IN THE SUPREME COURT OF FLORIDA

ERIC EDENFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC10-2146

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Respondent in the First District Court of Appeal, Appellee in the circuit court, and the prosecuting authority in the trial court, will be referred in this brief as Respondent, the prosecution, or the State. Petitioner, ERIC EDENFIELD, the Petitioner in the DCA, Appellant in the circuit court, and the defendant in the trial court, will be referred in this brief as Petitioner or by proper name.

The record consists of two volumes, which will be referenced according to the respective Roman numeral designated in the Index to the Supreme Court Record, followed by the appropriate page number, in parentheses. For clarity, the State will refer to the Appendix to Petitioner's Petition for Writ of Certiorari in the First District separately, as "Pet. App.," followed by the page number included in the appendix. "IB" will designate Petitioner's Initial Brief. The Florida Association of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, and American Civil Liberties Union of Florida will be referred to as "Amici" and their amicus brief referred as "Am. B." The State will refer to Petitioner's filings before the First District as "1st Dist.," followed by "IB" for the Initial Brief and "RB" for the Reply Brief.

STATEMENT OF THE CASE AND FACTS

Defendant's statement omits facts critical to the issues presented and the applicable standards of appellate review. Because of these serious defects, mere supplementation without extensive explanation would not render the statement comprehensible. Accordingly, the State declines to accept it in its entirety, urges the court to reject it, and presents the following statement of the case and facts:

On January 12, 2009, at 1:45 a.m., Petitioner was charged by citation with driving under the influence in violation of section 316.193(1), Florida Statutes. (Pet. App. 13-14.) On the afternoon of January 12, 2009, at 1:48 p.m., Petitioner appeared for first appearance before the county court. (Pet. App. 35-52.) At that time, Petitioner, as well as the other defendants who appeared at first appearance, received video instructions from Judge Eleni Derke, which included the following:

> Ladies and gentlemen, this is your first appearance hearing. Some of you are charged with felonies, some of you are charged with misdemeanors and some of you have both types of criminal charges pending. The charges against you are serious. I am now going to advise you of some very important constitutional rights which each of you have, so please pay attention to what I tell you. . . .
>
> Each of you also have the right to be represented by an attorney today and at each stage of the proceedings against you. If you are not able to hire an attorney, the Court will appoint one to represent you, if it determines you qualify for the services of a court appointed attorney . . . . If a lawyer is appointed to represent you, any communication with the Court will be through your lawyer.
>
> While you have the right to be represented by an attorney, the constitution also gives you the right to represent yourself and waive the right to the assistance of an attorney; however, there are some disadvantages in representing yourself. Some of the ways having a lawyer can help are as follows: A lawyer's legal knowledge of criminal law, criminal procedure, rules of evidence, and experience, may favorably affect bail and pretrial release possibilities; a lawyer's help may result in obtaining information about the case

> through the use of discovery; a lawyer can uncover potential violations of constitutional rights and take effective measures to address them; a lawyer may ensure compliance with speedy trial and statute of limitations provisions; an may identify and secure favorable evidence to be introduced later at trial on your behalf; a lawyer has the experience to advise you as to whether entering a plea is in your best interest; and might be able to negotiate with the State to bargain for different sentences or dispositions for your case; a lawyer can tell you the advantages and disadvantages of what you might say to the judge during your plea hearing and sentencing that will follow. Please understand that you will not get any special consideration from the presiding judge just because you are representing yourself. . . .

(Pet. App. 37-39.)

In the video, Judge Derke went on to explain that misdemeanor cases may be able to be resolved that day, that the "blue form" set out the maximum and minimum sentences based on any prior DUIs, their frequency, and the defendant's alcohol level at the time of testing. (Pet. App. 40-41.) Judge Derke explained the available pleas of not guilty, guilty, and no contest. (Pet. App. 42.) Judge Derke also explained the rights a plea of guilty or no contest would give up:

> If you enter a plea of guilty or no contest to the charges, please understand that you will be giving up the following rights: The right to a trial by jury or the right to a trial before a judge; the right to have the assistance of a lawyer through all proceedings, including pretrials, hearings on motions, and trial; the right to compel the attendance of witnesses to testify for you or on your behalf; the right to confront and cross-examine any witnesses who could testify against you; the right to remain silent; and the right not to be compelled to incriminate yourself; the right to require the State to prove your guilt beyond and to the exclusion of every reasonable doubt; the right to appeal any matter pertaining to the judgment and sentence in your case.
>
> When your name is called, please come forward. The judge will advise you of the charges against you. In some situations, the judge or the Assistant State Attorney may advise you of the sentence or disposition that will be imposed if you enter either a plea of guilty or no contest.

> The Court will also ask you if you want an attorney or if you want to represent yourself. You or your lawyer should advise the judge whether you wish to plead not guilty, gulity or no contest. Please disregard any advice that other inmates or anyone who is not your lawyer may have given you about the possible outcome of your case. . . .
>
> If it is your decision to resolve your case today by pleading guilty or no contest, the Court will usually impose sentence immediately. In some situations, your case may be passed to another date for sentence to be imposed.
>
> Please do not enter a plea of guilty or no contest if you feel threatened or coerced, or feel that special promises have been made to you out of court. . . .

(Pet. App. 43-44.)

After the video with Judge Derke was completed, Petitioner and the other defendants were collectively sworn. (Pet. App. 47.) At that time, the following colloquy occurred:

> **THE COURT**: Good afternoon, ladies and gentlemen. As indicated, I am Judge Cofer. I preside in Division H of the county court and this is your first appearance hearing.
>
> Before taking the bench this afternoon each of you had the opportunity to observe a video tape in which Judge Derke advises you of your constitutional rights and advises you of your rights to counsel, your right to represent yourself, and the disadvantages of self-representation.
>
> Is there anyone here who did not have an opportunity to view that video-taped explanation of rights?
>
> (No response.)
>
> **THE COURT**: No response.
>
> Is there anyone here who did not understand the rights as explained by Judge Derke on the video tape?
>
> (No response.)
>
> **THE COURT**: All right. I see no responses. We have a couple of private counsel . . . .

