IN THE

SUPREME COURT OF FLORIDA

ERIC EDENFIELD, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC10-2146

AMICUS BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF PETITIONER EDENFIELD

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C. PRELIMINARY STATEMENT.

This brief is being filed by the Florida Association of Criminal Defense Lawyers ("FACDL"), the National Association of Criminal Defense Lawyers (NACDL), and the American Civil Liberties Union of Florida (ACLU-FL), in support of the Petitioner, ERIC EDENFIELD.

FACDL is a statewide organization representing 1,700 members, all of whom are criminal defense practitioners. FACDL's members can bring a unique perspective to the Court insofar as its members—over 300 of whom are Public Defenders and many of whom are charged with representing indigent defendants at first appearance in Florida courts—are familiar with the unique role defense counsel can play in ensuring that defendants are aware of the full panoply of consequences that flow from a guilty or no contest plea to a misdemeanor.

NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense lawyers and their clients. NACDL has 10,000 members nationwide – joined by 90 state and local affiliate organizations totaling more than 40,000 attorneys – including private criminal defense lawyers, public defenders, active and reserve military defense counsel and law professors committed to preserving fairness within America's criminal justice system.

NACDL currently has a particular focus, among others, on the increase of misdemeanor offenses throughout the country and the failure of court systems to protect those charged with them. In April 2009, NACDL released a study in which Florida was featured with six other states, entitled *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Court*. In August 2011, NACDL then released a narrower study focused solely on Florida, entitled *Three Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*. These studies are relied upon in this brief. Because this case raises important questions concerning the right to counsel for defendants charged with misdemeanors, NACDL offers its expertise in that area for the Court's consideration.

The ACLU is a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions. The ACLU of Florida is its state affiliate and has approximately 25,000 members in the State of Florida also dedicated to the principles of liberty and equality embodied in the United States Constitution and the Florida Constitution. The ACLU and its affiliates, including the ACLU of Florida, have long been committed to protecting constitutional rights where criminal charges are involved. The ACLU of Florida has participated in several cases in Florida's courts on this score. *See, e.g., Stelmack v. State,* 58 So.3d 874 (Fla. 2d DCA 2010) (*amicus curiae* brief asserting First Amendment issues in

application of criminal statute); *Hagopian v. Justice Admin. Comm'n,* 18 So. 3d 625 (Fla. 2d DCA 2009) (*amicus curiae* brief asserting interests of criminal defendant in involuntary appointment of counsel); *Limbaugh v. State, 887* So. 2d 387 (Fla. 4th DCA 2004) (*amicus curiae* brief asserting right to privacy in medical records sought by State for criminal investigation); *State v. Shank,* 795 So. 2d 1067 (Fla. 4th DCA 2001) (vacating conviction based on statute that prohibited publications tending to expose persons to hatred, contempt, or ridicule; held to violate First Amendment; direct representation). The proper resolution of this case is a matter of substantial concern to the ACLU of Florida.

D. SUMMARY OF ARGUMENT.

In the face of rising dockets, the Duval County Courts have streamlined their first appearance procedures in a manner that gravely threatens, and in many cases has already extinguished, the constitutional right to counsel of defendants charged with misdemeanors. The group of defendants charged with misdemeanors that came before the Duval County Court for first appearance in this case, which included Mr. Edenfield, was told via video that they had a "right" to waive counsel and that they might be able to resolve their cases that day. By contrast to those charged with felonies, Mr. Edenfield and the other defendants charged with misdemeanors were not given a financial affidavit to fill out for the appointment of counsel, nor were they told that the Court would assume they wanted counsel to be

appointed unless otherwise specified. This subtly conveyed to Mr. Edenfield and the other similarly situated defendants that the assistance of counsel was not as important in a misdemeanor case as in a felony case. As those who represent and work to safeguard the constitutional rights of *all* defendants, *Amici* respectfully disagree.

Mr. Edenfield was asked if he wanted counsel appointed and was permitted to waive the right with a bare bones colloquy that wholly failed to establish that the waiver was voluntary, knowing and intelligent. In doing so, he was exposed to numerous consequences, about which the trial court was not obligated to inform him. Because such hidden consequences are potentially life-altering for a defendant, the assumption that he will seek appointment of counsel should be no less applicable in a misdemeanor case than in a felony case. The trial court has no duty to, nor can it ethically, provide an individualized assessment of a defendant's case and the *tangible* risks of pleading guilty or no contest at first appearance. Mr. Edenfield's waiver of counsel was unconstitutional under sections 2 and 16 of article I of the Florida Constitution and Rule 3.111 of the Florida Rules of Criminal Procedure and the Duval County Court's system of "assembly-line justice" does not adequately prevent further constitutional violations.

E. ARGUMENT AND CITATIONS OF AUTHORITY.

1. *The Duval County Courts' Solution to Overburdened Dockets Does Not Adequately Safeguard the Right to Counsel for Misdemeanor Offenders and Led to an Unconstitutional Waiver of that Right by Mr. Edenfield.*

As the Supreme Court pointed out many years ago,

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of the trial court, in which the accused – whose life or liberty is at stake – is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

Johnson v. Zerbst, 304 U.S. 458, 465(1938). The trial court in this case did not fulfill this protective responsibility.

At first appearance hearings in Duval County Court, the court first plays a group of sometimes 100 or more defendants charged with felonies and misdemeanors a videotape explaining their broad constitutional rights and the advantages and disadvantages to waiving them. The judges then call each misdemeanant to the bench to ask him how he pleads. Mr. Edenfield did what the system is designed to have him do: he pled no contest so that he could go home that day. The Florida and National Associations of Criminal Defense Lawyers, along with the American Civil Liberties Union of Florida, file this brief to express its concern that Mr. Edenfield's case demonstrates that Duval County's system unconstitutionally encourages a defendant to waive his right to counsel despite

serious consequences about which competent attorneys have an obligation to warn. In this context, Mr. Edenfield's waiver of counsel cannot be considered voluntary, knowing, and intelligent.

It is well-settled that the holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the seminal case establishing the right to counsel for indigent defendants, is not limited to defendants facing felony charges. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the United States Supreme Court explained:

> [T]he problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial. . . . "[T] prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."
>
> . . . [A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.

Argersinger, 407 U.S. at 36-37 (footnotes omitted) (quoting *Baldwin v. New York*, 399 U.S. 66 (1970)). The application of *Gideon* also is not limited to trials, of course, but rather, extends to guilty pleas:

> Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

Id. at 34.

Florida has always carefully guarded the all-important right to counsel at all stages of a criminal proceeding, no matter what the charge. As eloquently put by this Court:

> Special vigilance is required where the fundamental rights of Florida citizens suspected of wrongdoing are concerned, for here society has a strong natural inclination to relinquish incrementally the hard-won and stoutly defended freedoms enumerated in our Declaration [of rights] in its effort to preserve public order. Each law-abiding member of society is inclined to strike out at crime reflexively by constricting the constitutional rights of all citizens in order to limit those of the suspect—each is inclined to give up a degree of his or her own protection from government intrusion in order to permit greater intrusion into the life of the suspect. The framers of our Constitution, however, deliberately rejected the short-term solution in favor of a fairer, more structured system of criminal justice. . . .

Traylor v. State, 596 So. 2d 957, 963 (Fla. 1992). For this reason, this Court has held that sections 2 and 16 of article I of the Florida Constitution stretch farther than the Sixth Amendment, providing even more protection for defendants facing misdemeanor charges than the United States Constitution. That is, while the Court in *Argersinger* and its subsequent case, *Scott v. Illinois*, 440 U.S. 367 (1979), limited the right to appointed counsel to cases in which the defendant was *actually* incarcerated, *Scott*, 440 U.S. at 373, Florida indigent defendants have a right to counsel in *all* criminal proceedings as long as their charged offenses are *punishable* by imprisonment, whether or not that punishment is meted out. The only exception is where the trial judge "opts out" by certifying pre-trial that the defendant will not

be incarcerated for the charged offense. *Fla. R. Crim. P.* 3.160(e); *Fla. R. Crim. P.* 3.111(b)(1); § 27.51(1)(b)(1)-(2), Fla. Stat. (2006).

Yet, this noble ideal has become an empty promise as the number of arrestable offenses multiply each year and the number of defendants charged follow suit.[1] The county court in this case made it clear that its assembly line approach to first appearances is designed to deal with one thing—its overcrowded docket:

> [T]he real world facts are that sometimes we are confronted with first appearance hearings with over 100 defendants in each session. . . .You know, I don't mean to have it rest upon the fact that we have too many cases in our system but what I think is important is that individuals are advised, that they are knowledgeable about the rights that they have, the advantages and disadvantages of self-representation and that I have done enough to ensure that that has been done. Otherwise, our system is going to grind to a halt, and if our appellate courts say that's what we want have at it, but we are elevating form over substance when we start saying to the Judges that you have to in each and every case do each and every thing for each and every defendant. . . . Either I have got to be there for 24 hours to handle a three-hour calendar comes up [sic]. Maybe that's a decision I have got to start doing but it frustrates me all of these rights that we do have to be compatible with a system of justice that protects a defendant's rights but still works.

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[1] The volume of misdemeanor cases nation-wide is estimated to have more than doubled in the past 34 years, jumping from five million in 1972 to 10.5 million in 2006. ROBERT C. BORUCHOVITZ, MALIA N. BRINK, AND MAUREEN DIMINO, *Minor Crime, Massive Waste: The Terrible Toll of America's Misdemeanor Courts*, at11 (Nat'l Assoc. of Crim. Def. Lawyers 2009), available at http://www.nacdl.org/reports/. Nearly half a million people pass through Florida's misdemeanor courts each year. ALISA SMITH AND SEAN MADDEN, *Three Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, at 14 (Nat'l Assoc. of Crim. Def. Laywers 2011), available at http://www.nacdl.org/reports/.

(Pet. App. 76-83.)

From a defense perspective, the purpose of first appearance for an indigent defendant is generally to provide for a meeting between defendant and appointed counsel, negotiate a deal with the state or plead "not guilty," and present arguments to the court to support a request for release pending resolution of the case. Most misdemeanants, it is safe to assume, are released on their own recognizance pending trial or a plea. During this time, the consequences of each approach can be discussed in a thorough and individualized manner. Thus, it will generally be in a defendant's best interest to request appointed counsel at arraignment. Nonetheless, the video played to Mr. Edenfield and numerous other defendants appearing for arraignment at the same time discourages this approach.

First, the video addresses the defendants charged with felonies separately from those charged with misdemeanors, though all of the defendants hear the entire presentation:

> Now, for those of you who are charged with felonies, today's hearing is a probable cause determination and a bond hearing. . . . If you want the Court to appoint an attorney to represent you on your felony, you should have already filled out a financial affidavit. Since you are charged with a felony, the Court will assume that you wish to have a lawyer appointed to represent you.

(Pet.'s App. at 39-40) No such assumption is conveyed to the defendants charged with misdemeanors and there is no indication in the record that they are

automatically given financial affidavits to fill out. (Pet.'s App. at 40) In fact, they are instructed simply that if they are in court on a misdemeanor charge and their case has not been assigned to a particular judge, "it may be possible to resolve your case today." (Pet.'s App. at 40) They are read the statutory maximums and minimums for the types of misdemeanor offenses, the three types of pleas are explained, and they are read the various rights that they relinquish if they waive counsel and/or plead guilty or no contest. They are then informed that they will be asked if they want an attorney and what they intend to plead. (Pet.'s App. at 43-4)

At the very least, this puts the onus on the defendant charged with a misdemeanor to request counsel, which is not the case with defendants charged with felonies. At worst, it subtly conveys to the defendants that a defendant charged with a misdemeanor does not need counsel to achieve the best possible outcome in his case.

That presumption continued in Mr. Edenfield's colloquy with the judge, which clearly fell far short of the requirements of *Faretta v. California*, 422 U.S. 806 (1963), as applied by Florida courts. Indeed, the entire colloquy probably took less than three minutes. *See* Pet.'s App. at 34-6.

The most important distinction between judge and defense counsel is counsel's ability to advise her clients about the likelihood of success at trial and of the ramifications of a plea. This is reflected by the American Bar Association's

commentary to ABA Pleas of Guilty Standard 14-3.2, which states that the court's inquiry before accepting a guilty plea "is not, of course, any substitute for advice by counsel" based on the following reasoning:

> The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

See also ABA Pleas of Guilty Standard 14-3.2(f) cmt. at 126. For a large majority of defendants facing misdemeanor charges, a no contest plea may be in their best interest. But for a growing minority, there are extenuating circumstances that should give the defendant pause. As NACDL recently pointed out in a national report on misdemeanor offenses, "In the years since the *Argersinger* decision, the collateral consequences that can result from any conviction, including a misdemeanor conviction, have expanded significantly. These consequences can be quite grave." ROBERT C. BORUCHOVITZ, MALIA N. BRINK, AND MAUREEN DIMINO, *Minor Crime, Massive Waste: The Terrible Toll of America's Misdemeanor Courts*, at12 (Nat'l Assoc. of Crim. Def. Lawyers 2009), available at http://www.nacdl.org/reports/.

For example, the United States Supreme Court recognized in *I.N.S. v. St.*

Cyr, that for an immigrant who faces possible deportation as a result of pleading guilty, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." 533 U.S. 289, 323 (2001) (citation omitted). *See also Padilla v. Kentucky,* 599 U.S. __, 130 S. Ct. 1473, 1476 (2010) ("We have long recognized that deportation is a particularly severe "penalty[.]") (citing *Fong Yue Ting v. United States,* 149 U.S. 698, 740 (1893)). For this reason, the *Padilla* Court held last year that defense counsel has a Sixth Amendment obligation to warn her client of the deportation consequences of a guilty plea in cases in which such consequences are both clear and all but inevitable, or "presumptively mandatory." *Padilla*, 599 U.S. at __, 130 Sup. Ct. at 1486.

Some misdemeanor offenses fall within this category. For instance, pursuant to section 893.147(1), Florida Statutes, possession of drug paraphernalia is a first-degree misdemeanor. Because possession of drug paraphernalia is an offense relating to a "controlled substance," deportation is presumptively mandatory. *See Luu–Le v. I.N.S.*, 224 F.3d 911, 914 (9th Cir. 2000). *See also* 8 U.S.C. § 1227(a)(2)(B).

Thus, if a noncitizen defendant charged with possession of drug paraphernalia is represented by counsel, *Padilla* requires counsel to inform the defendant that a guilty or no contest plea to this charge will result in deportation.

However, if that same noncitizen defendant has the misfortune of being charged in Duval County, then it is likely that the defendant will enter a guilty or no contest plea without the benefit of counsel at first appearance – meaning that the only warning that the defendant will hear is that the plea "may" result in deportation.

There are many other examples of the potentially dire consequences of a guilty plea to a misdemeanor. A defendant's vehicle may be impounded or his driver's license suspended or revoked, both of which could be required for the defendant's occupation.[2] He may be denied employment because of the conviction itself, or denied access to a wide array of professional licenses. His record may disqualify him from obtaining student loans or result in an expulsion from school. Additional consequences can include the loss of public housing and access to food assistance, which can affect not only for the misdemeanant but also his family. Finally, fines, costs and other fees associated with convictions are often staggering.

[2] For example, in *Bolware v. State*, 995 So. 2d 268, 276 (Fla. 2008), the defendant sought to vacate his guilty plea when he realized that one consequence of the plea was revocation of his driver's license for five years. This Court stated that even though trial courts would be required in the future to warn defendants that automatic revocation of a driver's license may be a consequence of a guilty plea, "We also hope that counsel include this important consequence when advising defendants about whether or not to plead guilty or *nolo contendere*." This "hope" goes unfulfilled if a defendant enters a guilty or no contest plea without the benefit of counsel and is simply informed of the *possible* consequence through the court's boilerplate warnings.

BORUCHOVITZ, BRINK, AND DIMINO, *Minor Crime, Massive Waste: The Terrible Toll of America's Misdemeanor Courts*, at 12 (citations omitted).

Fees and fines are particularly acute in Florida, which is using them more and more to fund the Florida court system.[3] According to a recent study by the Brennan Center for Justice, "[t]he [Florida] legislature has added more than 20 new categories of 'legal financial obligations' ("LFO's") to the criminal justice process since 1996." REBEKAH DILLER, *The Hidden Costs of Florida's Criminal Justice Fees*, at 1 (Brennan Center for Justice 2010), available at http://www.brennancenter.org/content/resource/FL_Fees_report/. The fees range from the cost of prosecution and court costs to restitution, and inevitably run over $1,000 for the average misdemeanor guilty plea. Rather than waiving fines for indigent defendants, most Florida clerks arrange payment plans, "but often without any judicial determination that an individual has the ability to make the scheduled payment plan amounts." *Id.*

> When individuals fail to make payments, they may suffer a range of consequences including late fees, driver's license suspensions and, sometimes, arrest and short-term incarceration if they fail to make

[3] In spring 2010, over sixty-four percent of guilty or no contest plea cases resulted in monetary sanctions out of over 1,600 cases observed in 21 Florida misdemeanor county courts. ALISA SMITH, J.D., PH.D., & SEAN MADDAN, PH.D., *Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, at 25, Table 23 (Nat'l Assoc. of Crim. Def. Lawyers 2010), available at http://www.nacdl.org/criminaldefense.aspx?id=22112&terms=reports.

> court appearances related to the debt. These incarcerations constitute a modern variation on debtors' prison: at root, individuals are incarcerated for their failure or inability to make payments (though the technical reason is failure to appear in court).

Id. at 14. Payment plans themselves generate additional charges even when the defendant is able to pay. State law authorizes clerks to charge debtors $25 to enroll in the partial payment plan or an additional $5 charge per month. *Id.* at 15. In 2009, the Legislature also passed a bill requiring clerks to use private collection agencies to collect fees that are unpaid after ninety days. The result has been to pass on a 40% surcharge from the collection agency to the debtor. *Id.* at 21.

Defendants have no way of knowing that these hidden costs lie ahead when they plead guilty, and they often have no means to pay them. This is especially true in DUI cases like Mr. Edenfield's, where the defendant's license is often suspended, thereby depriving him of a means of transportation to employment. Because of these sanctions and others listed above, the guiding hand of counsel is just as critical in all stages of a misdemeanor prosecution as in that of a felony.

After speaking with counsel, many defendants might still opt for a fine over jail time, for which they will also ultimately be charged; but the innocent defendant, or the one whose case the state cannot prove,[4] would almost certainly

[4] A perfect example is the scandal that broke recently revealing that the Florida Department of Law Enforcement (FDLE) has been burying proof that approximately forty percent of the intoxilyzers being used in Florida have been

prefer to try to get released on his own recognizance pending trial and to fight the charges against him before he would accept steep fines that could cripple him financially.

Not surprisingly, the statistics bear this out. A comprehensive study of a sample of Florida's misdemeanor courts, published this year by *Amicus Curiae* NACDL, found that in the twenty-one counties studied (Duval was not among them), defendants charged with misdemeanors who were not represented by counsel pled guilty or no contest 80.2% of the time. When they were represented by public counsel, that percentage went down to 64.2%. When they were represented by private counsel, it went down to 60.9%. These differences are statistically significant. SMITH & MADDAN, *Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, at 23. Startlingly, of those defendants who entered pleas of guilty or no contest, more than 50% were processed at arraignment in three minutes or less. *Id.* at 23, Table 13. Thus, the problem facing Duval County does not appear to be isolated, and nor is its unconstitutional solution. If the courts are overburdened with so many cases that they cannot safeguard a

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malfunctioning for as long as five years, thereby falsely inflating many drivers' blood alcohol levels. TODD RUGER, "Florida DUI cases built on faulty test results," Herald-Tribune, Oct. 8, 2011, available at http:www.heraldtribune.com/article/ 20111008/ARTICLE/ 111009605. A defendant charged with a misdemeanor DUI who is without counsel likely would not know enough to raise a defense based on such malfunctions.

defendant's right to counsel, the legislature must rectify the problem. In the meantime, Mr. Edenfield's uncounseled plea, which followed his unconstitutional waiver of counsel, must be vacated.

F. CONCLUSION.

This Court should vacate Mr. Edenfield's guilty plea as in violation of the Sixth Amendment right to counsel and remand for further proceedings.

Respectfully submitted,

/s/ Sonya Rudenstine

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G. CERTIFICATE OF SERVICE

Undersigned counsel hereby certify that a true and correct copy of the foregoing has been furnished to: David Robbins and Susan Cohen, counsel for the Petitioner, 233 E. Bay Street, Suite 1125, Jacksonville, Florida 32202; and the Office of the Attorney General, counsel for the Respondent, PL-01, The Capitol, Tallahassee, Florida 32399-1050, by U.S. mail this 31st day of October, 2011.

H. CERTIFICATE OF COMPLIANCE.

Undersigned counsel hereby certify that this brief is in 14-point Times New Roman font and therefore complies with the type-font limitation in Florida Rule of Appellate Procedure 9.210(a)(2).

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