IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2350

THOMAS J. MORGAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This case involves an appeal of a circuit court order summarily denying Thomas Morgan's Rule 3.850 motion. The Fourth District Court of Appeal affirmed the trial court's order, but certified conflict with regard to one aspect of Morgan's claim:

> In his fourth point, Morgan alleges ineffective assistance of trial counsel regarding counsel's advice that Morgan reject a favorable plea offer. Morgan alleges that counsel assured him a win at trial, or at worst, a conviction for a reduced offense. This court affirmed the summary denial of a similar claim in *Gonzales v. State*, 691 So. 2d 602 (Fla. 4th DCA 1997), *rev. denied*, 700 So. 2d 685 (Fla. 1997). We certify conflict with the Third District's decisions in *Gomez v. State*, 832 So. 2d 793 (Fla. 3d DCA 2002), and *Sharpe v. State*, 861 So. 2d 483 (Fla. 3d DCA 2002), on this point.

Morgan v. State, 941 So. 2d 1198 (Fla. 4th DCA 2006); App. A, p. 1. Morgan was convicted of two counts of aggravated assault with a weapon and sentenced to 10 years of imprisonment. R-70-73. The pertinent allegations of Morgan's Rule 3.850 motion stated:

GROUND FOUR
COUNSEL ADVISED NOT TO TAKE STATE'S OFFER OF FIVE YEARS IMPRISONMENT WITH ASSURANCES THAT SHE WOULD WIN AT TRIAL
A. DEFICIENT PERFORMANCE

35. Defense counsel advised the Defendant that the

> State submitted a plea offer of five years imprisonment in exchange for a guilty plea. Counsel advised the Defendant that she felt she would win at trial and that at worst, the charges should be domestic violence, if that. She strongly encouraged Defendant to proceed with a trial and to decline the State's offer. The Defendant, following counsel's advice went to trial and was convicted.
>
> B. DEFICIENT PERFORMANCE PREJUDICED DEFENSE
>
> 36. Defendant now submits that based on counsel's assurances that she would win at trial, he declined to accept the State's offer of five years imprisonment. Counsel did not win at trial and as a result of exercising his right to stand trial, the Court sentenced Defendant to two (2) ten (10) year terms of imprisonment as an Habitual Offender and sentenced him as a Prison Release Re-offender, ordering that he serve five years on each count concurrently in accordance with § 775.082(8)(a)(2), Florida Statutes. Had Defendant known that counsel would not win at trial, he would have accepted the State's offer of five years imprisonment. Gomez v. State, ___ So. 2d. ___, 27 FLW D2058 (Fla. 3rd DCA, September 27, 2002.)

R-21-22.

Morgan relied on *Gomez* because *Gomez* reversed a summary denial of a 3.850 motion alleging that defense counsel advised Gomez to reject a favorable plea offer. An evidentiary hearing was mandated. *Gomez'* holding was followed in a subsequent Third District Court of Appeal decision, *Sharpe v. State*, 861 So.

2d 483 (Fla. 3d DCA 2003).

The Fourth District's affirmance of the trial court's summary denial of Morgan's ineffective assistance of counsel claim was presaged by its 1997 decision in *Gonzales v. State*, 691 So. 2d 602 (Fla. 4th DCA 1997). There the court affirmed a summary denial of Gonzales' claim that his lawyer advised him to reject a five year plea bargain offer. Quoting Gonzales' motion the Fourth District wrote:

> "Counsel informed the defendant that she would win the case and that there was no sense in accepting the State's plea offer of (5) years. This resulted in prejudice to the defendant as he was convicted on all charges at jury trial. Defendant asserts that, but for counsel's erroneous advice, he would have accepted the State's offer of (5) years incarceration and would *not* have gone to a jury trial."
>
> The trial court summarily denied his motion, and he appeals. We affirm.

Id. at 602. (emphasis in original). Thus there is no doubt that the Fourth District Court of Appeal and the Third District Court of Appeal are at odds.

The sharp conflict between the Fourth District Court of Appeal and the Third District Court of Appeal on the following question must be resolved by this Court:

> DOES A RULE 3.850 CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON AN ALLEGATION THAT A CRIMINAL DEFENDANT'S COUNSEL ADVISED HIM OR HER TO REJECT A FAVORABLE PLEA OFFER BECAUSE THE DEFENDANT WOULD PREVAIL AT TRIAL, REQUIRE AN EVIDENTIARY HEARING?

For the reasons which follow, the answer should be "yes."

SUMMARY OF THE ARGUMENT

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984) teaches that "prevailing norms of practice as reflected in American Bar Association standards and the like. . . are guides to determining what is reasonable" conduct for a criminal defense lawyer. Those standards include "not intentionally. . . overstat[ing] the prospects of the case to exert undue influence on the accused's decision as to his or her plea." American Bar Association Model Code of Professional Responsibility, Standard 4-5.1(b). When, as here, a defendant claims that his lawyer told him to reject the beneficial plea offer because he can win at trial, and the defendant loses at trial and receives a substantially longer sentence, such a defendant has stated a claim for ineffective assistance, requiring an evidentiary hearing. Here, the court below affirmed a summary dismissal of Morgan's Rule 3.850 motion, acknowledging conflict with the Third

District Court of Appeal which saw such factual allegations as being within the purview of *Strickland* and needing an evidentiary hearing to test the claim. The Third District decision correctly applied *Strickland* to the duties of the criminal defense function and the Fourth District's approach should be disapproved.

