IN THE SUPREME COURT OF FLORIDA

ANTHONY SHEPPARD,	
Petitioner,	
v.	**Case No. SC08-1452**
STATE OF FLORIDA,	**2DCA NO.: 2D06-4557**
Respondent.	

ON PETITION FOR REVIEW FROM

THE SECOND DISTRICT COURT OF APPEAL

STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On September 24, 2002, Petitioner Anthony Sheppard admitted violating previously imposed sex offender probation extended on a attempted sexual battery conviction imposed in case no. 00-8186. (Supp 1 R 149) Revoking his probation, the circuit court sentenced Sheppard to five years prison. Id. On the same date, Sheppard also entered guilty pleas to two counts of uttering a forged instrument as charged in case no. 02-8009. (R 1 12-13, 20-21) Pursuant to his plea terms (Supp 1 R 153), Sheppard was placed on sex offender probation for five years on count one of case no. 02-8009, followed by three years of sex offender probation on count two. These probationary terms ran consecutively to his prison sentence in case no. 00-8186. (V 1 R 20-21, 22-24, 25-29, 91-105)

Upon his release from prison, Sheppard was arrested for violating the terms of his supervision. (V 1 R 30-36) Revoking his probation, the circuit court placed Sheppard on two years community control followed by three years on sex offender probation on count one of case no. 02-8009. A consecutive term of three years sex offender probation was imposed on count two. (V 1 R 30-39, 40-41, 42-43, 44-48)

On August 9, 2005, Sheppard, represented by court-appointed counsel, admitted violating his community control imposed in case no. 02-8009, in particular, condition 9 (failure to report) and condition 12 (failure to remain in approved residence. During the

plea colloquy, Sheppard confirmed he understood he was pleading open with the advice of counsel, and no threats or promises had made to him to enter his plea. (V 1 R 148) He indicated he wanted to do straight time. Revoking his community control, the circuit court imposed five-year prison terms on the two counts of uttering a forged instrument to run consecutively.

Sheppard filed a pro se motion to withdraw his admission to having violated his community control in which he claimed his counsel told him the state had made an offer of a prison term of a year and a day with four years probation. According to Sheppard, he informed his counsel he wanted to accept the offer; however, counsel purportedly refused to allow him to accept the deal, telling Sheppard counsel was sure he could get Sheppard two years probation if Sheppard would enter an open plea. (V 1 R 77) Sheppard alleged that had he known he would not be sentenced to two years probation, he would not have entered his admission. (V 1 R 78) More particularly, the motion stated, in relevant part:

> 1. On 9-19-02, Defendant was sentenced to 3 yrs probation on count one and 5 yrs probation on count two. The probation on count two was ordered to run consecutive to the probation imposed on count one.
>
> 2. On 5-19-05 Defendant's probation officer filed an affidavit of violation alleging that he failed to report; failed to register with DOC; and failed to follow curfew restriction.
>
> 3. Prior to the hearing on the violation, Defendant spoke with counsel who informed him of a 1 year and 1 day with 4 years probation plea/admission offer from the state. Defendant immediately responded that he

> would like to accept the state's offer, however, counsel refused to allow Defendant to accept the state's offer, and told him that he was sure he could get him 2 years probation if he would enter an open plea/admission of guilt to the court.
>
> 4. Pursuant to counsel's instructions, defendant entered an open plea/admission of guilty to the court on 8-4-05, and contrary to counsel's representation, Defendant was sentenced to 10 years imprisonment.
>
> 5. Counsel's misrepresentation and the subsequent imposition of 10 years imprisonment by the court rendered Defendant's plea/admission involuntary. Had Defendant known he was not going to be sentenced to 2 years probation as informed by counsel, he would not have entered an open plea/admission of guilty to the court.
>
> Wherefore, Defendant moves this Honorable Court to allow him to withdraw his plea/admission of guilty.

(V 1 R 76-78) By nonfinal order rendered February 1, 2006, the circuit court directed the state to respond to Sheppard's motion to withdraw his pleas. (V 1 R 80-84) The state responded a hearing was needed. (V 1 R 88) An evidentiary hearing was held May 9, 2006, on Sheppard's request to withdraw his admission. His trial counsel testified Sheppard did not want to accept the state's offer of one year in the county jail, followed by four years probation. Not desirous of a probationary term, Sheppard wanted to plead open and request the circuit court to impose jail time. His trial counsel informed Sheppard he could be sentenced to the maximum prison term of five years to run consecutively on each count of uttering a forged instrument. (V 1 R 122-123) Sheppard maintained counsel did not advise him to enter an open plea. (V 1 R 125) Stating it has reviewed the transcript of the violating hearing at

which Sheppard had admitted violating his community control, the circuit court denied his motion to withdraw the admission. (V 1 R 125) A written order followed on September 13, 2006. (V 1 R 106-117) Sheppard appealed, and following briefing, the district court in a detailed revised opinion on rehearing reversed with directions to the circuit court to strike the pro se motion to withdraw, filed while Sheppard was represented by court-appointed counsel, as a nullity. Sheppard v. State, 988 So. 2d 74 (Fla. 2d DCA 2008).

