IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2047

LOWER TRIBUNAL NO. DCA: 3D07-2834

JOSE RODRIGUEZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, Jose Rodriguez, was the defendant in the trial court and the Appellee in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the Appellant in the Third District Court of Appeal. The parties shall be referred to as they stand in this court.

STATEMENT OF THE CASE AND FACTS

Procedural History

Petitioner filed a post-conviction motion under Fla. R. Crim. P. 3.850, claiming that trial counsel rendered ineffective assistance when he conveyed the State's plea offer to his client. The trial court granted the motion, and the Third District Court of Appeal reversed. The pertinent facts as found by the district court are as follows:

> Rodriguez was charged in a one hundred thirteen count Information which alleged the commission of one violation of the Racketeering Influence Corrupt Organization Act ("RICO"), forty-nine counts of robbery, thirty-three counts of kidnapping, nineteen counts of unlawful possession of a firearm while engaged in a criminal offense, three counts of sexual battery, six counts of attempted robbery, and three counts of aggravated assault. The Information alleged that Rodriguez was involved in at least twenty-two separate incidents giving rise to the charges. In the fall of 1987, the State made known its strategy of separating the different incidents for trial. One incident in particular was set to be tried during the first week of November 1987.
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> The record demonstrates that the State had substantial evidence against Rodriguez, including eyewitness testimony and physical evidence. Rodriguez's defense counsel sought to advance the defense

of either misidentification or toxic psychosis as a result of cocaine intoxication. Prior to the November trial, however, the State extended a plea offer to Rodriguez to resolve all one hundred thirteen charges of the Information in exchange for a guilty plea and a term of thirty years in prison. Defense counsel recalled that the plea offer was made at a status conference prior to the commencement of trial and that he was under time constraints in his effort to convey the plea offer to Rodriguez. After discussions with defense counsel, the plea offer was rejected by Rodriguez and the case proceeded to trial. Rodriguez was convicted of numerous counts pertaining to the incident that was the subject of the trial. Despite the conviction, the trial court delayed sentencing pending the resolution of the remaining charges. Following the conviction after the first trial, the State offered Rodriguez life imprisonment in exchange for a guilty plea, with a fifteen-year minimum mandatory term to resolve the remaining counts. This offer was also rejected by Rodriguez and he proceeded to trial on the second incident. Rodriguez was, once again, convicted and sentenced to several terms of life imprisonment. Afterward, the State dismissed the remaining counts pertaining to the other incidents. Rodriguez subsequently appealed his convictions, which we affirmed without opinion. *Rodriguez v. State*, 691 So. 2d 1085 (Fla. 3d DCA 1997).

In April 1999, Rodriguez filed a motion for post conviction relief which was denied by the trial court without an evidentiary hearing. In February 2001, we reversed and directed the trial court to hold an evidentiary hearing with respect to certain issues in Rodriguez's original motion. *Rodriguez v. State*, 777 So. 2d 1143 (Fla. 3d DCA 2001). The hearing was commenced on April 24, 2005 but, in order to allow further discovery, was continued and did not resume until September 28, 2007. At the continuation of the hearing, Rodriguez announced that he was abandoning all his claims of ineffective assistance of counsel except for his claim that defense counsel had failed to properly convey the State's original plea offer of thirty years in state prison to Rodriguez. Rodriguez, his former defense counsel, and Rodriguez's expert witness, Ray Taseff, Esq., testified at the hearing.

At the evidentiary hearing, defense counsel testified that he discussed the plea offer with Rodriguez and advised him that he would be eligible for good time, gain time, credit for time served, and possibly

