IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner/
Cross-Respondent,

v. CASE NO. 87,545

ANTONIO LEE CRAFT,

Respondent/
Cross-Petitioner.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF CROSS-PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner/ Cross-Respondent, v. ANTONIO LEE CRAFT, Respondent/ Cross-Petitioner.	:	CASE NO. 87,545

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PRELIMINARY STATEMENT

Respondent/Cross-Petitioner files this brief in reply to Issues II and III. He will rely on his initial brief as to Issue IV.

ARGUMENT

ISSUE II

ARGUMENT IN REPLY TO CROSS-RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE.

The state relies on California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), for the proposition that Craft had no expectation of privacy in the contents of the garbage can. The case is not on point and is easily distinguishable. There, a drug trafficker left plastic trash bags on the curb in front of his house for the garbage man to pick up. A police officer had the collector pick up the bags and

turn them over to the police.

The court held that the defendants' trash bags would be constitutionally protected if they showed a subjective expectation of privacy which society would accept as objectively reasonable, under the teachings of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The court held that they had no expectation of privacy because they had left the bags on the side of the street, where they were accessible to the public, and where they expected the trash collectors to come by and pick them up.

Not so in the present case. Craft's mother testified that the large garbage can was on her property in her front yard, 20 to 25 feet from the can to the street. The can must be rolled out to the street for collection. The officers testified that the lid was down, and the inculpatory items inside the can were enclosed in paper bags, so that one who lifted the lid could not see what was inside.

Because Craft's trash can was on Craft's property, 20 to 25 feet from the street, not on the street and ready for collection, with the lid closed, and with the objects inside concealed in paper bags, society should be willing to recognize an objective expectation of privacy in the can. The fact that the can was outside the fence should not matter, because it was still in Craft's yard. It was left there only for convenience, so that it

did not have to be rolled all the way back to the house every week after it was emptied.

To rule otherwise would give a wealthy homeowner with a garbage can outside of a fence in the middle of the front yard of a large estate more of an expectation of privacy than a poor person with a small front yard. The expectation of privacy should not depend on how wealthy a person is or how large their front yard is.

Moreover, because Craft's mother testified that she did not approve of people coming up and rummaging through her can, she further expressed a subjective expectation of privacy. Also, a subjective expectation of privacy was expressed because the can's lid was left closed, and the objects inside were concealed in paper bags and could not be seen even if one opened the lid. California v. Greenwood is not on point.

The state also relies on two pre-Greenwood cases and one post-Greenwood case, all from Florida. In State v. Fisher, 591 So. 2d 1049 (Fla. 5th DCA 1991), There the defendants left a plastic garbage can on the right-of-way in front of their house, and the police found marijuana inside the can without a warrant. The trial judge suppressed the evidence upon a belief that the defendants had not abandoned the can.

The appellate court reversed because there was no reasonable expectation of privacy in a garbage can left on the road right-

of-way. *Accord*: State v. Slatko, 432 So. 2d 635 (Fla. 3rd DCA 1983) (no expectation of privacy in trash bags placed next to an alley for pickup by trash collectors).

Another case relied on by the state, Stone v. State, 402 So. 2d 1330 (Fla. 1st DCA 1981), decided seven years prior to California v. Greenwood on a slightly different theory, is also not on point. There the defendant placed his opaque garbage bags, secured with twist ties, just inside his property, but within three to four feet from the street curb. A police officer accompanied the garbage men on two occasions on their regular run down the defendant's street, and seized the bags and found contraband inside.

The court found that the defendant had no reasonable expectation of privacy in the bags because he had abandoned them by placing them out for collection, and it did not matter if he had placed them on the street right-of-way or just inside his property line.

Here, however, the can was not placed out by the street for collection. Rather, it was kept inside the yard and not rolled out until collection day. It was not on the street right-of-way or within a few feet thereof; rather, it was located 20 to 25 feet from the street. Thus, the court's view in Stone that trash is abandoned when it is set out for collection is correct, but it does not apply to the facts of this case. The state does not

address Craft's other argument on this issue -- that his mother did not freely and voluntarily consent to a search of the trash can, even though she had agreed to allow the police to look in the laundry room. As noted in the previous brief, she evinced her feelings as to the trash can by saying: "I guess so, y'all would look anyway" (R 252), or "I reckon not, you're gonna do it anyway." (R 270). Significantly, after that verbal exchange, she refused to sign the consent to search form.