The district court then addressed Sheppard's argument the allegations in his pro se motion were sufficient to show that "an adversarial relationship" existed between him and his court-appointed counsel and such negated the prohibition against the filing of pro se pleadings by defendants with counsel, even though the motion did not contain an unequivocal request to discharge counsel. The district court certified its decision was in direct conflict with Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004), and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005). As the court explained two grounds prompted the court in Mourra v. State, 884 So. 2d 316 (Fla. 2d DCA 2004), to note its disagreement with the holding in Peterson: (1) a recognition of the prohibition against hybrid representation in criminal cases except in circumstances where the pro se pleading is accompanied by an unequivocal request to discharge counsel and (2) concerns about the possible prejudice that the defendant might unwittingly sustain as

a result of the pro se filing. The district court also declined to follow Bermudez where the Fourth District held a defendant's allegation he was promised by counsel he would get a shorter sentence if he pled guilty created "an adversarial relationship" between the defendant and his attorney that precluded striking the pro se motion as a nullity. In so declining, the district court noted the exceptions to the rule prohibiting hybrid representation that the Fourth District has adopted in Peterson and Bermudez may be at odds with the more limited view of the matter that this Court in Logan. Further, the position it took in Mourra is fully consistent with Logan. Moreover, the potential preclusive effect of the rule 3.170(l) motion argues against permitting all defendants with complaints about their counsel's advice or performance to pursue pro se motions under the rule. See Mourra, 884 So. 2d at 319-21. In addition, the district court observed the exceptions to the rule prohibiting hybrid representation that the Fourth District has recognized in Peterson and Bermudez are so broad that they threaten to swallow the rule. Accordingly, the district court concluded the exception to the rule prohibiting hybrid representation for motions under rule 3.170(l) should be limited--as it held in Mourra--to cases where the defendant makes an unequivocal request to discharge counsel. Sheppard, supra.

Sheppard invoked the discretionary jurisdiction of this Court, asserting the decision of the Second District in the instant case

expressly and directly conflicts with the Fourth District's decisions in Peterson and Bermudez. After securing briefing on jurisdiction, this Honorable Court on September 29, 2008, accepted jurisdiction, although postponing its decision on whether to entertain oral argument.

SUMMARY OF THE ARGUMENT

A criminal defendant does not have a constitutional right to "hybrid" representation. Logan v. State, 846 So. 2d 472 (Fla. 2003). The requirements of Nelson v. State, 274 So. 256 (Fla. 4th DCA 1973), depend upon a clear and unequivocal statement from the criminal defendant that he wishes to discharge counsel prior to trial. Given that the limited exception to the "nullity" rule which is applied in the pretrial setting is designed to effectuate the holding in Nelson, the exception to the "nullity" rule cannot be triggered merely by a statement in a pleading that the defendant is generally dissatisfied with counsel or counsel's performance. It must instead depend upon a clear statement from the defendant he wishes to discharge court-appointed counsel because of perceived ineffectiveness of counsel.

Similar reasoning attends a pro se motion to withdraw a plea after sentencing under Fla.R.Crim.P. 3.170(l). Unless a counseled defendant unequivocally asks to discharge his counsel, he functionally is asking to represent himself while still represented in a bid for plea withdrawal. The motion filed by Sheppard did not clearly state he wished to discharge his attorney and amounted to an attempt by Sheppard to proceed pro se while also represented in the context of his pending criminal proceedings. Consistent with long-standing precedent, the pro se motion lacking a request for counsel’s dismissal is properly stricken as unauthorized.

ARGUMENT

ISSUE

WHETHER A BROADER EXCEPTION TO THE RULE PRECLUDING HYBRID REPRESENTATION IN THE CONTEXT OF RULE 3.170(l) MOTIONS APPLIES WHERE A PRO SE MOTION TO WITHDRAW A PLEA IS NOT ACCOMPANIED BY AN UNEQUIVOCAL REQUEST TO DISCHARGE COUNSEL. (as restated by Respondent)

Sheppard filed a motion pro se to withdraw his plea of admission to violating his community control. At the time, he was still represented by counsel. The pro se motion to withdraw the admission did not contain an unequivocal request to discharge his violation counsel and appoint substitute counsel; nor did Sheppard ask to proceed pro se. Sheppard's motion was not adopted by his appointed counsel, although such was entertained and denied after an evidentiary hearing at which counsel testified and Sheppard maintained he did not know anything about an open plea. (V 1 R 125) In a detailed opinion, the Second District concluded the trial court should have stricken the motion as a nullity. See Sheppard v. State, 988 So. 2d 74, 79 (Fla. 2d DCA 2008).