(Pet. App. 47-48.)

After addressing other defendants, Judge Cofer then had the following colloquy with Petitioner:

> **THE COURT**: Eric Edenfield. All right. Mr. Edenfield, you are charged with driving under the influence. Same question to you as to

the others. You are not required to respond but if you do, it must be truthful.

Do you have any prior convictions for DUI here or anywhere else?

DEFENDANT: No, sir.

THE COURT: All right. You appear to fall into the same minimum mandatories.

Do you want me to go back over them with you?

DEFENDANT: No, sir.

THE COURT: Did you wish for me to appoint counsel or do you wish to handle the case yourself?

DEFENDANT: I will do it myself.

THE COURT: All right. Have you read through the blue form?

DEFENDANT: Yes, sir.

THE COURT: Okay. Do you understand all the rights on the blue form?

DEFENDANT: Yes, sir.

THE COURT: How do you plead to the charge?

DEFENDANT: No contest.

THE COURT: All right. If you will please sign the blue form and the waiver of right to counsel.

(The defendant complies.)

THE COURT: Okay. Mr. Edenfield, you have entered a plea of no contest to one count of DUI. Do you understand that by entering that plea you are giving up the right to a trial, the right to remain silent during the course of the trial, the right to the assistance of a lawyer during trial, the right to compel the attendance of witnesses to testify on your behalf, the right to confront and cross examine any witnesses who might be called to testify against you, and the right to have the State prove its charges against you beyond a reasonable doubt? Do you understand all of those rights that are you [*sic*] giving up?

DEFENDANT: Yes, sir.

THE COURT: Are you entering this plea today because you believe it is in your best interest to do so?

DEFENDANT: Yes, sir.

THE COURT: All right. I will find that the plea is freely and voluntarily entered with the full understanding of the consequences. I also find that there is a factual basis for the entry of the plea based upon the sworn narrative on the arrest and booking report.

At this time, Mr. Edenfield, on your plea I will adjudicate you guilty of DUI, place you on six months probation with the special conditions that you perform 50 hours of community service, complete DUI school, pay fines and costs totaling $1,016, you must attend a Victim Impact Panel, your vehicle will be immobilized for a period of ten days, and I will recommend the minimum driver's license revocation of 180 days. I will also discharge the civil infraction of speeding. All right.

Is there anything I did to you that you did not expect or understand?

DEFENDANT: No, sir.
THE COURT: You will need to step in that room.

(Pet. App. 48-51.)

The Waiver of Right to Counsel form Petitioner signed and referred to in the colloquy provides:

> I have been advised that I have a right to have my lawyer present with me during all stages of these proceedings.
> I have been advised by the Court and understand that if I desire to have a lawyer, and if I am financially unable to employ or retain a lawyer to represent me, one will be appointed for me by the Court, without cost or obligation on my part.
> I understand that I am charged in this Court with DUI.
> . . .
> I hereby waive my right to a court appointed lawyer and request that I be allowed to represent myself and that I be tried without a lawyer.

(Pet. App. 16.)

Additionally, the Plea of Guilty or No Contest form for driving under the influence that Petitioner, the "blue form" referenced in the above colloquy, provides, in relevant part:

> **ADVISEMENT OF RIGHTS**
> I understand that I have the following listed rights under Florida and Federal Law and that by entering a plea of guilty or no contest to the charge(s) I am giving up these rights:
> . . .
> B. The right to have the assistance of a lawyer;
> . . .
> **WAIVER OF COUNSEL (If applicable)**
> I have been advised that I have a right to have an attorney with me during all stages of these proceedings. I have been advised by the Court and understand that, if I desire to have any attorney and if I am financially unable to employ or retain an attorney to represent me, an attorney will be appointed for me by the Court, without cost or obligation on my part at this time. I understand that I am waiving my right to a court appointed attorney and request that I be allowed to represent myself.
> . . .
> **PLEA TRUE AND CORRECT AND UNDERSTOOD**

> I have read and fully understand this plea of guilty or no contest form. Everything stated on the form is true and correct. I have no questions pertaining to it. I am entering this plea of guilty or no contest because I am guilty of the offense or feel it is in my best interest to do so. I have signed this statement of guilty or no contest plea and explanation of my rights in open court.
> . . .

(Pet. App. 17-23.)

On January 12, 2009, the county court rendered an Order Placing Defendant on Probation and a Judgment and Sentence. (Pet. App. 24, 27-29.)

On February 10, 2009, Petitioner, through counsel, filed a motion to withdraw plea pursuant to Rule 3.170(*l*), contending that the county court's inquiry into the waiver of counsel was insufficient for the court to determine that the waiver was knowingly and intelligently entered. (Pet. App. 30–33.)

At the hearing on Petitioner's motion, Petitioner presented no evidence that he was not present in the courtroom when the videotape was played, no evidence that he did not hear or understand the advice given on the videotape, no evidence that he did not read or understand his waiver of counsel form, no evidence that he did not read or understand the "blue form," no evidence that he did not understand he had a right to counsel, no evidence that he did not understand the nature of the proceedings, and no evidence that he was confused or misled in any way in entering his plea of guilty. (Pet. App. 66-83.)