ARGUMENT

AN EVIDENTIARY HEARING IS REQUIRED UNDER RULE 3.850 WHEN A CRIMINAL DEFENDANT ALLEGES INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL ADVISED AGAINST ACCEPTANCE OF A FAVORABLE PLEA OFFER BASED ON SUCCESS AT TRIAL

Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984) sets forth the standard for reviewing ineffective assistance of counsel claims: "First, the defendant must show that counsel's performance was deficient . . . . Second the defendant must show that the deficient performance prejudiced the defense." The "performance" prong requires a showing "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687. The Court continued:

> The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions . . . . The proper measure of attorney performance remains simply reasonableness

under prevailing professional norms.

* * *

[P]revailing norms of practice as reflected in American Bar Association standards and the like, . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

* * *

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

* * *

Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest . . . . From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

Id. at 687-691.

The Fourth District's decision in *Gonzales* – which animated its decision in this case – viewed the "reject the plea and go to trial" advice as "incapable of being evaluated by any 'objective' standard of reasonableness as contemplated by *Strickland.*" 691 So. 2d at 604. The *Gonzales* court thought that criminal jury trials are too unpredictable to be subject to Sixth Amendment scrutiny:

> Just as good lawyers can disagree on trial tactics, they can also disagree on whether to advise a client to go to trial. One reason why there can be such wide disagreement is the lack of predictability as to what a jury in a given case will do. A jury can decide to acquit a defendant whom it knows is guilty, and that decision is not subject to review. A jury can also find a defendant guilty of a lesser included offense, when the evidence shows that the defendant committed only the greater offense, and not the lesser. Predicting results in criminal cases is thus much more difficult than in civil cases, where the absence of evidence to support findings of fact is subject to review by the trial judge as well as an appellate court.

691 So. 2d at 603-04.

The Third District disagreed with the *Gonzales* "unpredictability" explanation for precluding evidentiary hearings on the "reject the plea and go to trial because I can win" genre of ineffective assistance:

> We have taken the opposite position in this district. *See Gomez v. State*, 832 So. 2d 793 (Fla. 3d DCA 2002). There a defendant turned down a favorable plea offer because of allegedly ineffective advice that the defense

> would win a pending motion to suppress evidence. We held the defendant was entitled to an evidentiary hearing on the claim of ineffective assistance.
>
> As we view the matter, the decision in *Strickland v. Washington* supplies the framework for analysis of claims of ineffective assistance of counsel. While the *Strickland* decision is highly deferential to decisions made by counsel, they are subject to review if they fall outside *Strickland's* expansive boundaries. *See Strickland,* 466 U.S. at 689, 104 S. Ct. 2052. We do not understand *Strickland* and its progeny to contain a "take it to trial" exemption. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052.

Sharpe v. State, *supra*, 861 So. 2d at 484. *See also Perez v. State*, 893 So. 2d 629 (Fla. 3d DCA 2005). *Sharpe* makes the point correctly. There is no principled reason for concluding that a lawyer's advice to reject a plea and go to trial cannot be objectively reviewed for reasonableness under *Strickland*.

Indeed, there is an uncomfortable hubris involved in a lawyer's "I will win" optimism in most criminal cases; an arrogance that actually is underscored by the Fourth District's recognition of how unpredictable criminal trials are. While the *Gonzales* court spoke of unjustified acquittals and unprincipled convictions of lesser offenses, the converse is just as likely: convictions that are the product of the myriad mysteries of juror perceptions, jury dynamics and the difficulty of

determining what "reasonable doubt" really means. So while the *Gonzales* court may have been correct in saying that "[p]redicting results in criminal cases is thus much more difficult than in civil cases" (691 So. 2d at 604) its conclusion – that the unpredictability cuts against being able to objectively determine reasonableness of counsel's advice – was wrong. The opposite conclusion is more accurate. Because a criminal trial is unpredictable, a lawyer's "we will win" advice to forgo a favorable plea and risk exposure to a lengthy prison sentence is in most instances, reckless and unreasonable. In many criminal cases (perhaps most), the issue of what to do in response to a prosecutor's offer of a plea-bargained sentence is probably the most important decision to be made by a defendant. The United States Court of Appeals for the Second Circuit has addressed the critical nature of good advice at that crucial juncture of a case, quoting the American Bar Association's Model Code of Professional Responsibility, Ethical Consideration 7-7(1992), and Anthony Amsterdam's observations in Trial Manual 5 for the Defense of Criminal Cases (1988). See *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996). In addition, American Bar Association Ethical Standard § 4-5.1(a)(b) views it as unprofessional conduct to overstate the prospects of a case in order to exert undue influence on the defendant's decision with regard to pleading.[1]

