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IN THE SIXTH DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

ADAM MURRAY COSTELLO,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Case No. 6D23-2400

L.T. No. 16-CF-371

Appeal from the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County

INITIAL BRIEF OF APPELLANT ADAM MURRAY COSTELLO

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PREFACE

The Appellant, Adam Murray Costello, is the Defendant in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, wherein his motion for postconviction relief was denied following a hearing. The Appellant will be referred to as the Appellant or the Defendant; the Appellee will be referred to as the State of Florida or the State. The following symbol will be used:

(R.____) - Record on Appeal.

JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to Article V, § 4(b)(1), Florida Constitution, and Fla. R. App. P. 9.030(b)(1)(A).

STATEMENT OF THE CASE AND FACTS

In this case the Defendant, Adam Murray Costello, was charged by a Fourth Amended Information filed 12 March 2018 with leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015).

R.036. He was also charged with tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). R.036. The latter charge is not the subject of the Defendant's postconviction motion or the instant appeal. The Defendant was represented in the trial court by Shannon H. McFee (hereinafter "Trial Counsel"). R.422, line 22 - R.423, line 1; R.052; R.072; R.074.

The Defendant entered pleas of nolo contendere and was convicted on both charges. Judgment and sentence were rendered on 19 March 2018. R.052-59. The Defendant was sentenced to 10 years 6 months of incarceration on the charge of leaving the scene with a minimum mandatory term of incarceration of 4 years, and to 5 years of incarceration on the charge of tampering with evidence, with the sentences to run concurrently. R.054-58. No issues were reserved for appeal and no direct appeal was taken.

At or near the time of the plea, the State Attorney filed a Criminal Punishment Code Scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015). R.040-43. In section III the Scoresheet included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040.

Also at or near the time of the plea Trial Counsel filed a written "Plea Agreement Waiver of Rights". R.044-47. The same provided in relevant part that the Defendant agreed to the following: "The Defendant shall be sentenced in Count One to 10.5 years Florida State Prison with a 4 year minimum mandatory. As to Count Two the Defendant shall be sentenced to 5 years Florida State Prison." R.045.

The Defendant was sentenced as provided by the plea agreement. On the charge in count one of the information he was sentenced to 10 years 6 months incarceration with a minimum mandatory term of 4 years. R.054-55. On the charge in count two of the information he was sentenced to 5 years incarceration. R.056. The sentences of incarceration were to be concurrent. R.055, R.057. Certain court costs and fees and other special conditions were imposed. R.053.

On 05 March 2020 the Defendant timely moved under Fla. R. Crim. P. 3.850 to vacate the incarcerative portion of his sentence because his attorney failed to provide effective assistance of counsel. R.060-69. The Defendant asserted that Trial Counsel

provided ineffective assistance to the Defendant by failing to review and correct errors in the Criminal Punishment Code Scoresheet in this case. R.063-67. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040, R.062. The correct lowest permissible scoresheet sentence under § 921.0024 would have been 36.3 months incarceration (notwithstanding the four year mandatory minumum under § 316.027(c)) had victim injury points not been improperly included. R.065-66. Trial Counsel failed to recognize that the 120 points for victim injury were improperly included and therefore affirmatively misadvised the Defendant concerning the sentence he was likely to receive. R.065-67.

In his postconviction motion the Defendant asserted that any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible sentence. R.067. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel. R.067. The Defendant asserted that he was prejudiced because the Defendant agreed to accept a

sentence which he believed, based on the affirmative misadvise of counsel, was the minimum sentence under the Criminal Punishment Code. R.067. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement; he only did so because he was affirmatively misadvised by trial counsel. R.067.

On 14 April 2020 the postconviction court ordered the State Attorney to respond to the Defendant's motion for postconviction relief. R.070-71. The State Attorney filed a timely response. R.119-123. The Defendant filed a reply to the State's response. R.124-30. On 01 March 2021, after the postconviction court failed to act for nearly six months, the Defendant moved for a hearing on his original postconviction motion. R.131-33.

On 19 April 2021 the postconviction court entered an order denying the Defendant's postconviction motion and the Defendant's motion for a hearing. R.134-36. The Defendant appealed to the Second District Court of Appeal. On 22 December 2021 that court reversed the order of the postconviction court. R.138-42.

The Second District Court held that the Defendant's "claim as to the improper inclusion of victim injury points is not conclusively refuted by the record or the postconviction court's order. The court did not include any attachments refuting the claim, and the record does not include any information regarding the victim's cause of death." R.141.

