IN THE SUPREME COURT OF FLORIDA

TOMMY LEE ALCORN,

Petitioner,

vs.

CASE NO.
DCA Case No. **4D08-5049**

STATE OF FLORIDA,

Respondent.
_________________________________/

PETITIONER'S BRIEF ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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PRELIMNARY STATEMENT

Mr. Alcorn was the movant and the State of Florida was the respondent in the Criminal Divison of the Circuit Court of the 19th Judicial Circuit in and for Indian River County, Florida. Mr. Alcorn was the Appellant and the State of Florida was the Appellee in the Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Mr. Alcorn filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. It was denied after an evidentiary hearing. The trial court held an evidentiary hearing on two issues, whether the trial attorney had conveyed the plea offer and whether the trial attorney had misadvised him concerning the legal maximum. The plea offer was 12 years in prison. Mr. Alcorn received a sentence of 30 years in prison after a trial. The District Court affirmed this ruling with a written opinion. Alcorn v. State, 36 Fla. L. Weekly D1220 (Fla. 4th DCA June 8, 2011).

Mr. Alcorn testified at the hearing that his counsel had never conveyed the 12 year offer. Trial counsel testified that she had no independent recollection of conveying the offer but was sure that she did as it was her usual practice. The District Court held that the trial judge did not err in rejecting the claim due to the fact that the circumstantial evidence corroborated the attorney's general practice and the attorney's superior credibility. 36 Fla. L. Weekly D1221. The Court also noted potential conflict with decisions of the Third District.

> Some appellate decisions suggest that counsel's testimony about a standard practice, where counsel lacks a specific recollection of the event, cannot be competent ,substantial evidence to support a trial court's factual finding and to refute a post conviction movant's testimony to the contrary. *Polite v. State*, 990 So.2d 1242, 1244 (Fla. 3d DCA 2008); *Labady v. State*, 783 So.2d 275, 276 (Fla. 3d DCA 2001). This court has

> disagreed that an absolute rule applies whenever an attorney cannot specifically recall a matter relevant to a postconviction claim. *Gusow v. State*, 6 So.3d 699, 702 n. 4 (Fla. 4th DCA 2009).

36 Fla. L. Weekly D 1221.

There was unrefuted testimony that trial counsel had told Mr. Alcorn that the maximum sentence was 30 years when in fact it was life in prison. 36 Fla. L. Weekly D1221. The District Court affirmed with the following analysis.

> In the Reply Brief, defense counsel concedes that this 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 no greater than "the expected maximum sentence [appellant] would have received by proceeding to trial bases upon [the] 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 *Revel 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).

36 Fla. L. Weekly at D1221.

SUMMARY OF THE ARGUMENT

The Fourth District certified direct conflict with the decisions in Lewis v. State, 751 So. 2d 715 (Fla. 5th DCA 2000) and Revell v. State, 989 So. 2d 751 (Fla. 2d DCA 2008). 36 Fla. L. Weekly at D1221. Thus, this Honorable Court has jurisdiction to hear this case. Fla.R.App. 9.030(a)(2)(vi)(Discretionary jurisdiction to hear decisions that "are certified to be in direct conflict with decisions of other district courts of appeal"). This Court should exercise its jurisdiction to hear this case.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETONARS JURISDICTION TO HEAR THIS CASE.

Article V.₴ 3(b)(4) of the Florida Constitution vests this Court with jurisdiction to "review any decision of a district court of appeal. . . that is certified by it to be in direct conflict with a decision of another district court of appeal." *Accord Fla. R. Ap. P.* 9.030(a)(2)(A)(vii).

There can no doubt that this Court has discretionary jurisdiction to hear this case as the District Court has certified conflict the decisions of two other district courts. The only question before this Court is whether it should exercise its discretion to accept jurisdiction of this case.

This Court should exercise its discretion to hear this case. This case presents an important issue of law which this Court should resolve. There is no dispute that inaccurate advice as to the maximum penalty meets the performance prong for ineffective assistance of counsel. Cottle v. State, 733 So. 2d 963 (Fla. 1999); Morgan v. State, 991 So. 2d 835 (Fla. 2008). However, the District Courts are split on how to determine whether the movant is prejudiced. The First, Second, and Fifth Districts all follow the same analysis. They all hold that if the Defendant can show a reasonable probability that he/she would have accepted the plea and the plea would have resulted in a lesser sentence then he/she has shown prejudice

pursuant to Strickland v. Washington, 466 U.S. 668 (1984). This analysis is consistent with Honorable Court's analysis. Morgan v. State, 991 So. 2d 835, 839-840 (Fla. 2008).

The Fourth District follows a different prejudice standard than any other court in Florida. It holds that if the sentence imposed is equal to or less than the erroneous maximum sentence which counsel told the client he is facing there is no prejudice. Lester v. State, 15 So. 3d 728 (Fla. 4th DCA 2009); Alcorn, supra. This Honorable Court should resolve this important legal issue.

This case is a good vehicle to resolve this conflict. It also involves a conflict between the Third and Fourth District on another important legal issue. The opinion below notes this conflict but does not certify it. 36 Fla. L. Weekly at D1221. Petitioner is not suggesting that this conflict alone confers jurisdiction on this Court. However, it is a reason why this Court should exercise its discretionary jurisdiction to take this case. In this case, Mr. Alcorn testified that he had a specific recollection and that the plea offer had not been conveyed. Trial counsel stated that she did not have a specific recollection but that she was "sure" that she had conveyed the plea offer due to her general practice. 36 Fla. L. Weekly at D1220-1221. The Fourth District that the lawyer's testimony concerning his/her general practice can govern over the client's specific recollection. 36 Fla. L. Weekly at D1221. However, it correctly noted that Third District had reached the

opposite result in Polite v. State, 990 So. 2d 1242, 1244 (Fla. 3d DCA 2008) and Labady v. State, 783 So. 2d 275, 276 (Fla. 3d DCA 2001). 36 Fla. L. Weekly at D1221. This Court should take jurisdiction of this case to resolve one or both of these issues.

CONCLUSION

Discretionary jurisdiction is clear in this case due to the District Court's certification of conflict. This Honorable Court should accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petitioner's Brief on Jurisdiction with Appendix has been furnished by courier mail to Katherine McIntire, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401-3432 and by U. S. Mail to Appellant, Tommy Lee Alcorn, DC# 571061, Mayo Correctional Institution, 8784 U.S. Hwy 27 West, Mayo, Florida 32066, on this _____ day of June, 2011.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared with 14 point Times New Roman font as required by *Fla. R. App. P.* 9.201.

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Richard B. Greene
Attorney for Tommy Lee Alcorn