It must be remembered that the search of the garbage can occurred on January 15 at 2:30 p.m., after Craft had been taken into custody and after the police had been to the house at 12:25 p.m., looking for Craft's bloody clothes in the laundry room. There is no reason why the police could not have obtained a search warrant for the house and its curtilage, including the garbage can, when they found no bloody clothes two hours earlier, but where they had information, probably from Ms. Peart, that Craft's clothes were bloody when he returned her car on the night of the murder.

For all of these reasons, the evidence seized from the garbage can should have been suppressed.

ISSUE III

ARGUMENT IN REPLY TO CROSS-RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING CRAFT'S MOTION FOR THE APPOINTMENT OF NEW COUNSEL.

The lower tribunal agreed that the lower court's inquiry

into Craft's complaints about his lawyer did not go far enough, but held that the error was harmless:

> [W]hile we find that the trial court erred in failing to inform the defendant as to his right of self representation after hearing defendant's motion to discharge counsel based on incompetence (*see Bodiford v. State*, 665 So.2d 315 (Fla. 1st DCA 1995)), we find that such an error was harmless in light of the overwhelming evidence of guilt and the later representations by defendant's counsel in defendant's presence that he did not desire to represent himself. *See Parker v. State*, 570 So. 2d 1053 (Fla. 1st DCA 1990), *rev. denied*, 581 So. 2d 1309 (Fla. 1991).

Craft v. State, 670 So. 2d 112, 113 (Fla. 1st DCA 1996).

The state has not addressed this issue. Rather, the state has taken the same position that it took in the lower tribunal -- that no inquiry whatsoever was necessary. The state argued below that Craft had not expressed enough discomfort about his lawyer's effectiveness to even require an inquiry. The lower tribunal's citation to Bodiford v. State, 665 So. 2d 315 (Fla. 1st DCA 1995), indicates that it rejected the state's argument.

Craft filed a motion for the appointment of new counsel on October 4, 1994, alleging that his assistant public defender was not representing him properly (R 303-305). A hearing was held on this motion on October 10, 1994. The court asked Craft and his counsel about the allegation that counsel had declined to call three defense witnesses (R 396-400); the allegation that counsel had told Craft he would be found guilty (R 400-402); the

allegation that counsel had made insufficient arguments at the suppression hearing (R 402-404); and the allegation that Craft was filing a complaint with the Florida Bar (R 404-407).

At the conclusion of the hearing, the court found the allegations made were legally insufficient (R 407).

The judge's inquiry into Craft's complaints about his lawyer did not go far enough. Although the judge heard from Craft and counsel and found no grounds to discharge counsel, the law requires the judge to take another step -- he must advise the defendant that if he discharges counsel, he may be required to represent himself.

Craft had tried to express his displeasure with his attorney twice after the Nelson[1] hearing on October 4, 1994. At the beginning of voir dire of the trial on the first degree murder, armed robbery, and carrying a concealed firearm, Craft stated he did not wish to proceed to trial with Mr. France, but the court said he would, and referred back to the previous Nelson hearing (T 1-2). Craft declined to participate in part of jury selection (T 11-17). The judge believed he had made an adequate inquiry two months earlier, and made no inquiry into appellant's position at trial. Moreover, Craft's request to be co-counsel at trial (T 199-200) was given no consideration at all by the judge. It was

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[1]*Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973). It is difficult to understand why a decision which has been on the books for over 20 years can still cause such controversy.

summarily denied by the judge as a legal impossibility[2]; the prosecutor, the judge, and defense counsel discussed the matter, with absolutely no input from Craft; and it could have been viewed as a last-ditch attempt by Craft to again voice his complaints to the judge in the only manner available to him.

