IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC05-516

HERBERT DICKEY,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant before the trial court and the appellant in the lower tribunal. A one volume record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses.

Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Dickey v. State, 30 Fla. L. Weekly D443 (Fla. 1st DCA Feb. 15, 2005). This brief is being submitted in Word format and electronically.

Petitioner=s Brief on the Merits will be referred to as APB,@ followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner=s recitation of the history of this case (PB at 1-4).

By unreported order issued along with the opinion, the lower tribunal appointed this Office to represent respondent in this Court.

III SUMMARY OF THE ARGUMENT

The lower tribunal=s opinion in this case properly held that where a defendant claims that his attorney gave him affirmative misadvice that his plea could not be used to later enhance future sentences, the defendant has set forth an actionable claim of ineffective assistance of counsel.

The standard of review is de novo, since this case involves only a question of law.

The decision below is correct. The law is clear that where an attorney offers affirmative misadvice on some collateral matter (such as becoming a citizen or possible deportation or involuntary civil commitment as a sex offender or eligibility for gain time or obtaining a license or certification as a correctional officer or losing the right to vote), and the defendant relies on that misadvice in deciding whether to enter a plea, the defendant has set forth a claim of ineffective assistance of counsel and is entitled to a hearing on his request to withdraw his plea.

There is no reason why the result should not be the same where the attorney misadvises the defendant that his plea cannot be used to enhance a future sentence. The Fourth District has agreed with respondent=s position and held that a defendant who alleges that his attorney affirmatively

misadvised him that a plea to a crime could never be used to enhance a future sentence

has set forth a claim for postconviction relief. The Second and Third Districts have held to the contrary, but their reasoning is flawed.

Petitioner has failed to show how this type of affirmative misadvice is any different from affirmative misadvice concerning citizenship or possible deportation or involuntary civil commitment as a sex offender or eligibility for gain time or obtaining an occupational license or being employed as a correctional officer or losing the right to vote.

All of these consequences, whether one characterizes them as Adirect@ or Acollateral,@ flow from the entry of the plea. Some of these may also be Atoo 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.

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.

Courts should not decide the rights of individual litigants based upon some nebulous view of Apublic policy.@ Rather, cases should be decided on their facts, in light of protecting the defendant=s constitutional rights.

This Court has set forth rules to guarantee that a defendant=s plea is voluntary, and placed the burden on the trial judge to ensure that it is voluntary. 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 respondent=s constitutional rights. A plea of guilty is more than a grumbling admission of misconduct. It involves the waiver of important constitutional rights. 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.

In order for our system of justice to function properly, it is essential that counsel render competent advice in order for the plea to be deemed voluntary. Where counsel renders affirmative misadvice, counsel cannot by definition be competent, and so the voluntariness of the plea becomes suspect and the defendant can easily allege prejudice from his counsel=s misadvice.

The view that granting relief in these cases would encourage defendants to commit future crimes is incorrect. 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 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, that purpose is thwarted if the attorney misadvises the defendant that he or she cannot be punished in the future as a recidivist.

This Court must accept the First and Fourth Districts= view and 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.

IV ARGUMENT

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 respondent had set forth a claim for relief where he alleged that his counsel had misadvised him as to the ramifications of his 1996 pleas to two Leon County felonies, which were used later to enhance a sentence in Alabama.

The First District in this case receded from its previous position in Bates v. State, 818 So. 2d 626 (Fla. 1st DCA 2002), *quashed* 887 So. 2d 1214 (Fla. 2004), and held that respondent had set forth an actionable claim of ineffective assistance of counsel. The lower tribunal had previously held in Joyner v. State, 795 So. 2d 267, 268 (Fla. 1st DCA 2001), that defense counsel=s affirmative misadvice that a youthful offender adjudication did not count as a prior conviction Afor future repercussions@ set forth a valid claim for relief.

The standard of review in this case is de novo, since this case involves only a question of law. City of Jacksonville v. Cook, 765 So. 2d 289 (Fla. 1st DCA 2000).

BACKGROUND CASES FROM THIS COURT

The law from this Court has developed to a stage that where an attorney offers affirmative misadvice, as opposed to no advice
at all, and the defendant relies on that affirmative misadvice in deciding whether to enter a plea, then the defendant has set forth a claim of ineffective assistance of counsel and is entitled to withdraw his plea.

In Major v. State, 814 So. 2d 424 (Fla. 2002), this Court held that defense counsel has no duty to inform his or her client that if the client enters a plea in the pending, that conviction may cause a sentence for a future crime to be enhanced, because the possibility of future enhancement was a collateral, not direct, consequence of the plea. Major left open the question presented here -- where the lawyer gives affirmative misadvice that the plea cannot be used to enhance a future sentence, is the defendant entitled to relief.

In State v. Ginebra, 511 So. 2d 960 (Fla. 1987), this Court held that a defendant who is not a U.S. citizen cannot collaterally attack his plea on the grounds that his lawyer failed to advise him that his plea could lead to deportation. State v. Ginebra also left open the question presented here.