Rule 3.170(l) post-sentence request for plea withdrawal

Under Florida Rule of Criminal Procedure 3.170(l), a defendant may file a motion to withdraw plea within 30 days of the rendition of his sentence based on any of the grounds set forth in Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)a-e. Florida courts

review the denial of a pre-sentencing motion to withdraw a plea for abuse of discretion. After sentencing, the defendant must demonstrate that a manifest injustice has occurred. State v. Partlow, 840 So.2d 1040, 1044 (Fla. 2003). As Sheppard's motion to withdraw plea was filed after his community control revocation sentencing, the "manifest injustice" standard was applicable.

Our district courts have been in agreement on the point an indigent defendant has the right to court-appointed counsel to assist in filing a motion to withdraw plea after sentencing, pursuant to Florida Rule of Criminal Procedure 3.170(l). See Wofford v. State, 819 So. 2d 891 (Fla. 1st DCA 2002); Meeks v. State, 841 So. 2d 648 (Fla. 2d DCA 2003)(A motion to withdraw plea pursuant to rule 3.170(l) is such a critical stage of the criminal proceedings, citing Bible v. State, 779 So. 2d 517 (Fla. 2d DCA 2000); Schriber v. State, 959 So. 2d 1254, 1256 (Fla. 4th DCA 2007)(the filing of a rule 3.170(l) motion would be hollow indeed if the defendant were not allowed the guiding hand of counsel to assist in preparing the initial motion to withdraw the plea), citing Padgett v. State, 743 So. 2d 70 (Fla. 4th DCA 1999);

However, our district courts decisions vary on the circumstances requiring substitute counsel. In Holifield v. State, 717 So. 2d 69 (Fla. 1st DCA 1998), the First District held a defendant is entitled to independent counsel in connection with a motion to withdraw a plea where the motion alleges

"misrepresentation, coercion or duress by defense counsel, or once a conflict of interest arises between the defendant and defense counsel at the motion hearing." Holifield, 717 So. 2d at 69.[1] Other courts have held that when appointed counsel for the defendant in filing a motion to withdraw the plea on behalf of the client takes a position adverse to that asserted by the latter, a defendant is entitled to appointment of conflict free counsel. E.g., Bible v. State, 779 So. 2d 517 (Fla. 2d DCA 2000); Padgett, 743 So. 2d at 70 (Fla. 4th DCA 1999). A per se rule requiring substitute counsel has not been universally employed. For instance, in Cunningham v. State, 677 So. 2d 929, 930 (Fla. 4th DCA 1996), the Fourth District held its decision in Roberts v. State, 670 So. 2d 1042 (Fla. 4th DCA 1996), should not be read to establish a per se rule requiring a trial court to appoint new counsel to argue a motion to withdraw a plea upon the mere filing of a motion to discharge trial counsel. Subsequently, in Padgett, the Fourth District found the facts there distinguishable from

[1] The phrase "conflict of interest" is a term of art often inartfully used. As the United States Supreme Court explained in Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002),a true conflict of interest under Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), arise only where there are multiple clients and in no other context. Only multiple clients invokes the Sullivan conflict of interest law. While this situation may pose attorney/client problems, it is not a “conflict of interest” See Alessi v. State, 969 So.2d 430 (Fla. 5th DCA 2007). Accordingly, courts should not refer to a conflict of interest, where, as here, there was no multiple representation.

those in Cunningham, as Padgett concerned a factual dispute regarding counsel's coercive behavior which allegedly took place in private. In Cunningham, the claim of ineffective assistance of counsel was conclusively refuted by the record which was before the trial judge. See Padgett, 743 So. 2d at 74. By comparison, in Smith v. State, 849 So. 2d 485, 486 (Fla. 2d DCA 2003), the Second District did not consider the plea colloquy, which the state maintained reflected Smith understood the consequences of his plea, in limiting its inquiry into whether Smith was denied conflict-free counsel). Prior to its decision in Sheppard, the Second District in Hampton v. State, 848 So. 2d 405 (Fla. 2d DCA 2003), addressing a refusal to appoint counsel to assist the defendant in preparation of his motion to withdraw plea, held the defendant was entitled to counsel where his pro se motion to withdraw his plea alleged that his trial counsel had "'lied to' and 'deceived' him, inducing him to enter the plea." Id., 848 So. 2d at 406.

