IN THE SUPREME COURT OF THE STATE OF FLORIDA

TOMMY LEE ALCORN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CASE NO.: SC11-1322**
	)	
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
_____	)	

INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Mr. Alcorn was the Movant and Appellee was the Respondent in the Criminal Division of the Circuit Court of the 19th Judicial Circuit, in and for Indian River County. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. The symbol R will be used for the Record and T for the Transcript. The volume number will be referred to by Roman numeral and the page number will be referred to by Arabic numeral.

STATEMENT OF THE CASE AND FACTS

Mr. Alcorn was originally charged with sale of cocaine within 1,000 feet of a church and possession of cocaine. IR153-156. Trial counsel made a Motion for Judgment of Acquittal as to the proof that the sale of cocaine took place within 1,000 feet of a church. IR154-155. The state stipulated to this motion and the judge granted it. IR155-156. Mr. Alcorn was convicted of Sale of Cocaine and Possession of Cocaine. IIT2. He was sentenced to 30 years in prison on Count I, as an Habitual Offender, and 5 years in prison on Count II, with both sentences to run concurrently. IR2. His case was affirmed on direct appeal, without written opinion. Alcorn v. State, 956 So.2d 1196 (Fla. 4th DCA 2007).

There is only one claim of ineffective assistance at issue here. Trial counsel was unaware of the fact that Mr. Alcorn qualified to be a Habitual Offender. Thus, she misadvised him as to the maximum sentence which he faced. Mr. Alcorn was originally charged with sale of cocaine within 1,000 feet of a school. This is a first degree felony. It is normally punishable by a maximum sentence of 30 years in prison. However, it is punishable by life in prison if the Defendant is a Habitual Offender. It is undisputed that trial counsel incorrectly advised Mr. Alcorn that the maximum sentence was 30 years in prison, when in fact it was life in prison. Mr. Alcorn was convicted of the lesser offense of sale of cocaine. This is a second degree felony. It is normally punishable by a maximum sentence of 15 years in

prison. However, he was found to be a Habitual Offender. He received the maximum sentence of 30 years in prison. The trial judge denied the claim after an evidentiary hearing. IR768-772. However, the trial judge made no fact findings or legal ruling on this sub-issue. IR768-772.

The Fourth District Court of Appeal affirmed the denial of the Motion for Post-Conviction Relief. Alcorn v. State, ___ So. 3d ____, 36 Fla. L. Weekly D1220 (Fla. 4th DCA June 8, 2011). The Court's holding on this issue was:

> ***Failure to Advise of the Correct Statutory Maximum at the Time of the Plea Offer.***
>
> The testimony at the evidentiary hearing was undisputed that neither defense counsel, nor the prosecutor, was aware before trial that appellant qualified as an HFO. They were aware of the possibility, as was appellant, but had erroneously concluded before trial that he did not qualify. *See* ~~§~~ 775.084(1)(a)2.b., Fla. Stat. (2003) (providing that the HFO designation applies where the offense to be sentenced was committed within five years of release from a post-prison supervision program).
>
> Appellant was not advised before trial that as an HFO he could be sentenced to life in prison for the first – degree felony charged in Court I. ~~§~~ 775.084(4)(A) 1. , Fla. Stat. (2003). The state filed a notice of intent to seek enhanced sentencing after trial. Counsel then researched the issue and learned that appellant qualified for the enhanced penalty. Nevertheless, because he initially faced a first-degree felony charge, appellant was aware, when he rejected the twelve-year plea offer, that he could receive up to thirty years in prison.
>
> [4] In the Reply Brief, defense counsel concedes that his court's decision in *Lester v. State*, 15 So.3d 728

(Fla. 4th DCA 2009), supports affirmance. Pursuant to *Lester*, the correct remedy in this situation is not to grant a new trial or remand for renewed plea negotiations as other courts have held, but to impose a sentence not greater than "the expected maximum sentence [appellant] would have received by proceeding to trial based upon [tge] attorney's advice." *Id*. At 729. Here, appellant rejected the twelve-year plea offer and proceeded to trial knowing he could be sentenced to thirty years in prison which is the sentence he ultimately received. We must affirm because appellant cannot show prejudice under *Lester*.