Id at 962, note 6.[1] But in State v. Sallato, 519 So. 2d 605 (Fla. 1988), this Court indicated that affirmative misadvice about the effect of a plea on possible deportation may set forth a claim for relief.

Ten years later, in State v. Leroux, 689 So. 2d 235, 236 (Fla. 1997), this Court set forth the general rule regarding the effect of affirmative misadvice from a defense lawyer which leads a defendant to enter a plea:

> Misrepresentations by counsel as to the length of a sentence or eligibility for gain time can be the basis for postconviction relief in the form of leave to withdraw a guilty plea.

The same rule should apply where a lawyer affirmatively misadvises a client that his plea can never be used to enhance a sentence for a future crime. Such affirmative misadvice goes to the heart of the voluntariness of the plea, just like affirmative misadvice regarding the amount of time the

[1] *State v. Ginebra* was also superceded by Fla. R. Crim. P. 3.172(c)(8). *See State v. DeAbreu*, 613 So. 2d 453 (Fla. 1993).

defendant will have to serve in prison if he enters a plea.[2]

[2]The lower tribunal has recognized that the latter would set forth a claim for relief. *See Romero v. State*, 729 So. 2d 502 (Fla. 1st DCA 1999); and *Burnham v. State*, 702 So. 2d 303 (Fla. 1st DCA 1997).

While it is true that the district courts of appeal are split on the precise issue presented here, the Fourth District=s position supports respondent=s claim for relief.

THE FOURTH DISTRICT=S POSITION

In Smith v. State, 784 So. 2d 460 (Fla. 4th 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. 4th DCA 2001).

In Love v. State, 814 So. 2d 475 (Fla. 4th 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. 4th DCA 2002): Aaffirmative misadvice, regarding even collateral consequences of a plea, may form the basis for withdrawing the plea.@

In Ghanavati v. State, 820 So. 2d 989 (Fla. 4th DCA 2002), a deportation case, the defendant=s motion for postconviction relief included an affidavit from his lawyer saying that the lawyer had advised him that his plea with adjudication withheld would cause him no Afurther repercussions at all arising from or relating to the charges or the plea itself.@ The defendant also swore in an affidavit that he would not have entered the plea if he had known of the deportation consequences. The Fourth District reversed for a hearing and

summed up its position in such cases, 820 So. 2d at 991:

> When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her.

In Burns v. State, 826 So. 2d 1055, 1056 (Fla. 4th DCA 2002), the Fourth District adhered to its position:

> When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he was thereby prejudiced, the defendant may seek to withdraw the plea even if the misadvice concerns collateral consequences as to which the trial court was under no obligation to advise.

In Smith v. State, 829 So. 2d 940, 941 (Fla. 4th DCA 2002), *review pending* case no. SC02-2492, the Fourth District again adhered to its position:

> This Court has treated affirmative misadvice of counsel differently from the mere failure to advise of enhancement consequences and has found it cognizable in a motion for postconviction relief.

THE SECOND DISTRICT=S POSITION

The Second District had previously granted relief where the defendant alleged that his attorney erroneously told him he would not subject to a Jimmy Ryce commitment, Roberti v. State, 782 So. 2d 919 (Fla. 2nd DCA 2001), and where the defendant alleged that his attorney mis-informed him that he would receive gain time against a mandatory minimum sentence,

Ray v. State, 480 So. 2d 228 (Fla. 2nd DCA 1985).[3]

However, in Stansel v. State, 825 So. 2d 1007 (Fla. 2nd DCA 2002), a majority of that court held that it would not grant relief to Mr. Stansel where he alleged that his attorney had misadvised him that his violation of probation could not be used as a prior conviction against him in a subsequent case, because a person has the duty not to commit future crimes.[4]

THE THIRD DISTRICT=S POSITION

The Third District has taken a position contrary to the Fourth District. In a line of cases commencing with Rhodes v.

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[3]Likewise, in ***Walkup v. State***, 822 So. 2d 524 (Fla. 2nd DCA 2002), the Second District granted relief defendant entered a negotiated plea to the lesser charge of attempted capital sexual battery. He later alleged that his counsel had told him if he did not enter a plea, he would be subject to Jimmy Ryce commitment. The court cited ***Roberti*** and reversed for an evidentiary hearing at which Mr. Walkup would have to prove that his attorney=s misadvice had caused him to enter the plea.

[4]In ***Bates***, Judge Allen, dissenting, stated that:

> 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.

818 So. 2d at 632.

State, 701 So. 2d 388 (Fla. 3rd DCA 1997)[5] and concluding with McPhee v. State, 823 So. 2d 160 (Fla. 3rd DCA 2002), *review pending* case no. SC02-1501, that court has held that even if an attorney gives his client affirmative misadvice about the collateral consequences of the plea, that fact does not set forth a valid claim for postconviction relief.

