IN THE SUPREME COURT OF FLORIDA

ANTHONY SHEPPARD,	:	
Petitioner,	:	
vs.	:	Case No. SC08-1452
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

RICHARD P. ALBERTINE, JR.
Assistant Public Defender
FLORIDA BAR NUMBER 0365610

Public Defender's Office
Polk County Courthouse
P.O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

In this initial brief on the merits, Petitioner, ANTHONY SHEPPARD, Defendant in circuit court and Appellant in district court of appeal, shall be referred to as Petitioner or by name. Respondent, State of Florida, represented by State Attorney for Thirteenth Judicial Circuit in circuit court and by the Office of the Attorney General in district court of appeal, shall be referred to as Respondent or the State. Petitioner's appeal, 2D06-4557, comprised two volumes: (V1, R01-129; SV1, R130-157).

STATEMENT OF THE CASE AND FACTS

Petitioner, ANTHONY SHEPPARD, was charged in circuit case 02-CF-8009, with two counts of uttering a forged instrument, in violation of § 831.02, Fla. Stat. (2001), alleged to have occurred on May 14 and 16, 2002, in Hillsborough County, Florida. (V1, R12-13). On September 24, 2002, Sheppard entered a guilty plea in this case after which he was adjudicated and sentenced to five years of sex offender probation in count one followed by consecutive three years of sex-offender probation in count two to be served consecutive to three year prison term imposed in circuit case 00-CF-8186. (V1, R20-21, 22-24, 25-29, 91-105).

On March 2, 2005, an order of community supervision was imposed, rendered on March 11, 2005, placing Mr. Sheppard on two years of community control followed by three years of sex offender probation in count one followed by consecutive three years of sex

offender probation in count two after his probation had been revoked in both counts. (V1, R30-39, 40-41, 42-43, 44-48).

On August 9, 2005, Sheppard entered an open plea or admission to violating his community control after which community control was revoked and he was adjudicated and sentenced to five years in prison on count one followed by consecutive five years in prison in count two with credit for presentence jail time served. (V1, R49-62, 64-65, 67-74, 75, 79; SV1, R147-158).

On September 2, 2005, according to the prison stamp and certificate of service, Mr. Sheppard placed in the hands of prison officials his pro se motion to withdraw plea/admission of guilty to probation violation, pursuant to Fla. R. Crim. P. 3.170(l), also referred to herein as pro se motion to withdraw plea, on the ground that his attorney had misadvised him as to the sentence he would receive after talking Sheppard out of accepting the state's offer of one year and one day in prison followed by four years of probation thereby rendering his plea/admission involuntary. (V1, R76-78). No notice of appeal appears to have been filed in circuit case 02-CF-8009 regarding the judgment and sentences imposed after Mr. Sheppard's community control was revoked pursuant to his open plea or admission to violating his court supervision. (V1, R05). Moreover, no motion to withdraw from representation appears to have filed by APD Cardamone on behalf of the Office of the Public Defender nor does any order appear to have been rendered discharging APD Cardamone or the Office of the Public Defender

from representation of Mr. Sheppard. (V1, R05).

On February 1, 2006, the trial court rendered an order to respond to motion to withdraw guilty plea/admission of guilty to probation violation to which the state responded that an evidentiary hearing on Sheppard's motion to withdraw his guilty plea/admission was necessary. (V1, R80-84). On May 2, 2006, the Honorable Walter Heinrich entered an oral order appointing the Office of Public Defender to represent Sheppard on May 2, 2006. (V1, R06). After an evidentiary hearing was held on May 9, 2006, where at the trial court orally denied Sheppard's pro se motion to withdraw plea, an order was rendered, September 13, 2006, denying defendant's motion to withdraw guilty plea/admission of guilty to probation violation. (V1, R106-117, 118-127). On September 29, 2006, notice of appeal was filed as to the trial court order denying Sheppard's motion to withdraw his guilty plea/admission to violating his community supervision. (V1, R128-129).

Mr. Sheppard's motion to withdraw plea/admission of guilty to probation violation stated in pertinent part the following:

> Comes Now the Defendant, Anthony Jerome Sheppard, pro se, and moves this Honorable Court pursuant to Florida Rules of Criminal Procedure 3.170(l) to allow him to withdraw his plea/admission of guilty to probation violation. Defendant states the following in support thereof:
>
> 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.

(V1, R76-78).

On May 9, 2006, a hearing was held on Mr. Sheppard's pro se motion to withdraw plea where at Sheppard was not provided with conflict-free counsel as APD Cardamone testified as a witness for the state. (SV1, R136-139). APD Cardamone stated he was employed by the Public Defender's Office and represented Anthony Sheppard in that capacity on a violation of probation. (SV1, R137). APD Cardamone said it was Sheppard's opinion that he wanted to admit to an amended affidavit violation of community control at that point after Cardamone had been in negotiation with the state who was offering one year and a day in prison followed by four years of sex offender probation which offer Cardamone said he conveyed to Mr. Sheppard. (SV1, R137). APD Cardamone said that he did not have any concerns as to whether Sheppard understood what was going

on and that Sheppard did not accept the state's offer because he wanted a straight time offer with no probation to follow the term of incarceration. (SV1, R137-138). APD Cardamone said that instead of taking the state's offer of a year and a day in prison followed by four years of sex offender probation, Sheppard wanted to plead open and ask the trial court for a straight-time offer without any consecutive term of probation. (SV1, R139). APD Cardamone said the state was offering probation to make sure Sheppard received the type of rehabilitation treatment that he needed. (SV1, R138). As to pleading open, APD Cardamone said he advised Sheppard that the trial court judge could give him anywhere up the maximum which was five years each for two counts of uttering a forged instrument, consecutive to each other. (SV1, R138-139). APD Cardamone said Sheppard still did not want to take the state's offer after having been advised about the maximum sentence he could receive if he pleaded open. (SV1, R139). According to Cardamone, Judge Timmerman was the trial court judge at the time and he ended up giving Sheppard two five year terms of prison, one for each count, to be served consecutively. (SV1, R139). State exhibit 1, a transcript of the hearing where Sheppard entered his admission to violating community control, was identified by APD Cardamone and admitted in evidence without objection. (SV1, R139-140). When asked if he had any questions for his lawyer, Sheppard, who appeared to be unrepresented by counsel, conflict-free or otherwise, stated, "He didn't advise me to open plea. I don't know nothing about no open

plea." (SV1, R141).