Instead, Petitioner presented only legal argument in support of his motion. Nevertheless, during the course of the hearing, the county court judge, who was the judge that accepted the plea, explained a number of

facts related to the circumstances of his acceptance of Petitioner's plea, and responded, at length, to Petitioner's argument. That colloquy provides, in relevant part:

> **THE COURT**: Let me ask you a question, Ms. Cohen, because I think eventually the Courts are going to have – the Appellate Courts are going to have to grapple with this issue and are going to have to grapple with the reality of what we do in County Court.
>
> The County Court judges many years ago spent a great deal of time in drafting a general advisement of rights to defendants in first appearance courts and Judge Derke was kind enough to volunteer to be the person who would be videotaped to provide that advisement of rights because from a real world standpoint the rules require that we provide a first appearance hearing to individuals within 24 hours, and the real world facts are that sometimes we are confronted with first appearance hearings with over 100 defendants in each session.
>
> Yeah. If I had come into court this day and instead of having Judge Derke's videotape shown, I came in personally and I read the transcript of her advisement of rights to the group as a whole and then I followed that with the same inquiry that I typically make when I come out to court, that did everyone hear what I just said and everybody said yes. Did anybody not understand the rights as I have just explained them to you, all the rights? I don't hear any adverse response, and then a Mr. Edenfield comes up.
>
> Is it your position – and I have got to go through the whole 13-minute speech with Mr. Edenfield before I have obtained a valid waiver of counsel if he chooses to represent himself?
>
> **MS. COHEN**: Your Honor, as recognized by the First District Court of Appeal in some of these cases there is two parts. There is the advisement which is now on the videotape.
>
> **THE COURT**: Okay.
>
> **MS. COHEN**: And then there is the individual inquiry with the person regarding their understanding of the right to counsel which is what 3.111 addresses, their understanding so the Court can show on the record that there is a knowing and intelligent waiver of the right to counsel and there's at least two, maybe three cases where the Court specifically found in the last year or so, I think several of them out of Duval County Circuit Court cases where the record shows there was an advisement of the dangers and disadvantages but there is no inquiry. The Riley decision which was –
>
> **THE COURT**: Ms. Cohen, you very much avoided answering my question.
>
> **MS. COHEN**: The answer would be no. The answer would be--
>
> **THE COURT**: I would not have –
>
> **MS. COHEN**: You would have to – it would not be sufficient to do that as a group. You would have to individually not necessarily repeat everything but discuss with them did you understand on the video they

talked about the dangers and how far did you – have you been in court before? Have you represented yourself before? And recognizing that it is a cumbersome – (Inaudible) - there are a number of people. There are also a number of cases where the District Courts – and quite possibly because they have never been in the position this Court is in J-1 but have said difficult, long calendars, numbers do not – don't make it – don't solve the problem.

THE COURT: I think the complaint of the Courts are when these rights are given short shrift and totally ignored rather than there being an exacting requirement on the Courts that they go through each and every thing with each and every defendant individually.

I try not to assume that everybody that it [*sic*] appears before me is an idiot. I try to assume that when I ask generally to people have you heard this, is there anybody who didn't understand it? Tell me. I will go over it with you individually.

That gives me the confidence that the individuals have heard it and understand it, and when we then give them an additional rights form and plea form and I ask them have you read it, have you understood it and they say, yes, I have and I did that they are telling me the truth and it gives me the confidence that they now understanding all the rights.

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 insure 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.

Half of us in these courtrooms are irritated if I keep going over what the minimum mandatories are. It's like I don't want to hear it any more. You have done it ten times before me, Judge. Do you think I'm stupid? That's the look I get from defendants if I try to keep advising them of these things, that they don't want to hear it.

They just want to get their plea done and get out of there, and I don't think we have to assume that everybody in front of us is stupid for us to satisfy our jobs.

I will be the first to admit that in years past the Courts fell short insuring that individuals understood the rights that they were giving up and I think we have made great strides in doing so with the videotaped explanation of rights. I don't agree with you and I don't mean – don't mean to cut you off but I have read through the transcript and it's going to speak for itself. Either I have done it right sufficiently or it's not.

MS. COHEN: Yes, sir.

THE COURT: Either I have got to be there for 24 hours to handle a three-hour calendar comes up. 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.

You know, on someone like Mr. Edenfield do I need to inquire about his educational level or can I assume that because he is a [Jacksonville Electric Authority] lineman he has a certain level of smarts? He knows not to put electric plugs in his mouth and then plug them into a wall socket. He's at a certain level.

I can't say that about every defendant that comes in front of me but he's an individual and because it's part of the record and I know that from reading the docket, I know that's what he does so I think he's got a certain level of sophistication.

I don't think your motion is sufficient –

MS. COHEN: Yes, sir.

THE COURT: – to raise an issue that's allowed to be raised on a motion to withdraw a plea. In the greater scheme of things looking over this there are – is an extended 12-and-a-half to 13-minute advisement of rights that focuses a great deal on the right to counsel, the advantages of counsel, the disadvantages of self representation.

There is a clear waiver of those rights in the plea form. There is a questioning by me to all the defendants including Mr. Edenfield as to whether they've heard that advisement of rights, whether they understand those rights.

There is a secondary opportunity when I address Mr. Edenfield individually to find out whether he wants an attorney or wishes to represent himself. In my view that's sufficient. Without further showing of involuntariness that in and of it itself, that record does not establish an involuntary plea or evidence of an involuntary plea so I will deny your motion.

(Pet. App. 76-83.)

The county court entered an order denying Petitioner's motion to withdraw his plea. (Pet. App. 58.) Petitioner filed a motion for rehearing, contending that the Court "made no inquiry into the Defendant's age, education, ability to read and write, any mental or physical conditions, or any other factors that would affect his ability to make a knowing and intelligent waiver of the right to counsel." (Pet. App. 59-60.) Petitioner then abandoned that motion for rehearing by filing a Notice of

Appeal to the Circuit Court on April 20, 2009. (Pet. App. 61); FLA. R. APP. P. 9.020(h)(3).