However the Second District Court also held that the Defendant's claim was facially insufficient because it did not include a request to withdraw his plea. R.141. Rather he merely requested that the postconviction court vacate his sentence and resentence him using a corrected scoresheet. R.141. Therefore the Second District Court reversed the summary denial of the Defendant's rule 3.850 motion and remanded the case to the postconviction court with instructions to strike the motion with leave to amend. R.142. The Mandate issued on 18 January 2022. R.037.

On 03 March 2022 the Defendant moved to withdraw his plea. R.143-53. The Defendant again argued that Trial Counsel had failed to provide effective assistance of counsel by failing to review

and correct errors in the Criminal Punishment Code Scoresheet in this case. R.147-50. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040, R.147. The correct lowest permissible scoresheet sentence under § 921.0024 would have been 36.3 months incarceration (notwithstanding the four year mandatory minumum under § 316.027(c)) had the additional points not been improperly included. R.149. Trial Counsel failed to recognize that the 120 points for victim injury were improperly applied and therefore affirmatively misadvised the Defendant concerning the sentence he was likely to receive. R.149-50.

In his postconviction motion the Defendant asserted that any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible sentence. R.150. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel. R.150. The Defendant asserted that he was prejudiced because the Defendant agreed to accept a sentence which he believed, based on the affirmative misadvise of

counsel, was the minimum sentence under the Criminal Punishment Code. R.067. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement; he only did so because he was affirmatively misadvised by trial counsel. R.150-51.

The Defendant asserted that had Trial Counsel done the appropriate research, he could have easily ascertained that the same 120 victim injury points were not properly assessed in the instant case. R.147. The Defendant again based his argument on the rule in *Sims v. State*, 998 So. 2d 494,496 (Fla. 2008). R.147-48. The Defendant asserted that to impose victim injury points, "a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points." R.148, quoting *Sims* at 505. Here no evidence of the necessary causal connection is known to exist.

The postconviction court ordered the State to respond. R.154. The State filed a timely response. R.155-223. The Defendant filed a reply on 16 May 2022. R.224-30.

When the postconviction court had done nothing for six months after the pleadings were complete, the Defendant moved for a hearing on his motion on 05 December 2022. R.231-33. The postconviction court entered an order for an evidentiary hearing. R.234-37. An evidentiary hearing was scheduled for 14 February 2023. R.238.

At the evidentiary hearing on the Defendant's motion to withdraw his plea, the original Scoresheet and a transcript of the original plea proceedings were admitted to evidence. R.243; R.412, lines 12-20; R.418, line 23 - R.419, line 7. A transcript of the same hearing is contained in the Record on Appeal. R.394-451. At the time of the hearing the postconviction court reserved ruling. T.449, lines 17-18.

The postconviction court ultimately denied the Defendant's motion to withdraw his plea. R.295-393. A timely Notice of Appeal was filed. R.452. This appeal follows.

SUMMARY OF ARGUMENT

The Defendant agreed to enter a plea of nolo contendere to the charge of leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015). He entered that plea instead of proceeding to trial because his attorney at the time of the plea mislead him to believe that 10 years 6 months was the lowest permissible sentence he could receive under § 921.00265 Florida Statutes (2015). The Defendant's mistaken belief, and therefore his plea, was directly and solely the result of that affirmative misadvice given him by Trial Counsel.

Had the Defendant understood that the actual minimum sentence was less than half of the agreed sentence, he would not have entered that plea. The Defendant was prejudiced by receiving a sentence more than twice as long as the minimum sentence he could have received under § 921.00265 and § 316.027(c).

The postconviction court improperly denied the Defendant's motion to withdraw his plea under Fla. R. Crim. P. 3.850 because no record evidence supported the findings of that court. Therefore denial of the relief requested by the Defendant was reversible error.

ARGUMENT

DENIAL OF THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA WAS REVERSIBLE ERROR BECAUSE NO RECORD EVIDENCE SUPPORTED THE FINDINGS OF THE POSTCONVICTION COURT.

Standard of Review

The Defendant moved the postconviction court to allow him to withdraw his plea based on affirmative misadvise of trial counsel. R.143-53. In reviewing postconviction claims of ineffective assistance of counsel, Florida courts apply the rule in *Strickland v. Washington*, 466 U.S. 668 (1984):

> Claims of ineffective assistance of trial counsel require a showing of deficient performance and prejudice. *See generally Strickland v. Washington*, 466 U.S. 668... (1984). First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. *See Gore v. State*, 846 So.2d 461, 467 (Fla.2003). Second, the deficiency must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *See id.* The two prongs are related, in that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning

> of the adversarial process that the trial cannot be relied on as having produced a just result." *Rutherford v. State*, 727 So.2d 216, 219 (Fla.1998) (quoting *Strickland*, 466 U.S. at 686...).