At this point, the trial court denied Mr. Sheppard's pro se motion to withdraw his plea, saying he had reviewed the transcript of the proceedings in which Mr. Sheppard admitted to violating the terms and conditions of his probation and at this time was going to deny his Motion to Withdraw his Plea. (SV1, R141).

On September 13, 2006, the trial court rendered an order denying Defendant's motion to withdraw guilty plea/admission of guilty to probation violation that stated in pertinent part:

> THIS MATTER is before the Court on Defendant's Motion to Withdraw Guilty Plea/Admission of Guilty to Probation Violation, filed on September 12, 2005. The Court, after considering the Motion, the court files, and the record finds as follows:
>
> In his motion, the Defendant asserted that he should be allowed to withdraw his guilty plea entered in the probation revocation on August 9, 2005, pursuant to Florida Rule of Criminal Procedure 3.170(l). He alleged that after his attorney informed him of a plea offer from the State for one year and one day Florida State Prison followed by 4 years of probation, his attorney refused to allow the Defendant to accept the State's offer and instead advised him to enter an open plea.
>
> At the May 9, 2006 hearing, the Court heard testimony from the Defendant's former attorney, Christopher Cardamone, Esq. He testified that he had informed the Defendant of the plea offer. However, he testified that the Defendant informed him that he wished to enter an open plea and ask for a "straight time offer," meaning a sentence that did not include prison with consecutive probation. (See May 9, 2006 Transcript attached).
>
> Finally, the Court denied the Defendant's motion at the May 9, 2006 hearing stating the following:
>
> > I've had a chance to review the transcript of the proceedings in which Mr. Sheppard admitted to violating the terms and conditions of his probation, and at this time I'm going to deny his Motion to Withdraw his Plea.
>
> (See May 9, 2005 Transcript, attached).
>
> It is therefore ORDERED AND ADJUDGED that

Defendant's Motion is hereby DENIED.

(V1, R106-107).

A timely notice of appeal of the trial court's judgment and sentencing was filed on September 29, 2006, from which appeal ensued in the Second District Court of Appeal in appeal 2D06-4557. (V1, R128-129). On appeal, the Second District Court of Appeal denied Mr. Sheppard's appeal on Feb. 27, 2008, concluding the trial court should not have considered the merits of the pro se motion to withdraw plea but, instead, should have stricken it as a nullity, see Sheppard v. State, No. 2D06-4557, slip op.2 (Fla. 2d DCA Feb. 27, 2008), after which a motion for rehearing, clarification, and/or certification was filed on March 12, 2008, based on direct conflict with the Fourth District Court of Appeal decisions, in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981, 984-85 (Fla. 4th DCA 2005). On July 16, 2008, the Second District Court of Appeal granted rehearing in part, affirming its earlier decision reversing the trial court's order denying Mr. Sheppard's pro se motion to withdraw plea and remanding with directions that the trial court strike the motion as a nullity, while certifying direct conflict with the Fourth District Court of Appeal decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005), on the prohibition against "hybrid representation" called the "nullity rule" and pro se motions to withdraw plea filed, pursuant to Fla.

R. Crim. P. 3.170(l), being treated as a nullity unless the pro se motion contains an unequivocal request to discharge counsel and whether an exception existed to treating a pro se motion without an unequivocal request to discharge counsel as a nullity when the pro se motion contained allegations of counsel's misadvice or coercion that reflected an "adversarial relationship" between pro se defendant and his court-appointed counsel that negated any prohibition against "hybrid representation" and precluded striking the pro se motion to withdraw plea as a nullity. See Sheppard v. State, 988 So. 2d 74, 75-78 (Fla. 2d DCA 2008), reh'g granted in part.

Notice to invoke discretionary jurisdiction, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(vi), was filed in Second District Court of Appeal on July 28, 2008. See Fla. R. App. P. 9.120(b) & (d). On July 28, 2008, motion to stay mandate was filed that the Second District Court of Appeal denied, August 21, 2008, issuing its mandate September 8, 2008. On August 7, 2008, a brief on jurisdiction was filed on Sheppard’s behalf followed by an answer brief on jurisdiction filed August 28, 2008. On September 28, 2008, this Court accepted discretionary jurisdiction by order issued that day, ordering Petitioner’s initial brief on the merits be served on or before October 24, 2008.

SUMMARY OF THE ARGUMENT

Contrary to the Second District Court of Appeal’s decision,

in Sheppard v. State, 988 So. 2d 74 (Fla. 2d DCA 2008), reh'g granted in part, denying Mr. Sheppard's appeal of the trial court's denial of his pro se motion to withdraw plea based on the nullity rule and its prohibition against "hybrid representation" as applied to the pro se motion to withdraw plea filed by Mr. Sheppard while represented by court-appointed counsel because the pro se motion did not contain an unequivocal request to discharge counsel, reversing the trial court's order denying Mr. Sheppard's pro se motion to withdraw plea and remanding back to the trial court to strike the pro se motion as a nullity, an exception does exist in Florida as reflected in the Fourth District Court of Appeal's decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005); that being when the pro se motion to withdraw plea contains allegations of counsel misadvice or coercion sufficient to reflect an "adversarial relationship" between the pro se defendant and his court-appointed counsel that negates any prohibition against "hybrid representation" and precludes striking the pro se motion to withdraw plea as a nullity.

ARGUMENT

ISSUE I

WHETHER AN EXCEPTION EXISTS TO THE NULLITY RULE'S PROHIBITION AGAINST "HYBRID REPRESENTATION" AND PRO SE MOTIONS TO WITHDRAW PLEA FILED PURSUANT TO FLA. R. CRIM. P. 3.170(l) WHEN REPRESENTED BY COUNSEL BEING TREATED AS A NULLITY UNLESS THE PRO SE MOTION CONTAINS AN UNEQUIVOCAL REQUEST TO DISCHARGE COUNSEL WHEN THE PRO SE MOTION OTHERWISE CONTAINS ALLEGATION OF COERCION OR MISADVICE THAT REFLECTS AN "ADVERSARIAL RELATIONSHIP" BETWEEN A PRO SE DEFENDANT AND HIS COURT-APPOINTED COUNSEL THAT NEGATES THE PROHIBITION AGAINST "HYBRID REPRESENTATION" AND PRECLUDES STRIKING THE PRO SE MOTION TO WITHDRAW PLEA AS A NULLITY?

