affirmative misadvice.

More recently, in Bates v. State, 887 So. 2d 1214 (Fla. 2004), the majority of this Court temporarily skirted the issue of affirmative misadvice of trial counsel on the sentencing enhancing effects of a plea for future criminal behavior. In three separate decisions, the Justices foreshadowed the ultimate decision on this question, which was authoritatively decided in State v. Dickey, 928 So. 2d 1193 (Fla. 2006). In two of those separate decisions, Justices Wells and Cantero make clear that criminal defense attorneys do not need to anticipate their clients' future recidivism. See Bates, 887 So. 2d at 1221 (Wells, J., concurring specially) ("The cause of prejudice to Bates is the separate and independent new crime for which he was convicted after the plea was entered."); Id. at 1223 (Cantero, J., specially concurring) ("Defense counsel need not anticipate a defendant's future criminal conduct."). Importantly, Justice Cantero qualified his remarks where, as is the case of Mr. Ey, "at the time of the plea (and the wrong advice attendant to it), the

defendant already has committed another felony . . . ." Id. at 1221 n.5 (Cantero, J., specially concurring).

In Dickey, this Court concluded that a defendant could not successfully maintain an ineffective assistance of counsel claim where counsel affirmatively misadvised the defendant of the sentence enhancing consequences of a defendant's plea for future criminal behavior. 928 So. 2d at 1194. This Court emphasized that its decision applied to crimes committed in the future, after the plea. See id. at 1198 ("Therefore, we hold that wrong advice about the consequences for a crime not yet committed cannot constitute ineffective assistance of counsel.").

For the reasons that will follow, the "direct" versus "collateral" consequence analysis is not implicated in an affirmative misadvice claim. Rather, under both of the Supreme Court's and this Court's case law, counsel's misadvice rendered Mr. Ey's plea involuntary. Furthermore, neither Ginebra nor Major applies here because those decisions involved counsel's failure to advise and not counsel's affirmative misadvice. The decisions in Bates and Dickey do not apply here because those decisions specifically did not address Mr. Ey's situation, i.e., where the crime occurred prior to the plea.

2. Affirmative misadvice.

This case is controlled by State v. Sallato, 519 So. 2d 605 (Fla. 1988), and State v. Leroux, 689 So. 2d 235 (Fla. 1996). Those cases require an evidentiary

hearing where the defendant claims to have relied on affirmative misadvice by trial counsel to enter a plea. See Sallato, 519 So. 2d at 606 (affirmative misadvise on chances of becoming permanent United States citizen). Even though this was a "collateral" consequence of the plea, the evidentiary hearing was necessary because Ginebra specifically addressed a failure to advise on deportation consequences and not affirmative misadvice on deportation consequences. Sallato, 519 So. 2d at 606. Sallato was decided after the Supreme Court's decisions in Strickland and Hill and therefore this Court must have applied the two-prong ineffective assistance of counsel test in Sallato.

In another affirmative misadvice case, this Court observed that "[t]he 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." Leroux, 689 So. 2d at 237. This statement was made after reviewing case law finding pleas to be involuntary. See id. at 236. In Leroux, the attorney affirmatively misadvised the defendant on the applicability of sentence-reducing credit programs. See id. at 235. Accordingly, the defendant in Leroux received an evidentiary hearing. See id. at 236, 238. As Justice Cantero recently noted, it did not matter that this affirmative misadvice involved a "collateral" consequence of the plea in Leroux. See Dickey, 928 So. 2d at 1200 (Cantero, J., concurring).

The district courts of appeal likewise require evidentiary hearings where counsel affirmative misadvises a defendant, even on "collateral" consequences of the plea. That is so because "affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea." Walkup v. State, 822 So. 2d 524, 525 (Fla. 2d DCA 2002) (misadvice on application of Involuntary Civil Commitment of Sexually Violent Predators Act). This same rule of law is applied by Florida's other district courts. See, e.g., Joyner v. State, 795 So. 2d 267, 268 (Fla. 1st DCA 2001) (misadvice on right to vote); Roberson v. State, 792 So. 2d 585, 586 (Fla. 4th DCA 2001) (misadvice on pleading to misdemeanor versus felony); State v. Johnson, 615 So. 2d 179, 180 (Fla. 3d DCA 1993) (misadvice on continued employment as correctional officer).