State v. Davis, 872 So. 2d 250, 253 (Fla. 2004); *Happ v. State*, 922 So. 2d 182, 186 (Fla. 2005).

The *Strickland* Court held that the standard requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The Court held that a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

A defendant bears the burden of establishing the claim. *See Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000) (a "defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based"). In *Campbell v. State*, 247 So. 3d 102, 106 (Fla. 2d DCA 2018), the Second District Court addressed the standard of review to be applied after a defendant meets the *Freeman* burden:

> "[W]hen a defendant presents competent **substantial evidence in support of his ineffective assistance claim[s], the burden shifts to the State to present contradictory evidence.**" *Williams[v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007)] (citing *Green v. State*, 857 So.2d 304, 305 (Fla. 2d DCA 2003); *accord Thomas v. State*, 117 So.3d 1191, 1194 (Fla. 2d DCA 2013) ("**Generally, a defendant has the burden to present evidence at a postconviction evidentiary hearing, and once he does so, even if only through the presentation of his own testimony, the State must present contradictory evidence.**").

Campbell at 106 (emphasis added).

> **Where there is "no conflicting testimony that required the [postconviction] court to assess the relative credibility of different witnesses," the issue is not one of witness credibility**. *Feldpausch v. State*, 826 So.2d 354, 356 (Fla. 2d DCA 2002); *see also Yarbrough v. State*, 871 So.2d 1026, 1029 (Fla. 1st DCA 2004) ("[T]he evidentiary hearing raised virtually no disputed issues.... Thus, the [postconviction] court needed only to apply these established facts to the law regarding ineffective assistance of counsel."). "**[I]f a defendant's testimony is unrefuted and the postconviction court has not articulated a reason to disbelieve the defendant, the court cannot choose to disregard the defendant's testimony.**" *Thomas*, 117 So.3d at 1194.

Campbell at 107 (emphasis added).

The First Prong of Strickland: Deficient Performance

In the instant case the Defendant entered pleas of nolo contendere to the charges of leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015), and tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). R.048-49; R.075, line 21 - R.076, line 15; R.079, lines 4-7; R.083, lines 1-2. He was adjudicated guilty on both charges R.115, lines 3-5. Judgment and sentence were rendered on 19 March 2018. R.052-59.

The Defendant was represented in the trial court at all relevant times by Shannon H. McFee (hereinafter "Trial Counsel"). R.422, line 13 - R.423, line 9; R.047; R.052. In his motion to withdraw his plea the Defendant asserted that trial counsel affirmatively misadvised him that the minimum sentence he could receive based on the sentencing Scoresheet prepared under § 921.0024 Florida Statutes (2015). R.143, 149-50. Trial Counsel failed to review and correct the same Scoresheet; he failed to

ascertain whether the 120 victim injury points in section III of the Scoresheet were properly included. T.147-50.

At the hearing on the Defendant's motion to withdraw his plea, Trial Counsel testified that in 2007 the Florida Statutes "changed to then indicate that you could get those death points on a leaving the scene with a death if the Court makes a finding that you caused the death or the injury under those circumstances." R.424, lines 16-19. Trial Counsel was correct that § 921.0021(7) changed in 2007. *See* Ch. 2007-211 Laws of Florida. Trial Counsel was also correct that after that change 120 victim injury points could be included, but only where a court finds that the offender caused victim injury. *Id.* Of course any such finding must be supported by competent substantial evidence.

Chapter 2007-211 Laws of Florida amended § 921.0021(7) Florida Statutes to include a new paragraph:

> (e) Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

For a court to find "that an offender caused victim injury" record evidence supporting such a finding would be required. Here no such record evidence exists.

At the hearing on the Defendant's motion to withdraw his plea Trial Counsel testified that he believed that if this case had gone to trial, the State may have been able to present evidence that the Defendant had "caused victim injury":

> Q.[by ASA Worcester] Did you, in fact, take depositions of the eyewitnesses to see if there was a cause?
>
> A.[by Trial Counsel] We did. There was at least two that I recall, a Mr. Burnell and Mr. Ramiro. One was a youth at the time of the accident. The other was an adult. And we – in the deposition in the discovery that I determined – looked at, they were going to indicate who was at fault.