While maintaining, as a threshold matter, a facially sufficient motion to withdraw the plea is a preliminary requirement for asserting a right to conflict-free counsel, the state observes sub judice the Second District did not undertake to establish the criteria for the appointment of replacement counsel when a defendant files a 3.170(l) motion. Nor did the Second District hold that the trial court in Sheppard's case could properly reach the merits of his claim without appointing conflict free counsel.

The district court merely declined to exempt a pro se motion to withdraw a plea from the requirement he affirmatively seek discharge of counsel in order to have his pro se pleading entertained.

Logan's requirement of an unequivocal request for discharge

The Second District's reasoning comports with Logan v. State, 846 So. 2d 472, 476 (Fla. 2003), in which this Court explained:

> Only when a pro se criminal defendant is affirmatively seeking to discharge his or her court-appointed attorney have the courts of this state not viewed the pro se pleading in which the request to discharge is made as unauthorized and a "nullity." See Lewis, 766 So. 2d at 289[2] ("The courts have carved out an exception [to the rule that pleadings filed by a criminal defendant represented by counsel are treated as a nullity] permitting a criminal defendant who is represented by counsel to file a pro se motion seeking discharge of that counsel."). The Fourth District Court of Appeal in Graves v. State, 642 So. 2d 142, 143-44 (Fla. 4th DCA 1994), explained why this limited exception to the "nullity" rule was necessary to effectuate the holding in Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973), approved of in Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988).

Logan, 846 So. 2d at 472.

This Court observed the requirements of Nelson depend upon a clear and unequivocal statement from the criminal defendant that he wishes to discharge counsel. As this Court had explained in Morrison v. State, 818 So. 2d 432 (Fla.), cert. denied, 537 U.S.

[2] Lewis v. State, 766 So. 288 (Fla. 4th DCA 2000).

957, 154 L. Ed. 2d 308, 123 S. Ct. 406 (2002), generalized complaints about court-appointed counsel's trial strategy or lack of contact or communication with the defendant do not constitute the kind of unequivocal request to discharge counsel necessary to trigger the requirements of Nelson. Logan, 846 So. 2d at 477. Observing the limited exception to the "nullity" rule discussed in Graves is designed to effectuate the holding in Nelson, the Court held said exception to the "nullity" rule cannot be triggered merely by a statement in a pleading that the defendant is generally dissatisfied with counsel or counsel's performance. Logan, 846 So. 2d at 478. Instead, it must instead depend upon a clear statement from the defendant he wishes to discharge court-appointed counsel due to counsel's perceived ineffectiveness. Id.

The Nelson procedure applies to requests for new counsel made before the commencement of trial where a defendant feels that the attorney is ineffective or incompetent. Even so, the concepts employed in the Nelson line of cases are often analogous to cases discussing conflict between attorney and client, including those alleged in the plea context. There is no compelling reason to exempt a dissatisfied defendant, having pled guilty or no contest or admitted his violation of probation or community control as did Sheppard, from the requirement he clearly convey he wants to discharge present counsel in seeking plea withdrawal when the Court requires such unambiguity from him pre-conviction.

Indeed, this Court in Logan applied took a restrictive approach to excepting a pro se extraordinary writ petition from the nullity rule where such is filed during the course of criminal proceedings in which petitioners are represented by counsel. There, the Court explained petitioners' attorneys retain their status as counsel for the petitioners in this Court unless others are duly appointed or substituted, id., 846 So. 2d at 475, citing Fla. R. App. P. 9.360(b) (providing that "attorneys . . . in the lower tribunal shall retain their status in the [appellate] court unless others are duly appointed or substituted").

Consequently, the petitions in the subject cases before the Court could not be entertained on the merits as they were filed pro se and had not been adopted by counsel. Id. The petitions addressed in Logan did not clearly state the petitioners have discharged, or wish to discharge, their court-appointed attorneys in the pending criminal proceedings below. Therefore, the petitions were nothing more than attempts by the petitioners to proceed both pro se and represented by counsel in the context of their pending criminal proceedings. Consistent with long-standing precedent in this state, this Court declined to accept such attempts at "hybrid" representation. Logan, 846 So. 2d at 478-479. Accordingly, this Court announced:

> . . . . in the future, we will not entertain pro se extraordinary writ petitions from criminal defendants seeking affirmative relief in the context of pending trial court criminal cases, where it is clear from the

> face of the petitions that the petitioners are represented by counsel in the pending criminal proceedings and the petitioners do not clearly indicate that they are seeking to discharge counsel in those proceedings. If a petition clearly indicates that the petitioner is represented by counsel in the pending criminal proceeding, and the petitioner does not unequivocally seek to discharge counsel in that proceeding by way of the petition, the petition will be dismissed as unauthorized.

