IN THE FLORIDA SUPREME COURT

HERBERT N. PRICE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.: SC06-2045

PETITIONER'S REPLY BRIEF

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FIFTH DISTRICT

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ARGUMENT IN RESPONSE AND REBUTTAL

The State makes the remarkable suggestion in its Answer Brief that this Court reverse its own reasoning in *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983), and reconsider whether a charging instrument which completely fails to state an essential element of a crime and is therefore fundamentally flawed may be challenged at any time. Such cavalier treatment of rights guaranteed to individuals by the United States Constitution should alert this Court to the serious nature of the injustice at issue in this case. The Petitioner, Mr. Price's, charging instrument completely failed to state an essential element of his offense and therefore was fundamentally flawed, a defect which can be raised at any time, according to this Court under *Gray*, and which should result in reversal of a conviction and vacating of Mr. Price's sentence, *Gray v. State*, 404 So.2d 388, 392 (Fla. 5th DCA 1981) (reversed on other grounds, 435 So. 2d 816 (Fla. 1983)).

The charging instrument failed to indicate the specific act of penetration of the victim's vagina by Mr. Price's penis. The jury instructions at trial did specifically indicate this act, and Mr. Price was convicted. Therefore, Mr. Price was convicted of an act for which he was not charged, which violates the right to due process of law guaranteed to Mr. Price in the Fifth and Fourteenth Amendments to the United States Constitution.

The wording of the charging instrument, which was quoted in full in Petitioner's Initial Brief on the merits, has the effect of confusing and completely omitting the method of penetration or the actor allegedly doing the penetration. The pertinent language is worth repeating: that Mr. Price "did unlawfully commit sexual battery by oral and or vaginal petration [sic] by, or union with the sexual organ of [the victim]…" The language allows reasonably for an interpretation that the penetration of the victim's mouth or vagina is done "by" the sexual organ of the victim. This inartful language completely fails to allege not only how the penetration was accomplished, by also by whom it was accomplished. This failure rises to the level of a fundamental defect in the charging instrument and is not simply imprecise, as the State argues.[1]

The defect is made even more damaging because Mr. Price's Rule 3.850 motion was summarily denied without his either having received a "live" evidentiary hearing on his petition or the court having attached trial record material showing that he is entitled to no relief. § 79.05, Fla. Stat. (2006); Fla. R. Crim. P.

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[1]The State refers to several unpublished opinions to support its argument that failure to raise a non-fundamental defect at trial amounts to waiver. While Mr. Price does not disagree with that general principle, unpublished opinions do not have precedential value and generally should not be cited. *Comm'r of Internal Revenue v. McCoy,* 484 U.S. 3, 7 (1987).

3.850(d); *Smallwood v. State*, 809 So. 2d 56 (Fla. 5th DCA 2002). The State was unable to argue against the impropriety of this summary denial in its Answer Brief.

Even if the defect in the charging instrument were held not to be fundamental, it should be heard in this action because Mr. Price's direct appeal was improperly dismissed. The state claims that Mr. Price should not be heard to complain of the improper dismissal because he voluntarily moved for dismissal. However, the reasoning of the State fails to take into account a complete reading of *Anders v. California*, 386 U.S. 738 (1967).

In *Anders*, the United States Supreme Court held that after defense counsel files a brief stating he or she believes there is no appealable issue and requesting permission to withdraw (since commonly referred to as an "*Anders* brief"), the duty shifts to the appellate court to review the parts of the record counsel referred to. *Anders*, 386 U.S. 738, 744. The court must make this review before deciding whether to grant counsel's request to withdraw. *Id.* Until the court has granted counsel's request to withdraw, counsel still represents the defendant, and the court should treat pro se filings from the defendant as a "nullity," *Lewis v. State*, 766 So. 2d 288, 289 (Fla. 4th DCA 2000), as defendants do not have the right to both be represented by counsel and act pro se. *Logan v. State*, 846 So. 2d 472, 475-476 (Fla. 2003). Therefore, the court improperly accepted Mr. Price's pro se voluntary

dismissal, as the court had not granted or denied counsel's request to withdraw and had given no indication of having conducted its *Anders* review. See *Anders*, 386 U.S. 738, 742. Therefore, Mr. Price's direct appeal should not have been dismissed, cutting off any opportunity Mr. Price may have had to pursue the defects in his charging instrument.

For all the foregoing reasons, this Court should reverse Mr. Price's conviction and vacate his sentence.

CERTIFICATE OF STYLE AND FONT

I HEREBY CERTIFY that this document was typed using Times New Roman font in 14-point size and that Times New Roman is a proportionately spaced font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent to Kellie Nielan, Esq., Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118-3951, by United States Mail this 23rd day of June, 2007.

Respectfully submitted,

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