The Circuit Court affirmed the order denying relief without opinion. (Pet. App. 1.) Petitioner filed a petition for writ of certiorari in the District Court of Appeal, First District ("First District") contending that the Circuit Court's affirmance was a departure from the essential requirements of law. (I. 1-23.) The First District denied the petition, finding that "the County Court had sufficient grounds to find a knowing and intelligent waiver under the applicable law and Rules." *Edenfield v. State*, 45 So. 3d 26 (Fla. 1st DCA 2010). The First District rejected Petitioner's contention that the waiver of counsel was invalid because the court did not ask specific questions regarding his age, education, and mental competence, noting that "since there are no 'magic words' required in a *Faretta* inquiry, there is no requirement that any specific questions be asked." *Edenfield*, 45 So. 3d at 30. The First District observed that Rule 3.111(d) "requires only: (1) advisement of the dangers of self-representation; and (2) enough of an inquiry to ensure the defendant is waiving the right to counsel knowingly and intelligently." *Id.* at 31. Applying these factors, the First District found that Petitioner's waiver was valid:

> Edenfield does not, and could not, claim that the County Court failed to advise him of the dangers of self-representation. These warnings were in the video. Nor does he claim that his waiver of the right to counsel was, in any way, unknowing or unintelligent. Edenfield was certainly literate and able to express himself to the trial judge. The error that Edenfield alleges does not have its genesis in Rule 3.111(d). Rather, he adds requirements to the Rule and would mandate the County Court to ask the specific questions he outlines before

> concluding any waiver was made "with eyes open." This claim is spurious. There are both procedural and factual reasons why this is so.

Id.

Procedurally, the First District noted that "the validity of a waiver cannot be judged simply by the rote recitation of certain, predefined questions." *Id.* "As noted above, there is no 'model inquiry' or series of questions which must be asked before a waiver can be accepted." *Id.* Moreover, the First District observed that the answers to the questions Petitioner claims were required are "largely irrelevant," since the Court cannot deny self-representation based solely on age or education. *Id.*

Factually, "[n]o less than six times, Edenfield declared he was entering the waiver with full knowledge of its consequences." *Id.* This finding was supported by the county court's "ability to personally observe Edenfield and evaluate his competency at the time he waived his right to counsel." *Id*. at 32.

Petitioner sought to invoke this Court's review jurisdiction, claiming that the decision below conflicted with eight other DCA opinions, and "misapplied" this Court's decisions in *State v. Bowen*, 698 So. 2d 248 (Fla. 1997); *Potts v. State*, 718 So. 2d 757 (Fla. 1998); *Hill v. State*, 688 So. 2d 901 (Fla. 1997); and *Rogers v. Singletary*, 698 So. 2d 1178 (Fla. 1997).

SUMMARY OF ARGUMENT

Throughout the course of the various lower court proceedings in this case, Petitioner has raised different, and sometimes conflicting arguments. Accordingly, his claims are largely unpreserved, procedurally barred and abandoned at various times.

Even if Petitioner's claims were properly considered on the merits, the are meritless. As this case is a result of a certiorari petition to the district court, Petitioner must demonstrate, not just legal error, but a departure from the essential requirements of law resulting in a gross miscarriage of justice. Petitioner cannot meet this heavy burden.

Although Petitioner and his Amici express hostility or outright denial to it, Petitioner has a constitutional right to self-representation, and a court that denies Petitioner that desire to exercise that right with a general understanding of the value of counsel violates that defendant's constitutional rights.

Petitioner's argument here, that the trial court must specifically ask questions regarding a Petitioner's age, education, experience with the justice system, and the nature and complexity of the case, as well as other factors, relies on an outdated form of Rule 3.111, is contrary to this Court and the United States Supreme Court's repeated pronouncements. Further, those district court cases that indicate otherwise are incorrect for the same reason. A competent defendant who has been advised of the disadvantages and dangers of self-representation cannot be denied the right to self-representation, regardless of age, education, experience, or the

nature of complexity of the case. The words the trial court employs are not what matters. What matters is that the defendant made a knowing an voluntary waiver and decision to exercise his right to self-representation. Petitioner's premise that a formulaic script of "magic words" is necessary is simply incorrect.

Petitioner also makes a number of erroneous implications about Rule 3.111's use of the phrase "thorough inquiry." However, Petitioner fallaciously presumes that an "inquiry" cannot be anything but entirely verbal, and that an "inquiry" cannot be "thorough" unless it is lengthy in duration. A court can "inquire" both verbally and by examining the record before it. A court may inquire "thoroughly" even when the length of time it engages in the inquiry is brief or does not encompass extensive pages of transcript. Neither of these implications is true. Yet both of these implications inform Petitioner's "form over substance" argument.

Petitioner also ignores that, as a result of his plea, there are two significant points relevant to his case. First, Petitioner has the burden to demonstrate that his plea was not, in fact, knowing and voluntary. Yet, Petitioner utterly failed in this burden as, when offered to opportunity to present evidence that he in fact failed to understand his rights, Petitioner specifically declined to do so, expressly choosing to offer no evidence that his plea was, in any way, involuntary.

Petitioner also repeatedly relies on cases involving a defendant who wishes to engage in self-representation for trial, not for entry of a plea. Yet, Petitioner ignores that the dangers and disadvantages of self-

representation for a plea are quite different than they are for trial. Indeed, a defendant can often make a rational chose to engage in self-representation for a plea for any number of reasons. Nevertheless, the reason why a defendant chooses to exercise his right to self-representation is not decisive; only that the defendant knowingly and voluntarily chooses to do so "with eyes open."

