IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. DOCKET NO: *78,560*

BRUCE W. ROCK,

Respondent.

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ON APPEAL FROM THE DISTRICT COURT OF APF'EAL
FIRST DISTRICT OF FLORIDA
CERTIFIED QUESTION

# RESPONDENT'S ANSWER BRIEF

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## PRELIMINARY STATEMENT

Respondent, BRUCE ROCK, was the defendant in the Circuit Court and appellant in the First District Court of Appeal. Mr. Rock will be referred to in this Brief as Respondent or by his proper name. Petitioner, State of Florida, was the prosecutor in the circuit court and appellee in the appellate court. It will be referred to in this brief as Petitioner OK as "the State".

## JURISDICTION STATEMENT

The First District Court of Appeal issued an opinion and certified a question to be of great public importance. The State of Florida filed a Notice to invoke Discretionary Jurisdiction of the Supreme Court of Florida to review a Decision of the First District Court of Appeal. This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, and Article V, Section 3 (b)(4) of the Florida Constitution.

## STATEMENT OF THE FACTS AND CASE

On July 27, 1987, Bruce Warren Rock was arrested for leaving the scene of an automobile accident with injury. (R-1). Shortly thereafter, an information was filed charging Bruce Rock with leaving the scene of an accident and false reporting of an accident, contrary to Sections 316.061, and 316.027, Florida Statutes. (R-7).

Ultimately, Bruce Rock entered a plea of nolo contendere as to count one. (R-11). (T2-4). On October 30, 1987, Circuit Judge Southwood entered an order withholding adjudication of guilt and placing Mr. Rock on community control for six months followed by 30 months of probation. (R-13).

On December 17, Bruce Rock waived his right to appear and contest modification of probation (R-16). On December 20, 1989, Judge Southwood entered a subsequent Order of Modification of Probation. In the December 20 order, the Court mcdified special conditions 18 and 19, extended the term of probation and required Mr. Rock to enroll in an alcohol treatment program. (R-15).

Some four months later, Florida Department of Corrections Officer Andrena V. Thomas filed an affidavit of violation of probation. Ms. Thomas stated that special condition 5 had been violated by Mr. Rock's arrest for trespass, disorderly intoxication and resisting arrest without violence. She also stated that special condition 19 had been violated by Mr. Rock's failure to complete an alcohol treatment program. (R-17).

Mr. Rock was arrested pursuant to an warrant for violation of

community control. (R-20). Subsequently, defense counsel filed a motion to strike paragraph 2 from the affidavit of violation of probation. The motion was premised on Mr. Rock's waiver of appearance and contest of the modification being conducted outside the court and without the benefit of legal counsel. (R-30). The motion was denied. (R-33).

At the hearing on revocation of community control, Ms. Thomas testified of her employment as Mr. Rock's probation officer. She stated that she previously explained the reporting requirements in general and, stated over objection, the special conditions of community control in particular. (T3-23). Ms. Thomas also testified that Mr. Rock had violated his probation by his arrest on March 21, 1990 for trespassing, disorderly intoxication, and resisting arrest without violence. (T3-26). She represented that Mr. Rock pled guilty to these charges and was sentenced to five days in the Duval County Jail. (T3-34). Finally, Ms. Thomas testified that Mr. Rock failed to attend alcohol counseling at Gateway Community Services. (T3-27).

On cross-examination, Ms. Thomas admitted that Mr. Rock had been on probation since October 30, 1987, and was placed under her supervisor on July 20, 1989. (T3-27). She also admitted that she was not present when the modification of term of community control was signed by Mr. Rock. (T3-29).

Bruce W. Rock testified that he was arrested on March 21, 1990, for "DI, trespassing and resisting arrest without violence." (T3-43). He also stated that he was not intoxicated, not

trespassing, nor resisted arrest. He nonetheless chose to plead guilty in order to serve a jail term of one day and be released. Mr. Rock testified that he was not represented by an attorney when he pled guilty to the charges. **(T3-45).**

Judge Haddock asked Mr. Rock several questions as to the basis for his arrest. **Mr. Rock** testified that around 2:00 o' clock in the morning he ordered breakfast at the restaurant but fell asleep. Mr. Rock was dragged out of the building and woke up outside restaurant. He vowed that he was sober the entire time. **(T3-47).**

Mr. **Rock's** counsel renewed his objection to the violation of Special Condition 19. He also objected to the Court finding a violation of Special Condition 5 because of the hearsay testimony by the probation officer and in addition the fact that it was a conviction obtained without the benefit of counsel. **(T3-48).**

Judge Haddock found from the testimony that Mr. Rock violated Special Condition 5 by committing three offenses: trespass, disorderly intoxication, and resisting an officer. He also found Mr. Rock to have violated Special Condition 19, in refusing to report for alcohol treatment. **(T3-51).** Judge Haddock revoked the probationary sentence and adjudicated Mr. Rock guilty of leaving the scene of an accident, and committed him to the Florida Department of Corrections for thirty (30) **months. (T3-53).**

A notice of appeal was timely filed. This appeal follows.