R.427, lines 2-8.

However no witness testified at the hearing on the Defendant's motion to withdraw his plea, or at any other time, about anything that had happened at the scene of the accident before the Defendant left the scene. No testimony was ever taken from anyone which could address the cause of the accident.

Even if transcripts of the discovery depositions which were the basis of Trial Counsel's opinion had been included in the trial court file (and they were not), such deposition transcripts would be inadmissible hearsay for the purpose of determining causation. Trial Counsel's opinion regarding the impact of potential testimony by witnesses might provide a basis for advice to his client. However Trial Counsel's opinion about out-of-court statements of witnesses at depositions was clearly not competent substantial evidence of anything which may have happened at the scene at the time of the accident.

Trial Counsel testified that he believed the witnesses "were going to indicate who was at fault." R.427, lines 7-8. Counsel for the Defendant objected to Trial Counsel's testimony about the deposition testimony because it was hearsay. R.427, line 9. The objection was overruled by the postconviction court: "Overruled. It is not being offered for the truth but rather what was a factor in the plea. It seems obvious to me from the record and, therefore, I overrule the hearsay objection." R.427, lines 10-13.

Overruling that objection was error because evidence of who may have been at fault in the accident goes directly to whether victim injury points were properly included on the Scoresheet. Therefore this court should not consider Trial Counsel's testimony that he believed the witnesses were going to indicate who was at fault for any purpose. Trial Counsel's subjective belief about what the potential testimony of two potential witnesses is simply not relevant to any issue before this court.

Scoresheet Error

Had he done the appropriate research, Trial Counsel could have easily ascertained that the 120 victim injury points were not properly assessed in the instant case. In *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008), Sims was driving a truck when he struck and killed a victim. Sims left the scene of the accident without ever stopping the truck. *Id.* He was charged with leaving the scene of a crash resulting in the death of a person under § 316.027(1)(b) Florida Statutes (2001), and was found guilty as charged in the information. *Id.* At the sentencing hearing the trial court added

120 victim injury points to Sims' Criminal Punishment Code Scoresheet. *Id.* at 497. The Fifth District Court of Appeal affirmed the sentence, concluding that victim-injury points were properly imposed. *Id.* The Supreme Court granted review. *Id.* at 498-99.

In *Sims* the Supreme Court held: "Based upon the plain language of section 921.0021(7)(a)[Florida Statutes (2001)], which defines 'victim injury' for the purpose of scoring victim-injury points, we conclude that under these facts, the imposition of such points for leaving the scene in violation of section 316.027(1)(b) was incorrect." *Id.* at 505. The Supreme Court reasoned:

> Section 921.0021(7)(a) provides: "Victim injury" means the physical injury or death suffered by a person as a *direct result* of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense. (Emphasis supplied.) **This "direct result" language clearly imparts and includes a causation requirement, which must exist between the death of the victim and the charged offense of leaving the scene of an accident resulting in death.**

Id. at 505 (italics as in the report of *Sims,* boldface added).

> Accordingly, here, a similar interpretation of section 921.0021(7)(a), requiring the existence of a causal connection to impose victim-injury points, is warranted. Moreover, if the imposition of a restitution award, which results in monetary loss, entails a causation requirement, a causal connection is also required for the imposition of victim-injury points, which can lead to the much more significant loss of personal liberty through the imposition of a longer sentence. Finally, in interpreting Florida Rule of Criminal Procedure 3.701(d)(7), which provides when victim injury "shall be" scored under the sentencing guidelines, this Court concluded that the Sentencing Guidelines Commission had recommended that victim injury be scored when the "injury occurred *during* the offense which led to the conviction." *Fla. R.Crim. Pro. re Sentencing Guidelines (Rules 3.701 & 3.988),* 509 So.2d 1088, 1089 (Fla.1987) (emphasis supplied). For these reasons, we conclude that **a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points**.

998 So. 2d at 505-06 (italics as in the report of *Sims,* boldface added).

> The death of the victim was the direct result of the initial impact, rather than the underlying offense which occurred only after the death. So, the causal connection, which is absolutely necessary to impose victim-injury points, simply does not exist in this case

998 So. 2d at 507. Thus in *Sims* the Florida Supreme Court concluded that to assess victim injury points, it must be established that the "injury occurred *during the offense* which led to the conviction." 998 So. 2d at 505 (emphasis added).