Sallato and Leroux remain valid and the correct expression of the state of the law; thus stare decisis requires that this Court follow those decisions in Mr. Ey's case. See Puryear v. State, 810 So. 2d 901, 904, 905 (Fla. 2002) (holding that this Court does not overrule itself sub silento). This Court certainly was aware of Sallato and Leroux when deciding Dickey and Bates, as those decisions cited to Sallato and Leroux. These decisions provide that, regardless of whether a consequence is "direct" or "collateral," a defendant is entitled to an evidentiary hearing where there is an allegation of affirmative misadvice that affects the

voluntary nature of the plea. Requiring an evidentiary hearing in affirmative misadvice claims makes sense: affirmative misadvice, even on a collateral issue, is qualitatively different that a failure to advise on a collateral issue because the defendant is specifically relying on the attorney's advice in the former situation. Bad advice undermines the plea process because in that situation the defendant cannot be said to comprehend the plea, making it involuntary.

B. Mr. Ey satisfies both prongs of the *Strickland/Hill* test and is therefore entitled to an evidentiary hearing on his claim.

Mr. Ey contends that at the time of his plea in Case Number 99-21195, he told his counsel that he was under investigation for other crimes. Mr. Ey asked his counsel whether his plea in Case Number 99-21195 could be used against him for those allegedly previously committed crimes. His counsel responded "no." This advice was in error: Mr. Ey was habitualized in Case Number 00-9494 on the basis of the felony conviction in 99-21195. As a result, Mr. Ey received a thirty-year habitual felony offender sentence when the statutory maximum for his crime without habitualization was actually fifteen years.

The first prong – deficient performance – is satisfied here. Unlike the situation in Dickey, the advice given by counsel did not concern a hypothetical legal question. Instead, counsel's wrong advice was made knowing that Mr. Ey allegedly had committed other crimes for which he was not yet charged. This concrete error was so serious that Mr. Ey's counsel was not functioning as the

"counsel" guaranteed by the Sixth Amendment. At the time counsel made the incorrect statement, the contingency of committing another crime for habitualization purposes had already occurred.

The second prong – prejudice – is satisfied here. Mr. Ey was harmed; his plea in Case Number 99-21195 directly permitted the State to habitualize Mr. Ey and impose a thirty-year instead of a fifteen-year sentence in Case Number 00-9494. This is the type of harm Justice Wells suggests is required to demonstrate prejudice. See Bates, 887 So. 2d at 1221 (Wells, J., concurring specially). As Mr. Ey contended, had his counsel correctly counseled him about his plea in 99-21195, he would not have pled, and he would have opted for trial instead. See Grosvenor, 874 So. 2d at 1179 ("[A] defendant must demonstrate a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.").

It does not matter for Sixth Amendment ineffective assistance of counsel claims whether the misadvice was on a "direct" or "collateral" consequence of a plea. Nothing in Strickland or Hill limits ineffectiveness to direct consequences of a plea. Indeed, this Court has required evidentiary hearings where counsel's misadvice involved a "collateral" consequence. See Leroux, 689 So. 2d at 237; Sallato, 519 So. 2d at 606. Rather, the Supreme Court's case law makes clear that when there is "incomprehension" of the effect of the plea, such plea is involuntary

and therefore unconstitutional. See Bousley, 523 U.S. at 618; Boykin, 395 U.S. 242-43. That is the case here – affirmative misadvice results in a defendant's incomprehension of the plea. Mr. Ey's demonstration that he satisfies both prongs of the ineffectiveness test is sufficient to entitle him to an evidentiary hearing to demonstrate his plea was involuntary due to affirmative misadvice.

II. MR. EY'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE BY AFFIRMATIVELY MISADVISING MR. EY THAT HIS PLEA IN CASE NUMBER 99-21195 COULD NOT BE USED TO ENHANCE A SENTENCE BECAUSE THE PETIT THEFT CHARGE WAS ALREADY ENHANCED.