Yes. As reflected in the Fourth District Court of Appeal's decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005), an exception does exist in Florida as to the nullity rule's prohibition against "hybrid representation" and a pro se motion to withdraw plea filed, pursuant to Fla. R. Crim. P. 3.170(l), being treated as a nullity unless such motion contained an unequivocal request to discharge counsel; that being when the pro se motion to withdraw plea, though containing no unequivocal request to discharge counsel, does contain allegations of counsel misadvice or coercion that reflect an "adversarial relationship" between a pro se defendant and his court-appointed counsel that negates the prohibition against "hybrid representation" and precludes striking the pro se motion to withdraw plea as a nullity, contrary to the Second District Court of Appeal's decision, in Sheppard v. State, 988 So. 2d 74 (Fla. 2d DCA 2008), reh'g granted in part, denying Sheppard's appeal of the trial

court's denial of his pro se motion to withdraw plea based on the nullity rule and its prohibition against "hybrid representation" as applied to Sheppard's pro se motion to withdraw plea filed while represented by court-appointed counsel because the pro se motion did not contain an unequivocal request to discharge counsel, reversing the trial court's order denying Sheppard's pro se motion to withdraw plea and remanding back to the trial court to strike the pro se motion as a nullity. In declining to recognize the exception adopted by the Fourth District Court of Appeal in Peterson and Bermudez, the Second District Court of Appeal erroneously reversed the trial court order denying Mr. Sheppard's pro se motion to withdraw plea, remanding back to the trial court with direction to strike the motion as a nullity, while certifying direct conflict with Peterson and Bermudez. Accordingly, this Court should disapprove and vacate the Second District Court of Appeal's decision in Sheppard, while approving and reaffirming the Fourth District Court of Appeal's exception to the nullity rule in Peterson and Bermudez, and remand to the trial court with directions to reverse the trial court’s orders denying and striking Sheppard's pro se motion to withdraw plea and hold an evidentiary hearing there on where at Sheppard is provided conflict-free counsel or, alternatively, remand back to the Second District Court of Appeal for further proceedings on the merits of Sheppard's appeal of the trial court's order denying his motion to withdraw plea.

By erroneously treating Sheppard's pro se motion to withdraw plea as a nullity, the Second District Court of Appeal averted ruling on the merits of whether the trial court had prejudicially erred by denying Mr. Sheppard's pro se motion to withdraw plea after an evidentiary hearing where at Mr. Sheppard was neither provided with conflict-free counsel nor a Faretta hearing, see Faretta v. California, 422 U.S. 806 (1975), to determine if he had knowingly and intelligently waived his right to counsel, where his pro se motion to withdraw plea, although not containing an unequivocal request to discharge counsel, alleged misadvice and coercion that evidenced an adversarial relationship between Mr. Sheppard and his court-appointed counsel, APD Cardamone, that negated any prohibition against hybrid representation and precluded striking same as a nullity. (V1, R76-78, 106-107; SV1, R141). Sheppard was substantially prejudiced by the trial court's erroneous ruling denying his pro se motion since Sheppard was neither provided with conflict-free counsel nor a Faretta hearing to determine if he had knowingly and intelligently waived his right to counsel as required by Florida law. Thus, the trial court's order denying Sheppard's pro se motion to withdraw plea should have been reversed and remanded for evidentiary hearing with Mr. Sheppard provided conflict-free counsel or a Faretta hearing to determine if he knowingly and intelligently waived his right to counsel, contrary to the Second District Court of Appeal that declined to recognize an exception to treating a pro se

motion to withdraw plea that failed to include an unequivocal request to discharge counsel as a nullity; that exception being when the pro se motion to withdraw plea contained allegation of misadvice or coercion that reflect an "adversarial relationship" between pro se defendant and his court-appointed counsel that negated any prohibition against "hybrid representation" and precluded striking the pro se motion to withdraw plea as a nullity as the Fourth District Court of Appeal held in Peterson, 881 So. 2d at 1129-30; and Bermudez, 901 So. 2d at 983-85.

On September 2, 2005, according to the prison stamp and certificate of service, Mr. Sheppard placed in the hands of prison officials his pro se motion to withdraw plea/admission of guilty to probation violation, pursuant to Fla. R. Crim. P. 3.170(l), on the ground that his attorney had misadvised him as to the sentence he would receive after not letting Sheppard accept the state's offer of one year and one day in prison followed by four years of probation thereby rendering Sheppard's plea/admission involuntary. (V1, R76-78). In pertinent part, Mr. Sheppard's motion to withdraw plea/admission of guilty to probation violation stated:

> 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.

(V1, R76-78). Mr. Sheppard's pro se motion to withdraw plea did not contain an unequivocal request to discharge his counsel. On May 2, 2006, an oral order was entered appointing the Office of Public Defender to represent Sheppard on May 2, 2006. (V1, R06). On May 9, 2006, a hearing was held on Sheppard's pro se motion to withdraw plea where at Sheppard was not provided with conflict-free counsel or given a Faretta hearing. APD Cardamone, Sheppard's court-appointed attorney at the time Sheppard entered an admission to violating his community control, neither adopted Mr. Sheppard's pro se motion to withdraw plea nor acted as legal counsel for Sheppard but, instead, testified as a witness for the state at the hearing as Sheppard stood by unrepresented. (SV1, R136-139). APD Cardamone testified he was employed by the Public Defender's Office and had represented Sheppard in that capacity on a violation of probation. (SV1, R137). APD Cardamone testified it was Sheppard's opinion that he wanted to admit to an amended affidavit violation of community control at that point after Cardamone had been in negotiation with the state who was offering one year and a day in prison followed by four years of sex offender probation which offer Cardamone said he had conveyed to Mr. Sheppard. (SV1, R137). APD Cardamone testified he did not have

any concerns as to whether Sheppard understood what was going on and that Sheppard did not accept the state's offer because he wanted a straight time offer with no probation to follow the term of incarceration. (SV1, R137-138). APD Cardamone testified that instead of taking the state's offer of a year and a day in prison followed by four years of sex offender probation, Sheppard wanted to plead open and ask the trial court judge for a straight-time offer without any consecutive term of probation. (SV1, R139). APD Cardamone testified the state was offering probation to make sure Sheppard received the type of rehabilitation treatment he needed. (SV1, R138). As to pleading open, APD Cardamone testified he advised Sheppard the trial court judge could give him anywhere up the very maximum that was five years each for two counts of uttering a forged instrument, consecutive to each other. (SV1, R138-139). APD Cardamone testified Sheppard still did not want to take the state's offer after having been advised about the maximum sentence he could receive if he pleaded open. (SV1, R139). According to APD Cardamone, Judge Timmerman was the trial court judge at the time and he ended up giving Sheppard two five year terms of prison, one for each count, to be served consecutively. (SV1, R139). State exhibit 1, a transcript of the hearing where at Sheppard entered his admission to violating his community control, was identified by APD Cardamone and admitted in evidence without objection. (SV1, R139-140). When asked if he had any questions for his lawyer, Mr. Sheppard, who appeared unrepresented by counsel,

conflict-free or otherwise, stated, "He didn't advise me to open plea. I don't know nothing about no open plea." (SV1, R141).