> parole. Defense counsel also intimated to Rodriguez that he would not have to serve the entire thirty-year term. However, defense counsel stated that he had not specifically quantified the amount of time Rodriguez would serve because he did not want to mislead him. Defense counsel also testified that he recommended that Rodriguez take the plea offer.
>
> Rodriguez testified at the evidentiary hearing that he was aware he faced life in prison and that defense counsel had informed him about the thirty-year plea offer and the possibility of parole. He further testified that defense counsel had not advised him of gain time. Despite his discussion with defense counsel, Rodriguez testified that he came away from the conversation believing that he would have to serve the full thirty years. Rodriguez admitted that he used drugs for a period of approximately eight to ten years, which included the time the plea offer was conveyed, and that his memory was affected as a result.
>
> Following the evidentiary hearing, the trial court granted Rodriguez's motion and ordered a new trial. The trial court based its decision upon findings which included that defense counsel had advised Rodriguez of the possibility of parole even though parole had been abolished in 1983, and failed to quantify the amount of time Rodriguez could expect to serve in prison even though counsel was aware that in the late 1980's inmates were, for various reasons, serving considerably less time than the term of years imposed at sentencing. The court also found that, although defense counsel advised Rodriguez that in the event of an acquittal he would still spend approximately five years in a mental hospital, he was ineffective in failing to advise him that, by accepting the plea, he faced a similar loss of liberty. The trial court further found that, even though defense counsel had recommended that Rodriguez take the plea, defense counsel failed to explain why it was in his best interest to accept the plea. This appeal from the State followed.

State v. Rodriguez, 33 Fla. L. Weekly D2051, 2008 WL 3916236 (Fla. 3d DCA August 27, 2008) ("*Rodriguez 2008*").

The Third District Court of Appeal's opinion addressed whether defense counsel, Mr. Dieguez, was required to inform his client about the collateral consequences of a plea, including good time, gain time, or work time credits. The Court held in pertinent part:

> Gain time, good time, provisional credit time, and additional mitigating credits are all collateral consequences of a guilty plea. It cannot be said with any certainty that these collateral consequences would have been automatically imposed upon Rodriguez's entry of a guilty plea. In fact, most of the potential time credits that Rodriguez may have been eligible for, depended upon external factors including Rodriguez's behavior in prison as well as the percentage of fill capacity reached by the prison population. As such, the "errors" cited by the trial court involved only collateral consequences of Rodriguez's plea and defense counsel had no duty or obligation to advise Rodriguez of same.
>
> While there exists case law affording a defendant relief based on misinformation with respect to a plea, we have found no cases which require that defense counsel advise a defendant of all possible reductions in prison time for which he may be entitled and, furthermore, there is no requirement that a defendant be given a specifically quantified amount of time that he is expected to serve in prison. This Court has previously held that "relief is not warranted where counsel merely fails to inform a client about the various ramifications of gain time as opposed to volunteering incorrect information." *Henderson v. State*, 626 So. 2d 310, 311 (Fla. 3d DCA 1993). Moreover, "[n]either the trial court nor counsel is required to forewarn a defendant about every conceivable collateral consequence of a plea to criminal charges." *Simmons v. State*, 611 So. 2d 1250, 1252 (Fla. 2d DCA 1992) (citing *Blackshear v. State*, 455 So. 2d 555 (Fla. 1st DCA 1984)).
>
> As such, defense counsel was under no affirmative obligation to quantify the amount of time in prison Rodriguez could expect to serve and had no duty to advise Rodriguez of every possible factor that would affect the amount of prison time he faced. Lastly, we find

> defense counsel's reference to the possibility of parole to be harmless because Rodriguez did not accept the plea and, therefore, placed no reliance on the representation that he would be eligible for parole. Based upon the foregoing, we reverse the trial court's order.

Rodriguez 2008, at *6-7. Petitioner now seeks discretionary review in this Court.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction to address the Petitioner's claims because there is no express and direct conflict among any of the cases upon which the Petitioner cites, and his reliance on the case law is misplaced, inapposite, or inapplicable.

Further, Petitioner is attempting to raise a new issue that is beyond the scope of a jurisdictional brief. Concurring and dissenting opinions cannot form the basis for conflict jurisdiction, and this Court should not entertain jurisdiction over an argument that was not within the four corners of the Third District Court of Appeal's decision.

ARGUMENT

> THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL BELOW IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF OTHER DISTRICT COURTS.

As a general rule, conflict jurisdiction exists when a decision of a court of appeal expressly and directly conflicts with another court of appeal "on the same question of law." Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

In this case, however, the Court does not have jurisdiction to address the Petitioner's claim for the following reasons:

First, the State notes that the cases cited by the Petitioner refer to affirmative misadvice of counsel. However, the instant case involves allegations about an attorney's failure to advise his client. As such, this situation is distinguishable, and thus, there is no express and direct conflict among any of the cases upon which he relies. In fact, Petitioner has not pointed to any cases from this Court or from any district court of appeal in Florida that require trial counsel to forewarn a defendant about the collateral consequences of a plea or to provide an exact numerical estimate of the amount of time that a defendant will serve in prison.