Mr. Ey also sufficiently alleged that his attorney affirmatively misadvised him that the petit theft charged as a felony in Case Number 99-21195 could never be used as a basis to enhance a sentence because the petit theft sentence was already enhanced. Counsel's statement to Mr. Ey was in error.

Mr. Ey must concede that to the extent the enhancement occurred on the basis of a crime committed after his plea, this Court's decision in Dickey holds such contention cannot rise to the level of ineffective assistance of counsel. That is not the case here, however.

As in Issue I, Mr. Ey's attorney knew at the time of the plea in Case Number 99-21195 Mr. Ey had allegedly committed other crimes not yet charged. The felony conviction in Case Number 99-21194 was used to habitualize Mr. Ey and

impose a habitual offender sentence in Case Number 00-9494. Thus, the analysis from Issue I applies here on this claim. Mr. Ey is entitled to an evidentiary hearing on this claim.

III. MR. EY IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS ALLEGATIONS THAT HIS ASSISTANT PUBLIC DEFENDER AFFIRMATIVELY MISADVISED HIM THAT VOLUNTARY INTOXICATION WAS NOT A DEFENSE TO HIS THEFT CHARGE.

There is yet another separate and independent basis for this Court to quash the decision below and grant Mr. Ey an evidentiary hearing on his 3.850 motion. This basis is not dependent on the Court's resolution of Issues I or II in Mr. Ey's favor. Instead, Mr. Ey's allegations that his counsel affirmatively misadvised him that voluntary intoxication was not a legal defense to the theft charge entitles Mr. Ey to an evidentiary hearing.

As noted above, if the felony conviction for petit theft in Case Number 99-21195 is reversed, the trial court's basis to sentence Mr. Ey as a habitual felony offender is eliminated. Thus, the thirty year sentence on a second-degree felony would be an illegal sentence as it exceeds the statutory maximum. This is sufficient prejudice until the Strickland standard.

Petit theft is a specific intent crime. See, e.g., Straitwell v. State, 834 So. 2d 918, 920 (Fla. 2d DCA 2003); see also Whitfield v. State, 923 So. 2d 375, 379

(Fla. 2005) (citing Straitwell with approval). Voluntary intoxication is a valid defense to specific intent crimes. See Straitwell 834 So. 2d at 920 ("Voluntary intoxication is a defense to specific intent crimes such as . . . petit theft.").

Effective October 1, 1999, the Florida Legislature mostly eliminated the defense of voluntary intoxication. See Troy v. State, 948 So. 2d 635, 643-645 (Fla. 2006); Ch. 99-174, §§ 1, 2, Laws of Fla. (codified as section 775.051, Florida Statutes (1999)). The Legislature, however, specifically authorized defendants to pursue an intoxication defense where the intoxication resulted from doctor prescribed controlled substance. See § 775.051, Fla. Stat. This Court previously has upheld the constitutionality of this statute and the doctor-prescribed medicine exception. See Troy, 948 So. 2d at 643-645. As noted below, though, section 775.051 does not apply to Mr. Ey.

In Mr. Ey's case, the date of his petit theft in Case Number 99-21195 is not revealed on the Record, although the date of his arrest in this case is November 24, 1999.[9] (R 6). Assuming for the moment that the crime occurred after October 1, 1999, Mr. Ey specifically alleged that he told the assistant public defender prior to his plea in this case that on the day of the theft he was taking doctor prescribed

[9] If Mr. Ey's alleged theft crime occurred prior to October 1, 1999, he would indisputably be entitled to the voluntary intoxication defense. See Straitwell, 834 So. 2d at 920. If this Court rejects Mr. Ey's allegations concerning the "doctor-prescribed exception" contained in section 775.051 is a valid defense for Mr. Ey, this Court should permit Mr. Ey an opportunity to demonstrate whether this crime occurred before or after October 1, 1999.

medicine following a recent surgery. (R 7, 12-13). That medicine adversely affected his ability to recall the events of the day of the theft, which negates any specific intent. (R 7, 12-13). Mr. Ey also alleged that had he known voluntary intoxication was a defense at the time of his plea, he would not have pled to the theft charge, he would have gone to trial, and he likely would have been acquitted. (R 7, 12-14). Nothing in the Record refutes Mr. Ey's contentions. Thus, regardless of whether Mr. Ey's theft crime in Case Number 99-21195 occurred before of after October 1, 1999, he would have been entitled to pursue a voluntary intoxication defense.

