IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2350

THOMAS J. MORGAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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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

The State urges approval of the Fourth District decision that precludes claims of ineffective assistance on the basis of an attorney's advice to reject a plea offer. The State's argument is two-fold. First, that the requirement of attorney candor in advising clients justified the advice of Morgan's counsel. Second, that the outcome of a trial is too difficult to ascertain for advice regarding it to be objectively examined. That approach is inconsistent with *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984). Instead, this Court should approve the decisions of the Third District and reaffirm that an attorney's performance is always held to a standard of reasonableness.[1]

Strickland references American Bar Association Standards as guidelines for determining the reasonableness of attorney performance. *Id*. at 688-89. The State offers ABA Model Rule of Professional Conduct 2.1 and its nearly identical counterpart from the Rules Regulating the Florida Bar. Those rules, along with

[1] *See Gomez v. State*, 832 So.2d 793 (Fla. 3d DCA 2002); *See also Sharpe v. State*, 861 So.2d 483 (Fla. 3d DCA 2002).

Standard 4-5.1 of The Defense Function, stress that attorneys should offer candid advice to their clients, but they do not support the State's proposition that advice regarding the acceptance of a plea agreement is incapable of an objective evaluation.

Standard 4-5.1 expresses the boundaries within which attorneys should give advice to their clients. Subsection (a) emphasizes the importance of candor when providing advice and subsection (b) warns against understating or overstating a case. *See* American Bar Association Ethical Standard § 4-5.1 (a)-(b).[2] Adherence to both maxims directs a lawyer toward the objective and professionally competent advice envisioned by the Sixth Amendment and *Strickland*. Offering candid advice can sometimes mean accepting a plea if it is reasonable to do so. It is an examination of the full set of circumstances that helps determine if the advice was reasonable and candid.

In the second part of its argument, the State says that because it is difficult to

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

(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 accused's decision as to his or her plea.

predict the outcome of a trial, accepting or rejecting a plea is a strategic or tactical decision which requires discretion or judgment and cannot be objectively examined for error. Therefore, the State contends, an attorney's advice to accept or reject a plea offer cannot be deficient and is not subject to review. That tautology does not override *Strickland* and the Sixth Amendment. That it is difficult to predict the result of a trial is precisely why an attorney's advice is so important and advice to reject a plea offer can be an example of deficient performance. All the facts surrounding an attorney's advice must still be considered and a determination made about its reasonableness.

To determine whether an attorney's performance is deficient, it must be evaluated in the context in which the advice was given. As stated in *Strickland*, "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. When considering all of the factors, rejection of a plea offer can be held to a reasonable attorney standard and determined to be acceptable. In any case, when considering the reasonableness of an attorney's decision, "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. That is a task for the trial courts that can be done only after conducting an evidentiary hearing.

It is not impossible to objectively evaluate advice regarding the acceptance of a plea offer. Such an evaluation can be made. The willingness of other courts to entertain ineffective assistance claims on this basis illustrates that they are capable of an objective analysis. *See Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988)(a motion for new trial was granted after an evidentiary hearing where ineffective assistance of counsel was alleged based on counsel's advice to reject a two-year plea offer); *See also United States v. Dabelko*, 154 F.Supp. 2d 1156, 1162 (N.D. Ohio 2000)(the court entertained a claim of ineffective assistance of counsel at an evidentiary hearing based on counsel's advice to reject a plea offer).

The Eighth Circuit Court of Appeals has stated that "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." *Wanatee v. Ault*, 259 F.3d 700, 703 (8th Cir. 2001)(citing *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995)(collecting cases)). Holding here that counsel's advice to reject a plea bargain, which leads to in a higher sentence, is a possible basis for an ineffective assistance claim does not mean that a new trial will always result. It means simply that defendants in such a situation should have an opportunity to present the facts surrounding the advice for a determination as to whether that advice was reasonable under the Sixth

Amendment and *Strickland*.

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 that there should be 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 30th day of April, 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