

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC05-516

v.

HERBERT DICKEY,

Respondent.

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Parties (such as the State and Respondent, Herbert Dickey), emphasis, and the record on appeal will be designated as in the Initial Brief, and "IB" will designate Petitioner's Initial Brief, "AB," will designate Respondent's Answer Brief, each followed by any appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State will rely on the Statement of the Case and Facts as set forth in the Initial Brief.

ARGUMENT

ISSUE I

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?  
(Restated)

***Standard of Review***

The issue of whether the trial court properly denied the motion for post-conviction relief is a legal determination which this Court reviews de novo.

***Argument***

The First District erred by finding as a matter of law that misadvice regarding consequences of future misconduct constitutes a deficient performance on the part of counsel. Dickey v. State, 30 Fla. L. Weekly D443 (Fla. 1<sup>st</sup> DCA Feb. 15, 2005). Appellant, like the First District, erred by relying on cases which have granted relief when a defendant claimed affirmative misadvice regarding collateral consequences such as incorrect advice regarding whether a plea would effect availability of permanent citizenship, deportation, civil commitment pursuant to the Sexually Violent Predators Act, gain time, occupational licensing or future employment as a

correctional officer, or loss of the right to vote. In each of those cases, although the misadvice concerns a collateral consequence, the consequence nevertheless directly relates to the plea. For instance, if a defendant alleges misadvice regarding the consequences a guilty plea may have on his immigrant status, courts have granted relief because the defendant may be subject to deportation as a result of the guilty plea. The deportation procedures are not contingent on subsequent bad acts of the defendant. It is the plea itself which subjects the defendant to the possibility of deportation. Likewise, a defendant's occupational license may be in jeopardy at the time he enters a guilty plea. However, it is the effect of the plea at issue, not future conduct of the defendant that places the license in jeopardy. Therefore, when a defendant has alleged that he received misadvice regarding the effect his guilty plea would have on his occupational license, the courts have provided relief. The same is true for each of the examples the court and appellant relied upon.

Nevertheless, when a defendant alleges misadvice regarding future sentencing consequences due to a guilty or nolo contendere plea, the consequences are not directly related to the plea. Sentencing enhancing consequences are dependant on a defendant committing future crimes, and a defendant, like all

citizens "an obligation to follow the law." Stansel v. State, 825 So.2d 1007, 1009 (Fla. 2d DCA 2002). A defendant has no right to commit crimes. If an attorney actually advised a defendant that the guilty plea he was entering would have no effect whatsoever on any sentence he could receive in the future, the defendant still would not be subject to an enhanced sentence unless he committed another crime. If the defendant follows the law as he is obligated to do, then there will be no future sentence to enhance, and the misadvice would have no effect on him whatsoever. Therefore, as Justice Cantero stated in his concurring opinion in Bates v. State, 887 So.2d 1214 (Fla. 2004): "It is the defendant's decision to commit another felony, not the wrong advice, that produces the enhanced sentence." Furthermore, the numerous sentencing enhancing provisions in the Florida Statutes, should make it "apparent to a defendant that a prior conviction for a crime may cause him to be punished more harshly than a first-time offender." Stansel at 1009. Accordingly, this Court should affirm the reasoning of the Second, Third, and Fifth District Courts of Appeal, and hold that claims of misadvice regarding the future sentencing enhancing consequences of a plea on subsequent crimes is not cognizable in a post conviction motion.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits that the decision of the First District Court of Appeal in the case at bar should be overruled, and the order entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to P. Douglas Brinkmeyer.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on \_\_\_\_ day of June, 2005.

Respectfully submitted and served,

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[AGO# # L05-1-9962]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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