A postconviction allegation that counsel failed to pursue a known voluntary intoxication defense requires an evidentiary hearing to determine whether counsel was deficient. See, e.g. Reaves v. State, 826 So. 2d 932, 937-939 (Fla. 2002) (reversing trial court's summary affirmance of postconviction motion for evidentiary hearing to establish whether counsel performed deficiently in failing to pursue known intoxication defense); Scott v. State, 842 So. 2d 244, 244 (Fla. 2d DCA 2003) (same); Foster v. State, 825 So. 2d 1023, 1024 (Fla. 1st DCA 2002) (same). If the record is inconclusive as to why counsel did not pursue the involuntary intoxication defense, like it is here, the petitioner is entitled to an evidentiary hearing. See id.

In the absence of record evidence refuting his allegations, Mr. Ey's allegations concerning his involuntary intoxication defense were sufficient to permit him an evidentiary hearing to determine whether counsel was ineffective. See, e.g., Reaves, 826 So. 2d at 937-939.

IV. MR. EY TIMELY SOUGHT POSTCONVICTION RELIEF CONTENDING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AND HIS PLEA IN CASE NUMBER 99-21195 WAS INVOLUNTARY.

The Record in this case demonstrates substantial efforts Mr. Ey made pro se to properly raise the matter of ineffective assistance of counsel resulting in an involuntary plea in Case Number 99-21195. Mr. Ey's allegations should not have been summarily dismissed.

A. Mr. Ey's instant postconviction motion was timely.

1. The date of notice of counsel's error controls.

Mr. Ey learned on August 30, 2000, that his counsel's advice that his plea in Case Number 99-21195 could not be used to enhance the sentences on crimes he previously committed was incorrect. That is the date he received notice in Case Number 00-9494 that the State sought an enhanced penalty due to section 775.084. Mr. Ey filed his instant postconviction motion with the Court on August 7, 2002. (R 4). Both of those dates are within two years of Mr. Ey learning of counsel's error.

The date the defendant learns of the misadvice is the date the two year window begins to run. See Ghanavati v. State, 820 So. 2d 989, 990 (Fla. 4th DCA 2002). In Ghanavati, the defendant pled in 1987 (after receiving affirmative misadvise from his attorney), but did not learn of the threat of deportation until July 11, 2001. See id. The court held the motion was timely because it was filed within two years of that date. See id.

Similarly, that is the same holding in Love v. State, 814 So. 2d 475, 477 (Fla. 4th DCA 2002), where the court permitted a challenge to a 1987 plea where the defendant learned of the misadvice in 1995 and attempted to file postconviction motions in 1996. While those 1996 motions were time barred, the court found the postconviction motion filed in 2001 to be timely under Wood v. State, 750 So. 2d 592 (Fla. 1999). See Love, 814 So. 2d at 477.

Both the Ghanavati and Love decisions relied on this Court's decision in Peart v. State, 756 So. 2d 42, 46 (Fla. 2000), which provided the two-year window to bring the 3.850 challenge began to run when the threat of deportation was known or should have been known, and not the date of the judgment and sentence flowing from the plea. This Court in 2006 overruled itself on this issue, concluding that the two-year window began to run at the time of the plea and not the defendant's knowledge. See State v. Green, 944 So. 2d 208, 217-18 (Fla. 2006). In the interests of "fairness," this Court unanimously agreed to give

adversely affected defendants two years from the date of Green to file their postconviction challenge. See id. at 219.

This same fairness argument applies here. Because Mr. Ey filed his instant postconviction motion prior to the release of Green, this Court should find it timely. This Court did not address this issue in Dickey. See Dickey, 928 So. 2d at 1195 n.3.

