IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S SUPPLEMENTAL BRIEF

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(561) 355-7600

Richard Greene
Assistant Public Defender
Florida Bar No. 265446
rgreene@pd15.state.fl.us

Counsel for Appellant

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PRELIMINARY STATEMENT

Petitioner will rely on the Preliminary Statement in his Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely on the Statement of the Case and Facts in his Initial Brief.

SUMMARY OF THE ARGUMENT

I. THE APPROPRIATE REMEDY IS TO REQUIRE A NEW TRIAL.

This Honorable Court has asked the parties to brief the issue of remedy, based on the assumption that the Petitioner has shown both the performance and prejudice prongs of ineffective assistance of counsel are met, in light of *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). Petitioner would argue that the proper remedy is to vacate the judgment and conviction. The Court should order Respondent to reinstitute the 12 year plea offer. Assuming that Mr. Alcorn accepts the plea offer the trial court's discretion should be limited to accepting the plea and imposing a 12 year sentence or proceeding with a new trial. This remedy is consistent with the requirements of the Sixth Amendment of the United States Constitution as outlined in *Lafler, supra* and is necessary to fulfill the broader requirements of Article I, Section 16 of the Florida Constitution. *State v. Kelly*, 999 So. 2d 1029, 1040 (Fla. 2008) (Holding that Florida provides a broader right to counsel under Article I, Section 16 of the Florida Constitution than that provided by the Sixth Amendment of the United States Constitution).

The remedy proposed by Petitioner is the only way to restore petitioner to the position he was in prior to receiving ineffective assistance. A remedy for ineffective assistance should be "tailored to the injury suffered." *United States v. Morrison*, 449 U.S. 361, 364 (1981). "The Sixth Amendment mandates that the

State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). This is the appropriate remedy in this case.

ARGUMENT

I. THE APROPRIATE REMEDY IS TO REQUIRE A NEW TRIAL.

This issue involves the proper remedy assuming that the prejudice and performance prongs of ineffective assistance of counsel have been met. Petitioner would argue that the proper remedy is to vacate the judgment and sentence and to order a new trial. This Honorable Court should order the State to reoffer the 12 year sentence. Assuming that Petitioner accepts the plea the trial court should have discretion to accept the plea and impose the 12 year sentence or to proceed with a new trial. This is the only way to put Petitioner back in the position that he was in prior to receiving ineffective assistance of counsel. This is the only way to enforce his right to effective assistance of counsel under the Sixth Amendment and his broader right to counsel under Article I, Section 16 of the Florida Constitution.

The facts of this case are undisputed and are laid out in the opinion of the Fourth District. *Alcorn v. State*, 82 So. 3d 875 (Fla. 4th DCA 2011). Mr. Alcorn was originally charged with sale of cocaine within 1,000 feet of a church and possession of cocaine. The maximum sentence for sale of cocaine within 1,000 feet of a church is normally 30 years. It is life for a Habitual Offender. The State offered a plea of 12 years in prison to resolve the case. Alcorn was eligible to be sentenced as a Habitual Offender, but trial counsel did not tell him that. As a consequence he would have believed that the maximum sentence he faced if found

guilty as charged was 30 years in prison, when in fact, it was life in prison. Additionally, he would have believed that the maximum sentence he would have faced if found to be guilty of the lesser offense of sale of cocaine without the 1,000 foot enhancer was 15 years in prison. In fact, it was 30 years in prison.

Mr. Alcorn proceeded to trial. At the close of the State's case Defense Counsel made a Motion for Judgment of Acquittal as to the proof that the sale took place within 1,000 feet of a church. IR154-155. The State stipulated to this motion and the judge granted it. IR155-156. He was found guilty of Sale of Cocaine and Possession of Cocaine. IIT2. He was sentenced to 30 years in prison on the sale count as a Habitual Offender and to five years in prison on the possession count with both counts to run concurrent. IR2.

In *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) the United States Supreme Court held that a subsequent trial does not cure ineffective assistance in the plea bargaining process. The Court went on to describe the remedy involved.

