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

REPLY BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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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. Petitioner, ANTHONY SHEPPARD, continues to rely on the facts, arguments, and legal authorities presented in his initial brief. Contrary to Respondent’s answer, an exception, 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), 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, contains allegations of counsel misadvice or coercion that reflect an "adversarial relationship" between a pro se defendant and his court-appointed counsel that negates 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, erroneously 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.

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 Sheppard's pro se motion to withdraw plea after an evidentiary hearing where at 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 Sheppard and APD Cardamone, his court-appointed counsel, that negated a prohibition against hybrid representation and precluded striking same as a nullity. (V1, R76-78, 106-107; SV1, R141). Anthony 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.

At the hearing held on Sheppard’s pro se motion to withdraw plea, 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 Sheppard's pro se motion to withdraw guilty plea/admission to probation

violation. (V1, R106-107). On appeal, the Second District Court of Appeal granted in part 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 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. However, the Fourth District Court of Appeal, in Bermudez, 901 So. 2d at 984-85, distinguished the rule set out in Mourra and Sheppard, ruling that a pro se allegation of misadvice established 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. 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, slip op.3, n.3 (Fla. 5th DCA Aug. 29, 2008), 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 regarding the length of sentences he could procure if

Sheppard 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 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 to violating his probation. (V1, R78). Contrary to Respondent's answer, these allegations were sufficient to show an adversarial relationship existed between Sheppard and his counsel, negating any prohibition of "hybrid representation," that precluded striking Sheppard's pro se motion to withdraw plea, which 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 Sheppard's pro se motion. 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, 901 So. 2d at 984). Plainly, APD Cardamone's testifying as a witness for the state against Sheppard at the evidentiary hearing underscored the adversarial relationship that existed between Cardamone and Sheppard, as 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 had 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 reflected 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 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.

Contrary to Respondent's answer, 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 the defendant any longer thereby negating the nullity rule since the 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; 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 and Respondent's answer. 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 as Sheppard stood by unrepresented. Contrary to Respondent's answer, 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 or effectively 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 decision in Sheppard. Thus, contrary to Respondent's answer, this Court should disapprove and quash the Second District Court of Appeal decision in Sheppard, while approving an additional exception to the nullity rule' 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 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.

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 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. Contrary to Respondent's answer, the Court should disapprove and vacate the Second District Court of Appeal decision in Sheppard, while approving the Fourth District Court of Appeal exception to the nullity rule in Peterson and Bermudez, and remand to the trial court with directions to reverse the trial court 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.

CONCLUSION

Petitioner, ANTHONY SHEPPARD, urges this Court to resolve the certified direct conflict between the Second District Court of Appeal decision in Sheppard and the Fourth District Court of Appeal decisions in Peterson and Bermudez, by disapproving and quashing Sheppard while approving and reaffirming Peterson and Bermudez, and reverse the trial court orders denying and striking Sheppard's pro se motion to withdraw plea, remanding for an evidentiary hearing where Sheppard is given conflict-free counsel or, alternatively, remand to Second District Court of Appeal for further proceeding on the 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 December, 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,

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