2. Mr. Ey took steps to challenge the plea within two years of the plea.

Initially, Mr. Ey timely instructed his attorney to file a motion to withdraw his plea. Counsel, however, filed that motion untimely. That precipitated Mr. Ey to file a pro se motion to withdraw his plea on June 20, 2000.[10] The trial court denied that motion without prejudice on November 7, 2000. However, Mr. Ey did not receive the trial court's order until July 14, 2002. Mr. Ey served his instant postconviction motion within twenty days of receiving the trial court's order. This demonstrates Mr. Ey's diligence in bringing to the Court's attention his challenge to the plea.

Courts permit extensions to deadlines where good cause is shown. See, e.g., Kelly Assisted Living Svc's, inc. v. Estate of Reuter, 618 So. 2d 813, 814-15 (Fla.

[10] This filing date is taken from the Docket printout filed by the State. (A E). The Record does not reveal the exact date Mr. Ey filed his pro se motion; however, logically it had to have been prior to the date the court dismissed it on November 7, 2000, which is within two years of the date of the plea.

3d DCA 1996) (extending statutory and rule deadlines where good cause shown). That is the case here: Mr. Ey pro se challenged his plea at a time that he was still represented by counsel. That challenge occurred well within the two-year deadline set forth in rule 3.850. Given counsel's failure to file the motion to withdraw the plea, the confusion over the status of his counsel, it is quite possible that Mr. Ey did not receive the order until July 12, 2002, as he contends. Mr. Ey then filed the instant postconviction motion within twenty days. Because nothing in the Record refutes that contention, he should be entitled, at a minimum, to an evidentiary hearing to establish good cause.

B. Mr. Ey is entitled to an evidentiary hearing on his allegation that counsel failed to advance a postconviction motion after counsel agreed to do so.

Even if this Court were to conclude that Mr. Ey's current postconviction motion is time-barred, Mr. Ey would still be entitled to a hearing on his claim that the assistant public defender agreed to file a postconviction motion challenging Mr. Ey's plea in Case Number 99-21195, but that attorney failed to do so. This Court's case law mandates an evidentiary hearing.

In Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999), this Court held:

> We agree with the district court below that due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner. We hold that, if the prisoner prevails at the hearing, he or she is authorized to belatedly file a rule 3.850 motion challenging his or her conviction or sentence.

> We also agree with Judge Sharp's concurring opinion that the prisoner's claim under these specific circumstances should be presented to the court in a petition for writ of habeas corpus, which would not be barred under rule 3.850(h) because it would come within the final clause thereof.

(Emphasis added, citations omitted.) This decision was based on the Fifth Amendment to the United States Constitution, which this Court concluded applied to the postconviction process. Additionally in Steele, this Court amended rule 3.850, by adding subsection (b)(3), permitting a 3.850 motion to be filed beyond the two-year time limit where "the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion." See id. at 934; Fla. R. Crim. P. 3.850(b)(3).

This Court followed Steele in Medrano v. State, 748 So. 2d 986 (Fla. 1999). In that decision, this Court concluded that a prisoner does not need to file an untimely 3.850 in order to obtain a hearing on counsel's failure to file a 3.850. Medrano, 748 So. 2d at 987.

In Mr. Ey's case, he specifically alleged that his first assistant public defender agreed to file a postconviction motion challenging Mr. Ey's plea in Case Number 99-21195. (R 7, 9, 14, 15). That first assistant public defender, after having agreed to file that motion, failed to do so. (R 8, 9, 14, 15). Moreover, although the Record is not as clear on this point, Mr. Ey's second assistant public defender also agreed to file a postconviction motion attacking Mr. Ey's plea in

Case Number 99-21195, but she failed to file that motion, too. (R 23, 24). Under this Court's decisions in Steele and Medrano, Mr. Ey is entitled to a hearing.

The trial court apparently recognized Mr. Ey's right to proceed but dismissed his 3.850 motion anyway, ruling Mr. Ey should have filed a writ of habeas corpus. (R 3). Specifically, the trial court ruled:

> c. The Court notes that the proper procedure when alleging counsel did not file a rule 3.850 motion within the two-year time constraint is to file a petition for habeas corpus.