## SUMMARY OF THE ARGUMENT

The issue on this appeal involves who bears the burden of proving whether counsel was available or validly waived during a prior uncounseled misdemeanor conviction. The District Court of Appeal, First District certified the following question as one of great public importance:

> **WHETHER A DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NEITHER PROVIDED NOR OFE'ERED COUNSEL AT THE PROCEEDINGS RESULTING IN F'RIOR CONVICTIONS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT COUNSELED OR THAT COUNSEL WAS KNOWINGLY WAIVED.**

The Court should answer the question in the affirmative.

The United States Supreme Court, in due process inquiries involving the waiver of a defendant's constitutional rights, has placed the burden upon the state to prove that the waiver was freely and voluntarily given. The state should also have the burden of proving that the constitutional right has been provided or validly waived.

The District Courts of Appeal which have addressed this issue place the burden of proof upon the state. Accordingly, once a defendant raises the issue of an uncounseled conviction, the burden should be placed in the State to show by a preponderance of the evidence that counsel was provided or validly waived.

## ARGUMENT

**WHETHER A DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NEITHER PROVIDED NOR OFE'ERED COUNSEL AT THE PROCEEDINGS RESULTING IN F'RIOR CONVICTIONS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT COUNSELED OR THAT COUNSEL WAS KNOWINGLY WAIVED.**

It has long been settled that a criminal defendant has a constitutional right to assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). The constitutional right to counsel extends to defendant in misdemeanor cases in which the defendant is prosecuted for an offense punishable by more than six months imprisonment, or when the defendant is actually subjected to incarceration. Aigersinger V. Hamlin, 407 U.S. 25, 37 92 S.Ct. 2006, 2012 (1972); Hlad v. State, 565 So.2d 762 (Fla. 5th DCA 1990).

An uncounseled misdemeanor or conviction without a waiver of counsel will not support a probation revocation or an increased term of imprisonment on a subsequent conviction. Harrell v. State, 469 So.2d 169, 171 (Fla. 1st DCA 1985); see ~~also~~, Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, reh'g denied, 447 U.S. 930, 100 S.Ct. 3030 (1980); Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258 (1967); Aigersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006 (1972).

In the present case, the petitioner has conceded that Mr. Rock had a constitutional right to counsel in his misdemeanor case. It should also be noted that Mr. Rock's probation was revoked based upon his uncounseled misdemeanor conviction. The sole remaining question, therefore, is whether Mr. Rack waived his right to

counsel and who bears that burden of proof.[1]

Courts have placed the burden of proof upon the state in a side variety of due process inquiries. In the area of searches and seizures, the burden of proof has consistently been placed upon the state. In United States v. Simpson, 482 F.2d 197, 199 (5th Cir. 1973), the former Fifth Circuit placed the burden upon the state to prove the reasonableness of a search if the search is without a warrant. In Maine, the state supreme court required the state to prove by a preponderance of the evidence that probable cause existed at the time of arrest. State v. Heald, 314 A.2d 820, 829 (Me. 1973). Further, when a state relies upon consent to justify the lawfulness of the search, the state has the burden of proving that the consent was voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 1792 (1968).

The burden of proof has been shifted to the state in the area of confessions as well. When the state seeks to introduce a confession, the state has the burden of proving that the confession has been freely and voluntarily given. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 627 (1972).

It is important to note here that the consent issue in Bumper and the confession issue in Lego is very similar to the waiver of counsel issue in the present case. Both a consent to search and

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[1] The State argues that the trial court's judgment and sentence is to be presumed valid, and is not to be lightly overturned. (Petitioner's Brief at p.10). The present case, however, involves a question of law, i.e., who bears the burden of proof. For that reason, the case is subject to de novo review.

confession involve the waiver of a constitutional right; the right to be free from unreasonable searches and seizures and the right against self-incrimination, respectively. Likewise, the instant case involves the issue of a waiver of the constitutional right to counsel. Furthermore, the United States Supreme Court, in Bumper and Lego, placed the burden upon the state to prove that the waivers were freely and voluntarily given. There is no reason to suggest that the state should not also bear the burden of proving that Mr. Rock freely and voluntarily waived his right to counsel.