The Second and Third District=s position on the issue presented here is founded on Rhodes v. State, *supra*, that to warn a defendant that his present crime could be used to enhance a sentence on a future crime is an encouragement to the defendant to commit future crimes. That reasoning makes no sense. If a defendant heeds such a warning, he will not want to commit future crimes. Actually, the failure to warn is what encourages recidivism.[6]

THE FIFTH DISTRICT=S POSITION

In McKowen v. State, 831 So. 2d 794 (Fla. 5th DCA 2002), the Fifth District aligned itself with the view of the Second

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[5]including *Woods v. State*, 806 So. 2d 621 (Fla. 3rd DCA 2002), *review denied* 886 So. 2d 228 (Fla. 2004); *Scott v. State*, 813 So. 2d 1025 (Fla. 3rd DCA 2002), *review pending* case no. SC02-1043); and *Cifuentes v. State*, 816 So. 2d 804 (Fla. 3rd DCA 2002), *review pending* case no. SC02-1136).

[6]*See* Judge Allen=s comments in *Bates,* quoted in footnote 4, *supra*. Judge Northcutt, dissenting in *Stansel, supra*, 825 So. 2d at 1010, agreed with Judge Allen.

and Third Districts, without saying why.

THE LAW IS IN HOPELESS DISARRAY

Thus, the current state of the case law in Florida regarding affirmative misadvice by defense counsel is in hopeless disarray. The Districts are split as to whether affirmative misadvice as to the use of a plea to enhance a later sentence constitutes a claim for relief. As noted by the lower tribunal, the outcome is different if it involves affirmative misadvice about:

- **$** becoming a citizen
- **$** being deported
- **$** being committed under the Jimmy Ryce Act
- **$** being ineligible for gain time
- **$** obtaining a license
- **$** being employed as a correctional officer
- **$** losing the right to vote.[7]

The rules should be the same for all of these collateral consequences of a plea. Where a defendant alleges that his attorney=s affirmative misadvice on some collateral consequence of the plea caused him to enter the plea, he is entitled to relief. There is no reason why the result should not be the

[7]Appendix at 4.

same

in the instant case. The Fourth District=s view on the issue presented here is consistent with the above cases as it pertains to misadvising a defendant about the use of his plea to enhance future sentences. The contrary view of the Second and Third District is illogical and not consistent with the above cases.[8]

THE STATE=S POSITION IS WITHOUT MERIT

Petitioner 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 (PB at 9).

However, petitioner argues, as it did in Bates, *supra*, that affirmative misadvice concerning the effect of a conviction on

[8]On January 5, 2005, this Court ordered the parties in the cases pending on this issue (*Cifuentes*, case no. SC02-1136, *McPhee*, case no. SC02-1501, *Scott*, case no. SC02-1043, and *State*

v. Smith, case no. SC02-2492) to state whether their petitions for relief were timely-filed in light of *Bates*.

future habitualization is Atoo attenuated@ to be relied upon (PB at 11). But petitioner has failed to show how this type of affirmative misadvice is any different from affirmative misadvice concerning citizenship or possible deportation or involuntary civil commitment as a sex offender or eligibility for gain time or obtaining an occupational license or being employed as a correctional officer or losing the right to vote. These consequences, just like an enhanced sentence for a subsequent crime, may also occur many years down the road from the plea.

All of these consequences, whether one characterizes them as Adirect@ or Acollateral,@ flow from the entry of the plea. Some of these may also be Atoo 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.

Petitioner distinguishes the collateral consequence cases relied upon by the lower tribunal on the basis that they are contrary to public policy (PB at 14). 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 respondent=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, 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).

In order for our system of justice to function properly, 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, 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).

Petitioner argued in Bates v. State, *supra*, and continues to argue here that to grant relief to a defendant who received affirmative misadvice regarding the effect of the plea on future sentences is contrary to public policy because it would encourage him and others to commit future crimes (PB at 12-13). Judge Allen, dissenting in Bates, had Asome difficulty in following this logic.@ Bates, *supra*, 818 So. 2d at 632. Judge Allen=s position has been adopted by the lower tribunal in the instant case:

> The logic of this assertion escapes us, as

> we cannot discern how telling an accused defendant that he will face harsher penalties if he commits another crime in the future can be construed as encouraging the defendant to go out and break the law again. On the contrary**, it is our opinion that advising an accused that his plea and conviction *cannot* be used to enhance a future sentence is more likely to encourage recidivism.**

Appendix at 6; bold emphasis added; italics in original.

It would be most 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 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 former Justice Shaw noted, dissenting in Major v. State, *supra*, 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.

* * *

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.

* * *

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.

* * *

It is very much in society's interest **B** it seems to me **B** 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.**

* * *

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.
>
> * * *
>
> 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 former 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 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 Apublic 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 Apublic 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 Apublic 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. (bold emphasis added).

This Court must answer the certified question in the affirmative and hold that respondent has stated a valid claim for relief. 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 an evidentiary hearing on his claim for relief.

V CONCLUSION

Based upon the arguments presented here, respondent respectfully asks this Court to answer the certified question in the affirmative and hold that respondent has set forth a claim of relief since his attorney affirmatively gave him misadvice regarding the ramifications of his 1996 pleas of nolo contendere in Leon County.