State v. Ey, Case No. 99-21195 (Fla. 6th Cir. Ct. Sept. 4, 2002) (citation omitted). The trial court, however, should not have dismissed Mr. Ey's motion; instead, the trial court should have considered the motion as a petition for writ of habeas corpus as commanded by article V, section 2(a), Florida Constitution. That provision requires "that no cause shall be dismissed because an improper remedy has been sought."

This Court long-ago admonished courts not to dismiss cases because of a procedural defect. See, e.g., State v. Johnson, 306 So. 2d 102 (Fla. 1974) (quashing the district court's decision not to treat writ of certiorari as notice of appeal pursuant to article V, section 2(a), Florida Constitution). In fact, this Court in rule 3.020 demands that the all of the rules under Rule 3 "shall be construed to secure simplicity in procedure and fairness in administration" for the "just determination of every criminal proceeding." Yet, dismissing the case instead of

treating the filing as seeking the correct remedy is exactly what the trial court did.[11] This was error. See LaMonica v. State, 732 So. 2d 1175, 1176 (Fla. 4th DCA 1999) (reversing trial court's summary affirmance and requiring trial court to treat rule 3.850 motion as petition for writ of error coram nobis).

Accordingly, this Court should quash the district court's decision and remand with instructions that the trial court conduct an evidentiary hearing on Mr. Ey's contention that his attorney agreed to pursue a postconviction challenge to Mr. Ey's plea in Case Number 99-21195.

CONCLUSION

Mr. Ey alleged at least three separate instances where his counsel affirmatively misadvised him about the consequences of his plea in Case Number 99-21195: (1) that his plea could not be used to enhance crimes that counsel knew Mr. Ey had allegedly committed at the time of plea; (2) that his felony conviction for third time petit theft could never be used to enhance a sentence because that

[11] No reasonable purpose is served by requiring Mr. Ey to file a separate pro se writ of habeas corpus. Substantial administrative work would go into opening a new case that could be avoided simply by treating the 3.850 motion as one for writ of habeas corpus. The trial court in its discretion could limit the evidentiary hearing to this matter. Of course, if Mr. Ey is successful there, he would be entitled to another evidentiary hearing on his ineffective assistance of counsel claims. Steele, 747 So. 2d at 934. Thus, holding an evidentiary hearing on all matters might be in the best interests of judicial economy. This critical evaluation of whether to bifurcate the proceeding is analogous to Justice Cantero's discussion in Grosvenor v. State, 874 So. 2d 1176, 1182-1183 (Fla. 2004), concerning the decision to bifurcate the prejudice and deficient performance prongs.

felony conviction itself was enhanced; and (3) that involuntary intoxication by doctor prescribed medicine was not an affirmative defense to the theft charge.

Without the felony conviction in Case Number 99-21195 on account of Mr. Ey's plea, the State would have been unable to habitualize Mr. Ey in Case Number 00-9494 and impose a thirty year sentence instead of the lesser statutory maximum.

Mr. Ey's plea in Case Number 99-21195 was not voluntary because of this affirmative misadvice. Both deficient performance and prejudice prongs of the ineffective assistance test are satisfied, requiring an evidentiary hearing. Mr. Ey's postconviction motion was timely filed. And even if it was not, he would still be entitled to an evidentiary hearing on his claim that his attorney agreed to file a postconviction motion attacking the plea, but the attorney failed to do so.

This Court should quash the decision for review and remand with instructions that the trial court conduct evidentiary hearings on Mr. Ey's claims of ineffective assistance of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY, this ___ day of June, 2007, that a true copy of the foregoing Initial Brief of Petitioner Robert Ey and the corresponding Appendix has been furnished by First Class U.S. Mail to:

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I FURTHER CERTIFY, this ___ day of June, 2007, that the type size and style used throughout Petitioner's Initial Brief is Times New Roman 14-point font, which is compliant with Florida Rule of Appellate Procedure 9.210(a)(2).

_____
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