IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ROBERT GENE BRUCE,

Respondent.

CASE NO. SC08-2127

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Parties (such as the State and Respondent, ROBERT GENE BRUCE), 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

Nothing added.

ARGUMENT

ISSUE I

MAY A DEFENDANT WHO HAS ENTERED A NEGOTIATED PLEA RAISE FOR THE FIRST TIME ON DIRECT APPEAL THE CLAIM THAT HIS CONVICTION VIOLATES THE DECISION IN THOMPSON V. STATE, 887 So.2D 1260 (Fla. 2004)?

Argument

Respondent was charged with two felonies and a misdemeanor and entered into a negotiated plea to one of the felony charges in exchange for the State dismissing the other two charges. Without first seeking to withdraw his plea, Respondent argued on direct appeal that his conviction must be vacated and a misdemeanor entered because the State cannot prove all of the elements. The First District Court has certified a question of great public importance to be resolved by this Court.

Petitioner will reply in the format utilized by Respondent in his answer brief.

I.WHY THIS COURT SHOULD RETAIN JURISDICTION.

Respondent contends this Court should discharge review of this case because the case involves “mere intradistrict conflict on a narrow issue.” (AB 4). The Respondent fails to understand this Court’s jurisdictional powers and the certified question at hand.

Under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), this Court may accept jurisdiction to review a decision of a district court of appeal that passed upon a question certified to be of great public importance. The district court certified a question and this Court accepted jurisdiction on November 21, 2008. As noted by former Supreme Court Justice Ben F. Overton, there are two courses in which a district court can proceed when faced with precedent in which it disagrees,

> [W]e would expect that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing. **As an alternative, the district court panel could, of course, certify the issue to this Court for resolution.** (Emphasis added)
>
> In re Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Fla. Rules of Appellate Procedure, 416 So.2d 1127, 1128 (Fla. 1982).

Accordingly, the district court of appeal has properly certified a question of great public importance to this Court for resolution.

Further, Respondent believes that the certified question merely asks whether a violation of the holding in Thompson is fundamental error. (AB 5). The question is more complex than Respondent represents it to be. The First District Court stated, when certifying the question,

> because we conclude that the issue of whether a defendant waives his right to appeal a defect in his conviction when he receives the benefit of a negotiated plea is a matter of great public importance, we certify the following question...
>
> Bruce v. State, 993 So.2d 155, 156 (Fla. 1st DCA 2008)

The question involves in what limited circumstances may a defendant directly appeal a plea of guilty, what effect a negotiated plea of guilty has on those circumstances, and what effect does it have on Respondent's case in light of this Court's holding in Thompson.

Thus, the question will directly impact all cases in which there are negotiated pleas which involve the waiver of due process rights. This is a far greater issue then Respondent argues.

II. WHETHER A DEFENDANT WHO HAS ENTERED A NEGOTIATED PLEA MAY RAISE FOR THE FIRST TIME ON DIRECT APPEAL A CLAIM THAT HIS CONVICTION LACKS AN ESSENTIAL ELEMENT OF THE CRIME CHARGED UNDER THE THEORY OF FUNDAMENTAL ERROR?

Respondent argues a string of cases to support his argument that the due process clause forbids a state to convict a person of a crime without proving every element of the crime. However, each one of these cases is distinguishable.

First, Respondent attempts to support his contention with cases that do not even involve a plea of guilty, or no contest,

much less a negotiated plea. See Fiore v. White, 531 U.S. 225 (2001)(appeal of a conviction after jury trial); Troedel v. State, 462 So.2d 392 (Fla. 1984)(appeal of a conviction after jury trial); K.A.N. v. State, 582 So.2d 57 (Fla. 1st DCA 1991)(appeal of a conviction after bench trial); and Nelson v. State, 543 So.2d 1308 (Fla. 2nd DCA 1989)(appeal of a conviction after jury trial).

Next, Respondent attempts to support his argument citing Dydek v. State, 400 So.2d 1255 (Fla. 2nd DCA 1981) for the contention that a plea of guilty or no contest does not waive the due process violation that results from a conviction of a crime that never occurred. (AB 9). Dydek is distinguishable simply because it does not involve a **negotiated** plea. Therefore, the appellate court was not considering whether a defendant may waive a defect in a negotiated plea.

Respondent then cites Button v. State, 641 So.2d 106 (Fla. 2nd DCA 1994), to support his contention. Button did involve a negotiated plea. Again, however, the case is distinguishable because the defendant first properly moved for relief in a post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.850. Button actually supports that portion of the State's argument to the effect that a defendant may only make a direct

appeal under limited circumstances after entering a plea of guilty or no contest.

Respondent also cites to Bryan, a case involving a negotiated plea, to support his contention. Bryan v. State, 862 So.2d 822 (Fla. 5th DCA 2003), reversed, 905 So.2d 120 (Fla. 2005). This case is also distinguishable. In Bryan the defendant moved to withdraw his plea which the trial court denied and he appealed. 862 So.2d at 823. The courts did not consider either a possible waiver based on a negotiated plea or any effect his receipt of the benefit of his bargain had on the case.

Respondent then attempts to distinguish this Court's ruling in Hoover v. State, 530 So.2d 308 (Fla. 1988), in which this Court held that a defendant can enter a plea to a charge in which the State can not prove every element of the crime, so long as it is voluntarily and knowingly done. Respondent then states that his plea colloquy does not establish that he knowingly and voluntarily waived his right to be convicted of a crime in which the State could not prove every element. The State contends that the mere fact that the Respondent chose to plea to this particular count, rather than the other third degree felony, should be sufficient proof that he knowingly and voluntarily waived any defects. However, if it is not, this is

the precise reason why the Respondent should first have to move to withdraw his plea, so that the lower tribunal can conduct an evidentiary hearing to elucidate whether the plea was actually knowing and voluntary.

Finally, Respondent cites to Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)e which holds that a defendant may make a direct appeal "as otherwise provided by law." The State contends that this is not a catch-all for defendants who fail to properly follow the rules of criminal and appellate procedure. This subsection tracks to statutory rights conferred by the Legislature, such as under Section 924.06(3), Florida Statutes, which states:

> A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue, or a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have no right to a direct appeal.

In summation, it is well established that an appeal from a guilty plea should never be a substitute for a motion to withdraw the plea. If the record raises issues concerning the voluntary or intelligent nature of the plea, that issue should first be presented to the trial court in accordance with the law and rules of procedure. If the action of the trial court on such a motion is adverse to the defendant, it would be subject

to review on direct appeal. Robinson v. State, 373 So.2d 898, 902 (Fla. 1979).

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 933 So. 2d 155 should be disapproved, and the judgment and sentence 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 Glen P. Gifford, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on February ____, 2009.

Respectfully submitted and served,

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[AGO# L08-1-32034]

CERTIFICATE OF COMPLIANCE

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

_____

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