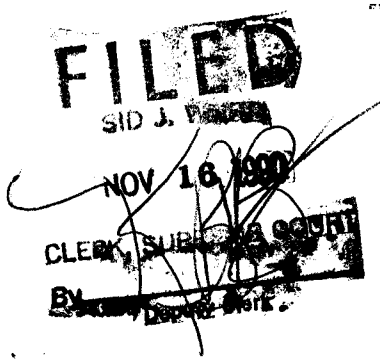

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs. CASE NUMBER 76,576

JOSEPH BEACH,

Respondent.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA
CERTIFIED QUESTION

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

ISSUE

WHETHER A DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NOT PROVIDED OR OFFERED COUNSEL AT THE PROCEEDINGS RESULTING IN PRIOR CONVICTIONS IS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT COUNSELED OR THAT COUNSEL WAS KNOWINGLY WAIVED.

Respondent argues in essence that a defendant challenging the scoring of prior misdemeanor convictions may shift the burden to the state to establish that the prior convictions were valid by a bald assertion that counsel was not provided in the prior proceedings. As petitioners have previously argued, the fact that counsel was not provided in the prior proceedings is not dispositive of whether the conviction is valid for enhancement purposes, and, where the defendant did not have the right to counsel in the prior proceedings, that fact is wholly irrelevant.

While it is true, as respondent asserts, that the state bears the burden to insure that the guidelines scoresheet is accurate, respondent fails to recognize that duly entered convictions which are never challenged by way of direct appeal or post-conviction proceedings are presumptively valid. It is that presumption which is the true starting point for inquiry when prior convictions are challenged as uncounseled. In order

to overcome this presumption of validity, a defendant should bear the burden to establish that 1) he had the right to counsel in the prior convictions; and 2) he either was not provided counsel, or did not knowingly and validly waive his right to counsel. The strong presumption of validity is bolstered by the state's presumptive adherence to the long-standing rulings of Gideon v. Wainwright, 372 U.S. 9. 9 L.Ed. 2d 799, 83 S.Ct. 792, (1963) and Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972), which established the parameters for the right to counsel by indigent defendants.

Respondent relies upon Delaine v. State, 486 So.2d 39 (Fla. 2d DCA 1986), in which the court required the state to corroborate hearsay statements contained on a presentence investigation report when the defendant challenged the accuracy of the statements. Delaine is inapposite. As noted previously by petitioner, respondent in this case did not contest the accuracy of the entries on his presentence investigative report. Rather, he challenged the accurately entered prior convictions as uncounseled, and therefore invalid for purposes of enhancement in his subsequent conviction. Smelley v. State, 500 So.2d 318 (Fla. 1st DCA 1986), Hill v. State, 557 So.2d 238 (Fla. 1st DCA 1990), Webb v. State, 560 So.2d 1226 (Fla. 2d DCA 1990), and Wills v. State, 561 So.2d 1355 (Fla. 2d DCA 1990), all cited by respondent, likewise involve challenges to the hearsay evidence of prior convictions, rather than challenges to admitted prior convictions as constitutionally infirm.

In Ousley v. State, 560 So.2d 422 (Fla. 4th DCA 1990), the court, relying upon State v. Troehler, 546 So.2d 109 (Fla. 4th DCA 1989), held that the state's evidence that the prior misdemeanor was valid was insufficient, where the state presented a driving record which was silent as to whether counsel was provided, or the right to counsel was waived. In that case, the court stated that the issue of an uncounseled prior conviction was "raised by defense counsel," but the decision does not elucidate in what manner the issue was raised, and the court made no ruling as to the sufficiency of the defendant's showing of invalidity. Ousley thus does not involve the issue raised in the instant case. Annechino v. State, 557 So.2d 915 (Fla. 4th DCA 1990) similarly is irrelevant to the issue of what burden the defendant must initially bear when he challenges prior misdemeanor convictions as uncounseled. In Annechino, the court had before it evidence that the defendant was not advised of his right to counsel, had not waived counsel, and did not have counsel when he entered a guilty plea in his prior conviction. The issue in the case was whether the defendant's waiver of his right to counsel at an earlier stage of the prior proceedings constituted a waiver at the plea hearing. The court held that it did not.

Respondent asserts that "[T]he petitioner wants a presumption of representation of counsel which the Respondent must overcome, even though such a presumption from a silent

record is constitutionally impermissible." Respondent's brief at 6-7. As petitioner previously noted, no record of the prior convictions, silent or otherwise, was entered by either party in this case. Thus, the rule set forth in Troehler is entirely irrelevant to this case. The issue in this case is what must the defendant allege in order to overcome the presumption of validity prior to the submission of any record of the prior convictions.

Respondent asserts that petitioner seeks to elevate mere form over substance in requiring a defendant to establish the invalidity of his prior convictions by allegations that he had the right to counsel, and that right was not knowingly and voluntarily waived. Petitioner disagrees. The burden on the state to come forth with records of prior convictions is onerous. In order to shift that burden to the state, a defendant should be required to overcome the presumption of validity which is to be accorded a duly entered judgment of conviction.

Petitioner requests this court to answer the certified question in the negative.

CONCLUSION

Based on the foregoing argument and citations of authority, Petitioner requests this court to answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been forwarded by United States mail to Mr. Williams H. Webster, P.A., Post Office Box 478, Crawfordville, Florida 32327, this 16th day of November 1990.

Laura Rush
Assistant Attorney General