In *Manhard v. State*, 282 So. 3d 941, 948 (Fla. 1st DCA 2019), *review denied*, SC19-2133, 2020 WL 1894688 (Fla. Apr. 16, 2020), *certiorari denied, Manhard v. Florida*, 141 S.Ct. 562 (2020), the district court recognized that in *Sims* the Florida Supreme Court "clarified that the 'direct result' language included a causation element linking the death of the victim and the charged offense. *Sims*, 998 So. 2d at 505." The *Manhard* court held: "A conviction under 'vehicular homicide or any other offense in which the crime actually involved the impact that caused the death... would have satisfied the causation requirement for the imposition of victim-injury points.'" 282 So. 3d at 948, quoting *Sims*, 998 So. 2d at 505. Manhard had been convicted of DUI manslaughter, which satisfied the causation requirement because it linked the death with the charged offenses. Therefore, the victim-injury points were

properly assessed because Manhard's conviction of DUI manslaughter established the requisite causation. *Manhard* at 948.

Here, unlike *Manhard*, the Defendant was charged with no other offense which might have satisfied the requirement of causation. In the instant case, as in *Sims*, the offense for which the victim injury points was assessed was leaving the scene of a crash involving death. R.040; R.044; R.048; R.052. Therefore the same result as in *Sims* would be required in the instant case. To impose victim injury points, "a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points." *Sims* at 505.

In 2007, after the district court opinion in *Sims*, the Legislature added a new provision to 921.0021(7) Florida Statutes:

> Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

Ch. 2007-211, § 4, Laws of Fla. That was effective 01 July 2007. *Id.* at § 5; it is codified at § 921.0021(7)(e) Florida Statutes (2015).

Error by the Postconviction Court

Under some circumstances Ch. 2007-211, § 4, would allow assessment of victim injury points. However to do so a court must find "that the offender caused victim injury...." In the instant case no record evidence exists which would support any such finding. In addition nothing in Ch. 2007-211, § 4, changed or even addressed the rule in *Sims* that "a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points." 998 So. 2d at 506.

Therefore, even after the 2007 change to the statute, the rule in *Sims* still applies to the instant case because "a causal connection must clearly exist between the charged offense and the death of the victim." 998 So. 2d at 506. But even if it did not, the plain language of § 921.0021(7) Florida Statutes after the amendment by Ch. 2007-211, § 4, still requires that a court find "that the offender caused victim injury" before it can assess sentence points for victim injury.

As explained supra absolutely no evidence existed in the instant case to show that the Defendant did anything or failed to do

anything which caused any death. The State presented no such evidence at any hearing. In the alternative that fact could be established by an admission by the accused. Here neither occurred. Unlike *Manhard*, the Defendant was charged with nothing to which a plea would necessarily be an admission of causing death.

In addition, to be guilty of leaving the scene of a crash involving death, it would be necessary for a death to have occurred before the Defendant allegedly left the scene. If no death had occurred before the Defendant left the scene, it would not be possible to find that the Defendant left the scene of a death.

In the instant case no evidence exists to show whether the victim died before or after the Defendant left the scene. However even if the Defendant left the scene after the victim died, no evidence exists to show that the act of leaving the scene could possibly have caused that death.

Sims was decided by the Supreme Court in 2008. The events giving rise to the instant case were alleged to have occurred in 2016. Therefore Trial Counsel should have been aware of the rule in *Sims* and the proper application of the same. However the

Defendant testified that Trial Counsel never discussed the Supreme Court opinion in *Sims* with him. R.409, lines 22-24. Trial Counsel testified that he was aware of the opinion in Sims. T.432, line 4 - R.433, line 7. However he never denied that he had failed to discuss the Supreme Court opinion in *Sims* with the Defendant.

Trial Counsel affirmatively advised the Defendant that the State's proposed sentence of 10 years 6 months was the minimum sentence that the trial court could impose absent some mitigating circumstance under § 921.0026. Apparently here no such mitigating circumstance existed. The Defendant accepted that advice and entered into the proposed plea agreement.

However the State's proposed sentence of 10 years 6 months was **not** the minimum sentence that the trial court could impose absent some mitigating circumstance. Had the erroneously included 120 points for victim injury been omitted from the Scoresheet, the total sentence points would have been 76.4. That would have resulted in a lowest permissible sentence of 36.3 months under the Criminal Punishment Code. (76.4 - 28 = 48.4; 48.4 x .75 = 36.3). *See* § 921.0024(2); Fla. R. Crim. P. 3.704(26).

Section 316.027(2)(c) Florida Statutes required a four year mandatory minimum sentence, less than half the sentence the Defendant had been mislead to believe was the minimum sentence that the trial court could impose absent some mitigating circumstance.