Here, after being extensively informed of his constitutional right to counsel, the dangers and disadvantages of self-representation via a lengthy video presentation, and thorough inquiry by the county court judge into the record and discussion with Petitioner, Petitioner knowingly and voluntarily waived his right to counsel and exercised his right to self-representation to enter a plea. Indeed, on no less than six times on three occasions during his first appearance, Petitioner was informed of and waived his right to counsel.

Petitioner has failed to meet his burden to demonstrate that the Circuit Court's affirmance of the County Court's denial of Petitioner's motion to withdraw his plea was a departure from the essential requirements of law resulting in a manifest injustice. This Court should approve the decision of the First District.

ARGUMENT

ISSUE: WHETHER THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN AFFIRMING THE COUNTY COURT ORDER FINDING THAT PETITIONER'S WAIVER OF COUNSEL AND DECISION TO REPRESENT HIMSELF WAS SUFFICIENT TO PLEAD GUILTY. (RESTATED)

A. Standard of Review.

The decision under review was not a direct appeal from the denial of Petitioner's motion to withdraw plea. The circuit court affirmed the county court's denial on direct appeal. Petitioner then sought certiorari in the DCA. A petition for writ of certiorari should be granted only when the lower tribunal has acted beyond its jurisdiction or in a manner that departed from the essential requirements of law. *Haines City Community Development v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995). Departure from the essential requirements of the law has been defined as "a violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983).

"It is well-established that certiorari should not be used as a vehicle for a second appeal in a typical case tried in county court." *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000). "A decision made according to the form of the law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, is not an illegal or irregular act or proceeding remedial by certiorari." *Heggs*, 658 So. 2d at 525. "Instead, we held that the proper inquiry under certiorari review is limited to whether the circuit court afforded procedural due process and whether it applied the correct law." *Ivey,* 774

So. 2d at 682; *see also Combs*, 436 So. 2d at 95 (in considering common law certiorari, district courts of appeal should be primarily concerned with the seriousness of the error, not the mere existence of error, and should exercise certiorari discretion only when there has been a violation of clearly established principles of law resulting in a miscarriage of justice); *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003)("the departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error"). In other words:

> The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Heggs, 658 So. 2d at 527-28 (quoting *Jines v. State*, 477 So. 2d 566, 569 (Fla. 1985)(Boyd, C.J., concurring specially.)).

Accordingly, it should be noted at the outset that the DCA was not reviewing Petitioner's case for "simple legal error." Petitioner was not entitled to relief in the DCA unless he demonstrated that the circuit court, on appeal, afforded procedural due process and applied the correct law. The DCA clearly did not err in applying that standard.[1]

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[1] When raised on direct appeal, "[w]hen reviewing a trial court's handling of a request for self-representation, the standard of review is abuse of discretion." *Aguirre-Jarquin v. State*, 9 So. 3d 593, 602 (Fla. 2009).

B. Petitioner's Claim that the Trial Court Failed to Ask Specific Questions Regarding Age, Education, and Experience Are Procedurally Barred.

Petitioner's claim regarding his education was not properly brought to the county court's attention nor raised on appeal before the Circuit Court. This argument was not in his Motion to Withdraw Plea and was not mentioned at the hearing on the claim. (Pet. App. 53-56, 68-83.) Rather, Petitioner raised this argument, for the first time, in his Motion for Rehearing. (Pet. App. 59-60.) However, Petitioner then abandoned that Motion for Rehearing by filing a Notice of Appeal before it was resolved. (Pet. App. 61.)

Rule 9.020(h) of the Florida Rules of Appellate Procedure provides that rendition of an Order is tolled by the filing of a timely motion for rehearing. However, subsection (c) establishes that the filing of a notice of appeal abandons a pending motion for rehearing, and provides, in relevant part:

> If such a motion or motions have been filed and a notice of appeal is filed before the filing of a signed, written order disposing of all such motions, all motions filed by the appealing party that are pending at the time shall be deemed abandoned, and the final order shall be deemed rendered by the filing of the notice of appeal as to all claims between parties who then have no such motions pending between them. . . .

FLA. R. APP. P. 9.020(h)(3).

Because Petitioner abandoned his motion for rehearing, any claims raised in that motion for rehearing were not properly preserved for appellate review by the Circuit Court and are procedurally barred from being raised on certiorari.

Furthermore, on appeal to the Circuit Court, Petitioner's entire argument was that the county court erred because the county court failed to engage in an "individual inquiry" and, therefore, not a "proper inquiry," not that the "inquiry" was not "thorough" because specific questions about age, education, and experience were not asked. (Pet. App. 99-120.) The argument Petitioner has presented to this Court is quite different than the one he presented to the county court (and did not abandon) and the Circuit Court and is unpreserved.

Both Florida Statutes and Florida case law require a defendant to preserve issues for appellate review by raising them first in the trial court. Section 924.051, Florida Statutes, provides, in relevant part:

> (3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court, or if not properly preserved, would constitute fundamental error.

§ 924.051(3), FLA. STAT. (2008) (emphasis added). Under the statute, "preserved" means an issue or legal argument timely raised and ruled on by the trial court, that is "sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." § 924.051(1)(b), FLA. STAT. (2008) (emphasis added). These statutory provisions are consistent with this Court's holdings requiring preservation of error. As this Court has found, proper preservation entails three components. First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection.

Third, "[i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *accord Rodriguez v. State*, 609 So. 2d 493, 499 (Fla. 1992) (stating that "the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal"), *cert. denied*, 510 U.S. 830 (1993). The purpose of this rule is to "place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978).