Logan, 846 So. 2d at 479.

This year, this Court made clear the rule in Logan is not limited to cases where the defendant is represented by trial counsel. In Johnson v. State, 974 So. 2d 363, 364-5 (Fla. 2008), this Court had before it a pro se mandamus petition seeking relief from a claimed illegal sentence. At the time, the petitioner had counsel. Dismissing the pro se pleading as unauthorized, this Court held the rule announced in Logan applies to "any pro se filings submitted by litigants seeking affirmative relief in the context of *any* criminal proceeding where a death sentence has not been imposed, whether direct or collateral, either in the trial court or a district court of appeal, and who are represented by counsel in those proceedings." Johnson, 974 So. 2d at 365 (emphasis in original).

Here, Sheppard attempts to distance himself from Logan and Johnson's straightforward approach, inviting this Court to employ instead the additional exceptions to the nullity rule recognized by the Fourth District where the defendant asserts

that counsel coerced the defendant into taking certain action, Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004), or his allegations reflect an adversarial relationship between the defendant and his counsel, Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005). As the Second District recognized, however, the Fourth District's approach seriously undermines the rule against hybrid representation. The added exceptions created by Peterson and Bermudez are so broad such threaten to swallow the rule. The Second District elaborated:

> A substantial percentage--if not a majority--of the defendants filing pro se motions under rule 3.170(l) either complain that they were misadvised concerning the consequences of their pleas or express some other dissatisfaction with the way their lawyers handled their cases. See Williams v. State, 959 So. 2d 830, 832 (Fla. 4th DCA 2007) (Warner, J., concurring specially.) (noting the prevalence within the Fourth District of rule 3.170(l) motions by defendants alleging coercion by counsel or misrepresentation by counsel). Under Peterson and Bermudez, the motions filed by all of the defendants alleging these sorts of complaints must be considered on the merits instead of being struck as nullities.

Sheppard, 988 So. 2d at 79.

Sheppard dismisses the Second District's concerns, reasoning, in essence, the nullity rule is negated anyway since a defendant who is misadvised or coerced to plead is not being afforded counsel within the meaning of the Sixth Amendment. (Initial Merits Brief at p. 27) Sheppard argues the defendant in such situation is left in with no good option other than to file a pro se pleading informing the court of

the purported misadvice. Sheppard's argument in this vein illustrates the nullity rule will functionally cease to exist, as such means any charge involving counsel's advice or performance can be brought while a defendant is still receiving, or has access to, court-appointed counsel's advice in the plea withdrawal quest. After all, Sheppard does not lay any circumstance in which the rule would work striking a pro se pleading under his rationale, and Sheppard's argument, in essence, devolves to one of a quarrel with having a simple requirement defendant clearly say he wants to dismiss counsel, at least in the plea withdrawal context.

Sheppard points to the limited exception to the nullity rule necessary to effectuate the holding in Nelson. However, he does not dispute a clear unequivocal request to dismiss counsel is precondition to invoking the Nelson procedure. He likens the rationale regarding pro se complaints under Nelson to the allegations treated as additional exceptions to the nullity rule recognized in Peterson and Bermudez. Then, he points to the evidentiary hearing in his own case to assert there was an adversarial relationship with counsel highlighted by his counsel's testimony at the probe. (Initial Merits Brief at p. 28) Sheppard is apparently concerned his "right" to have his counsel's purported misadvice brought to light through a pro se pleading is outweighed by the Second

District's concern over collapse of the rule with injection of Peterson/Bermudez exceptions. He ignores, respectfully, he, or a similarly situated rule 3.170 movant, is not being barred from bringing any such complaint against counsel in a pro se motion to withdraw the plea under the rule. He is simply being asked, and required, to tell the court he wants to discharge his appointed counsel when he seeks plea withdrawal. That pleading requirement is not onerous in any regard, and Sheppard does not suggest and show otherwise.

Moreover, Sheppard does not satisfactorily explain why the exceptions created by the Fourth District are needed for a petitioner such as Sheppard to pursue his allegations in an endeavour to upset a plea-based judgment of conviction and/or sentence. He argues requiring him to say he wants to dismiss counsel conveys no more than what is clearly conveyed by his allegations of misadvice. In that regard, he cannot complain the pleading requirement of an unequivocal request to discharge counsel is burdensome. To the extent Sheppard suggests it is an unnecessary, he presupposes every pro se pleading can so be easily construed, as he suggests with regard to his own pleading. Trial courts are frequently deluged with confusing pro se filings, and given the precept such must be liberally construed, Sheppard's argument taken to its logical conclusion would mean, if adopted, any pro se

filing need be deemed to convey an adversarial relationship equating with dissatisfaction forming a request for counsel's discharge. No such broad assumption need be made.

It is well-settled a trial court does not err in refusing to hold a Nelson hearing in cases "where the defendant's dissatisfaction with counsel is articulated in terms of general complaints which do not suggest ineffective assistance of counsel." Morrison v. State, 818 So. 2d 432, 442 (Fla. 2002)(it was not error to deny Nelson hearing where motion alleged mere disagreement with attorney's frequency of communication, trial strategy, and trial preparation and appellant rather than any specific claims of incompetence"); Lee v. State, 641 So. 2d 164 (Fla. 1st DCA 1994)(no error to refuse hearing where discharge request was "based upon inadequate communication between counsel and appellant rather than any specific claims of incompetence"). These types of generalized complaints are no less present in the post-sentence setting. Yet, in such situation, Sheppard's position carries the risk defendants seeking plea withdrawal would not be discouraged from pressing such claims pro se based on the faulty premise such allegations equate to lack of representation.

Even if Sheppard could, arguendo, lay to rest concern in such regard over such potential outfall, Sheppard nonetheless

unduly diminishes the Second District's concern that the effect of the holdings in Peterson and Bermudez is to impose additional strain on the criminal justice system. Particularly in these challenging economic times, this Court need not ignore the impact on the judiciary in relaxing the nullity rule, regardless of whether or not the Fourth District's approach is viewed as one tantamount to the creation of exceptions engulfing the rule.

Of equal or more importance, Sheppard jettisons this Court's common sense rationale in Logan and Johnson. Under such approach, the trial court is not burdened with having to decide whether the added exceptions applied by the Fourth District to the nullity rule govern based on the particular allegations in a motion to withdraw a plea. Furthermore, there is no compelling reason to exempt a dissatisfied defendant, having pled guilty or no contest or admitting he has violated the terms of his supervision, from the requirement he clearly convey he wants to discharge present counsel in seeking plea withdrawal, when the Court requires such unambiguity from him pre-conviction.

Sheppard never asserted he wanted new representation, wished to proceed pro se, or otherwise desired to terminate representation by his attorney in his quest to undo his plea of admission to the violation of his community control. Given

that Sheppard was still represented by counsel, his pro se rule 3.710(1) motion should have been stricken by the trial court as a nullity in the absence of a request to dismiss counsel in the course of seeking plea withdrawal.

Sheppard alternatively argues that should the Court adopt the Peterson/Bermudez exceptions, he is entitled to appointment of conflict free counsel and a new evidentiary hearing on his motion to withdraw his admission to violating his community control. Sheppard, however, did not specifically allege in his motion to withdraw his admission his violation attorney forced or coerced him to admit violating community control. Rather, the thrust of his claim was his counsel talked him out of accepting the state's plea offer by telling him counsel "was sure" he could get him two years prison if Petitioner entered an open admission to the violation. (V 1 R 77) The claim was, at its core, one of a wrong prediction as to the sentencing outcome and is factually distinguishable from a claim of coercion such as Sheppard's motion claiming he was coerced to plead. Therefore, his case is distinguishable from Peterson.

Moreover, his case is distinguishable from Bermudez, in which the defendant alleged he was promised by his attorney he would get a shorter sentence if he entered a plea of guilty. Sheppard in his motion to withdraw his admission did not

assert his counsel promised him a two-year sentence. Rather, he said his counsel said he was sure he could get him two years prison. So framed, Sheppard's claim was one assailing counsel's confidence in a prediction and not one of a guarantee on the part of counsel.

In a post-sentencing motion to withdraw a plea, a trial court can do one of four things: (1) deny the motion as facially insufficient without granting an evidentiary hearing; (2) accept the allegations as true, grant the motion, and dispense with a hearing; (3) deny an evidentiary hearing because the factual assertions in the defendant's motion are conclusively refuted by the record; or (4) hold an evidentiary hearing and appoint new counsel if there is a "conflict" between the defendant and his current counsel. See Iaconetti v. State, 869 So. 2d 695, 699 (Fla. 2d DCA 2004). Even in the Nelson context, second counsel is not required. Rather, we allow the judge to inquiry into the matter and allow current counsel to explain the matter without considering such is a situation that requires a second attorney to explore. Just as second counsel is not required for every Nelson inquiry, it stands to reason replacement counsel is not precondition to examination of a defendant's allegations in seeking plea withdrawal under rule 3.170.

In Sheppard's case, the trial court would be correct to

deny his motion on the alternative ground it is facially insufficient. Sheppard's motion was facially insufficient because he failed to allege facts that could constitute a manifest injustice. Where, as here, a defendant does not allege counsel made an affirmative misrepresentation not refuted by the record as to the consequences of the plea, the motion is facially insufficient to require appointment of second counsel.

Alternatively, even if the motion is deemed facially sufficient, any error would have been harmless because his assertions are conclusively rebutted by the record of the plea colloquy. The evidentiary development in this case merely corroborated what was represented by counsel at the time Sheppard admitted violating his community control. Sheppard does not point to any additional fact successor counsel could have presented on his behalf or argued differently which would support vacating his admission.

To the extent Sheppard suggests the trial court should have conducted an inquiry pursuant to Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), he is, respectfully, mistaken. There was no unequivocal request made by Sheppard to represent himself in his plea withdrawal proceeding.

Moreover, the constitutional standards governing the

voluntariness of a guilty plea do not govern a probation revocation hearing, which does not have to meet the strict requirements of a criminal trial. In Washington v. State, 284 So. 2d 236, 237 (Fla. 2d DCA 1973), the Second District Court rejected the contention the strict requirements of guilty pleas in original criminal proceedings which were established in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), must be carried over to a proceeding involving the revocation of probation. The Washington Court there affirmed notwithstanding the plea colloquy in the revocation proceeding might not meet Boykin muster. The Court elaborated:

> Section 948.06, Florida Statutes, F.S.A., states that at a hearing on revocation of probation, the court shall advise the probationer of the charge of violation. The statute further provides that if such charge is admitted, the court may revoke the probation. While appellant was advised of the charge of violation and admitted that he understood that a guilty plea would open up his original sentence for reconsideration, there was no affirmative inquiry into whether the plea was voluntarily and freely given. Hence, the record might not stand the scrutiny of Boykin had this been a plea to an original criminal charge, but we do not need to decide that question. A hearing for the revocation of probation need not meet the strict requirements of a criminal trial. It is enough that a hearing be held in which evidence is taken and in which the probationer has a reasonable opportunity to present his position. McNeely v. State, Fla.App.1966, 186 So.2d 520.
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> Here, appellant was represented by counsel, and the record reflects that he knew what he was doing when he made his plea. There was no contention that the plea was not freely and voluntarily given. While such a contention was said to be irrelevant in Boykin, we have concluded

> that the requirements of Boykin need not be fulfilled to the letter in a hearing on revocation of the privilege of probation.

Washington, 284 So. 2d at 237. Federal courts have similarly concluded Boykin is inapplicable where a violation of probation is admitted. See Allen v. State, 662 So. 2d 380, 381 (Fla. 4th DCA 1995), citing United States v. Johns, 625 F.2d 1175 (5th Cir. 1980), and cases cited therein.

As this Court recently observed, [a] "criminal prosecution" concludes with the determination of guilt of the crime charged, not with a determination that a later violation of probation has occurred. See Peters v. State, 984 So. 2d 1227 (Fla. 2008), citing, for comparison, Bernhardt v. State, 288 So. 2d 490, 498 (Fla. 1974)("Probation revocation is an entirely different stage of the criminal-correctional process." (quoting In re Whitney, 421 F.2d 337, 338 (1st Cir. 1970)); Gagnon v. Scarpelli, 411 U.S. 778 at 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)("Probation revocation, like parole revocation, is not a stage of a criminal prosecution . . ."). Although a probationer accused of a violation is not entitled to the full panoply of rights guaranteed at a criminal trial, he is entitled to minimal due process, including:

> (a) written notice of the claimed violations . . .; (b) disclosure . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and

> documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a 'neutral and detached' hearing body . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking . . . .

Gagnon, 411 U.S. at 786. Section 948.06, Florida Statutes (2005), implements these rights and requires that a court conduct a probation revocation hearing if the probationer disputes the charges. At the hearing, the State must prove the violation by a preponderance of the evidence. Stevens v. State, 823 So. 2d 319, 320 (Fla. 2d DCA 2002).

Moreover, it has been held a trial court in a probation revocation proceeding need not comply with Florida Rule of Criminal Procedure 3.172, which governs the acceptance of a guilty or nolo contendere plea. See Balsinger v. State, 974 So. 2d 592, 593 (Fla. 2d DCA 2008). There, the Court looked to Florida's statutory requirements in the probation revocation setting, pointing out section 948.06(2), Florida Statutes (2006), requires the trial court advise the probationer of the alleged violation. Id., at 593, citing Edwards, 721 So. 2d at 745.[3] If the probationer does not admit to the violation and the charged violation is not dismissed, the court must give the probationer an opportunity

[3] Edwards v. State, 721 So. 2d 744 (Fla. 4th DCA 1998).

to be fully heard. Balsinger, at 593, citing § 948.06(2)(d). The Court further pointed out the Edwards court added "[t]he probationer should also be told of the potential consequences of a guilty plea, the right to counsel, and the right to a final hearing on violation of probation, at which time a probationer has the 'opportunity to be fully heard on his or her behalf in person or by counsel.'" Id., citing Edwards, 721 So. 2d at 745 (quoting § 948.06, Fla. Stat. (1997)).

Sheppard's admission

In Sheppard's case, the trial court fully complied with the requirements of § 948.06(1), Florida Statutes. He entered an open plea and was told of the consequences of his plea. Sheppard's case does not present the situation where a defendant has not knowingly waived his right to contest the charges. Undeniably, he was aware of the charged violations and his right to contest such and to be heard at a violation hearing with the assistance of counsel.

Nor does Sheppard's case present the situation where the record does not refute an allegation a defendant has been affirmatively mislead by his attorney or the court with regard to the consequences of his plea. At the violation hearing, Sheppard's counsel represented to the trial court the state's offer was a year and a day followed by four years of sex offender probation, and both counsel and Sheppard were in

agreement he could not do probation. (V 1 R 93) The prosecutor pointed out he was facing ten years. (V 1 R 98) Sheppard during the colloquy confirmed he wished to admit he violated his community control (V 1 R 95) and he understood he was pleading open. (V 1 R 96) His counsel's later testimony that Sheppard had refused to allow counsel to agree to the state's offer of one year prison and one day, followed by four years probation because Sheppard did not want probation and Sheppard wanted straight time and no probation (V 1 R 121-122) merely bore out counsel's representations made to the trial court at the time of the plea. Counsel further testified he advised Sheppard the court could sentence him to a maximum of five years consecutive on each of the uttering counts. (V 1 R 122) Even if such advice was not laid out by the counsel in his representations to the trial court at the time of the plea, nonetheless, Sheppard did not specifically complain in his motion to withdraw his plea he did not know he could face consecutive five-year prison terms.

The record of the plea hearing suffices to conclude Sheppard clearly had an accurate understanding of the maximum penalty and acted with such an understanding in entering his admission. Sheppard did not claim any error by the violation court in the taking of his plea of admission, and at any rate, the plea hearing is regular. The representations of his

counsel, together with his own affirmations, reflect he did not operate under any affirmative misadvice as to the consequences of his plea.

This case, in actuality, is not about unfulfilled promise. Undoubtedly, due process requires the government to adhere to the terms of any plea bargain. United States v. Weaver, 905 F.2d 1466, 1472 (11th Cir. 1990). When an accused voluntarily chooses to reject or withdraw from a plea bargain, however, he retains no right to the rejected sentence. Having rejected the offer of a lesser sentence, he assumes the risk of receiving a harsher sentence. Jones v. State, 834 So. 2d 226, 227 (Fla. 2d DCA 2002).

The plea record, standing alone, reflects Sheppard chose to admit the violation without promise of a certain outcome. At its core, Sheppard's collateral theory for upsetting his admission constitutes an allegation that that even though his counsel did not misadvise him regarding the plea consequences, he was still entitled to assume he would receive a sentence not guaranteed him. He was not entitled to withdraw his admission merely because he subjectively expected a particular outcome under the circumstances. A defendant who has a change of heart regarding his plea should not be permitted to withdraw it merely because he received a harsher sentence than he subjectively expected. Cf., Bradbury v. Wainwright, 658

F.2d 1083, 1087 (5th Cir. 1981)(subjective hope is insufficient to make guilty plea involuntary).

In so stating, the state maintains Sheppard's pro se motion to withdraw the plea is properly stricken as unauthorized. In the absence of an unequivocal request to discharge counsel, such constitutes an attempt to have hybrid representation. The Second District's conclusion his pro se motion should be stricken as a nullity comports with Logan and Johnson.

CONCLUSION

Respondent respectfully requests this Honorable Court discharge its jurisdiction or, alternatively, approve the district court's well-reasoned decision, and/or conclude no remand is necessary in light of Sheppard's allegations and the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard P. Albertine, Jr., Esquire, Public Defender's Office, Polk County Courthouse, P.O. Box 9000 –- Drawer PD, Bartow, FL 33831 this 12th day of November 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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