The misadvice given by Trial Counsel in the instant case was not simply a failure to properly advise the Defendant. Here the advice given by Trial Counsel incorporated errors of law or, as some courts have referred to it, was "affirmative" or "positive misadvice." In *Ey v. State*, 982 So. 2d 618, 622 (Fla. 2008), the Supreme Court held that such affirmative misadvice about even collateral matters may constitute a legally cognizable claim for ineffective assistance of counsel when that misadvice affects the voluntariness of a plea. "When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her." *Ghanavati v. State*, 820 So. 2d 989, 991 (Fla. 4th DCA 2002). *See also*

Fernandez v. State, 199 So. 3d 500, 504 (Fla. 2d DCA 2016), citing *Ey*; *Gunn v. State*, 841 So. 2d 629, 631 (Fla. 2d DCA 2003); *Roberti v. State*, 782 So. 2d 919, 920 (Fla. 2d DCA 2001).

The affirmative advice which Trial Counsel gave the Defendant was error. Even considering the minimum mandatory sentencing provision in § 316.027(2)(c), the minimum sentence that the circuit court could impose absent some mitigating circumstance was not 10 years and 6 months; it was less than half of that. Here the affirmative misadvice given to the Defendant by trial counsel mislead him to believe that the minimum sentence which he could receive in the instant case was 10 years 6 months.

The Defendant stated in his sworn motion to withdraw his plea that had he known the truth he would not have entered into the plea agreement. R.150. The Defendant explained at the hearing on the motion to withdraw his plea:

> Q.[by counsel for the Defendant] Now, did Mr. McFee ever tell you that the minimum potential sentence in this case was less than ten and a half years?
>
> A.[the Defendant] No, absolutely not.

Q. Okay. Had Mr. McFee told you that the potential minimum sentence was less than ten and a half years, would you have entered a plea to ten and a half years?

A. No.

Q. Was your entry of the plea to ten and a half years based upon your understanding of the potential minimum sentence and what Mr. McFee told you?

A. Yes.

Q. Had you believed, had you had information from somebody anywhere that the potential minimum sentence in this case was less than ten and a half years would you have entered a plea to ten and a half years?

A. No.

R.409, lines 5-21.

Any reasonable attorney would have ascertained the correct application of victim injury points to a charge of leaving the scene of a crash involving death. Had Trial Counsel done so, he would have ascertained that the correct minimum sentence was less than half of the sentence to which he advised the Defendant to agree. The failure of Trial Counsel to do so was ineffective assistance of counsel because it rendered the plea involuntary. The Defendant

would not have agreed to the proposed sentence had he not been affirmatively mislead by Trial Counsel.

The Second Prong of Strickland: Prejudice to the Defendant

In the instant case the aforesaid failures of Trial Counsel to provide effective assistance resulted in prejudice to the Defendant. The Defendant entered into the plea agreement because he was affirmatively mislead by Trial Counsel to believe that 10 years 6 months was the minimum sentence he might receive. As a direct result of the failure of trial counsel to recognize and assert the errors in the sentencing Scoresheet, the Defendant entered into a plea agreement based on that affirmative misadvice. As explained supra, the plea agreement in this case was predicated upon a fallacy. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement. The Defendant so stated in his sworn postconviction motion and again in his testimony. R.150; R.409, lines 5-21.

Prejudice to the Defendant arose from his loss of his right to liberty resulting from the failure of trial counsel to recognize and assert the correct lowest permissible sentence which might be imposed in this case. As a result of the ineffective assistance of trial counsel the Defendant entered into a plea agreement which was based on a fallacy. He is presently serving a 10 year 6 month sentence which is not required by the statutory and decisional law of Florida. Had the Defendant known that under § 921.00265 and § 316.027(2)(c) Florida Statutes the actual lowest permissible sentence he might have received was substantially less than that agreed-upon sentence, he would not have entered into the plea agreement in this case. T.409, lines 5-21.

Application to the Instant Case

Thus the two prongs of the test in *Strickland v. Washington* and its progeny are both met. The unprofessional error of Trial Counsel by failing to recognize and assert the correct minimum sentence which might be imposed in this case was "outside the wide range of professionally competent assistance." *Strickland*

at 694. "[T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Order of the Postconviction Court

The postconviction court ruled on the Defendant's motion to withdraw his plea in a written order entered 16 March 2023. R.295-304. The court first reviewed the procedural history of the case and the rule in *Strickland v. Washington* and its application by Florida courts. R.295-98.

