

015
69283
,

IN THE SUPREME COURT OF FLORIDA

CASE NO.

THE STATE OF FLORIDA,

Petitioner,

vs.

LAZARO GINEBRA,

Respondent.

FILED
CLERK
M

* * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * *

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General
Tallahassee, Florida

RALPH BARREIRA
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS.....	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1-4
QUESTION PRESENTED.....	5
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	7-8
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	9

TABLE OF CITATIONS

<u>CITES</u>	<u>PAGE</u>
Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981).....	2
Ginebra v. State, ____ So.2d ____ (Fla. 3d DCA 1986, case decided August 26, 1986 Case No. 86-1802).....	5
Hahn v. State, 421 So.2d 710 (Fla. 1st DCA 1982).....	2
Martinez v. State, 475 So.2d 1292 (Fla. 3d DCA 1985).....	2

INTRODUCTION

The Petitioner, The State of Florida, was the Appellee in the District Court of Appeal of Florida, Third District, and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The Respondent, Lazaro Ginebra, was the Appellant in the District Court of Appeal and the Defendant in the trial court. The parties will be referred to as they stand in this Court. The symbol "A" will be utilized to designate the Appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information in four separate cases as follows:

- A) Case No. 80-23755-A: Grand Theft.
- B) Case No. 81-994: Count I - Armed Robbery, Count II - Possession of a Firearm while Engaged in a Criminal Offense.
- C) Case No. 83-12589: Count I - Attempted Second Degree Murder, Count II - Armed Robbery, Count III - Possession of a Firearm While Engaged in a Criminal Offense.
- D) Case No. 83-8064-A: Carrying a Concealed Firearm.

On August 22, 1983 Respondent pleaded guilty to all of the above charges, was adjudicated guilty on each charge, and was sentenced to five years each in case A and D, and twenty-five years with a three year minimum mandatory in cases B and C, respectively, with all of the sentences to run cuncurrent with each other.

On June 2, 1986 Respondent filed a motion in the trial court for post conviction relief pursuant to Fla.R.Crim.P. 3.850. (A. 1) The basis for Respondent's attack on his judgment and sentence was that his plea was not knowingly and intelligently made, in that his attorney failed to advise him that as a result of his convictions he would be subject to deportation under Federal Immigration laws. Respondent relied on the decisions of the Third District in Martinez v. State, 475 So.2d 1292 (Fla. 3d DCA 1985), and Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), wherein the Third District held that failure to advise an alien de-fendant of the possibility of deportation as a result of his conviction constituted ineffective assistance of counsel as a matter of law, and therefore rendered the guilty plea involuntary. The Third District further held that when an alien defendant raises the above issue in a 3.850 motion, he is automatically entitled to an evidentiary hearing to determine whether his attorney did in fact fail to advise him of the deportation consequences, and whether he will in fact be deported as a result of his convictions.

Copies of the Third District's opinions in Martinez and Edwards, supra, are attached. (A. 2 and A. 3).

On June 16, 1986 the trial court entered an order summarily denying Respondent's 3.850 motion, (A. 4), and Respondent appealed. The Third District entered an order July 22, 1986 directing Petitioner to show cause why the relief sought by Respondent should not be granted (A. 5). On August 11, 1986 Petitioner filed its Response, urging the Third District to reconsider its prior opinions in Martinez and Edwards, or to at least modify these holdings to require that the defendant specifically allege in his 3.850 motion that he is in the process of actually being deported. (A. 6).

On August 26, 1986 the Third District rendered its opinion, (A. 7), which reversed the trial court's summary denial of Respondent's 3.850 motion, and remanded for an evidentiary hearing in compliance with its prior decisions in Martinez and Edwards.

As recognized by Chief Judge Schwartz in his special concurrence in Martinez, the position of the Third District in Edwards and Martinez (and the instant case) is in direct and express conflict with the First District's decision in

Hahn v. State, 421 So.2d 710 (Fla. 1st DCA 1982).(A. 8)
Chief Judge Schwartz stated that he himself disagreed with
Edwards¹, but felt bound to concur because of its binding
authority.

A notice invoking the discretionary review jurisdiction
of this Court was filed on August 29, 1986.

¹As had then Chief Judge Hubbard in his strong dissent in
Edwards.

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN GINEBRA V. STATE, _____ SO.2D _____ (FLA. 3D DCA 1986, CASE DECIDED AUGUST 26, 1986 CASE NO. 86-1802), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN STATE V. HAHN, 421 SO.2D 710 (FLA. 1ST DCA 1982).

SUMMARY OF ARGUMENT

The decision of the Third District in the case sub
judice directly and expressly conflicts with the decision of
the First District in Hahn, supra, hence the exercise of
discretionary review in this cause is warranted.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT
COURT OF APPEAL IN GINEBRA V.
STATE, SO.2D, (FLA. 3D DCA
1986, CASE DECIDED AUGUST 26, 1986
CASE NO. 86-1802) DIRECTLY AND EX-
PRESSLY CONFLICTS WITH THE FIRST
DISTRICT COURT OF APPEAL'S DECISION
IN STATE V. HAHN, 421 SO.2D 710
(FLA. 3D DCA 1982)

The issue, whether counsel's failure to advise alien defendants of possible deportation consequences renders a guilty plea involuntary, has been addressed by both the Third and First District Court of Appeals, with opposite results. In Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), the Third District held that failure to advise an alien defendant that his conviction might result in deportation pursuant to Federal Immigration laws, constituted ineffective assistance of counsel, and hence rendered the defendant's guilty plea involuntary. Where an alien defendant alleges such a failure by counsel in his 3.850 motion, the trial court must hold an evidentiary hearing to determine if the allegation is true, and if the defendant is actually going to be deported.

In Hahn v. State, 421 So.2d 710 (Fla. 1st DCA 1982), the defendant, relying on Edwards, supra, presented the identical argument to the First District. The First District rejected this argument, holding that an attorney

has no affirmative duty to advise an alien defendant of the deportation consequences which might result from a plea of guilty. The First District concluded its opinion by stating "We acknowledge conflict with Edwards." (Id at 710).

The subsequent opinions of the Third District in Martinez and Ginebra (the instant case), supra, merely re-affirmed its prior holding in Edwards.

In his special concurrence in Martinez, Chief Judge Schwartz stated his own opposition to the Edwards rule, and specifically recognized the conflict between the Third and First Districts, citing Hahn, supra. Chief Judge Schwartz thus sided with then Chief Judge Hubbard, who entered a vigorous dissenting opinion in Edwards.

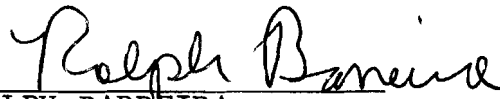
In Sum, the decision of the Third District in the case sub judice directly and expressly conflicts with the decision of the First District in Hahn, hence the exercise of discretionary review in this cause is warranted.

CONCLUSION

Based upon the foregoing, Petitioner respectfully urges this Court to grant discretionary review in this cause.

Respectfully submitted,

JIM SMITH
Attorney General



RALPH BARREIRA
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was furnished by mail to LAZARO GINEBRA, pro se, Avon Park Correctional Institute, DOC No. 091096, P.O. Box 1100-1354, Avon Park, Florida 33825 on this 5 day of September, 1986.



RALPH BARREIRA
Assistant Attorney General

RB/dm