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 Meggs Pate, Assistant Attorney General, The Capitol, Tallahassee, Florida; and to respondent, #10760-017, PMB 1000, Beta B, Federal Correctional Institution, Talladega, Alabama 35160; on this ___ day of May, 2005.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

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

_____
P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC05-516

HERBERT DICKEY,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

APPENDIX: Opinion of Lower Tribunal.

NANCY A. DANIELS
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<KeyCite History>

Briefs and Other Related Documents

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
First District.
Herbert **DICKEY,** Appellant,
v.
STATE of Florida, Appellee.
No. 1D03-2489.

Feb. 15, 2005.

Background: Defendant filed postconviction motion alleging ineffective assistance of counsel. The Circuit Court, Leon County, Kathleen F. Dekker, J., summarily denied the motion. Defendant appealed.

Holding: On rehearing, the District Court of Appeal, Davis, J., held that allegations of affirmative misadvice by trial counsel on the sentence-enhancing consequences that defendant's plea would have in future criminal prosecutions, if presented in an otherwise facially sufficient motion for postconviction relief, are cognizable as an ineffective assistance of counsel claim.

Affirmed in part, reversed in part, and remanded with instructions; question recertified.

[1] Criminal Law k1536
110k1536
Defendant's discovery that his sentence in Alabama for a conviction in that state would be enhanced based on his prior conviction in Florida was newly-discovered evidence, for purposes of determining the timeliness of his motion for postconviction relief in Florida based on a claim that his trial counsel for the Florida prosecution had been ineffective in affirmatively misadvising him that his plea of nolo contendere could not be used to enhance a future sentence. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.

[2] Criminal Law k1519(8)
110k1519(8)
Allegations of affirmative misadvice by trial counsel on the sentence-enhancing consequences that defendant's plea would have in future criminal prosecutions, if presented in an otherwise facially sufficient motion for postconviction relief, are cognizable as an ineffective assistance of counsel claim. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.

[3] Criminal Law k641.13(5)
110k641.13(5)
Counsel's misadvice regarding the collateral consequence that a plea will have on future sentence enhancement constitutes deficient performance, as element of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[4] Criminal Law k273.1(4)
110k273.1(4)
A "direct consequence" of a plea is one which has

a definite, immediate, and largely automatic effect on the range of the defendant's punishment, while a "collateral consequence," such as damage to reputation, loss of professional licenses, and loss of certain civil rights such as the right to vote and the right to own a firearm, does not affect the range of the defendant's punishment. West's F.S.A. §§ 97.041(2)(b), 790.23, 944.292(1).

[5] Criminal Law k274(4)
110k274(4)
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, even if the mistaken advice regards a collateral consequence of the plea.

[6] Criminal Law k641.13(5)
110k641.13(5)
Counsel's misadvice on a collateral consequence of a plea, about which consequence counsel has no obligation to advise the accused, is as a matter of law deficient performance, as element of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[7] Criminal Law k1655(6)
110k1655(6)
Prejudice sufficient to warrant an evidentiary hearing on a claim of ineffective assistance of counsel is established if the defendant alleges that but for counsel's misadvice regarding the collateral consequences of the plea, the defendant would not have entered the plea. U.S.C.A. Const.Amend. 6.

[8] Criminal Law k641.13(5)
110k641.13(5)
Competent counsel must answer correctly, to provide non-deficient performance which will not constitute ineffective assistance of counsel, when a defendant asks for, or when counsel volunteers, information relating to whether the decision to plead will impact future sentences. U.S.C.A. Const.Amend. 6.

[9] Criminal Law k1655(6)
110k1655(6)
Summary denial of a postconviction claim that counsel was ineffective in misadvising defendant about the collateral consequences of the plea will be proper only when the claim is conclusively refuted by the record. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.
Appellant, pro se.

Charlie Crist, Attorney General, Tallahassee, for Appellee.

DAVIS, J.

***1** In *Dickey v. State,* 28 Fla. L. Weekly D2108 (Fla. 1st DCA September 5, 2003), this Court *per curiam* affirmed the trial court's summary denial of appellant's postconviction claims of ineffective assistance of counsel with a citation to this Court's decision in *Bates v. State,* 818 So.2d 626 (Fla. 1st DCA 2002), *review granted,* 832 So.2d 103 (Fla.2002), *quashed,* 887 So.2d 1214 (Fla.2004). In *Bates,* we certified the question:

> WHETHER 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?

818 So.2d at 626.

Due to the Florida Supreme Court's quashal of

our decision in *Bates, see* 887 So.2d at 1214, and the continuing importance of the certified question, we *sua sponte* withdraw our pre-mandate opinion in *Dickey,* 28 Fla. L. Weekly at D2108, and grant rehearing. We affirm without comment the summary denial of appellant's remaining claims; however, upon further consideration of appellant's timely claim that he entered a plea in reliance on his counsel's mistaken advice that the plea could not be used to enhance a future sentence, we reverse the trial court's summary denial of that claim and remand for an evidentiary hearing.

