IN THE SUPREME COURT OF THE STATE OF FLORIDA

TOMMY LEE ALCORN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC11-1322
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

PETITIONER'S REPLY BRIEF ON THE MERITS

CAREY HAUGHWOUT
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PRELIMINARY STATEMENT

Petitioner will rely on the Preliminary Statement in his Initial Brief with the following additions. The symbol IB will be used for Petitioner's Initial Brief on the merits and the symbol AB will be used for Respondent's Answer Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

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

ARGUMENT

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

Respondent essentially makes two arguments in its brief. (1). It argues that the prejudice analysis of the Fourth District is correct. AB5-12. This is the issue that the Fourth District certified conflict on and the issue that Petitioner briefed in his Initial Brief. (2). It devotes the bulk of its brief to an argument that the subsequent trial of Mr. Alcorn cures any ineffectiveness in the plea bargaining process. AB12-28. Respondent did not make this argument in the lower court. It played no role in the Fourth District's decision. It is not the issue on which the District Court certified conflict.

The prejudice analysis of the Fourth District is clearly incorrect and contrary to Strickland v. Washington, 466 U.S. 668 (1984). The facts in this case are undisputed and are laid out in the opinion of the Fourth District. Alcorn v. State, ____ So.3d _____, 36 Fla. L. Weekly D1220, 1221 (Fla. 4th DCA June 8, 2011). Mr. Alcorn was originally charged with sale of cocaine within 1,000 feet of a church and possession of cocaine. The State offered a plea of 12 years in prison to resolve the case. Trial counsel did not tell Mr. Alcorn that he was eligible to be sentenced as a Habitual Offender. In fact he was eligible to be sentenced as a Habitual Offender. As a consequence he would have believed that the maximum sentence he faced if found guilty as charged was 30 years in prison. 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.

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.

The United States Supreme Court has held that there is a right is to "the effective assistance of competent counsel…before deciding whether to plead guilty." Padilla v. Kentucky, 130 S. Ct. 1473, 1480-1481 (2010). It is undisputed that the performance prong of an ineffective assistance claim has been met in this case as the Fourth District held in this case. 36 Fla. L. Weekly at D1221. This aspect of the decision is consistent with the holding of every Florida court which has faced this issue. Pennington v. State, 34 So. 3d 151 (Fla. 1st DCA 2010); Revell v. State, 989 So. 2d 751 (Fla. 2d DCA 2008); Lewis v. State, 751 So. 2d 715 (Fla. 5th DCA 2000). The only issue in this case is whether the prejudice prong is met.

The prejudice requirement in an ineffectiveness claim is whether there is "a reasonable probability that …. the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668,694 (1984). The rule of the Fourth District does not comport with Strickland.

Respondent seems to concede that the rule of Revell v. State, 989 So. 2d 751 (Fla. 2d DCA 2008) and Lewis v. State, 751 So. 2d 715 (Fla. 5th DCA 2000) would require a new trial in this case. AB7. However, it criticizes it as a "per se" rule. AB7-8. Assuming arguendo, that the rule of Lewis and Revell does not apply to all cases, it clearly applies to this case.

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 enhacer. 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. The only way to cure the deficient performance in this case is to grant Mr. Alcorn a new trial.

Respondent also makes an argument that if the prosecutor was aware that Mr. Alcorn could be habitualized he would not have made the 12 year plea offer. AB12. The fact is that he did. Defense counsel had a duty to be aware of the potential sentence and advise Mr. Alcorn correctly.

Respondent spends the bulk of its brief arguing that the fact that Mr. Alcorn subsequently received a trial cures any ineffectiveness in the plea negotiation stage. AB12-28. This is an argument that it is making for the first time in any Court. Its argument is primarily based on State v. Greuber, 165 P. 3d 1185 (Utah 2007). AB22-26.

Respondent fails to acknowledge that this Honorable Court has implicitly

rejected this formula. Morgan v. State, 991 So. 2d 835 (Fla. 2008). Morgan involved a claim that the Defendant would have accepted a plea if not for counsel's ineffective assistance. Instead, the Defendant went to trial and received a greater sentence. The Fourth District held that rejection of a plea due to erroneous advice can not be a basis for an ineffectiveness claim. Morgan v. State, 941 So. 2d 1198 (Fla. 4th DCA 2006). The Fourth District based its holding on its earlier holding in Gonzales v. State, 691 So. 2d 602 (Fla. 4th DCA 1997). This Honorable Court rejected the reasoning of the Fourth District. It stated:

> The Fourth District in Morgan affirmed the trial court's denial of postconviction relief on Morgan's claim that counsel was ineffective for advising him to reject a plea offer based on assurance of a win at trial. In affirming the denial of relief, the court cited to Gonzales. The court in Gonzales held that claims of ineffective assistance of counsel based on advice to reject a plea offer could not be the basis for an ineffective assistant of counsel claim. We disagree and reaffirm the requirements that a defendant must allege and prove in order to be entitled to relief bases on ineffective assistance of counsel for advising a defendant to reject a plea offer. The defendant must allege and prove that (1) counsel failed to convey a plea offer or misinformed the defendant concerning the possible sentence he faced, (2) the defendant would have accepted the plea but for counsel's failures, and (3) acceptance of the plea would have resulted in a lesser sentence than was ultimately imposed.

991 So. 2d at 839-840.

In Morgan, this Court implicitly rejected the argument that a subsequent trial cures any ineffectiveness in the plea bargaining process. Respondent fails to

acknowledge Morgan or argue why Morgan should be overruled. The overwhelming majority of state and federal courts that have considered this issue have rejected the argument that a subsequent trial cures any ineffectiveness in the plea bargaining process. See Commonwealth v. Mahar, 442 Mass. 11, 809 N.E. 2d 989, 993 N.5 (Mass. 2004). This is not surprising. To hold otherwise, would vitiate the holding of Padilla, supra that a Defendant is entitled to the effective assistance of counsel in the plea bargaining process. It would lead to the anomalous result that ineffective assistance leading to the acceptance of a plea could be remedied. However, ineffective assistance leading to the turning down of a plea could not be remedied. This is contrary to Florida the decisions of this Court and of the vast majority of state and federal courts. This argument must be rejected.

Respondent is correct that the United States Supreme Court has granted certiorari on two related issues. Missouri v. Frye, 131 S. Ct. 856 (January 7, 2011). The United States Supreme Court's decision may (or may not) guidance as to the Sixth Amendment issue in this case. However, as Petitioner pointed out in his Initial Brief on the merits this Honorable Court has interpreted Article I, Section 16 of the Florida Constitution more broadly than the Sixth Amendment to the United States Constitution. IB8. State v. Kelly, 999 So. 2d 1029, 1039-1041 (Fla. 2008). Regardless of the outcome of the Missouri v. Frye, supra Petitioner would argue that a new trial is mandated by the Florida Constitution.

CONCLUSION

The decision of the Fourth District should be quashed and a new trial should be granted.

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, 1515 N. Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 by courier and U.S. Mail to Mr. Tommy Lee Alcorn, DC# 571061, Columbia Correctional Institution, 216 SE Corrections Way, Lake City, Florida 32025, this ___ day of January 2012.

_____
Richard B. Greene
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

_____

Richard B. Greene
Assistant Public Defender

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APPENDIX

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