[1]**Standard 4-5.1 Advising the Accused**

Summary denials of claims like Morgan's, based on the notion that criminal jury trials are "unpredictable" reflects a short-sighted view of the qualities that are essential to a competent criminal defense. Other courts have had no difficulty in allowing such claims to be subjected to testimonial scrutiny. *See Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988), in which "Turner moved for a new trial on the grounds that he had received ineffective assistance of counsel in deciding to reject the two-year plea offer. After an evidentiary hearing the state trial court granted the motion." *Id.* at 1203. Various subsequent events led to federal habeas corpus, and the Sixth Circuit found that there was "objective evidence in the record . . . that tends to corroborate Turner's claim and provides independent reason to believe that there is a significant probability that, had [attorney] Bailey's advice been reasonable, Turner would have accepted the offer." *Id.* at 1206. *See also United States v. Dabelko*, 154 F.Supp. 2d 1156, 1162 (N.D. Ohio 2000) ("At the evidentiary hearing, the petitioner testified that he asked [attorney] Milano if he should accept or reject the offer . . . he related that Milano told him that 'I would

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(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the

be crazy to accept the offer.' The petitioner also testified that Milano told him that the government 'had a weak case against him.'"); *See also Wanatee v. Ault*, 259 F.3d 700 (8th Cir. 2001):

> The Supreme Court has long held that *Strickland* applies to ineffective assistance claims arising out of the plea bargaining process. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The prejudice inquiry in such cases "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the *plea process*." *Id*. at 59, 106 S.Ct. 366 (emphasis added). Moreover, a large body of federal case law holds that a defendant who rejects a plea offer due to improper advice from counsel may show prejudice under *Strickland* even though he ultimately received a fair trial. *See Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (collecting cases). To establish prejudice under such circumstances, the petitioner must show that he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence. *Id.*

Id. at 703, 704 (emphasis in original).

Morgan's Rule 3.850 motion made the allegation that should have resulted in an evidentiary hearing: "Defendant now submits that based on counsel's assurances that she would win at trial, he declined to accept the State's offer of five years imprisonment." R-21. Whether he would prevail at the evidentiary hearing

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accused's decision as to his or her plea.

is not the issue in this case. The issue is whether such an allegation is sufficient to require an evidentiary hearing. The Fourth District Court of Appeal's decision that such an allegation is insufficient and may be summarily dismissed is not supported by a principled reading of *Strickland* and its progeny. Nor is it supported by any reasonable application of the standards governing the representation of criminal defendants and the common recognition of the vagaries of criminal trials. To assure victory is a foolish promise. A defendant who rejects a beneficial plea bargain based on that promise, and who is convicted and sentenced to a substantially greater sentence, has stated a claim for ineffective assistance of counsel that entitles him or her to a hearing.

Finally, we bring to the Court's attention that the Second District Court of Appeal has taken a different approach to the question. In *Dines v. State*, 909 So. 2d 521 (Fla. 2d DCA 2005), embracing the *Gonzales* "unpredictability" view, that court adopted a "rejection-plus" standard:

> To state a claim under *Strickland*, the defendant must assert more than merely that counsel advised against accepting a plea, that the defendant took the advice, and that ultimately a greater sentence was imposed. On its face, such an allegation identifies no failing on counsel's

> part. Rather some specific deficiency must be alleged: for instance, that counsel advised the client to reject the plea without preparing or knowing the operative facts of the case, or that counsel neglected to identify the material legal issues, or that counsel otherwise did not fully perform as a lawyer. Mr. Dines has made no such allegation; thus, his first ground failed to state a facially sufficient claim.

Id. at 523. However the summary denial in *Dines* was based on "the transcript of the sentencing hearing to refute his allegations" which showed that *Dines'* sentence was the same as the plea offer. 909 So. 2d 522.

But *Dines'* views, if *Dines* is viewed as relevant here, are in conflict with the Third District because there is no basis for a "rejection plus" standard where counsel has promised victory as a reason for rejecting a beneficial plea offer. The failure to know the facts or the issues before advising a client regarding a plea is a failure that alone renders unreasonable and ineffective any advice regarding acceptance of a plea, thus such a case does not involve the issue presented here.

CONCLUSION

For the reasons set forth above, this Court should, we respectfully submit,

accept jurisdiction and hold that a Rule 3.850 allegation claiming that a defendant turned down a favorable plea offer because his or her lawyer told the defendant that the case could be won, or the more serious charge avoided, states a claim for ineffective assistance of counsel if the defendant has been convicted and been sentenced to more incarceration than would have occurred under the rejected plea offer. In such a case, an evidentiary hearing must be granted by the trial court. The Fourth District Court of Appeal decision in *Morgan* affirming the summary dismissal of Morgan's 3.850 motion should be reversed and remanded with instructions to provide an evidentiary hearing in the trial court on that claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail this 12th day of March, 2007 to the following persons:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

BRUCE S. ROGOW