[1] In 1996, appellant was sentenced to two years' probation on a conviction obtained by the state when appellant pled nolo contendere to charges of criminal mischief and failure to appear. Some time after successfully completing his Florida probation, appellant was convicted of a crime in Alabama, and Alabama enhanced appellant's sentence based upon appellant's 1996 Florida conviction. On May 9, 2001, more than two years after appellant's Florida conviction became final for purposes of 3.850, appellant filed a motion for postconviction relief pursuant to that rule. Among other grounds, appellant alleged to have suffered ineffective assistance of counsel in that his counsel affirmatively misadvised him regarding the potential future sentence enhancement consequences of his plea, which misadvice only surfaced as newly discovered evidence when appellant learned that his Alabama sentence was to be enhanced based upon the Florida conviction. The trial court correctly accepted as timely his claim of newly discovered evidence (which was filed within two years of the discovery of enhancement), reviewed the merits, and then denied relief with a citation to this Court's decision in *Bates v. State,* 818 So.2d 626 (Fla. 1st DCA 2002), *quashed,* 887 So.2d 1214 (Fla.2004).

This Court had received numerous petitions for writs of error coram nobis and untimely 3.850 motions raising this exact claim and asserting timeliness pursuant to *Wood v. State,* 750 So.2d 592 (Fla.1999)(providing that all defendants previously adjudicated would have two years from May 27, 1999, in which to file rule 3.850 motions raising claims traditionally cognizable under coram nobis). We therefore decided to *per curiam* affirm those claims with a citation to our decision in *Bates,* and we entered separate orders instructing those defendants that they would have until fifteen days after the Supreme Court answered the certified question in which to seek rehearing of this Court's affirmance of the summary denial of their claims. Appellant's claim was one of many to receive this treatment. The Supreme Court accepted review of our decision in *Bates,* but did not answer the certified question because it determined that our decision as to the timeliness of Bates' claim was incorrect; rather, the Supreme Court quashed this Court's decision and elected not to answer the procedurally barred question. *Bates,* 887 So.2d at 1214.

***2** [2] Based on the following, we now answer the question certified affirmatively and hold 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. We certify conflict with the Second, Third, and Fifth Districts, each of which has held that this claim does not entitle a defendant to an evidentiary hearing. *See Stansel v. State,* 825 So.2d 1007 (Fla. 2d DCA 2002)(acknowledging that affirmative misadvice about collateral consequences can constitute basis for withdrawal of plea, but denying relief on the claim of affirmative misadvice on future sentence enhancement consequences because "unlike other collateral consequences, such as deportation or

gain time eligibility, the future sentence-enhancing effects of a guilty plea only apply if the defendant commits a future criminal offense"); *Scott v. State*, 813 So.2d 1025, 1026-27 (Fla. 3d DCA 2002)("[T]he defendant is under a legal duty to refrain from committing further crimes. It makes no difference whether the defendant is given correct, or incorrect, advice regarding the possibility of enhanced punishment."); *McKowen v. State*, 831 So.2d 794 (Fla. 5th DCA 2002)(denying relief because "[t]o rule otherwise would be to encourage recidivism and frustrate the purpose of the statutory sentencing scheme which enhances sentences based on past criminal behavior"). We align ourselves with the Fourth District, which has held that "[w]hen a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he was thereby prejudiced, the defendant may seek to withdraw the plea even if the misadvice concerns collateral consequences as to which the trial court was under no obligation to advise." *Burns v. State*, 826 So.2d 1055, 1056-57 (Fla. 4th DCA 2002)(citing *Ghanavati v. State*, 820 So.2d 989, 991 (Fla. 4th DCA 2002); *Murphy v. State*, 820 So.2d 375 (Fla. 4th DCA 2002); *Love v. State*, 814 So.2d 475 (Fla. 4th DCA 2002); *Jones v. State*, 814 So.2d 446 (Fla. 4th DCA 2001)).

[3] Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant alleging ineffective assistance of counsel must prove both deficient performance of counsel and prejudice to the defendant. We hold, as a matter of law, that counsel's misadvice regarding the collateral consequence of future sentence enhancement constitutes deficient performance. Deficiency having been established, relief must be afforded if prejudice is shown. *Id.* Thus, the only remaining question is whether the harm suffered by a defendant who relies on misadvice regarding future sentence enhancement consequences when entering a plea is sufficient to meet the prejudice prong of *Strickland*.

[4] Future sentence enhancement has been categorized as a collateral consequence of a plea in Florida. *See Major v. State*, 790 So.2d 550, 552 (Fla. 3d DCA 2001), *aff'd*, 814 So.2d 424 (Fla.2002). The collateral consequences rule originated in *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970), wherein the Supreme Court ruled that a plea of guilty will not be found to be unknowing and involuntary in the absence of proof that the defendant was not advised of, or did not understand, the *direct* consequences of his plea. (Emphasis added). *Accord State v. Leroux*, 689 So.2d 235, 238 (Fla.1996)(holding that although a trial court's correct advice during the plea colloquy may refute a claim of reliance on counsel's misadvice regarding a direct consequence of a plea, "[i]t is only when the record 'conclusively' establishes that the defendant did not rely on the advice of counsel that a summary adjudication will be proper"); *State v. Ginebra*, 511 So.2d 960, 962 (Fla.1987)(holding that an attorney is required to advise a defendant of the direct consequences of a plea and will not be found ineffective for failing to advise of collateral consequences of the plea), *superseded by rule on other grounds, State v. De Abreu*, 613 So.2d 453 (Fla.1993). A direct consequence is one which has a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." *State v. Partlow*, 840 So.2d 1040, 1042 (Fla.2003)(quoting *Major*, 814 So.2d at 431). If the consequence does not affect the range of the defendant's punishment, "it is merely a collateral consequence of the plea." *Id.* at 1043. Included in the category of collateral consequences are such matters as damage to reputation, loss of professional licenses, and loss of certain civil rights, examples of which are the right to vote and