We certify that this decision, and the decision in *Lester*, expressly conflict with *Lewis v. State*, 751 So.2d 715 (Fla. 5th DCA 2000), and *Revell v. State*, 989 So.2d 751 (Fla. 2d DCA 2008), as to the proper remedy that applies when an attorney fails to correctly advise a defendant at the time of a plea offer regarding the statutory maximum sentence. *See also Pennington v. State*, 34 So.3d 151, 154-55 (Fla. 1st DCA 2010) (remanding for the trial court to determine, under a correct legal framework, whether a reasonable probability existed that defendant would have accepted the plea if he had known of the correct maximum penalty he faced).

Affirmed. Express conflict certified.

36 Fla. L. Weekly at D 1221.

SUMMARY OF THE ARGUMENT

I. THE PREJUDICE ANALYSIS OF THE FOURTH DISTRICT IS ERRONEOUS.

The facts in this case are undisputed. The State made a plea offer of 12 years in prison. Mr. Alcorn was charged with Sale of Cocaine within 1,000 feet of a school. This is a first degree felony which normally carries a maximum sentence of 30 years in prison. His attorney incorrectly told him he was not eligible for a Habitual Offender sentence and that the maximum sentence he faced was 30 years in prison. In fact, he was eligible to be sentenced as a Habitual Offender and faced a maximum sentence of life in prison. He turned down this plea offer in the mistaken belief that he was not eligible to be sentenced as a Habitual Offender. He was ultimately convicted of sale of cocaine (without the 1,000 foot enhancer), was found to be a Habitual Offender and sentenced to 30 years in prison.

It is undisputed in this case that the performance prong for ineffective assistance of counsel was met. See Strickland v. Washington, 466 U.S. 668 (1984). ABA Standard for Criminal Justice 4-6.1(b) governs standards for plea negotiations. It requires "an analysis of controlling law and the evidence likely to be introduced." In this case this would include a duty to know that Mr. Alcorn was eligible to be sentenced as a Habitual Offender and that the State had significant problems proving that the sale took place within 1,000 feet of a church. The issue before the Court in this case is whether Mr. Alcorn met the prejudice prong of

Strickland and its progeny. The Fourth District held that Mr. Alcorn was not prejudiced as was sentenced to 30 years in prison which was consistent with what his attorney had told him the potential maximum sentence was. The Fifth District and the Second District follow a different rule. Revell v. State, 989 So. 2d 751 (Fla. 2d DCA 2008); Lewis v. State, 751 So. 2d 715 (Fla. 5th DCA 2000). In both Revell and Lewis the Court held that when the Defendant is not advised of the possibility of habitualization the motion for post-conviction relief must be granted and he must be given a new trial.

The prejudice rule of the Fourth District has a superficial appeal. However, it is illogical if analyzed further. The Strickland prejudice standard is whether there is "a reasonable probability that … the result of the proceeding would have been different." 466 U.S. at 694. Thus, the issue is whether there is a reasonable probability that Mr. Alcorn would have accepted the plea offer of 12 years in prison if he had been correctly informed that he was eligible to be sentenced as a Habitual Offender. If he had been informed of this he would have known that he faced a maximum sentence of life imprisonment if he would have been found guilty as charged and that faced a maximum sentence of 30 years in prison if he was convicted of the lesser included offense of sale of cocaine, without the enhancer.

There clearly was a "reasonable probability" that the result would have been different in two respects. First, Mr. Alcorn may well have taken the plea agreement if he had known he was facing a possible sentence of life imprisonment rather than a possible sentence of 30 years. Additionally, there is a unique fact in this case that the Fourth District's analysis completely ignores. Trial counsel made a Motion for Judgment of Acquittal as to the proof that the offense happened within 1,000 feet of a church; the State stipulated to it; and the trial judge granted it. Mr. Alcorn may well have known that he was realistically only facing a possible conviction of the lesser offense of sale of cocaine without the enhancer. He had been mistakenly told by his attorney that he was not eligible to be sentenced as a Habitual Offender. Thus, he would have believed that realistically he was only facing a maximum sentence of 15 years in prison. This could have well influenced him to reject a plea offer of 12 years in prison. Thus, the rule used by the Fourth District in this case does not comply with the "reasonable probability" test outlined in Strickland and followed by this Honorable Court. Downs v. State, 453 So. 2d 1102 (Fla. 1984). The decision of the Fourth District must be reversed and the rule of the Second and Fifth Districts adopted.