Even though counsel informed the judge that Craft did not wish to represent himself, no one ever asked Craft if that was true. We cannot view Craft's actions as a repudiation of the desire to represent himself, because Craft was never fully advised of that option. Moreover, we cannot infer a waiver of that constitutional right from a silent record. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Craft, not being trained in courtroom procedure, brought the matter to the court's attention in the only ways he knew how -- by declining to participate in jury selection and by asking to be co-counsel. Once the judge was placed on notice that Craft was still not satisfied with his attorney, he should have reopened the Nelson inquiry on both occasions at trial.

The cases cited by the state are not on point. In Smith v. State, 641 So. 2d 1319 (Fla. 1994), this Court held that Smith had not expressed enough displeasure with his attorney to trigger an inquiry, and Smith had not asked to represent himself. Here,

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[2]Curiously, Judge Bell has appointed the public defender as "standby counsel" in a capital case, and this Court has approved that action. *Behr v. Bell*, 665 So. 2d 1055 (Fla. 1995).

as noted above, the lower tribunal found that Craft's complaints were specific enough to trigger the inquiry. Here, as noted above, the judge would not allow Craft to ask to represent himself.

Likewise, in Valdes v. State, 626 So. 2d 1316 (Fla. 1993), the defendant asked to dismiss his counsel at trial, but "refused to explain his allegations of ineffectiveness." *Id.* at 1319. Here, as noted above, the lower tribunal found that Craft's complaints were specific enough to trigger the inquiry.

Since the state has deliberately chosen not to address the harmless error issue, it has waived any reliance on the lower tribunal's decision. Craft urges this Court to hold that the failure to conduct a complete Nelson inquiry can never be harmless error, once the defendant has specifically alleged instances of ineffective counsel.

In Lee v. State, 508 So. 2d 1300, 1302-1303 (Fla. 1st DCA 1987), *approved*, 531 So. 2d 133 (Fla. 1988), the lower tribunal stated:

> **The state offered no argument on harmless error in its brief**, and at oral argument counsel insisted it was an obligation of the court to apply the harmless error test without argument or guidance from the state. We agree that it is the ultimate responsibility of this court to determine whether an error is harmless, but the **harmless error rule requires that the state demonstrate beyond a reasonable doubt that the error did not affect the**

> **jury verdict**. *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986). No doubt the state is free to rely solely on its argument that admission of the evidence was not error; however, **better appellate practice suggests that an appellee address the harmless nature of the asserted error as an alternative or backup argument**. Especially is that so in a case such as this, where the state has made arguments not supported by the record, has otherwise failed to support the propriety of the ruling in question, and must carry the heavy burden under the test laid down in *DiGuilio*.

(Emphasis added). In the instant case, since the state offered no argument on harmless error, it has not carried its heavy burden to show the error was harmless beyond a reasonable doubt.

Appellant's position is that this constitutional error can never be harmless, because it is impossible to determine whether Craft was prejudiced by the failure to comply with Nelson. If counsel was acting in an ineffective manner, the validity of the entire proceeding was thrown into doubt, and no one can say if the outcome would have been different if the judge had made the full Nelson inquiry.

This Court stated its *per se* reversible error position in another context in Francis v. State, 413 So. 2d 1175, 1178-79 (Fla. 1982):

> Since we find that the court erred in proceeding with the jury selection process in Francis' absence, we also consider whether this error is harmless. We are not satisfied beyond a reasonable doubt that

> this error in the particular factual context of this case is harmless. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).
> * * *
> **In the present case, we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial.**

(Emphasis added). Just as a defendant has the absolute right to be present when a juror is excused by a peremptory challenge, he also has the absolute right to be represented by effective counsel. Harmless error never comes into play, because no one can "assess the extent of prejudice."