Then the postconviction court reviewed the Florida Supreme Court opinion in *Sims v. State*. R.298-99. The postconviction court ruled:

> Notably, the holding in *Sims* was based on the Florida Supreme Court's interpretation of subsection (7)(a) of the 2001 version of section 921.0021, Florida Statutes. In 2007, the legislature amended section 921.0021, to add subsection (7)(e), which provides that, "[n]otwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that **the offender caused victim injury**, sentence

> points for victim injury may be assessed against the offender." Laws 2007, c. 2007-211 §4. (Emphasis added.)

R.299 (emphasis as in original order).

> The plain language of section 921.0021(7)(e), Florida Statutes (2016), provides that, if a conviction is for an offense described in section 316.027, points for victim injury "may" be assessed "if the court finds that the offender caused victim injury." Section 921.0021(7)(e) expressly provides that points may be assessed in these circumstances notwithstanding the "direct result of the primary offense" requirement of section 921.0021(7)(a).

R.299-300.

Therein the postconviction court was absolutely correct. The post-2007 version of the statute provides that points for victim injury may be assessed if the court finds that the offender caused victim injury. *See* Ch. 2007-211, § 4, Laws of Fla.

However, like any other finding by a court, a finding that the offender caused victim injury must be based on competent substantial evidence. Here no competent substantial evidence exists to support a finding that victim injury points could be

assessed in this case. As to victim injury points the trial court ruled:

> **Mr. McFee** considered the issue and **interpreted 921.0021(7)(e) to allow victim injury points to be assessed** if the Defendant was found to have caused the injury or death of the victim. Mr. McFee testified that **he believed that victim injury points could lawfully be assessed against the Defendant if the Defendant was "a cause," not necessarily the only cause, of the accident.**
> ....
>
> **Based on the evidence in discovery**, in particular the depositions of eyewitnesses Timothy Bernal and Shame Romero, **Mr. McFee concluded that the scoresheet that included victim injury points was accurate.**
> ....
>
> **Mr. McFee was confident that** if the case went to trial and the Defendant was convicted, **the Defendant would be found to have been a cause of the death of the victim** and victim injury points would be included on the sentencing scoresheet.

R.301-02 (emphasis added).

However no such evidence was before the postconviction court. No such evidence is in the record on appeal. Apparently the court based its ruling only on the opinion of Trial Counsel that

some trial testimony might support a finding that the Defendant caused the death of the victim. However well informed Trial Counsel may have been, he was not an eyewitness to the accident. He certainly could not testify to those events. Had Trial Counsel attempted to repeat at the hearing on the Defendant's motion what some other person had told him about the cause of the accident, such testimony would have been objected to as hearsay. The postconviction court properly sustained other objections when Trial Counsel attempted to repeat what others had told him. R.425, lines 12-13; R.425, lines 21-22; R.425, line 24 - R.426, line 1.

In a footnote immediately following the end of the above quotation the postconviction court opined:

> The probable cause affidavit, attached hereto as Exhibit A, supports Mr. McFee's conclusion that the evidence at trial would have provided a factual basis for the victim injury points. This was a two vehicle crash where the vehicle driven by the Defendant reportedly changed lanes, colliding with a motorcyclist who died at the scene.

R.302, footnote 4. However that probable cause affidavit was not in evidence. If it had been offered in evidence it would have been

objected to as hearsay. Certainly the probable cause affidavit was an out-of-court statement. If it had been offered for the truth of the matters asserted therein it would have been inadmissible hearsay. *See* § 90.801 and § 90.802 Florida Statutes. Any statements of persons other than the affiant contained in the probable cause affidavit would have been multi-level hearsay. Section 90.803(7) Florida Statutes addresses a hearsay exception for public records and reports. However the § 90.803(7) exception "exclud[es] in criminal cases matters observed by a police officer or other law enforcemt personnel". That exclusion has clear application to the probable cause affidavit cited by the postconviction court.

Then the postconviction court ruled:

> Counsel is correct that there was no record evidence regarding causation presented at the sentencing hearing (and, of course, no jury finding based on this evidence). However, the Defendant agreed to inclusion of the points as part of the plea bargain in this case.

R.303. The court was correct that the Defendant "agreed to inclusion of the points as part of the plea bargain in this case." However the Defendant explained at length in his motion to

withdraw his plea, and in his testimony at the hearing on that motion, (and again supra,) that he would not have entered a plea had he known that the agreed-upon sentence was not the minimum potential sentence. R.150; R.409, lines 5-21.