the right to own a firearm. *See* §§ 944.292(1); 790.23; 97.041(2)(b), Fla. Stat. (2004).

***3** Although the Florida Supreme Court initially held that a defendant did not have to be informed by court or counsel of *any* collateral consequences of a plea and only had to be informed of direct consequences in order for the plea to be considered knowing and voluntary, *Ginebra,* 511 So.2d at 962, that holding was superseded by Rule 3.172(c), *De Abreu,* 613 So.2d at 453 (Fla.1993), which now requires that a defendant be informed by the trial court of the potential deportation consequences of his plea. *See Partlow,* 840 So.2d at 1042-43. Also, the Florida Supreme Court mandated that a defendant who pleads guilty to a crime that subjects him to a potential habitual felony offender sentence must be told that habitualization could affect the possibility of early release. *See State v. Wilson,* 658 So.2d 521 (Fla.1995); *Ashley v. State,* 614 So.2d 486, 490 n. 8 (Fla.1993).

[5] Nonetheless, despite the fact that *failure to advise* as to collateral consequences cannot constitute ineffective assistance of counsel, "[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," *see Leroux,* 689 So.2d at 238 (citing *Costello v. State,* 260 So.2d 198 (Fla.1972); *Brown v. State,* 245 So.2d 41 (Fla.1971)), even if the mistaken advice regards a collateral consequence of the plea. *See Watrous v. State,* 793 So.2d 6, 11 (Fla. 2d DCA 2001)("It is well-settled that affirmative misadvice regarding even collateral consequences of a plea forms a basis for withdrawing the plea.") Although the Second, Third, and Fifth Districts have concluded that a claim of misadvice on future sentence enhancement implies insufficient prejudice to warrant relief, *see Stansel,* 825 So.2d at 1007; *Scott,* 813 So.2d at 1026-27; *McKowen,* 831 So.2d at 794, relief has nevertheless been granted to defendants claiming to have entered pleas in reliance on affirmative misadvice regarding whether the plea would subject the defendant to:

(i) difficulties becoming a permanent United States citizen. *See State v. Sallato,* 519 So.2d 605 (Fla.1988);

(ii) deportation. See *Moreno v. State,* 592 So.2d 1226 (Fla. 4th DCA 1992). *Accord Bermudez v. State,* 603 So.2d 657, 657 (Fla. 3d DCA 1992)(holding that trial court's correct advice during plea colloquy cures any prejudice stemming from misadvice regarding deportation), *rev. denied,* 613 So.2d 1 (Fla.1992);

(iii) commitment under the Involuntary Civil Commitment of Sexually Violent Predators Act. *See Ghanavati,* 820 So.2d at 989, *Roberti v. State,* 782 So.2d 919 (Fla. 2d DCA 2001); *Watrous,* 793 So.2d at 6;

(iv) ineligibility for gain time. *See Montgomery v. State,* 615 So.2d 226 (Fla. 5th DCA 1993), *Middleton v. State,* 603 So.2d 46 (Fla. 1st DCA 1992), *Simmons v. State,* 611 So.2d 1250 (Fla. 2d DCA 1992); *Ray v. State,* 480 So.2d 228 (Fla. 2d DCA 1985);

***4** (v) difficulties obtaining future occupational licensing by the State. *See Miralles v. State,* 837 So.2d 1083 (Fla. 4th DCA 2003); *Rodriguez v. State,* 824 So.2d 328 (Fla. 3d DCA 2002), *Kelly v. State,* 833 So.2d 256, 256 (Fla. 4th DCA 2002);

(vi) difficulties obtaining future employment as a correctional officer. *See State v. Johnson,* 615 So.2d 179 (Fla. 3d DCA 1993); and

(vii) loss of the right to vote. *See Joyner v. State,* 795 So.2d 267, 268 (Fla. 1st DCA 2001).