> The correct remedy is to order the State to reoffer the plea agreement. Presuming Respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.
>
> 132 S. Ct. at 1391.

The Court in *Lafler*, also stated that it would not define the boundaries of proper discretion. 132 S. Ct. at 1389. The Court stated "Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion." 132 S. Ct. at 1389.

An important principle of Florida law to be considered in crafting a remedy in this case is that "the effect of a reversal is to restore the defendant to the point in the proceedings where the error is made." *Griffith v. State*, 654 So. 2d 936, 944 n. 14 (Fla. 4th DCA 1995). The remedy proposed by Petitioner is the only way to meet this objective.

The Court also stated that the plea offer is a "baseline that can be consulted in finding a remedy." 132 S. Ct. at 1389.

There have been very few cases applying the remedy provisions of *Lafler*. However, the Sixth Circuit Court of Appeals has expressed concerns about whether the remedy in *Lafler* was sufficient to vindicate the right. *Titlow v. Burt*, 680 F. 3d 577 (6th Cir. 2012). The Court stated:

> We remain concerned that the remedy articulated in *Lafler* could become illusory if the state court chooses to merely reinstate Titlow's current sentence. But *Lafler* cautions that the state courts must at least "consult" the initial plea agreement in crafting a new sentence for the defendant, which indicates – sufficiently for now – that the state court's discretion is not entirely unfettered. The proper scope of this discretion need not be considered

> unless the state court imposes a sentence greater than the initial plea agreement. What remedy Titlow might have in federal court if such occurs is an issue to be resolved another day.
>
> 680 F.3d at 392

The Sixth Circuit's concerns in Titlow, supra are well placed. Giving the trial judge discretion to simply impose the current 30 year sentence provides no remedy whatsoever for the ineffective assistance of counsel received by Mr. Alcorn. This remedy is not "tailored to the injury suffered." *United States v. Morrison*, 449 U.S. 361, 364 (1981). A remedy "tailored to the injury suffered" would place Mr. Alcorn in the position he was in at the time of the ineffective assistance of counsel. It would require the State to bear the burden of the ineffective assistance of counsel. "The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). Absent the ineffective assistance, Mr. Alcorn would have been aware that he was eligible to be sentenced as a Habitual Offender and be facing a life sentence if found guilty as charged and a 30 year sentence if found guilty of the lesser included offense. He would have accepted the 12 year plea offer. The plea would have gone before the trial judge. The trial court would have had discretion to accept or reject the plea. *Fla. R. Crim. P.* 3.171(d). If the trial judge accepted the plea Mr. Alcorn would be sentenced to 12 years in prison. If the trial judge rejected the plea he would go to trial. This should be the remedy

in this case. Assuming arguendo, that this Honorable Court does not agree that the Sixth Amendment requires the remedy proposed by Petitioner, he would argue that this Court should adopt it as a matter of state law.

It is well settled that the states are free to provide broader protections for the rights of the individual than those provided by the United States Constitution. *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992). This Court has previously held that the right to counsel under Article I, Section 16 is broader than the right to counsel under the Sixth Amendment. *Peoples v. State*, 612 So. 2d 555, 556 (Fla. 1992) (Holding that right to counsel under the Florida Constitution attaches at an earlier point in time than that under the Sixth Amendment.); *State v. Kelly*, 999 So. 1029, 1040 (Fla. 2008) (Holding that the right to counsel in a misdemeanor is broader in Florida than under the Sixth Amendment.). In analyzing the issue of ineffective assistance causing the Defendant to reject a plea this Court has based its decisions on "both federal and Florida case law." *Morgan v. State*, 991 So. 2d 835, 840 (Fla. 2008). Additionally, the Florida Rules of Criminal Procedure impose specific duties on defense counsel in terms of properly advising the client concerning a proposed plea agreement. *Fla. R. Crim. P.* 3.171(c). Both Article I, Section 16 and the Florida Rules of Criminal Procedure give this Court the authority to provide broader protections than the minimum required by the Sixth Amendment.