A number of Florida courts have addressed the particular issue presented in this brief, and have placed the burden of proof upon the state.[2] In Harrell v. State, 469 So.2d 169 (Fla. 1st DCA

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[2] Petitioner appears to argue that sworn testimony is insufficient as evidence that Mr. Rock was not counseled and did not waive counsel. In support of its contention, Petitioner has cited several cases requiring that a defendant present prima facie evidence or to prove by a preponderance of the evidence that he was uncounseled and did not waive counsel. Petitioner's argument, however, is problematic for three reasons.

First, an acceptance of the Petitioner's argument would place a defendant under the difficult, if not impossible, task of proving a negative.

Second, the cases cited by Petitioner involve collateral attacks upon the validity of a prior judgment and sentence. Respondent concedes that a defendant should be placed under a more onerous burden when engaging in an attack on a judgment. The instant case, however, does not involve a collateral attack upon a judgment. Rather, Mr. Rock merely contends that the uncounseled conviction can and should not be used as the basis for a revocation of probation or sentence enhancement.

Third, Petitioner has taken an inconsistent position regarding the value of sworn testimony. At the trial level, Petitioner was willing to attest to the validity of the probation officer's sworn testimony as justification for Mr. Rock's probation revocation. The State now contends that Mr. Rock's sworn testimony is insufficient to shift the burden of proof to the state yet does not contest the ruling of the appellate court below that the probation officer's testimony was improper hearsay.

1985), the First District held that "where a probationer raises the issue of an uncounseled conviction. . .It is incuinbent upon the state to show by a preponderance of the evidence that the probationer was represented by counsel, or that counsel was available but validly waived." Id. at 171[3]; see also, Beach v. State, 564 So.2d 614 (Fla. 1st DCA 1990) (The defendant's affidavit contending that he was convicted without counsel or waiver of counsel "was sufficient to place these facts in issue and require the state to bear the burden of showing the contrary"); Smith v. State, 498 So.2d 1009, 1010 (Fla. 2d DCA 1986) ("Where a defendant raises the issue of an uncounseled conviction, the state must show by a preponderance of the evidence that the defendant was represented by counsel or that counsel was available but was validly waived.!!) (emphasis supplied); Cooper v. State, 538 So.2d 105 (Fla. 4th DCA 1989) ("the state failed to satisfy its burden of showing that those convictions were counseled, or that the defendant had waived the right to counsel on those convictions.").

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[3] Petitioner has cited the First District's opinion in Harrell as support for a two prong test. Petitioner argues that a defendant must, under the Harrell opinion, contend both that he was uncounseled and that he did not waive the assistance of counsel before the burden is shifted to the state. Petitioner then argues that Mr. Rock failed to meet the two prong test in Harrell. There are two problems with Petitioner's argument.

First, in Rock v. State, 16 F.L.W. D2242 (Fla. 1st DCA 1991), the appellate court specifically found that Mr. Rock met his burden under Harrell and that the burden rested with the state.

Second, as pointed out by the First District. in Rock, once a defendant produces evidence that he is unrepresented, it becomes the state's burden to show that defendant was represented or that counsel was validly waived. Id. Thus, it would appear, Harrell did not create a two prong test.

Based upon the foregoing, it is clear that once a defendant asserts under oath that he or she was uncounseled, the burden then shifts to the state to prove that defendant was in fact counseled or that counsel was validly waived.[4]

[4] In the closing portions of its brief, Petitioner appears to encourage the use of a collateral attack upon the prior, uncounseled judgments in order to properly raise the issue of whether counsel was provided or validly waived. The use of a collateral attacks under such circumstance should not be endorsed as a matter of public policy. Furthermore, as noted in footnote 2, supra, Mr. Rock does not seek to collaterally attack the validity of the prior judgment.

## CONCLUSION

For the foregoing reasons, Respondent requests this Honorable Court to answer the certified question in the affirmative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Attorney General's Office, The Capitol, Tallahassee, Florida 32301, by U.S. Mail, on this 22 day of November, 1991.

CLYDE M. COLLINS, JR., ESQUIRE