The crucial factor militating that relief be granted in each of the above cases was the defendant's reliance on the misadvice when entering the plea, not the nature of the collateral consequence about which advice was sought. The fact that relief was granted indicates judicial approval of the thought processes involved when the misadvice was received and relied upon by the defendant. In other words, these cases establish that it is acceptable for a defendant who is being advised whether to plead to a felony to ask his counsel whether that plea will prevent him from voting or working as a correctional officer. *See Joyner,* 795 So.2d at 268; *Johnson,* 615 So.2d at 179. It is acceptable for a defendant to ask his counsel if his plea will affect his occupational business licenses, *see Miralles,* 837 So.2d at 1083; *Rodriguez,* 824 So.2d at 328; *Kelly,* 833 So.2d at 256, and it is acceptable for a defendant to inquire of his counsel whether his plea will affect how much gain-time he may receive. *See Montgomery,* 615 So.2d at 226; *Middleton,* 603 So.2d at 46; *Simmons,* 611 So.2d at 1250; *Ray,* 480 So.2d at 228. It is also acceptable for a defendant to ask his counsel whether his plea will subject him to civil commitment as a sexual predator. *See Ghanavati,* 820 So.2d at 989; *Roberti,* 782 So.2d at 919; *Watrous,* 793 So.2d at 6. If misadvice on any of these collateral consequences is given and reasonable reliance thereon is shown, relief will be granted.

By contrast, the ineluctable inference to be drawn from the Second, Third, and Fifth Districts' denial of relief on the claim of misadvice regarding future sentence enhancement consequences of a plea is that the thought process of a defendant that is involved when the defendant asks his counsel whether or not his present plea could be used to enhance a future sentence is *not* acceptable.

Unlike the Second, Third, and Fifth Districts, the Fourth District holds that this claim is facially sufficient to warrant an evidentiary hearing. *See Burns,* 826 So.2d at 1056-57; *Ghanavati,* 820 So.2d at 991; *Murphy,* 820 So.2d at 375; *Love,* 814 So.2d at 475; *Jones,* 814 So.2d at 446. Thus, in the Fourth District, counsel can be deemed ineffective for giving mistaken advice on *any* collateral consequence, regardless of the nature of the consequence, if that mistaken advice was material to the defendant's decision to plead. In short, a defendant in the Fourth District is not penalized for trying to ascertain from his counsel the future sentence enhancement impact of a plea that he is being advised to enter.

***5** Effective representation is guaranteed to all defendants by the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI. Nowhere in the Sixth Amendment is the right to effective counsel limited by the nature of the question asked by client of counsel. Because the Sixth Amendment does not state or suggest that a defendant is only entitled to effective representation if the defendant asks an approved question of counsel, we align ourselves with the Fourth District. A defendant who inquires of his counsel about the future sentence enhancement consequences of his plea and who reasonably relies on the answer provided by his attorney when deciding to enter that plea is constitutionally entitled to representation that is as effective as that

guaranteed to a defendant who is concerned with whether his plea will subject him to civil commitment as a sexual predator.

[6] Because every defendant is entitled to equally effective representation, we conclude that counsel's misadvice on even a collateral consequence about which counsel has no obligation to advise the accused is, as a matter of law, deficient performance under *Strickland*. Therefore, as previously stated, the remaining question is whether this claim can meet the prejudice prong of *Strickland* such that an evidentiary hearing is warranted.

It has been asserted that any harm suffered by a defendant who relies on misadvice regarding future sentence enhancement consequences when entering a plea is too attenuated to satisfy the prejudice prong of *Strickland* because in order for the harm to materialize, a defendant must commit some future crime. We agree; the enhancement of a future sentence *is* an attenuated result of a current plea. This fact works in perfect harmony with the rule of law that neither court nor counsel need advise a defendant of this collateral consequence. However, the fact that the future sentence enhancement is attenuated does not require a rule of law that sanctions mistaken advice by counsel on an issue that is relevant to a defendant's decision to enter a plea.

The Second, Third, and Fifth Districts' cases measure prejudice by whether or not the future enhancement could have been avoided. This procedure runs afoul of the tests set forth by both the Florida Supreme Court and the United States Supreme Court. The Florida Supreme Court's decision in *Grosvenor v. State,* 874 So.2d 1176 (Fla.2004), is controlling precedent and mandates the result we reach in the present case. In *Grosvenor,* Justice Cantero, writing for the majority, said:

***6** The First District Court of Appeal has offered a cogent analysis of *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) :

> As the Court explained in *Hill,* the "prejudice" requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." 474 U.S. at 59, 106 S.Ct. 366, 88 L.Ed.2d 203 ... And the Court further elaborated that, in order to show prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, *he would not have pleaded guilty* and would have insisted on going to trial." *Id.* (emphasis added). Immediately following this language, the Court offered a footnote indicating that several federal appeals courts had previously "adopted this general approach" in their decisions. *Id. Thomas v. Lockhart,* 738 F.2d 304 (8th Cir.1984), and *United States v. Gavilan,* 761 F.2d 226 (5th Cir.1985), were cited as examples of such decisions. These federal appeals court decisions in turn make it clear that the relevant inquiry for purposes of a *Strickland* prejudice analysis in conjunction with a motion to withdraw a plea because of attorney incompetence is whether the outcome of the "plea proceedings" would have been different had competent assistance of counsel been provided. *See Thomas v. Lockhart,* 738 F.2d at 307; *United States v. Gavilan,* 761 F.2d at 228.
>
> *Brazeail v. State,* 821 So.2d 364, 368 (Fla. 1st DCA 2002). We agree with this analysis and conclude that the proper interpretation of Hill is to follow its express language....
>
> Our conclusion is buttressed by the Supreme Court's recent reaffirmation of *Hill* in *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). In *Flores-Ortega,* counsel failed to notify the defendant of his right to appeal. In granting