In reply before the district court, Petitioner asserted that his claim was one of fundamental error, referencing cases involving an inadequate or non-existent *Faretta* inquiry at trial. However, as discussed at length below, in this case, Petitioner entered a plea. Rule 9.140(b)(2)(A)(ii)c is unambiguous: "A defendant may not appeal from a guilty or nolo contendre plea except . . . an involuntary plea, if preserved by a motion to withdraw plea." Fla. R. App. P. 9.140(b)(2)(A)(ii)c.

Because Petitioner abandoned the only point where he made this argument in the county court (as well as not obtaining a ruling on the claim by the county court), this argument was not preserved for the Circuit Court on appeal. Additionally, because Petitioner's argument in the Circuit Court---that a inquiry must be completely individual---was not made before this Court, Petitioner is making claims different than those he made below and they are not preserved.

Furthermore, "[c]ommon-law certiorari is available only 'where no direct appellate proceedings are provided by law.'" *Heggs*, 658 So. 2d at 526 n.3. Accordingly, it is well-established that common law certiorari is not available when the petitioner has an adequate remedy at law. *See Martin-Johnson v. Savage*, 509 So. 2d 1097 (Fla. 1987). "Certiorari is not a substitute for an appeal." *State v. Smith*, 951 So. 2d 954, 956–57 (Fla. 1st DCA 2007).

An extraordinary writ cannot "be used 'for obtaining additional appeals of issues, which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been raised in' prior postconviction filings." *Mills v. Singletary*, 606 So. 2d 622, 623 (Fla. 1992) (underline added). Here, Petitioner could have properly preserved this issue on appeal to the Circuit Court, but did not and, therefore, failed to present this claim to the Circuit Court in a procedural posture in which it could have been resolved in his favor. Furthermore, the Circuit Court cannot depart from the essential requirements of law by not considering a claim not made to it. Accordingly, Petitioner cannot demonstrate that the Circuit Court departed from the essential requirements of law by failing to present this claim in a proper appellate posture to the Circuit Court. Petitioner cannot use an appeal of certiorari to this Court, any more than he can to the First District, as a substitute for direct appeal to the Circuit Court. The arguments made before this Court are procedurally barred.

C. The Circuit Court Did Not Depart from the Essential Requirements of Law.

1. The constitutional right to self-representation.

"Under the United States Supreme Court's ruling in *Faretta*[*v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975)], an accused has the right to self-representation at trial." *Tennis v. State*, 997 So. 2d 375, 377 (Fla. 2008). "A defendant's choice to invoke this right 'must be honored out of that respect for the individual which is the lifeblood of the law.'" *Id.* at 377-78 (quoting *Faretta*, 422 U.S. at 834). A defendant "must be free personally to decide whether in his particular case counsel is to his advantage." *Faretta*, 422 U.S. at 834. As such, "the Sixth and Fourteenth Amendments include a 'constitutional right to proceed *without* counsel when' a criminal defendant 'voluntarily and intelligently elects to do so.'" *Indiana v. Edwards*, 554 U.S. 164, 170, 128 S. Ct. 2379 (2008)(quoting *Faretta*, 422 U.S. at 807 (emphasis in original).

These observations provide the legal foundation for the issue in this appeal. *Faretta v. California*, and this Court's cases following *Faretta*, is not a limitation on a court's ability to find a waiver of counsel; rather, *Faretta* establishes that a competent defendant has a Sixth Amendment right to be free from counsel when the defendant so wishes.

Amici[2] treat this constitutional right dismissively: "Presenting waiver

[2] The State has moved to strike the Amici Brief for its inclusion of extra-record material. As of the filing of this brief, that motion remains pending.

of counsel as a *right* can only be characterized as spin." (Am. B. 8)(emphasis in original). This hostility toward the right of self-representation animates much of the argument of Petitioner and Amici. A court that refuses self-representation requested by a competent defendant with a general understanding of the value of counsel violates that defendant's constitutional rights, as this Court has plainly recognized. *See State v. Bowen*, 698 So. 2d 248 (Fla. 1997)(reversing trial court's refusal to permit self-representation based upon the defendant's lack of education; holding that "no citizen can be denied the right of self-representation" due to lack of education). While it is certainly understandable that associations of criminal defense attorneys may be hostile to the practice of defendants representing themselves without hiring criminal defense attorneys, in no way is it appropriate to characterize the right of self-representation as "spin."

2. History of Rule 3.111 and the waiver-of-counsel rules.

In the wake of *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006 (1972), a case expanding the right to appointed counsel for indigent defendants, this Court promulgated Florida Rule of Criminal Procedure 3.111, entitled "Providing Counsel to Indigents," which provided procedures for appointment of counsel to indigent defendants. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (Fla. 1972). The rule addressed a defendant's waiver of appointed counsel as follows:

> No waiver shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his

> mental condition, age, education, experience, the nature or complexity of the case, or other factors.

FLA. R. CRIM. P. 3.111(d)(3) (1973). Two years after this rule became effective, the United States Supreme Court decided *Faretta*, which, as stated, acknowledged that a defendant has the right to self-representation.

This Court addressed the tension between the waiver of counsel provision of Rule 3.111 and *Faretta* in *State v. Bowen*. In *Bowen*, the trial court refused to accept the defendant's waiver of counsel based upon the factors enumerated in Rule 3.111(d)(3), in particular that the defendant's education was insufficient to represent himself in a complex case. *Bowen*, 698 So.2d at 250-51. This Court reversed, holding that "once a court determines that a competent defendant of his or her own free will has 'knowingly and intelligently' waived the right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented." *Id.* at 251. "[N]o citizen can be denied the right of self-representation-or any other constitutional right-because he or she has only a high school diploma." *Id.* at 252.