Then the postconviction court ruled:

> Mr. McFee's unrebutted credible testimony at the February 14, 2023, hearing is that, if the Defendant went to trial and was convicted, the evidence would support a finding that the Defendant caused injury or death to the victim. Therefore, Mr. McFee told the Defendant that the 120 points for victim injury were properly included on the scoresheet. The Defendant has not shown that this advice was erroneous. Accordingly, the Defendant has failed to show that his plea was based on misadvice of counsel.

R.303.

As explained supra, the testimony of Trial Counsel evinced his opinion that testimony might have been presented at trial to show that the Defendant had caused the death of the victim. However no such evidence was admitted in this case at any time. No statement of any witness who claimed to have actually seen the accident has been admitted to evidence or even appears in the record. The

opinion of Trial Counsel of what the evidence might eventually be, however well informed, is not competent substantial evidence of causation of the accident. The Defendant has explained at length that no record evidence exists to support Mr. McFee's opinion. The State presented no such evidence. The postconviction court did not cite to any such evidence.

Finally the postconviction court ruled:

> Defendant has also failed to show that he would not have entered into the plea agreement if he had understood that the victim injury points were not required by law to be included by the judge at sentencing after a conviction at trial. Mr. McFee thoroughly discussed the victim injury points with the Defendant. Defendant testified that he agreed to the 10.5 year plea offer because he understood he likely could not do better at sentencing after a conviction at trial. He has not shown that this was a misunderstanding.

R.304.

The Defendant testified that if Trial Counsel had told him that the potential minimum sentence was less than ten and a half years, he would not have entered a plea to ten and a half years. R.409, lines 9-12. He testified that his entry of the plea to ten and a half

years was based on his understanding of the potential minimum sentence and what Trial Counsel told him. R.409, lines 13-16. The Defendant testified that had he believed that the potential minimum sentence in this case was less than ten and a half years he would not have entered a plea to ten and a half years. R.409, lines 17-21.

That testimony by the Defendant is completely unrebutted. In *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007), the district court held that a defendant has the burden of proving his claim of ineffective assistance of counsel at an evidentiary hearing on a rule 3.850 motion. "However, when a defendant presents competent substantial evidence in support of his ineffective assistance claim, the burden shifts to the State to present contradictory evidence." *Id.*, citing *Green v. State*, 857 So. 2d 304, 305 (Fla. 2d DCA 2003).

The same is true here for the same reason. "[I]f a defendant's testimony is unrefuted and the postconviction court has not articulated a reason to disbelieve the defendant, the court cannot choose to disregard the defendant's testimony." *Thomas v. State*,

117 So. 3d 1191, 1194 (Fla. 2d DCA 2013); *see also Campbell v. State*, 247 So. 3d at 106, citing *Thomas*. *See also Beasley v. State*, 964 So. 2d 213, 216-17 (Fla. 2d DCA 2007) (reversing an order of a postconviction court denying relief because findings were not supported by competent substantial evidence where the postconviction court chose not to believe appellant's testimony even though it was unrefuted); *Matton v. State*, 872 So. 2d 308, 312 (Fla. 2d DCA 2004) (reversing a postconviction court because the court had no evidence whatsoever upon which to base a finding where appellant's testimony was unrefuted); *Feldpausch v. State*, 826 So. 2d 354, 356 (Fla. 2d DCA 2002) (holding that where there was no conflicting testimony that required a postconviction court to assess credibility of different witnesses, the postconviction court erred by rejecting the testimony of an attorney simply because the postconviction court did not wish to believe him).

CONCLUSION

Thus the Defendant entered a plea mistakenly believing that the agreed upon sentence was the lowest permissible sentence he

could receive under § 921.00265. His mistaken belief was the direct result of incorrect advice given him by trial counsel. The Defendant was prejudiced by receiving a sentence more than twice as long as the minimum sentence he could have received under § 921.00265 and § 316.027(c). Therefore the postconviction court improperly denied relief.

WHEREFORE the Defendant requests this Honorable Court to reverse the order of the postconviction court denying relief and to grant such other relief as may be reasonable, just, and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by email (to CrimAppTPA@myfloridalegal.com) to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, as provided by Fla. R. Jud. Admin. 2.516(b)(1), on this 30th day of June, 2023.

CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY, as required by Fla. R. App. P. 9.045(e), that this brief complies with the font requirements of rule 9.045(b) and the word count requirements of rule 9.210(a)(2)(B).

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