Prior to *Lafler*, numerous courts have ordered a new trial involving cases in which ineffective assistance of counsel caused the Defendant to reject a plea. *United States v. Gordon*, 156 F. 3d 376 (2d Cir. 1998); *Beckham v. Wainwright*, 639 F. 2d 262 (5th Cir. 1981); *Carmichael v. State*, 206 P. 3d 800 (Colo. 2009); *People v. Curry*, 178 Ill. 2d 509, 687 N.E. 2d 877, 227 Ill. Dec. 395 (1997); *Dew v. State*, 843 N.E. 2d 556 (Ind. Ct. App. 2006); *People v. Carter*, 186 Mich. App. 625, 465 N.W. 2d 380 (1990); *State v. Simmons*, 65 N.C. App. 294, 309 S.E. 2d 493 (1983); *Ex Parte Wilson*, 724 S.W. 2d 72 (Tex. Crim. App. 1987); *State v. Ludwig*, 124 Wis. 2d 600, 369 N.W. 2d 722 (1985). The Florida Courts that have dealt with this precise error (failure to advise the Defendant of eligibility for Habitual Offender sanctions) reverse for a new trial and "good faith resumption of plea negotiations." *Lewis v. State*, 751 So. 2d 715, 718 (Fla. 5th DCA 2000); *Revell v. State*, 989 So. 2d 751, 752 (Fla. DCA 2d 2008).

This Honorable Court was faced with an analogous situation when the United States Supreme Court issued *Jackson v. Denno*, 378 U.S. 368 (1964). The Court held in *Jackson* that the trial judge must make a determination of the voluntariness of a confession outside the presence of the jury. The Court in *Jackson* held that a retrial was only required if the trial judge found the confession to be involuntary. 378 U.S. at 394. If the trial court found the confession to be voluntary, the judgment and sentence would remain intact. *Id*.

This Court rejected this approach. It instead held that if the judge has not held the required voluntariness hearing the case must be reversed for a new trial rather than merely a hearing on voluntariness and a possible new trial. *Land v. State*, 293 So. 2d 704 (Fla. 1974); *McDonell v. State*, 336 So. 2d 553 (Fla. 1976); *Greene v. State*, 351 So. 2d 941 (Fla. 1977). This Court expressed its concern that the trial judge would be influenced by the subsequent conviction and would not be completely objective in determining the voluntariness of the statement. *Land, supra* at 708. This Court stated that "when a man's liberty is at stake, considerations of due process outweigh those of economics." *Id*. at 708. This Court also stated "A judge is not a computer which can consistently make an objective determination without the possibility that a prior jury verdict of guilt may influence that ruling." *Greene, supra* at 942.

The holding in *Lafler, supra* that a subsequent fair trial does not cure ineffective assistance in the plea bargaining process is grounded, in part, on the recognition that "97% of federal convictions and 94% of state convictions are the result of guilty pleas." 132 S. Ct. at 1388. The United States Supreme Court has previously recognized that this system functions due to a "mutuality of advantage" for the parties. *Brady v. United States*, 397 U.S. 742, 752 (1970). Petitioner would argue that for the system to function properly this "mutuality of advantage" must include the trial judge. The judge must have a reason to accept a plea agreement.

That reason is the possibility of a trial and its subsequent effect on the court's workload. That is part of the plea bargaining process in the pre-trial setting. It must be part of the process here in order to restore Mr. Alcorn to the position he was in prior to receiving ineffective assistance.

CONCLUSION

The proper remedy is to vacate the judgment and sentence and order a new trial. The Court should order the State to renew the 12 year plea offer. If Petitioner accepts the offer the trial judge would have discretion to accept the plea and impose a 12 year sentence or to proceed with a new trial.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

_____
Richard B. Greene
Assistant Public Defender
Florida Bar No. 265446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been electronically e-file@flcourts.org, and efiled to Jeanine Germanowicz, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, and furnished by courier on this _____ day of July, 2012.

_____
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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Richard B. Greene
Assistant Public Defender