In concurrence, Justice Wells expressed concern that Rule 3.111(d)(3), prohibiting a court from accepting a waiver of counsel "where it appears that the defendant is unable to make an intelligent and understanding choice because of his . . . age, education, experience, the nature or complexity of the case, or other factors," was inconsistent with this Court's ruling in *Bowen* and other decisions. *Bowen*, 698 So. 2d at 252

(Wells, J., concurring).[3] Justice Wells urged the Criminal Procedure Rules Committee of The Florida Bar to "immediately review the rule," considering it "in light of our decision and the district court decision in the instant case, as well as our decision in *Hill v. State*, 656 So. 2d 1271 (Fla. 1995), in which we emphasized that a defendant does not need the technical legal knowledge of an attorney before being permitted to proceed pro se." *Id.*

The following year, the Criminal Procedure Rules Committee took up the task of amending Rule 3.111 in light of *Bowen*. This Court amended the rule, removing the requirement that a court refuse to permit a waiver of counsel based upon the defendant's mental condition, age, education, experience, the nature or complexity of the case, or other factors, and replaced it with the following:

> Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent him or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

FLA. R. CRIM. P. 3.111(d)(3) (1998); *Amendment to Florida Rule of Criminal Procedure 3.111(d)(2)-(3)*, 719 So. 2d 873 (Fla. 1998). This Court also

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[3] Justice Wells also mentioned "mental condition." However, the U.S. Supreme Court has held that a defendant can be forced to have an attorney at trial if he suffering from a "severe mental illness" where he is competent for trial, but not competent to conduct the trial himself. *See Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008). Assuming *Edwards* applies in the context of a plea, Petitioner has never alleged, much less established, that he is suffering from schizophrenia or another "severe" mental illness.

added a provision to subsection (2) of Rule 3.111(d) requiring the court to "advise the defendant of the disadvantages and dangers of self-representation" before determining whether a waiver of counsel is knowing and intelligent. In short, this Court made it clear that a competent defendant who has been advised of the disadvantages and dangers of self-representation cannot be denied the right to self-representation, regardless of age, education, experience, the nature or complexity of the case, or other factors.

Indeed, this Court recently reiterated this point in *McCray v. State*, --- So. 3d ---, 2011 WL 2637377 (Fla. July 7, 2011), where it found:

> In *Potts* [*v. State*, 718 So. 2d 757 (Fla. 1998)], this Court explained that in assessing the validity of a waiver of counsel, "a reviewing court should focus not on the specific advice rendered by the trial court—for there are no 'magic words' under *Faretta*—but rather on the defendant's general understanding of his or her rights." 718 So. 2d at 760. In *Aguirre-Jarden* [*v. State*, 9 So. 3d 593, 602 (Fla. 2009)], we reaffirmed that principle of law, holding that what matters is not the words the trial court employs, but rather the record reflects a defendant who "makes a knowing and voluntary waiver of counsel." Although acknowledging our approval of a standard colloquy for trial courts to utilize, we stressed that "a trial judge is not required to follow the colloquy word for word"; rather, "the essence of the colloquy is to ensure that the defendant makes a knowing and voluntary waiver of counsel." 9 So. 3d at 602.

Id. at *13 (underline added and footnote omitted). This Court then found that "the omission of one or more warnings in a particular case does not necessarily require reversal so long as it is apparent from the record that the defendant made an intelligent and knowledgeable waiver of his right to counsel." *Id.*

It is for this reason, their ultimate reliance on a repealed rule of procedure, that this Court cannot rely upon many of the district court

cases Petitioner cites to support his argument.[4] The State agrees that a court must, pursuant to *Bowen*, determine that a defendant is competent to make the decision to represent himself, before permitting self-representation. However, to the extent that these cases hold that the failure to ask specific questions about the defendant's age, education, or experience with the judicial system *ipso facto* renders self-representation unlawful, the State does not agree and this Court's precedent is to the contrary. Rather, as the First District found below when it observed that cases imposing such a requirement are relying upon the version of Rule 3.111(d) prior to its 1998 amendment in the wake of *Bowen*:

> The current version of Rule 3.111(d) does not require questions regarding any of the information emphasized by Edenfield. Some cases indicate a mechanical, rote process must be followed, requiring specific questions about the defendant's age, education, mental condition, and experience with criminal proceedings. However, these holdings are based on a prior version of Rule 3.111(d)(3). This prior version stated a waiver was unacceptable unless the trial court found on the record that the defendant had made a competent choice based on his "mental condition, age, education, experience, the nature or complexity of the case, or other factors." This language was removed from the Rule in 1998, following *Bowen*'s holding that the inquiry needs to ensure only that the defendant is proceeding "with eyes open." 698 So. 2d at 251.

Edenfield, 45 So.3d at 30, n. 11.

The First District's conclusion makes sense. If a court cannot deny

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[4] *See Curtis v. State*, 32 So. 3d 759 (Fla. 2d DCA 2010); *Montgomery v. State*, 1 So. 3d 1228 Fla. 2d DCA 2009); *Rodriguez v. State*, 982 So. 2d 1272 (Fla. 3d DCA 2008); *Smith v. State*, 956 So. 2d 1288 (Fla. 4th DCA 2007); *Davis v. State*, 10 So. 3d 176 (Fla. 5th DCA 2009); *McGee v. State*, 983 So. 2d 1212 (Fla. 5th DCA 2008); *Beaton v. State*, 709 So. 2d 172 (Fla. 4th DCA 1998); *Watkins v. State*, 959 So. 2d 386 (Fla. 5th DCA 2007).

self-representation based upon a defendant's age, education, or experience, then how can inquiry into a defendant's age, education, or experience be so critical to the process that failure to inquire about them *ipso facto* renders self-representation unlawful? *See, e.g., McKenzie v. State*, 29 So. 3d 272, 280-81 (Fla.), *cert. denied*, 131 S. Ct. 116, 178 (2010) (rejecting defendant's claim that *Faretta* inquiry was defective because the court did not specifically inquire as to his criminal justice experience and noting that a precise colloquy is not a constitutional prerequisite). This Court attempted to remedy this conundrum by amending Rule 3.111(d) in 1998, but the district courts, relying upon case law pre-dating the amendment, have occasionally failed to heed it. Again, this Court has instructed in *Bowen* that as long as the defendant is competent to waive counsel, his right to self-representation cannot be denied.