Then, the trial court denied Sheppard's motion to withdraw his plea, ruling "I've had a chance to review the transcript of the proceedings in which Mr. Sheppard admitted to violating the terms and conditions of his probation, and at this time I'm going to deny his Motion to Withdraw his Plea. (SV1, R141). On September 13, 2006, the trial court rendered an order denying Mr. Sheppard's pro se motion to withdraw guilty plea/admission to probation violation that stated, in pertinent part:

> THIS MATTER is before the Court on Defendant's Motion to Withdraw Guilty Plea/Admission of Guilty to Probation Violation, filed on September 12, 2005. The Court, after considering the Motion, the court files, and the record finds as follows:
>
> In his motion, the Defendant asserted that he should be allowed to withdraw his guilty plea entered in the probation revocation on August 9, 2005, pursuant to Florida Rule of Criminal Procedure 3.170(l). He alleged that after his attorney informed him of a plea offer from the State for one year and one day Florida State Prison followed by 4 years of probation, his attorney refused to allow the Defendant to accept the State's offer and instead advised him to enter an open plea.
>
> At the May 9, 2006 hearing, the Court heard testimony from the Defendant's former attorney, Christopher Cardamone, Esq. He testified that he had informed the Defendant of the plea offer. However, he testified that the Defendant informed him that he wished to enter an open plea and ask for a "straight time offer," meaning a sentence that did not include prison with consecutive probation. (See May 9, 2006 Transcript attached).
>
> Finally, the Court denied the Defendant's motion at the May 9, 2006 hearing stating the following:
>
> > I've had a chance to review the transcript of the proceedings in which Mr. Sheppard admitted to violating the terms and conditions of his probation, and at this time I'm going to deny his Motion to Withdraw his Plea.

(See May 9, 2005 Transcript, attached).

It is therefore ORDERED AND ADJUDGED that Defendant's Motion is hereby DENIED.

(V1, R106-107). On appeal, the Second District Court of Appeal granted in part Mr. Sheppard's motion for rehearing, reversing the trial court's order denying Sheppard's pro se motion to withdraw plea and remanding to the trial court with direction that the motion be stricken as a nullity, while certifying direct conflict with the Fourth District Court of Appeal's decisions in Peterson and Bermudez. Sheppard, 988 So. 2d at 74-79.

The standard of review for resolving the certified direct conflict between the Second District Court of Appeal decision in Sheppard and the Fourth District Court decisions in Peterson and Bermudez appears to be de novo as it involves a pure question of law on whether an exception exists as to the prohibition against "hybrid representation" and a pro se motion to withdraw plea filed, pursuant to Fla. R. Crim. P. 3.170(l), being treated as a nullity unless such motion contains an unequivocal request to discharge counsel; that being when the pro se motion to withdraw plea, though containing no unequivocal request to discharge counsel, contains allegations of counsel misadvice or coercion that reflect an "adversarial relationship" between a pro se defendant and his court-appointed counsel that negates the prohibition against "hybrid representation" and precludes striking the pro se motion to withdraw plea as a nullity. See State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The

standard of review for reviewing a trial court order denying a motion to withdraw plea, filed pursuant to Fla. R. Crim. P. 3.170(l), is abuse of discretion. See Woodly v. State, 937 So. 2d 193, 196 (Fla. 4th DCA 2006)(standard of review of trial court's denial of motion to withdraw plea is abuse of discretion, citing Boule v. State, 884 So. 2d 1023, 1024 (Fla. 2d DCA 2004)).

The Second District Court of Appeal has repeatedly held "[a] rule 3.170(l) motion to withdraw plea filed by a criminal defendant who is represented by counsel is a nullity, unless the defendant makes an unequivocal request to discharge counsel." King v. State, 939 So. 2d 1196, 1196 (Fla. 2d DCA 2006), citing Johnson v. State, 932 So. 2d 1169, 1170 (Fla. 2d DCA 2006); Grainger v. State, 906 So. 2d 380, 382 (Fla. 2d DCA 2005); Mourra v. State, 884 So. 2d 316, 320-21 (Fla. 2d DCA 2004)(defendant does not have a constitutional right to "hybrid" representation; that is, to be represented both by counsel and by himself such that pleadings filed by a criminal defendant who is represented by counsel are generally treated as a nullity, unless they include some unequivocal request to discharge counsel, applying the rule set out in Logan v. State, 846 So. 2d 472, 474 (Fla. 2003), generally to pro se motions pursuant to rule 3.170(l)); see also Sheppard, 988 So. 2d at 76-77.

The Fourth District Court of Appeal, in Bermudez, 901 So. 2d at 984-85, however, distinguished the rule set out in Mourra and Sheppard based on a pro se allegation of misadvice establishing

an adversarial relationship between defendant and his attorney that negated the prohibition of this "hybrid representation," thereby, precluding the striking of the pro se motion to withdraw plea that does not include an unequivocal request to discharge counsel. In particular, the Fourth District Court of Appeal, in Bermudez, citing Peterson, held:

> The state also argues that Bermudez's pro se motion was a nullity as the second district found in Mourra v. State, 884 So. 2d 316 (Fla. 2d DCA 2004). In Mourra, the second district held that pleadings filed by a defendant who is represented by counsel are a nullity unless they include some unequivocal request to discharge counsel. Id. at 321. However, in our decision in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004), this court held that there is an exception to this rule when the defendant claims his counsel coerced him into entering the plea. Id. In Peterson, the defendant filed a pro se motion to withdraw his plea, alleging that he was coerced into pleading no contest. However, his argument before this court was not coercion but misadvice by his attorney. Peterson was not threatened nor was he promised anything for entering into the plea. Nonetheless, the alleged misadvice created an adversarial relationship between Peterson and his attorney, thereby negating the prohibition of this "hybrid representation." Id. at 1129-30. In the instant case, Bermudez alleged that he was promised by his attorney that he would get a shorter sentence if he entered a plea of guilty. We consider the alleged promises asserted by Bermudez to create an adversarial relationship with his attorney and, therefore, preclude the striking of his pro se motion.

Bermudez, 901 So. 2d at 984; see Peterson, 881 So. 2d at 1129-30; see also Whiting v. State, 929 So. 2d 673, 674-675 (Fla. 5th DCA 2006)("Pro se pleadings filed by a criminal defendant who is represented by counsel are generally treated as a nullity unless they include an unequivocal request to discharge counsel, Mourra,

884 So. 2d at 321, assert that counsel coerced the defendant into taking certain action, Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004), or reflect an adversarial relationship between the defendant and his counsel, Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005)"); Gonzales v. State, No. 5D07-3777 (Fla. 5th DCA Aug. 29, 2008), wherein the Fifth District Court of Appeal noted the conflict that exists in the Florida district courts, while appearing to approve the Fourth District Court of Appeal's approach on the issue before this Court in Petitioner's appeal:

> FN3. There is a conflict among Florida's district courts regarding the circumstances under which a trial court is required to recognize and act upon a defendant's pro se motions or pleadings when the defendant is represented by counsel. See Sheppard v. State, 988 So. 2d 74 (Fla. 2d DCA 2008). As already discussed, we require a trial judge to consider and act upon any pro se motion to withdraw plea that reveals an obvious or patent conflict of interest between the defendant and his or her lawyer. Carmona, 873 So. 2d at 349. The Fourth District takes a similar approach. See, e.g., Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004). The Second District, however, has a more narrow view, and would not require a trial court to consider a motion to withdraw plea even if it reveals a patent conflict of interest between the defendant and his or her lawyer, unless the motion also includes an unequivocal request to discharge the lawyer. Sheppard, 988 So. 2d 74. Gonzales' motion to withdraw plea in this case did not reveal a conflict of interest, as we have already discussed, and did not contain a request to discharge counsel. That request was made in a separate motion, which the trial court did consider.

Gonzales, No. 5D07-3777 at slip op. 3 n.3, citing Carmona v. State, 873 So. 2d 348, 349 (Fla. 5th DCA 2004)("when a patent conflict of interest arises between counsel and client in a

motion to withdraw proceeding, the court has a duty to offer the client conflict-free counsel"). The Fourth District Court of Appeal in Bermudez and Peterson, contrary to the Second District Court of Appeal in Sheppard, recognized misadvice by counsel as to a plea and sentence could create an adversarial relationship between a defendant and his counsel that negated any prohibition against hybrid representation and precluded striking the pro se motion. Similarly, in Sheppard's case, APD Cardamone's misadvice and coercion as to the length of sentence he could procure for Sheppard if he pleaded open to violating his community control which resulted in Sheppard being sentenced to two consecutive five-year terms in prison instead of concurrent two-year terms of probation promised by APD Cardamone or concurrent terms of a year and a day in prison followed by four years probation as offered by the state, which offer Sheppard wanted to accept but for APD Cardamone's misadvice and coercion, that created an adversarial relationship that negated any prohibition against "hybrid representation" and precluded striking Sheppard's pro se motion to withdraw plea as a nullity. In Mr. Sheppard's case, he alleged in para. 3 of his pro se motion to withdraw plea that prior to the hearing on the violation of community supervision, he spoke with counsel who informed him of one year and one day plus four years probation plea/admission offer from the state which offer Sheppard told his counsel that he wanted to accept, however, his counsel refused to allow Sheppard to accept the state’s offer,

telling Sheppard that he was sure he could get him 2 years probation if he would enter an open plea/admission of guilt to the court. (V1, R77). Sheppard's pro se motion alleged in para. 4 that pursuant to counsel's instructions, Sheppard entered an open plea/admission of guilty to the court on 8-4-05, and contrary to his counsel's representation, Sheppard was sentenced to 10 years imprisonment. (V1, R77). Sheppard's pro se motion to withdraw plea alleged that his counsel's misrepresentation and the subsequent imposition of 10 years (5 + 5) imprisonment by the court rendered Mr. Sheppard's plea/admission involuntary and that had Sheppard known he was not going to be sentenced to 2 years probation as informed by his counsel, he would not have entered an open plea/admission of guilt to violating probation. (V1, R78). These allegations were sufficient to show an adversarial relationship existed between Sheppard and APD Cardamone that negated the prohibition of "hybrid representation," thereby, precluding the striking of Sheppard's pro se motion to withdraw plea that did not contain an unequivocal request to discharge counsel and was filed while Sheppard was still represented by APD Cardamone, who testified for the state against Sheppard at the evidentiary hearing held on his pro se motion to withdraw plea. See Bermudez, 901 So. 2d at 984; Peterson, 881 So. 2d at 1129-30; see also Whiting 929 So. 2d at 674-75; Perrette v. State, 960 So. 2d 888, 889 (Fla. 4th DCA 2007)("pro se motion falls within an exception to the general rule preventing a defendant from filing pro se

motions while represented by counsel," citing Bermudez v. State, 901 So. 2d 981, 984 (Fla. 4th DCA 2005)). APD Cardamone's testifying for the State against Sheppard at the evidentiary hearing underscored the adversarial relationship that existed between APD Cardamone and Sheppard alleged in Sheppard's pro se motion to withdraw plea regarding misadvice, misrepresentation, and coercion as to the length of sentence, 2 years probation, APD Cardamone advised he could get Sheppard if he pled open instead of accepting the state offer of 1 year & 1 day followed by 4 years probation as Sheppard wanted to do. (V1, R76-78).

The Second District Court of Appeal, however, in finding Sheppard's pro motion to withdraw plea to be a nullity, declined to expand the nullity rule's prohibition against "hybrid-representation" to pro se motion to withdraw plea filed while represented by counsel unless it included an unequivocal request to discharge counsel, relying on Mourra, 884 So. 2d at 321, consistent with the limited exception to the nullity rule announced by this Court in Logan, 846 So. 2d at 474. Sheppard, 988 So. 2d at 78-79. In Logan, this Court reaffirmed the nullity rule and its prohibition against "hybrid representation," while carving out a limited exception for those cases wherein the pro se pleading contained an unequivocal request to discharge counsel. Logan, 846 So. 2d at 474-79; see also Johnson v. State, 974 So. 2d 363, 364-65 (Fla. 2008)(clarifying "that the rule announced in Logan is not limited to cases where the defendant is

represented by trial counsel" but "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"). The Second District Court of Appeal, in Sheppard, declined to recognize another exception to the nullity rule, adopted by the Fourth District Court of Appeal in Peterson and Bermudez, that expanded the exception to include a pro se motion to withdraw plea filed while represented by counsel if the pro se motion contained allegation(s) of counsel misadvice or coercion that reflect an "adversarial relationship" between the pro se defendant and his court-appointed counsel that negated any prohibition against "hybrid representation" and precluded striking the pro se motion to withdraw plea as a nullity. Sheppard, 988 So. 2d at 76-79 In declining to expand the exception to the nullity rule beyond the limited exception of a pro se motion to withdraw plea filed while represented by counsel only if the motion contained an unequivocal request to discharge counsel, the Second District noted that the potential preclusive effect of Fla. R. Crim. P. 3.170(l) motions on postconviction motions argued against allowing defendants with complaints about their counsel's advice or performance to pursue pro se motions under the rule. Sheppard, 988 So. 2d at 78, citing Mourra, 884 So. 2d at 319-21. Further, the Second District Court of Appeal

expressed concern that the exceptions to the nullity rule recognized by the Fourth District Court of Appeal in Peterson and Bermudez were so broad that they threatened to swallow the rule, noting that "[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," Sheppard, 988 So. 2d at 78-79, citing 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). The Second District Court of Appeal lamented that under Peterson and Bermudez, motions filed by defendants alleging these sorts of complaints had to be considered on the merits instead of being stricken as nullities and that handling of pro se rule 3.170(l) motions in this manner would seriously undermine the general rule prohibiting pro se representation by a defendant with counsel. Sheppard, 988 So. 2d at 79. Finally, the Second District Court of Appeal found that in addition to undermining the nullity rule, the exception in Peterson and Bermudez would impose an additional strain on the criminal justice system in that valuable judicial time would be required to consider and dispose of the pro se rule 3.170(l) motions that would otherwise be struck as nullities, noting that conflict-free counsel would have to be appointed for

all of these defendants at considerable expense; that an assistant state attorney would have to appear at the hearing to defend the motion; and that despite all of this effort and expense, "these motions are routinely denied after an evidentiary hearing, because there was no coercion or misrepresentation and the plea colloquy fully explored these issues." Sheppard, 988 So. 2d at 79, citing and quoting Williams, 959 So. 2d at 832.

The Second District Court of Appeal's concerns for judicial economy and the potential preclusive effect on postconviction proceedings as well as its speculation as to the Fourth District Court of Appeal's exception swallowing up the nullity rule raised in Sheppard as rationale for the court declining to recognize the exception to the nullity rule adopted by the Fourth District Court of Appeal in Peterson and Bermudez are unpersuasive when compared to the Fourth District Court of Appeal's apparent rationale for adopting an additional exception in Peterson and Bermudez that focused on the effect of counsel's coercion and misadvice, particularly misadvice, in creating an "adversarial relationship" between defendant and his court-appointed attorney that negated the nullity rule's prohibition against "hybrid representation." The "adversarial relationship" created by counsel's misadvice or coercion involved, if not equated to, ineffective assistance of counsel that undermined the ability of that counsel to provide effective representation to a defendant any longer thereby negating the nullity rule since a defendant

who had been misadvised or coerced by his counsel with regard to the plea and/or sentence, or other legal matters relevant to his defense, was not being afforded effective assistance of counsel, guaranteed by the Sixth Amendment, by virtue of that counsel's misadvice or coercion underlying the adversarial relationship, leaving defendant with no good option or remedy but to file a pro se pleading informing the court of his counsel's misadvice or coercion. See Graves v. State, 642 So. 2d 142, 143-44 (Fla. 4th DCA 1994), wherein the Fourth District Court of Appeal explained why the 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), observing:

> In the first place, if the claim is that the appointed lawyer is not doing the lawyer's assigned job, one might wonder how that failure would ever come to light and be appropriately remedied if the person who is suffering from this inadequacy is not permitted to do so. Simply ignoring a pretrial assertion of ineffectiveness of counsel means that the claim is left to be taken up in post conviction relief proceedings. See, e.g., Johnson v. State, 501 So. 2d 94 (Fla. 1st DCA 1987). The supposed rule that all pro se filings by represented defendants are a nullity thus makes no sense, at least in the circumstance of ineffective assistance of counsel, and may lead to a manifest injustice. It will almost surely result in a frequent squandering of public resources on wasted trials that have to be repeated.
>
> In any event, the supposed nullity rule is contrary to Nelson. That decision makes no exception for pro se charges of ineffectiveness. Indeed it appears to have contemplated that it would be the defendant himself who would "make it appear." Nothing in Nelson requires that such charges be raised only by appointed counsel or

> they will be treated as a nullity. Nor is there anything inherent in the Sixth Amendment basis for Nelson that requires a trial court to treat as nonexistent all papers filed pro se by a represented defendant in the pretrial phase.
>
> Aside from the obvious problem with limiting nonperforming lawyer claims to being filed by only the allegedly nonperforming lawyers, there is simply no good reason to adopt such a rule. There is absolutely no reason to believe that the machinery of justice will become fouled by the filing of ineffective assistance of counsel claims by represented defendants. Those that present no basis for any action by the court can be safely rejected. The court has ample powers to treat any abuses of filing by overly litigious defendants.

Graves, 642 So. 2d at 144 (citation omitted); see also Logan, 846 So. 2d at 476-77, quoting Graves. A similar, albeit not exact, rationale regarding pro se charges of ineffective assistance or deficient performance of counsel can be applied to the Fourth District Court of Appeal's decisions, in Peterson and Bermudez, wherein the court held that counsel's misadvice and coercion reflected an adversarial relationship that negated the nullity rule and its effect, which was precisely what occurred in Mr. Sheppard's case, contrary to the Second District Court of Appeal's decision. Further, the adversarial relationship between Sheppard and APD Cardamone, outlined in Mr. Sheppard's pro se motion to withdraw plea, alleging misadvice and coercion, was highlighted and underscored when APD Cardamone testified against Sheppard at the evidentiary hearing held on Sheppard's pro se motion to withdraw plea while Sheppard stood by unrepresented. The Second District Court of Appeal's concerns for judicial

economy and the preclusive effect on postconviction proceedings as well as its speculation on the nullity rule being swallowed-up if the Fourth District Court of Appeal's exceptions in Peterson and Bermudez were followed do not outweigh Mr. Sheppard's right to have his counsel's misadvice or coercion brought to the attention of the trial court through a pro se pleading while he was still represented by that counsel since at the time Mr. Sheppard was no longer being effectively represented by his counsel due to the adversarial relationship that had been created as a result of APD Cardamone's misadvice and coercion regarding Sheppard accepting the state's offer and the sentence Cardamone said he could get Sheppard if he pleaded open instead. Moreover, no unequivocal request to discharge counsel in Sheppard's pro se motion would have conveyed that more clearly than the allegations of misadvice and coercion by APD Cardamone in Sheppard's pro se motion to withdraw plea, reflecting an adversarial relationship that negated the nullity rule and its prohibition against "hybrid representation," contrary to the Second District Court of Appeal's decision in Sheppard. For these reasons, this Court is urged to disapprove of and quash the Second District Court of Appeal's decision in Sheppard, while approving and reaffirmining the expansion of exceptions to the nullity rule and its prohibition against "hybrid representation" to include when a pro se motion to withdraw plea contains allegation of misadvice or coercion that reflects "adversarial relationship" between pro se

defendant and his court-appointed counsel that negates any prohibition against "hybrid representation" and precludes striking the pro se motion to withdraw plea as a nullity as the Fourth District Court of Appeal held in Peterson, 881 So. 2d at 1129-30; and Bermudez, 901 So. 2d at 983-85.

Should this Court approve the exception of the Fourth District Court of Appeal's decision in Peterson and Bermudez, then this Court is urged to consider the following additional arguments presented by Sheppard in his direct appeal to support entitlement to an evidentiary hearing on his pro se motion to withdraw plea represented by conflict-free counsel as it is established that once this Court has exercised jurisdiction it may, if necessary, consider any item that may affect the case such as following additional arguments presented by Appellant on direct appeal. See Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1983)("[o]nce an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case").

Florida Rule of Criminal Procedure 3.170(l) allows a defendant who has pleaded guilty or no contest to withdraw the plea on certain specified grounds. "When such a motion is filed after sentencing, the defendant bears the burden of proving that 'a manifest injustice has occurred.'" Iaconetti v. State, 869 So. 2d 695, 699 (Fla. 2d DCA 2004), citing Snodgrass v. State, 837 So. 2d 507, 508 (Fla. 4th DCA 2003)(quoting LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982)). Further, "[m]isrepresentations or

mistaken advice by counsel concerning the length of the defendant's sentence can constitute such a 'manifest injustice' and may be a basis for allowing a defendant to withdraw his or her plea." Iaconetti, 869 So. 2d at 699, citing State v. Leroux, 689 So. 2d 235, 236 (Fla. 1996); Daniel v. State, 865 So. 2d 661 (Fla. 2d DCA 2004); Snodgrass, 837 So. 2d at 508; see also Simeton v. State, 734 So. 2d 446, 447 (Fla. 4th DCA 1999). Once Sheppard alleged one of the permissible grounds to withdraw his plea, the pro se motion should have been considered facially sufficient to warrant a hearing. See Newsome v. State, 877 So. 2d 938, 940 (Fla. 2d DCA 2004), citing Garcia v. State, 846 So. 2d 660, 661 (Fla. 2d DCA 2003); see also Harris v. State, 818 So. 2d 567, 568-69 (Fla. 2d DCA 2002); Fla. R. Crim. P. 3.170(l); Fla. R. App. P. 9.140(b)(2)(A)(ii)(c)("an involuntary plea, if preserved by a motion to withdraw plea"). Because Sheppard's pro se motion, filed pursuant to Fla. R. Crim. P. 3.170(l), alleged the involuntariness of his plea, one of the enumerated grounds, and facts to support misadvice as to the length of sentence if Sheppard pleaded open instead of taking the state's offer, it was facially sufficient and warranted an evidentiary hearing. Garcia, 846 So. 2d at 661. "Because the defendant bears the burden of proof, when a defendant files a facially sufficient motion to withdraw a plea, the trial court must either afford the defendant an evidentiary hearing or accept the defendant's allegations in the motion as true except to the extent that they are

conclusively refuted by the record." Iaconetti, 869 So. 2d at 699, citing Daniel, 865 So. 2d at 661; Snodgrass, 837 So. 2d at 508. A motion to withdraw plea pursuant to rule 3.170(l) is a critical stage of the proceedings at which defendant is entitled to be represented by counsel. See Newsome, 877 So. 2d at 940; Garcia, 846 So. 2d at 661; Miller v. State, 838 So. 2d 1213 (Fla. 2d DCA 2003), citing Harris, 818 So. 2d at 568, ("a motion filed pursuant to Florida Rule of Criminal Procedure 3.170(l) has been treated as a critical stage of proceedings in the trial court for which the defendant is entitled to counsel"). "If the trial court decides to hold an evidentiary hearing, it must appoint conflict-free counsel to represent the defendant because such a hearing constitutes a 'critical stage' of the proceedings" which did not occur in Sheppard's case to his substantial prejudice." Iaconetti, 869 So. 2d at 699, citing Daniel, 865 So. 2d at 661; Hampton v. State, 848 So. 2d 405, 405 (Fla. 2d DCA 2003); see also Wofford v. State, 819 So. 2d 891, 891 (Fla. 1st DCA 2002). Sheppard's pro se motion to withdraw plea outlined a factual dispute or adversarial relationship between Sheppard and his counsel, APD Cardamone, concerning what occurred during private, off-the-record consultation on the state's plea offer and whether APD Cardamone gave Sheppard misadvice as to the length of sentence he would received if he pleaded open instead of taking the state's offer as Sheppard wanted to do. (V1, R76-78). In this situation, Sheppard was entitled to have conflict-free counsel

appointed and it was per se reversible error for the trial court to hold the evidentiary hearing on Sheppard's pro se motion to withdraw plea without appointing such conflict-free counsel to represent Sheppard. See Iaconetti, 869 So. 2d at 700, ("there was a factual dispute between Iaconetti and her counsel concerning what had occurred during a private, off-the-record consultation" and "[i]n this situation, Iaconetti was entitled to the appointment of conflict-free counsel, see Padgett v. State, 743 So. 2d 70, 74 (Fla. 4th DCA 1999), and it was per se reversible error for the trial court to hold a hearing on Iaconetti's motion without such counsel, Hampton, 848 So. 2d at 405").

The adversarial relationship between Mr. Sheppard and his court-appointed counsel, APD Cardamone, was even more evident at the evidentiary hearing held on Sheppard's pro se motion to withdraw plea where at APD Cardamone testified for the state in opposition to Sheppard's pro se motion instead of appearing in representative capacity as Sheppard's court-appointed counsel and adopting Sheppard's pro se motion to withdraw plea since the Office of the Public Defender appeared to have been appointed by oral order to represent Sheppard on May 2, 2006, which error led to the trial court's error in deciding Sheppard's pro se motion on the merits without appointing conflict-free counsel to represent Sheppard or conducting a Faretta inquiry to determine whether Sheppard had "knowingly and intelligently" waived right to counsel. By the time the trial court addressed Sheppard's

motion at the evidentiary hearing where APD Cardamone testified as a state witness, given Sheppard's allegation APD Cardamone had misadvised him about the sentence he would receive if he pleaded open as opposed to taking the state's offer of a year and a day plus four years of probation, it was patently clear that the position of APD Cardamone, Sheppard's court-appointed counsel when he entered his plea/admission to violating community control, had become adverse to Sheppard's and that APD Cardamone was no longer representing him such that Sheppard was entitled to have conflict-free counsel appointed to represent him at the evidentiary hearing in pursuing this motion. See Bermudez, 901 So. 2d at 984 ("[i]n Padgett v. State, 743 So. 2d 70 (Fla. 4th DCA 1999), this court reiterated that 'a criminal defendant facing incarceration has a right to counsel at every critical stage of the proceedings against him,'" id. at 72, and "[t]his court also noted that at Padgett's hearing, in which he and his counsel took adversarial positions on what happened while counsel was advising him concerning his appeal, he was entitled to the appointment of conflict-free counsel," id., such that "'denial of the right to counsel is not subject to a harmless error analysis,'" id. at 74); Garcia, 846 So. 2d at 661, ("[o]nce it became clear that Garcia and his counsel had adversarial positions concerning what actually happened while counsel was advising Garcia concerning the plea, Garcia was entitled to conflict-free counsel," citing Gunn v. State, 841 So. 2d 629

(Fla. 2d DCA 2003); Jones v. State, 827 So. 2d 1086 (Fla. 1st DCA 2002); Padgett v. State, 743 So. 2d 70 (Fla. 4th DCA 1999), and "denial of the constitutional right to assistance of counsel can never be treated as harmless error," citing Jones, 827 So. 2d at 1087); Newsome, 877 So. 2d at 940; Miller, 838 So. 2d at 1213; Wofford, 819 So. 2d at 892, ("[a]s Padgett and numerous other decisions point out, however, denial of the Sixth Amendment right to counsel is per se reversible error," citing Chapman v. California, 386 U.S. 18 (1967); Lee v. State, 690 So. 2d 664 (Fla. 1st DCA 1997)); see also Goldsmith v. State, 937 So. 2d 1253, 1256-57 (Fla. 2d DCA 2006)("in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits" associated with the right to counsel, quoting Faretta, 422 U.S. at 835, quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)), and "[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis" quoting McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8 (1984); citing State v. Young, 626 So. 2d 655, 657 (Fla. 1993)(harmless error doctrine does not apply when the court omits a Faretta inquiry)).

Unlike Grainger, 906 So. 2d at 381-83, wherein this Court noted but overlooked prejudicial reversible errors as occurred in Sheppard's case because the hearing should not even have taken place due Grainger’s pro se motion being a nullity, Sheppard’s

pro se motion to withdraw plea was not a nullity since Sheppard's facially sufficient pro se motion to withdraw plea alleged an adversarial relationship between Sheppard and his court-appointed counsel, APD Cardamone, based on misadvice of counsel that rendered Sheppard's plea or admissions involuntary, which negated any prohibition against hybrid representation such that an evidentiary hearing should have been and was held thereon. See Bermudez, 901 So. 2d at 984; see also Iaconetti, 869 So. 2d at 699, citing State v. Leroux, 689 So. 2d at 236; Daniel, 865 So. 2d at 661; Snodgrass, 837 So. 2d at 508; Simeton, 734 So. 2d at 447; Newsome, 877 So. 2d at 940, citing Garcia, 846 So. 2d at 661. Accordingly, unlike Grainger, the evidentiary hearing on Sheppard's pro se motion to withdraw plea, during which the prejudicial error(s) occurred as outlined above, should have taken place and Sheppard was substantially prejudiced thereby since he was not afforded conflict-free counsel as required by Florida law during the evidentiary hearing on his pro se motion to withdraw plea where at his court-appointed counsel, APD Cardamone, testified as a witness for the state. See Bermudez, 901 So. 2d at 984, citing Padgett, 743 So. 2d at 72-74; Iaconetti, 869 So. 2d at 699, citing Daniel, 865 So. 2d at 661; Hampton, 848 So. 2d at 405; Garcia, 846 So. 2d at 661, citing Gunn, Jones, and Padgett; see also Wofford, 819 So. 2d at 891.

Thus, the trial court prejudicially erred by denying Mr. Sheppard's pro se motion to withdraw plea after evidentiary

hearing where at Sheppard was neither provided with conflict-free counsel nor Faretta hearing to determine if he had knowingly and intelligently waived his right to counsel where his pro se motion to withdraw plea evidenced an adversarial relationship between Sheppard and his court-appointed counsel, APD Cardamone, although there was no showing in the record Sheppard was not represented at the time his pro se motion was filed nor was there an unequivocal request to discharge counsel in his pro se motion. (V1, R76-78, 106-107; SV1, R141). Sheppard was substantially prejudiced by the trial court's erroneous ruling denying his pro se motion since he was had not been provided with either conflict-free counsel or Faretta hearing to determine if he knowingly and intelligently waived his right to counsel as required by Florida law. Moreover, such error(s) cannot reasonably be considered to be harmless error since Sheppard's pro se motion to withdraw plea was denied without him being provided conflict-free counsel or Faretta hearing. See Goldsmith, 937 So. 2d at 1257; Garcia, 846 So. 2d at 661, citing Jones, 827 So. 2d at 1087; Wofford, 819 So. 2d at 892; see also State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The trial court's orders denying and striking Sheppard's pro se motion to withdraw plea should be reversed and remanded for an evidentiary hearing with Sheppard provided conflict-free counsel.

CONCLUSION

Petitioner, ANTHONY SHEPPARD, respectfully, urges this Court to resolve the certified direct conflict between the Second

District Court of Appeal's decision in Sheppard and the Fourth District Court of Appeal's decisions in Peterson and Bermudez by disapproving and quashing Sheppard while approving and reaffirming Peterson and Bermudez and reverse the trial court's orders denying and striking Sheppard's pro se motion to withdraw plea and remand for an evidentiary hearing where Sheppard is provided conflict-free counsel or, alternatively, remand to Second District Court of Appeal for further proceeding on merits of Sheppard's appeal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia A. McCarthy, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of November, 2008.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

RICHARD P. ALBERTINE, JR.
Assistant Public Defender
Florida Bar Number 0365610
P.O. Box 9000 - Drawer PD
Bartow, FL 33831

APPENDIX