ARGUMENT

I. THE PREJUDICE ANALYIS OF THE FOURTH DISTRICT IS ERRONEOUS.

The right to effective assistance of counsel is protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, and 16 of the Florida Constitution. Strickland, supra; Cottle v. State, 733 So. 2d 963 (Fla. 1999); Morgan v. State, 991 So. 2d 835, 840 (Fla. 2008). This Court has held that the right to counsel protections of Article I, Section 16 of the Florida Constitution are broader than those of the Sixth Amendment to the United States Constitution. State v. Kelly, 999 So. 2d 1029, 1039-1041 (Fla. 2008).

This issue involves the denial of a motion for post-conviction relief after an evidentiary hearing. The trial court's fact findings are entitled to great deference. Brancaccio v. State, 27 So. 3d 739, 740 (Fla. 2010). It's conclusions of law are reviewed de novo. Demps v. State, 761 So. 2d 302, 306 (Fla. 2000). In this case there are no factual disputes between the parties. Thus, this is a pure issue of law requiring de novo review. The denial of this motion denied Mr. Alcorn Due Process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, and 16 of the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

This is a pure issue of law as to the prejudice test when a Defendant is misinformed as to his eligibility for habitual offender status. In Lewis v. State, 751

So. 2d 715 (Fla. 5th DCA 2000) and Revell v. State, 989 So. 2d 751 (Fla. 2d DCA 2008) trial counsel had failed to tell the defendants of the possibility of habitualization. The Second and Fifth Districts reversed because the Defendants had turned down plea offers without knowing that they were subject to habitual offender sentences. In both cases the courts reversed for a new trial. In both cases the Defendants testified at the post-conviction hearings that they would have taken the plea offer if they had been told of the possibility of habitualization. Petitioner would argue that this is the correct rule of law. It implements the rule of Strickland that reversal is required if there is a reasonable probability that the result would be different; i.e. that the defendant would have accepted the plea agreement and received a lesser sentence.

The rule of the Fourth District does not comport with the rule of Strickland. The Fourth District in this case held that because Mr. Alcorn received a 30 year sentence and this was consistent with what his attorney had told him his maximum exposure was. This analysis does not focus on the reasonable probability that the result would be different test required by Strickland and its progeny. The error in the Fourth District's analysis is seen in its application to this case.

In this case, the proper analysis under Strickland should be whether there is a reasonable probability that Mr. Alcorn would have accepted the 12 year plea offer if he had been properly informed of the possibility of habitualization. There

clearly is. If Mr. Alcorn had known that the maximum sentence which he faced, if found to be guilty as charged, was life in prison rather than 30 years in prison there is a reasonable probability that he would have accepted the plea offer.

It is also important to note what actually happened at trial in this case. Mr. Alcorn was originally charged with sale of cocaine within 1,000 feet of a church. At the close of the State's case Defense counsel made a motion for judgment of acquittal to the lesser included offense of sale of cocaine without the enhancer. The State stipulated to this motion and it was granted. Mr. Alcorn was ultimately convicted of this lesser included offense. Mr. Alcorn may well have known that realistically he only faced possible conviction of this lesser included offense. Since he was not told of the possibility of habitualization he would have believed that the maximum sentence he could receive was 15 years in prison rather than the 30 year sentence which he actually received. There clearly was a reasonable probability that he would have accepted the 12 year plea offer if he had known that he faced a maximum of 30 years in prison on the lesser offense (which he was actually convicted of) rather than the 15 years which he thought that he faced. This case must be reversed for a new trial.

CONCLUSION

The decision below should be quashed and Mr. Alcorn's case reversed for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by efile to The Florida Supreme Court, E-file@flcourts.org, Jeanine M. Germanowicz, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by courier and U.S. Mail to Tommy Lee Alcorn, DC# 571061, Columbia Correctional Institution, 216 SE Corrections Way, Lake City, FL 32025, this _____ day of November, 2011.

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RICHARD B. GREENE
Assistant Public Defender

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2).

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