There are many situations in which constitutional error constitutes *per se* reversible error, without regard to harmless error. For example, the failure to allow the defendant to "backstrike" a potential juror before the jury is sworn is per se reversible error:

> Gilliam declined to challenge any prospective jurors during panel selection. He sought to strike the panel as a whole, or as many jurors as he was allowed to peremptorily challenge, at the completion of the state's jury selection. The court refused, even though the panel had not yet been sworn, finding that he had waived his right to participate in jury selection. Gilliam argues reversible error. We agree. **Florida Rule of Criminal Procedure 3.310**

> **provides that a defendant may challenge a prospective juror before the jury is sworn.** We reaffirmed this right in *Tedder v. Video Electronics, Inc.*, 491 So.2d 533 (Fla. 1986); *Jackson v. State*, 464 So.2d 1181 (Fla. 1985); *Rivers v. State*, 458 So.2d 762 (Fla. 1984); and *Jones v. State*, 332 So.2d 615 (Fla.1976); and held that "**[a] trial judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn.**" *Jackson*, 464 So.2d at 1183. **The denial of this right is per se reversible error.** We recede from *Jones* and *Rivers* to the extent that they hold otherwise.

Gilliam v. State, 514 So. 2d 1098, 1099 (Fla. 1987); emphasis added. Just as a defendant has the absolute right to challenge a juror prior to the jury being sworn, he also has the absolute right to be represented by effective counsel. Harmless error never comes into play.

Likewise, in Guess v. State, 579 So. 2d 339 (Fla. 1st DCA 1991), *approved*, 613 So. 2d 406 (Fla. 1993), the lower tribunal and this Court held that the failure to receive the defendant's testimony on the voluntariness of his confession was per se reversible error. Likewise, in Franklin v. State, 590 So. 2d 476 (Fla. 1st DCA 1991), *approved*, 618 So. 2d 171 (Fla. 1993), the lower tribunal and this Court held that the failure of the defendant and his attorney to be present when the judge reinstructed the jury was per se reversible error:

> In the case sub judice the State invites us to recede from *Williams* and its

> progenitor *Ivory*, or limit them to their facts. The State urges us to dispose of the prophylactic per se reversible error rule and instead expand the reach of the harmless error analysis discussed in *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), to a trial court's failure to comply with the strictures of rule 3.410. We decline this invitation and reaffirm the per se reversible error rule expressed in *Williams* and *Ivory*.
>
> The per se reversible error rule, relating to a jury's request for additional instructions under rule 3.410, exists for two distinct reasons. First, it is clear that **due process requires that the defendant and defendant's counsel be afforded the opportunity to be present** whenever the trial court communicates with the jury. *Ivory*, 351 So.2d at 28. Secondly:
>
> > Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless. *Id.*
>
> We recognize that prejudice is not the inevitable result of such communication. However, **we believe that the potential for prejudice and the danger of an incomplete record** of the trial court's communication with the jury **are so great as to warrant the imposition of a prophylactic per se reversible error rule. We therefore decline to apply a harmless error analysis** to communications between the trial court and the jury made in violation of rule 3.410.

618 So. 2d at 173; footnote omitted; emphasis added. The same prophylactic rule must be applied to a Nelson violation to

preserve the defendant's right to effective assistance of counsel. Harmless error should never come into play.

The lack of a complete Nelson inquiry should be considered harmful error *per se* as a structural defect in the trial. *See* Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir. 1995) (violation of defendant's right to presence is "structural defect" not amenable to harmless error analysis if the defendant's presence could have "influenced the process" of that critical stage of the trial). The Supreme Court has divided the class of constitutional errors that may occur during the course of a criminal proceeding into two categories; trial error and structural error. Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302, 331 (1991). Denial of or interference with the right to counsel, or a right rooted in the right to counsel, is a structural defect. Where a criminal proceeding is undermined by a structural error, the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence," and the defendant's conviction must be reversed. *Id.* On the other hand, trial error is error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its

admission was harmless. *Id.*, 499 U.S. at 307-308, 111 S.Ct. at 1263-64.

The failure of the judge to inquire fully into the accused's complaints against his attorney is a structural error requiring automatic reversal.

CONCLUSION

Based upon the foregoing, this Court should reverse all of the judgments and sentences and grant Craft new trials because the motion to suppress should have been granted, because an insufficient Nelson inquiry can never be harmless error, and because the prosecutor was guilty of overkill.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers and Mark C. Menser, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and by mail to Respondent/Cross-Petitioner, this 26 day of June, 1996.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER