ORIGINAL

IN THE SUPREME COURT OF FLORIDA

REGINALD DONALD GAINER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,720

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Reginald Donald Gainer, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts, with the following additions or qualifications.

1. The record on appeal does not show that any objection was made by the petitioner or his counsel concerning the absence of petitioner, from the sidebar conferences on jury selection. (T 276-277) The supplemental record establishes that counsel, after returning to the defense table, conferred with petitioner. (Counsel then announced that the jury was acceptable. (SR 304-306)(T 277)

2. A hearing was held on October 20, 1994, regarding petitioner's complaints and at the hearing the trial court conducted the following inquiry:

> TRIAL COURT: And as you pointed out in that letter you've raised some concerns about your attorney and the first thing I need to find out is whether or not you desire to have an attorney represent you.
>
> * * *
>
> And you need to understand that you do not control who the court appoints as your lawyer. In other words, the court will provide an attorney to represent you or if the court feels you are unable to represent yourself. And if the court provides an attorney for you, then your attorney has certain obligations in representing you that the attorney has to follow in representing you.
>
> The attorney is held to a standard of performance and if the attorney's standard of performance does not reach the proper standard then there are remedies available to someone who is represented by that type of lawyer to raise the issue of the lawyer not being effective or receiving adequate representation by an attorney.

> If you decide that you feel that you want to represent yourself, the court will have to conduct an inquiry with you to determine do you understand what you're doing, do you have the ability to represent yourself. And if the court makes a determination that you could represent yourself then you would be totally responsible for the defense in your case. And you would not be able to raise ineffective assistance of counsel because you would be raising it against yourself, you couldn't raise it against your lawyer. Because you would be your lawyer. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> DEFENDANT: Judge, I'm not trying to dictate who represent me. I do not want to represent myself. I need an attorney.

(T. 221-23)(emphasis added).

After the above expression of explicit need to have the assistance of counsel, petitioner began to describe his complaint with defense counsel's representation. He alleged that he was unable to contact defense counsel, that counsel did not provide him with the FDLE lab report, and that he had been unable to discuss potential defense witnesses with counsel (T. 224). The petitioner's counsel then responded to his client's charges:

> When I was appointed shortly after that I went up and spoke with Mr. Gainer at the annex. At that time he had a complete copy of the discovery provided through the docket, plea negotiations throughout his prior counsel.

> That's all the discovery I have, he has every piece of paper that I have relating to the police investigation. At that time he didn't identify any witnesses to investigate. I spoke to him again before the pre-trial, he didn't identify any witnesses to investigate. As far as I know he's made one effort to contact me by collect phone call, which I wasn't in the office for and can't accept anyway under the county's payment guidelines. And he's had, I believe his cousin called one day this week after that letter was sent about the FDLE report.
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> I don't have the FDLE report yet. [The prosecutor], I'm sure, doesn't have it. If it has, it hasn't been forwarded to me.
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> Mr. Gainer has a copy of every piece of paper in my file except deposition subpoenas and the notices, all of which were prepared this week.

(T. 225-26).

The trial court found that the petitioner was receiving effective representation (R. 230-31). The trial court noted that defense counsel kept the petitioner informed on the status of the case and that he had depositions scheduled. The trial court informed petitioner that he could communicate any potential defense witnesses to counsel through the mail, just as he had written the court (R. 230). Finally, the court found:

> TRIAL COURT: I do not feel it is an appropriate ground at this point in time to grant any relief in terms of withdrawal of counsel or to substitute counsel. If that matter digresses, so to speak, if that's the right term, I'm sure counsel or Mr. Gainer can raise it and

we can readdress the issue between now and the trial date but on the basis of this letter and based upon what I've heard has happened in the past, I feel Mr. Whitton can continue to represent you in this matter, that there hasn't been a showing that he is not prepared or getting prepared for your case. Apparently depositions have been scheduled, depositions will be taken, discovery has been provided, the state has communicated things to Mr. Whitton. He has communicated to you and that's all in the normal progress of handling your case.

I will deny Mr. Whitton's motion to withdraw and as you've indicated you still want to be represented by a lawyer so my suggestion would be to make sure you understand the necessity to provide Mr. Whitton with the names of an witnesses that you feel are appropriate so he can start investigation. That's something you need to talk to him about. Don't talk to me about that, you talk to him about that. That's the attorney, client privilege that we're talking about.

Do you understand that?

THE DEFENDANT: Yes, sir.

TRIAL COURT: Okay. Thank you.

(Proceedings adjourned).

(T. 232-33).

3. On the day of trial petitioner was still dissatisfied. He complained that he did not have deposition transcripts. He indicated that all his prior attorney's had provide deposition transcripts before trial. During a hearing held pretrial, he never asserted any desire to represent himself. (T 12-25)

Counsel's response was that petitioner was provided letters which contained summaries of the deposition testimony. (T 14-20)

The trial court found that ineffective assistance had not been shown. (T 18)

SUMMARY OF ARGUMENT

ISSUE I.

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the petitioner is not a member of the pipeline class who could benefit from an affirmative answer to the certified question, as he did not raise the issue at trial.

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its decisions prospective, and because modifications of rules of procedure are appropriately prospective only.

ISSUE II

Respondent asserts that this Court should decline review of this issue because the lower tribunal's decision was a routine application of settled principles to the facts of the case. His claim contains no legal issue warranting this Court's review.

If this Court reviews this issue, it should find that petitioner's assertions that the trial court's inquiry was inadequate and that the District Court misapplied the law are meritless. The trial court advised petitioner that if wanted to represent himself then the court would conduct an inquiry into self representation. Petitioner stated unequivocally that he <u>did not</u> want to represent himself and that he needed a lawyer. The court then conducted an inquiry into petitioner's complaints about counsel and found counsel was providing competent representation. The trial court complied with the requirements established by this Court for inquiries into the adequacy of trial counsel's representation. Therefore, the lower tribunal appropriately found no error and this court should approve that decision.

ARGUMENT

ISSUE I

CERTIFIED QUESTION

"DOES THE DECISION IN CONEY APPLY TO "PIPELINE CASES", THAT IS THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT REVIEW OR NOT YET FINAL DURING THE TIME CONEY WAS UNDER CONSIDERATION BUT PRIOR TO THE ISSUANCE OF THE OPINION?"

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, First District has certified the above stated question, therefore, this Court has jurisdiction.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question certified by the lower tribunal, it also has the discretion to decline to do so. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The state urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979)

The District Court of Appeal, First District of Florida, granted rehearing of its original opinion in order to certify this question. The certified question improperly asks this Court to conduct a rehearing of its decision in Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995). In Coney, this Court interpreted rule 3.180(a) F. R. Crim. P. and stated that:

> Our ruling today clarifying this issue is prospective only.

Id. at 1013

In certifying its question, the district court acknowledged that it understood the meaning of the language used by this Court in Coney: prospective means the decision does not apply to cases tried prior to the decision. The decision below questioned how the Coney decision can be reconciled with Smith v. State, 598 So.2d 1063 (Fla. 1992). In order to resolve what it perceived as an unanswered issue, the district court certified the question.

The district court's perception that an issue remains to be resolved is erroneous. Subsequent to the Smith decision, this Court has answered the question of how decisions of this Court are to be applied by the courts of this state. The issue was specifically addressed in Wuornos v. State, 644 So.2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and

held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. The issue was discussed in Domberg v. State, 661 So.2d 285 (Fla. 1995) a case dealing with retroactivity. In Domberg, this Court referred to Smith in the following way:

> Smith v. State, 598 So.2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So.2d 1000, 1008 n.4 (Fla. 1994)(Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert. denied ___ U.S. ___, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995), State v. Jones, 485 So.2d 1283 (Fla. 1986)

Domberg at 287

Thus, the issue of how Smith is to be read has been decided.

Since the issue presented by the certified question has been put to rest by recent decisions of this Court, it cannot be said that the certified question is one of any public importance. Therefore, this Court should decline to exercise its jurisdiction to answer the already decided question presented by this case. See Stein.

There is a second reason why this Court should decline to exercise its jurisdiction in this case. As part of its reason to certify the issue, the district court noted that there were

numerous Coney-type cases in the pipeline. This statement misapplies the definition of a pipeline case entitled to obtain the benefit from a new decision. A pipeline case is one in which the issue is properly preserved in an appeal which is not final at the time the change in law occurs. In order to be a pipeline case, an appellant must establish that he is similarly situated and his issue is properly preserved. This was made clear by this Court's holding in Gibson v. State, 661 So.2d 288 (Fla. 1995). There this Court held that issues relating to a defendant's presence during jury voir dire (like other jury voir dire issues) must be preserved in the trial court by contemporaneous objection. The Gibson case presented this Court on appeal with the following issue:

> Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of counsel by denying defense counsel's request to consult with Gibson before exercising peremptory challenges.

This Court specifically held that:

> In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on

> appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995)

Gibson at 290-291

Thus, Gibson's attempt to raise for the first time on appeal a Coney issue was rejected because it was not properly preserved. This rule of law operates independently of Coney and applies even to cases where the trial takes place after Coney issued. Likewise, petitioner did not object in the trial court and his case is indistinguishable from Gibson. Indeed, the record reflects that petitioner and counsel conferred regarding the exercise of peremptory challenges. (SR 304)

This Court should discourage the promiscuous certification of irrelevant questions by declining to exercise its discretionary jurisdiction and by instructing the district courts that unpreserved claims cannot be the basis for "an issue of great public importance." Misapplication of the designation "this is an issue of great public importance" when the issue certified

could not provide the defendant with relief is all too common. In fact, this "Coney" issue has been repeatedly certified by the lower tribunal in cases which do not contain any objection to the trial court procedure. See Branch v. State, no 87,717, Bell v. State, No. 87,716, Lett v. State, No. 87,541, Lee v. State, No. 87,715, Horn v. State, No. 87,789 Continuation of this practice should be discouraged.

Merits

This Court, if it exercises discretionary review, should answer the certified question in the negative.

This Court specifically answered the question of how its decisions are to be applied in, e.g., Wuornos v. State, 644 So.2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. The Court noted that it had repeatedly held that it had the authority to make new rules prospective and cited a series of cases in which it had dictated that the new rule was to be prospective only.

The issue was again addressed in Domberg v. State, 661 So.2d 285 (Fla. 1995) a case dealing with retroactivity. In Domberg, this Court referred to Smith in the following way:

> Smith v. State, 598 So.2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So.2d 1000, 1008 n.4 (Fla. 1994)(Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert. denied ___ U.S. ___, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995), State v. Jones, 485 So.2d 1283 (Fla. 1986)

Domberg at 287

Petitioner's arguments are based on a fundamental misunderstanding of the nature and scope of this Court's authority. Unlike the United States Supreme Court, this Court has the authority to promulgate procedural rules and modify them when necessary. For obvious reasons, changes to procedural rules are almost always prospective. Tucker v. State, 357 So.2d 719 (Fla. 1978) Thus, there will be many occasions for this Court's rulings to be prospective only. Adopting a rule akin to the United States Supreme Court rule in Griffin v. Kentucky, 479 U.S. 314 (1987) would be inappropriate given this Court's rulemaking authority and would unduly restrict the Courts ability to modify the rules.

This approach is also appropriate given the subject of this litigation. Like the decision in R.J.A v. Foster, 603 So.2d 1167 (Fla. 1992) where the Court found the procedural rule superseded the statutory juvenile speedy trial provision, rule 3.180 superseded the provisions of § 914.01 Fla. Statutes. see Thomas v. State, 65 So.2d 866, 868(Fla. 1953) Thus, the rule is a procedural mechanism to implement a substantive right.

It must also be recognized that the rights provided in the rule and the rights mandated by the constitution are not synonymous. In Shriner v. State, 452 So.2d 929 (Fla. 1984) this Court held that it was not fundamental error when a defendant was absent from bench conferences because he was present in the courtroom. Likewise, in Jones v. State, 569 So.2d 1234, (Fla. 1990), this Court found no error when Jones was not at the sidebar during selection of the jury even though the record did not reflect an affirmative waiver.

Thus, the Coney interpretation of the term present is not constitutionally mandated but a modification of a rule of procedure setting out the manner in which the constitutional right should be implemented. See R.J.A.

Reading the rule in this fashion is in accord with federal practice. The United States law regarding this issue was

summarized in United States v. McCoy, 8 F.3d 495, 496 (7th Cir. 1993):

> [2] A defendant's right to be present at trial derives from several sources. First, the defendant has a sixth amendment right to confront witnesses or evidence against him. See United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985) (per curiam); Verdin v. O'Leary, 972 F.2d 1467, 1481 (7th Cir.1992); United States v. Shukitis, 877 F.2d 1322, 1329 (7th Cir.1989). That right is not implicated here, because no witness or evidence against McCoy was presented at any of the conferences. See Verdin, 972 F.2d at 1481-82.
>
> [3] The defendant also has a due process right to be present " 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.' " Gagnon, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)). But " 'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " Id. (quoting Snyder, 291 U.S. at 107-08, 54 S.Ct. at 333); see also Verdin, 972 F.2d at 1481-82; United States v. Moore, 936 F.2d 1508, 1523 (7th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 607, 116 L.Ed.2d 630 (1991); Shukitis, 877 F.2d at 1329-30. That determination is made in light of the record as a whole. Gagnon, 470 U.S. at 526-27, 105 S.Ct. at 1484.
>
> In Gagnon, the Supreme Court found that defendants' due process rights were not violated when they were excluded from an in camera conference between the judge, defense counsel and a juror regarding the juror's possible bias. The Court based its holding on the fact that the defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending." Id. at 527, 105 S.Ct. at 1485. In Shukitis, we similarly held that a

defendant's due process rights were not implicated when he was excluded from an in camera conference that addressed a separation of witnesses order. We reasoned that the absence did not affect the court's ability to decide the issue or otherwise diminish Shukitis' ability to defend against the charges, and that Shukitis' interests were adequately protected by his counsel's presence at the conference. 877 F.2d at 1330. See also Moore, 936 F.2d at 1523.

As in Gagnon and Shukitis, McCoy's absence from the conferences did not detract from his defense or in any other way affect the fundamental fairness of his trial. Indeed, McCoy seems to have conceded this point, having offered no argument to the contrary. Like Shukitis, McCoy's interests were sufficiently protected by his counsel's presence at the conferences. McCoy therefore had no due process right to attend.

[4] Finally, Fed.R.Crim.P. 43 entitles defendants to be present "at every stage of the trial including the impaneling of the jury...." (FN1) This right is broader than the constitutional right (Shukitis, 877 F.2d at 1330), but is waived if the defendant does not assert it. Reversing the Ninth Circuit in Gagnon, the Supreme Court explained:

We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant had voluntarily absented himself under Rule 43 from an in camera conference of which he is aware. The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend.... A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.

470 U.S. at 528, 105 S.Ct. at 1485; cf. Taylor v. United States, 414 U.S. 17, 18-20, 94 S.Ct. 194, 195-96, 38 L.Ed.2d 174 (1973) (per curiam). A defendant may not assert a Rule 43 right for the first time on appeal. Gagnon, 470 U.S. at 529, 105 S.Ct. at 1485; Shukitis, 877 F.2d at 1330. Because McCoy did

not invoke Rule 43 either during trial or in a post-trial motion, he has waived any right under that rule. (FN2)

Because of the availability of consultation between a lawyer and his client present for trial, there is no due process violation when a defendant is not present at the bench during a sidebar for peremptory challenges. See, McCoy, United States v. Gayles, 1 F.3d 735 (8th Cir. 1993), United States v. Moore, 936 F.2d 1508, 1523 (7th Cir. 1991), United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984) Therefore, the only legitimate conclusion is that the Coney decision was not one of constitutional magnitude.

In United States v. Gagnon, 470 U.S. 522, 526-530 (1985) the Supreme Court indicated that the right of the defendant to be present under Rule 43 of the Federal Rules of Criminal Procedure (similar to our rule) is broader than the constitutionally based right to be present. In Gagnon, the Court held that such claims must be preserved at trial and that waiver of the benefits of the Rule 43 right to be present may be inferred by a defendant's failure to assert the right at trial. Thus, the United States Supreme Court recognizes that the Rule 43 right must be asserted

at trial by the defendant; our rule should follow the federal rule.

Finally, to state the problem and analysis in a slightly different form. The district court and the petitioner fail to distinguish between the Coney decision and the prospective rule announced in that decision. Coney is applicable to all pipeline cases, including the one at hand. However, Coney by its terms plainly announces that the new procedural rule established therein is only applicable to trials which occur after the announcement of the new rule. By its terms it does not provide relief to any appellant/petitioner whose trial occurred before the Coney decision became final. Not only is it uncontroverted that the issue was not preserved below, it is also uncontroverted that the trial occurred before the issuance of Coney. The district court is simply misapprehending the plain language of Coney in perceiving a conflict with Smith. None exists.

Summary

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the petitioner is not a member of the pipeline class who could benefit from an

affirmative answer to the certified question, as he did not raise the issue at trial. Gibson

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its decisions prospective, and because modifications of rules of procedure are appropriately prospective only.

ISSUE II

DID THE TRIAL COURT CONDUCT AN ADEQUATE INQUIRY INTO PETITIONER'S COMPLAINTS ABOUT HIS LAWYER? (Restated)

Petitioner argues that the trial court failed to conduct a proper inquiry into his complaints about his lawyer and that the District Court misapplied the law. Petitioner is wrong and this Court should reject his arguments.

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." When the Court obtains jurisdiction over a case, it obtains jurisdiction over all issues in the case. The District Court of Appeal of Florida, First District has certified a question, therefore, this Court has jurisdiction.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question, this Court has the discretion to decide whether it should exercise its jurisdiction and hear the case. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The state urges this Court to exercise its discretion and

decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979)

This Court should decline review of this issue because the lower tribunal's decision was a routine application of settled principles to the facts of the case. This issue contains no legal issue warranting this Court's review.

Merits

When a defendant alleges that his counsel is incompetent and requests that counsel be discharged, the trial court must conduct an inquiry:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla.) (quoting Nelson v. State, 274 So. 2d 256, 259 (Fla. 4th DCA 1973)), cert. denied, 488 U.S. 871, 109 S. Ct. 185, 102 L. Ed. 2d 154 (1988).

The District Court found that the trial court had complied with the requirements of Smith v. State, 641 So.2d 1319 (Fla. 1994), Hardwick, and Nelson and that no error existed.

The record on appeal supports this determination and shows that the petitioner's argument lacks even a scintilla of merit.

A hearing was held on October 20, 1994, and at the hearing the trial court conducted the following inquiry:

> TRIAL COURT: And as you pointed out in that letter you've raised some concerns about your attorney and the first thing I need to find out is whether or not you desire to have an attorney represent you.
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> And you need to understand that you do not control who the court appoints as your lawyer. In other words, the court will provide an attorney to represent you or if the court feels you are unable to represent yourself. And if the court provides an attorney for you, then your attorney has certain obligations in representing you that the attorney has to follow in representing you.
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> The attorney is held to a standard of performance and if the attorney's standard of performance does not reach the proper standard then there are remedies available to someone who is represented by that type of lawyer to raise the issue of the lawyer not being effective or receiving adequate representation by an attorney.
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> If you decide that you feel that you want to represent yourself, the court will have to conduct an inquiry with you to determine do you understand what you're doing, do you have the ability to represent yourself. And if the court makes a determination that you could

> represent yourself then you would be totally responsible for the defense in your case. And you would not be able to raise ineffective assistance of counsel because you would be raising it against yourself, you couldn't raise it against your lawyer. Because you would be your lawyer. Do you understand that?
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> DEFENDANT: Yes, sir.
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> DEFENDANT: Judge, I'm not trying to dictate who represent me. I do not want to represent my self. I need an attorney.

(T. 221-23)(emphasis added).

After the above expression of explicit need to have the assistance of counsel, petitioner began to describe his complaint with defense counsel's representation. He alleged that he was unable to contact defense counsel, that counsel did not provide him with the FDLE lab report, and that he had been unable to discuss potential defense witnesses with counsel (T. 224). The petitioner's counsel then responded to his client's charges:

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> That's all the discovery I have, he has every piece of paper that I have relating to the police investigation. At that time he didn't identify any witnesses to investigate. I spoke to him again before the pre-trial, he didn't identify any witnesses to investigate. As far as I know he's made one effort to contact me by

> collect phone call, which I wasn't in the office for and can't accept anyway under the county's payment guidelines. And he's had, I believe his cousin called one day this week after that letter was sent about the FDLE report.
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> I don't have the FDLE report yet. [The prosecutor], I'm sure, doesn't have it. If it has, it hasn't been forwarded to me.
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> Mr. Gainer has a copy of every piece of paper in my file except deposition subpoenas and the notices, all of which were prepared this week.

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The trial court found that the petitioner was receiving effective representation (T. 230-31). The trial court noted that defense counsel kept the petitioner informed on the status of the case and that he had depositions scheduled, and further told the petitioner that he could communicate any potential defense witnesses to counsel through the mail, just as he had written the court (T. 230). Finally, the court found:

> TRIAL COURT: I do not feel it is an appropriate ground at this point in time to grant any relief in terms of withdrawal of counsel or to substitute counsel. If that matter digresses, so to speak, if that's the right term, I'm sure counsel or Mr. Gainer can raise it and we can readdress the issue between now and the trial date but on the basis of this letter and based upon what I've heard has happened in the past, I feel Mr. Whitton can continue to represent you in this matter, that there hasn't been a showing that he is not prepared or getting prepared for your case. Apparently

depositions have been scheduled, depositions will be taken, discovery has been provided, the state has communicated things to Mr. Whitton. He has communicated to you and that's all in the normal progress of handling your case.

I will deny Mr. Whitton's motion to withdraw and as you've indicated you still want to be represented by a lawyer so my suggestion would be to make sure you understand the necessity to provide Mr. Whitton with the names of an witnesses that you feel are appropriate so he can start investigation. That's something you need to talk to him about. Don't talk to me about that, you talk to him about that. That's the attorney, client privilege that we're talking about.

Do you understand that?

THE DEFENDANT: Yes, sir.

TRIAL COURT: Okay. Thank you.

(Proceedings adjourned).

(T. 232-33).

As this Court has recently reaffirmed Faretta hearings are required only when a defendant unequivocally request for self-representation. Roberts v. State, 21 Fla. L. Weekly 220 (Fla. May 23, 1996) Petitioner made no such request, therefore, no Faretta hearing was required and the trial court's inquiry into the allegation of incompetence was sufficient. Therefore, no error has been shown.

Another hearing was held on the morning of trial, and the record shows that this hearing dealt with Gainer's insistence that he be provided with deposition transcripts. After listening to petitioner's complaints, the trial court found that there was still no indication that defense counsel was providing ineffective assistance of counsel, that defense counsel had informed the defendant concerning all deposition testimony and state discovery. Gainer's protest on the morning of trial was not that defense counsel had not informed him of these matters, but rather that he was not provided with the actual transcripts of the depositions taken. Petitioner made no request for self-representation at this time.

As the above demonstrates, the trial court more than adequately inquired as to the petitioner's specific complaints, and any argument to the contrary is wholly without merit.

This court should also reject the argument that the trial court failed to inform him of his right to self representation. The record above clearly shows that the petitioner was informed of his right to represent himself and that he specifically stated to the trial court that he did not want to represent himself. Petitioner never invoked his right to self-representation, thus, a Faretta hearing was not necessary. Roberts

Furthermore, because Gainer stated that he did not want to represent himself, even assuming, arguendo, that the petitioner was not informed of this right, no error resulted. The warning given to a defendant that if his lawyer were discharged the court was not required to appoint a new attorney is required only where counsel is discharged. Weems v. State, 645 So. 2d 1098 (Fla. 4th DCA 1994); Capeheart v. State, 583 So. 2d 1009 (Fla. 1991). As stated in Weems,

> [W]e can discern no reason to reverse upon the failure to give such warning when the court denies the discharge motion and the failure to so advise Appellant is patently harmless. We note that in this case, Appellant was not seeking to represent himself; therefore, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975), is inapposite.

In Capeheart, this Court found that the trial court conducted an adequate inquiry, and held that, "while the better course would have been for the trial court to inform Capeheart of the option of representing himself, we do not find it erred in denying Capeheart's request for new counsel." 583 So. 2d at 1014. The Supreme Court noted that "Capeheart at no time asked to represent himself." Id. Thus, a trial court is not required to affirmatively inform a defendant of his right to represent himself, but rather, the dictates of Faretta v. California, 422

U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975) are triggered only where a request for self-representation is stated unequivocally. Hardwick, 521 So. 2d at 1074.

In the case at bar, the petitioner was informed of his right of self representation, and even assuming, arguendo, that the trial court failed to inform him of this right, pursuant to Capeheart, and Smith there was no error, because the petitioner specifically stated that he did not wish to represent himself.

Summary

Respondents assert that this Court should decline review of this issue because the lower tribunal's decision was a routine application of settled principles to the facts of the case. His claim contains no legal issue warranting this Court's review.

Petitioner's assertions that the trial court's inquiry was inadequate and that the District Court misapplied the law are meritless. The trial court advised petitioner that if wanted to represent himself then the court would conduct an inquiry into self representation. Petitioner stated unequivocally that he did not want to represent himself and that he needed a lawyer. The court then conducted an inquiry into petitioner's complaints and found counsel competent. The trial court complied with the requirements established by the Court in Smith, Capeheart,

Hardwick, and Watts v. State, 593 So.2d 198 (Fla. 1992), regarding inquiries into the adequacy of representation. The fact that petitioner had more complaints about his lawyer did not require further inquiry absent a request for self-representation. Therefore, the lower tribunal appropriately found no error and this court should approve that decision.

CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should decline to exercise its jurisdiction. However, if jurisdiction is exercised the certified question should be answered in the negative, and the judgement entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Mr. Fred Parker Bingham, II, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 5th day of June, 1996.

Edward C. Hill, Jr.
Assistant Attorney General

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