relief, the Supreme Court explained that the defendant need not demonstrate grounds for a meritorious appeal or even "specify the points he would raise were his right to appeal reinstated." *Id.* at 486, 120 S.Ct. 1029. Instead, all that is required is that the defendant show that but for counsel's error he would have appealed. The Court noted that although evidence of nonfrivolous grounds for appeal will give weight to the contention that the defendant would have appealed, such evidence is not required where there are other substantial reasons to believe he would have appealed. *Id.* In *Flores-Ortega,* the Court expressly noted that its analysis "[broke] no new ground, for it mirrors the prejudice inquiry applied in [Hill]." *Id.* at 485, 120 S.Ct. 1029. The Court then compared the failure to advise of an appeal to the failure to advise of an available defense:

> Like the decision whether to appeal, the decision whether to plead guilty (i.e., waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled. We held that "to satisfy the 'prejudice' requirement [of *Strickland*], *the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*" *Hill, supra,* at 59, 106 S.Ct. 366.
>
> ***7** *Id.* at 485, 120 S.Ct. 1029 (emphasis added). Thus, if *Hill* needed any clarification, *Flores-Ortega* provided it.

Grosvenor, 874 So.2d at 1180-81.

We are also unpersuaded by the argument that to afford relief on the present claim is to encourage recidivism. *See Rhodes v. State,* 701 So.2d 388, 389 (Fla. 3d DCA 1997)(citing *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...."). The logic of this assertion escapes us, as we cannot discern how telling an accused defendant that he will face harsher penalties if he commits another crime in the future can be construed as encouraging the defendant to go out and break the law again. On the contrary, it is our opinion that advising an accused that his plea and conviction *cannot* be used to enhance a future sentence is more likely to encourage recidivism.

[7] Because the Fourth District's approach to this issue is, in our view, the only approach that is constitutionally acceptable and which follows the binding precedents of *Strickland, Hill,* and *Grosvenor,* we agree with the Fourth District that "[w]hen a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he was thereby prejudiced, the defendant may seek to withdraw the plea even if the misadvice concerns collateral consequences as to which the trial court was under no obligation to advise." *Burns,* 826 So.2d at 1056-57. Prejudice sufficient to warrant an evidentiary hearing is established if the defendant alleges that but for the misadvice, the defendant would not have entered the plea. *See Grosvenor,* 874 So.2d at 1180. We do not accept that a defendant's thought processes during the plea process should be subject to any further scrutiny than necessary to determine the credibility of the defendant's claim that he would not have entered the plea if his counsel had advised him correctly that his plea would be used to enhance future sentences.

[8][9] We hold that competent counsel must answer correctly when a defendant asks for, or when counsel volunteers, information relating to whether the decision to plead will impact future sentences. Zealous and effective advocacy demands no less. We are not stating that counsel must familiarize him or herself with every

habitualization statute throughout the land. Rather, we merely hold that, if questions about sentence enhancement are asked by the defendant or if counsel volunteers information relating to future sentence enhancement, the information conveyed by counsel to client must be correct. At the very least, common sense dictates that counsel's response to a direct inquiry regarding whether a present plea could be used to enhance a future sentence should be: "It is very likely." Because this claim will recur, we remind both court and counsel that summary denial of this claim will be proper only when it is conclusively refuted by the record. *See, e.g., Leroux v. State,* 656 So.2d 558, 559 (Fla. 4th DCA 1995)("When accepting a plea, trial courts are well advised at a minimum to ascertain whether any promises were made to a defendant concerning the sentence *apart from those discussed during the plea colloquy.*"), *approved, State v. Leroux,* 689 So.2d 235, 237-38 (Fla.1996)("Although we are not holding that such an inquiry is required ... such a procedure would add little to the burdens of the trial bench and would hopefully result in facilitating summary disposition of this type of case at the trial and appellate levels. A defendant who has initially acknowledged under oath that no such promises have been made will generally be estopped at a later time to claim otherwise.")(emphasis in original).

***8** In the present case, appellant has stated a timely, facially sufficient claim entitling him to an opportunity to prove at an evidentiary hearing that his counsel volunteered, or was asked and gave, affirmative misadvice on the future sentence enhancement consequences of his plea, that he relied on that misadvice when entering the plea, and that he would not have entered the plea had it not been for this misadvice. Then, and only then, is appellant entitled to the relief he ultimately seeks: a finding that his counsel was ineffective and a vacation of his conviction and sentence through withdrawal of his plea. If withdrawal of his plea is appellant's election, he does so at his own peril, because the state shall have the opportunity to try him.

We reverse the trial court's summary denial of this claim and remand with instructions that the trial court hold an evidentiary hearing thereon. We recertify the earlier question as a question of great public importance.

REVERSED; REMANDED WITH INSTRUCTIONS.

ALLEN and BENTON, JJ., concur.

2005 WL 350313 (Fla.App. 1 Dist.), 30 Fla. L. Weekly D443

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