Petitioner, for example, cites to *Brazeail v. State*, 821 So. 2d 364, 368 (Fla. 1st DCA 2002). There, the defendant pled guilty to various offenses and received a negotiated prison sentence of seven years, even though his attorney told him that he would be eligible for release after serving no more than four years of his sentence. In addition, the defendant's motion had been denied without an evidentiary hearing. Under those facts, the First District noted that counsel misinformed his client and granted relief. That situation has nothing to do with the case at bar. Rather, that case involves counsel's affirmative misadvice and a client's detrimental reliance on it and is therefore distinguishable or inapplicable.

Similarly, Petitioner's reliance on the Fourth District Court of Appeal's decision in *Steel v. State*, 684 So. 2d 290, 291 (Fla. 4th DCA 1996) and the Second District Court of Appeal's decision in *Deck v. State*, 985 So. 2d 1234 (Fla. 2d DCA 2008) is misplaced. Both of those cases addressed situations where a defense attorney affirmatively misadvised or misinformed a client about the consequences of his or her plea.

Unlike those situations, defense counsel in the instant case told his client that the State offered a plea of thirty years; that such a plea was a good deal; and that his client should take the plea. Defense counsel did not calculate, or attempt to predict, the actual number of years that his client would serve on his sentence. In fact, counsel testified that he did not want to mislead his client by specifically quantifying how many years his client could expect to serve because such a number was dependent on a number of external factors beyond his control such as his client's behavior in prison and the decisions of the Department of Corrections.

The Third District Court of Appeal's decision in the instant case relies upon this Court's decision in *Major v. State*, 814 So. 2d 424, 431 (Fla. 2002), which approved of the Fourth District Court of Appeal's definition of direct and collateral consequences in *Zambuto v. State*, 413 So. 2d 461, 462 (Fla. 4th DCA 1982). That holding is currently the law in Florida, and neither this Court nor the district courts have receded from that opinion. Further, Petitioner has not referred this Court or

the State to any language which supports a contrary interpretation. Consequently, the Petitioner's reliance on the case law is unavailing, and he has failed to assert a basis to invoke this Court's jurisdiction.

Finally, Petitioner raises a public policy argument about an unreasonable application of the state and federal constitution. Petitioner writes, "The Third District's conclusion that an attorney has fulfilled the obligations of the right to counsel clauses by merely advising a client of the plea and its direct consequences creates an unreasonable diminution of the guarantee of effective assistance of counsel." (Petitioner's Brief at 7). In support of that proposition, he cites to a portion of Justice Anstead's concurring/dissenting opinion in *State v. Bolware*, 33 Fla. L. Weekly S645 (Fla., September 18, 2008) (*See* Petitioner's Brief at 8).

Here, the State notes that concurring and dissenting opinions cannot form the basis for conflict jurisdiction. *See Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980) ("An opinion joined in by a majority of the members of the Court constitutes the law of the case. A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court.") (citations omitted). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *see also The Florida Bar v. B.J.F.*, 530 So.

2d 286, 288 (Fla. 1988). A dissenting opinion, even though the dissent represents the opinion of at least one member of the panel, cannot be considered because it is not the opinion of the court and therefore has no precedential value. A withdrawn or quashed opinion does not represent the opinion of any member of the panel and is even more legally insignificant. Further, as noted above, even if such claims were cognizable, this Court's precedent about the direct and collateral consequences of a plea derives from a long line of cases and fails to support the propositions upon which Petitioner relies.

CONCLUSION

Accordingly, there is no express and direct conflict between the instant case and the decisions upon which the Petitioner relies. Fla. R. App. P. 9.030(a)(2)(A)(iv). Further, the Petitioner raises an additional argument that is beyond the scope of a jurisdictional brief and is not a basis for conflict.

WHEREFORE, the State respectfully requests this Court to decline discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Peter Raben, Esquire, Museum Tower, 150 West Flagler Street, Suite #2850, Miami, Florida, 33130, this ___ day of October, 2008.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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