IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 78,560

BRUCE W. ROCK,

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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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority in the trial court and the appellee in the First District Court of Appeal, and will be referred to as "petitioner" or "the state" in this brief. Respondent was the defendant in the trial court and the appellant in the First District Court of Appeal, and will be **referred** to as "respondent" in this brief. **References** to the record on appeal will be noted by the symbol "R"; **references** to the transcripts of the proceedings below will be by the use of the symbol "T". All **references** will be followed by the appropriate page number(s) in parenthesis.

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the statement of the case and facts set out in its initial brief.

SUMMARY OF ARGUMENT

This Court should answer the certified question in the negative. A defendant who challenges the validity of prior misdemeanor convictions in a subsequent revocation of probation proceeding should bear the burden of establishing by a preponderance of evidence that he had a right to counsel in the prior proceedings, that he was not provided with counsel, and that he did not knowingly waive his right to counsel.

ARGUMENT

ISSUE

IS THE DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NEITHER PROVIDED NOR OFFERED COUNSEL AT THE PROCEEDINGS RESULTING IN PRIOR CONVICTIONS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT COUNSELED OR THAT COUNSEL WAS KNOWINGLY WAIVED.

Respondent's analogy between the State's burden of proof in the contexts of searches and seizures and confessions and the State's burden in the present case is faulty. Neither the cases cited by respondent nor the principles enunciated therein shed any light upon the issue raised in the present case. The sole issue in the case at hand is whether respondent's testimony at his probation revocation hearing - that he was not represented by counsel when he pled guilty to prior convictions - was insufficient to put the State to the burden of proving that respondent's prior convictions were in fact counseled or that counsel was knowingly waived.

In United States v. Impson, 482 F.2d 197 (5th Cir. 1973),[1] the court held that, where the search and seizure of incriminating evidence was based solely upon a hearsay report from a secret service agent and where the search and seizure was made without a search warrant or the searching-

[1] In his answer brief, respondent refers to this case as United States v. Simpson, 482 F.2d 197 (5th Cis. 1973).

arresting offices's personal knowledge of the basis for suspecting criminal activity, "the government has the burden of showing that the information on which the search was based itself had a reasonable foundation." Id. at 199. (Emphasis in original). In Bumper v. North Carolina, 391 U.S. 543, 548 (1968), the Court held that a prosecutor who seeks to rely upon consent to justify the lawfulness of the search of a house has the burden of proving that the consent was freely and voluntarily given. As none of the cases involve attacks upon the integrity of prior convictions, they are not relevant to the issue in the present case.

Respondent unsuccessfully relies upon Harrell v. State, 469 So.2d 169 (Fla. 1st DCA 1985), review denied, 479 So.2d 118 (Fla. 1985), in support of his argument. In Harrell, the trial court revoked the defendant's probation because the defendant pled nolo cantendere to a subsequent charge of disorderly intoxication. Id. at 170. At the revocation hearing and on appeal, the defendant objected to the introduction of a certified copy of the subsequent judgment and sentence on the grounds that the defendant did not have counsel when he pled nolo contendere, nor had he waived the right to counsel. Id. The Harrell Court held that

> in circumstances such as these where the document relied upon by the state attesting to a judgment and conviction states on its face that the conviction was uncounseled, it is incumbent 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. (Emphasis supplied).

Id. at 71. Thus, it is clear that the Harrell Cour limited its holding to cases with facts similar to that case. Id. at 172.

The present case is distinguishable from Harrell. First, the State in Harrell offered a certified copy of the prior conviction as the sole evidence to prove that the defendant violated probation, and the defendant in that case did not admit to pleading guilty to the charges. Id. This certified copy indicated on its face that counsel was neither available nor waived by the defendant. Id. Thus, the defendant in Harrell did far more than make a bald assertion that his prior conviction was uncounseled. Id. Second, defense counsel objected to the use of the prior convictions an the grounds that respondent was neither counseled when he plead nolo contendere, nor waived his right to counsel. Id. at 170. Respondent, however, failed to assert that he did not knowingly waived his right to counsel, asserting only that his prior convictions were uncounseled.

Similarly, appellant's reads more into Beach v. State, 564 So.2d 614 (Fla. 1st DCA 1990), petition for review filed, No. 76,576 (Fla. Aug. 31, 1990), than is actually there. In Beach, supra, at 614, the defendant submitted an affidavit to the trial court alleging that his convictions

were obtained without counsel or a knowing waiver of the right to counsel. The appellate court found that the affidavit was sufficient to require the State to bear the burden of showing that the defendant's prior convictions were either counseled or that counsel was knowingly waived. Id. However, the opinion fails to describe the contents of the affidavit in any detail. Id. Therefore, it is unclear as to how the defendant in that case raised the issue and met his initial burden, thereby shifting the burden to the State. Id.

Respondent states that, "Petitioner appears to argue that sworn testimony is insufficient as evidence that Mr. Rock was not counseled and did not waive counsel" (respondent's answer brief at 7, n.2) (emphasis supplied). Petitioner not only appears to so argue, but does so argue as the entire focus of the certified question centers on the effect of sworn testimony in shifting the burden of proof regarding allegedly uncounseled prior convictions. Respondent is incorrect in asserting that a defendant would have a difficult, if not impossible, task of proving that his prior canvictions were uncounseled and that counsel was not knowingly waived. Respondent is in the best position to muster evidence showing what happened at the prior hearing. He was there. He knows who were possible witnesses and who acted as trial judge. Appellant also is incorrect in stating that, because respondent is not challenging his prior convictions via a collateral attack, his sworn

testimony is sufficient to shift the burden to the State to prove the validity of the prior convictions. Respondent's burden may have been heavier had he elected to attack the convictions collaterally. However, this fact does not mean that respondent's sworn testimony would be sufficient to shift the burden in the present case. It clearly was not sufficient. Thus, this Court should answer the certified question in the negative.

CONCLUSION

Based on the foregoing legal authorities and arguments, Petitioner requests this Honorable 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 petitioner's brief on the merits has been furnished by U.S. Mail to Clyde M. Collins, **Esq.**, **920** Blackstone Building, **233** East Bay Street, Jacksonville, **FL 32202**, this 17th day of December, 1991.

Wendy S. Morris
Assistant Attorney General