Indeed, Rule 3.111 does not prescribe any particular form of procedure the court must use to determine that a waiver of counsel is knowing and intelligent waiver, or to advise the defendant of the disadvantages and dangers of self-representation. Furthermore, nowhere in the rule is specific script of the colloquy or, even a one-on-one colloquy between the court and the defendant (which was Petitioner's actual preserved argument in the district court), required.

Moreover, the United States Supreme Court has rejected the suggestion that any "formula or script to be read to a defendant who states that he elects to proceed without counsel," noting that "[t]he information a defendant must possess in order to make an intelligent election . . . will

depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). The Supreme Court in *Tovar* flatly rejected the formalistic "magic words" approach to adequacy of waiver advocated by Petitioner. Nor is there an absolute constitutional requirement that any waiver of counsel is *ipso facto* invalid unless all advisement of rights is conducted by a one-on-one individual repetition or individual interrogation by the court. *Tovar* clearly states that the question of whether the State has secured a constitutional, knowing and voluntary waiver of counsel depends on the particular facts and circumstances in each case. Even assuming *arguendo* that the court did not follow the specific requirements of rule 3.111(d) or follow the script suggested by the Conference of Circuit Judges, these shortcomings would not implicate a constitutional violation, and certainly do not constitute a departure from the essential requirements of law.

Moreover, this Court has recognized that the proper test as follows:

> The ultimate test is not the trial court's express advice, but rather the defendant's understanding. If the trial record demonstrates that [the defendant's] decision to represent himself was made with an understanding of the risks of self-representation, the knowing, intelligent, and voluntary waiver standard of the Sixth Amendment will be satisfied. So long as the record establishes that [the defendant] "'[knew] what he [was] doing and his choice [was] made with eyes open,'" the trial judge's decision to allow [the defendant] to represent himself will be upheld.

Rogers v. Singletary, 698 So. 2d 1178, 1180 (Fla. 1996) (citing *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1064 (11th Cir. 1986))(internal citations omitted) (underline added); *see also Smith v. State*, 956 So. 2d 1288, 1290

(Fla. 4th DCA 2007) (a court is "not required to follow the letter of the model colloquy.").

In light of numerous district courts reliance on the outdated and incorrect principle that an inquiry into age, education, experience, the nature or complexity of the case, and other factors is necessarily required for a defendant to exercise the right to self-representation irrespective of the circumstances, this Court should reassert that self-representation is not improper merely because the trial court failed to specifically inquire of the defendant's age, education or experience.

Nevertheless, here, Petitioner's age, education and experience were presented to the county court, even without Petitioner's "magic words" questions. The record before the county court states that Petitioner was at least 21 years old. (Pet. App. 8.) Further, the record indicates that Petitioner has 12 years of education.[5] (Pet. App. 10); *see Faretta*, 422 U.S. at 807 (requiring trial court to permit self-representation for trial of a defendant with a high school education). Additionally, the county court recognized at the plea withdrawal hearing that it had examined the record at the time of the waiver of counsel and found that Petitioner was a

[5] If Petitioner is suggesting that the court cannot look to its own files to consider the answers to such questions, that is meritless. As early as 1847, this Court had recognized that Florida courts can take judicial notice of their own records. *Randall v. Parramore*, 1 Fla. 409, 1847 WL 1060, *4 (Fla. 1847); *Foxworth v. Wainwright*, 167 So. 2d 868, 870 (Fla. 1964). This principle has applied in the context of a plea. *Cf. Sanchez v. State*, 33 So. 3d 753, 755 (Fla. 1st DCA 2010) (permitting consideration of the record before the trial court for factual basis of a plea); *James v. State*, 886 So. 2d 1032, 1033-34 (Fla. 4th DCA 2004) (same).

Jacksonville Electrical Authority lineman, which indicated that he had a certain level of sophistication, such that he could read, was not "an idiot," and had a certain level of "smarts." It was in this context that the county court indicated:

> You know, on someone like Mr. Edenfield do I need to inquire about his educational level or can I assume that because he is a [Jacksonville Electrical Authority] lineman he had a certain level of smarts? He knows not to put electric plugs in his mouth and then plug them into a wall socket. He's at a certain level.
>
> I can't say that about every defendant that comes in front of me but he's an individual and because it's part of the record and I know that from reading the docket, I know that's what he does so I think he's got a certain level of sophistication.

(Pet. App. 81-82.) Further, the county court specifically inquired of Petitioner whether he had any prior DUIs, which constitute an issue of his "experience" with the charge and the criminal justice system. Petitioner indicated he did not.[6] *See McKenzie*, 29 So. 3d at 280-81 (rejecting defendant's claim that *Faretta* inquiry was defective because the court did not specifically inquire as to his criminal justice experience and noting that a precise colloquy is not a constitutional prerequisite).

Essentially, Petitioner's argument is that an inquiry cannot be

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[6] Certainly, Petitioner cannot suggest that the trial court's inquiry was insufficient and its determination that he was knowingly and voluntarily exercising his right to self-representation was erroneous because Petitioner might have had experience with the criminal justice system on a different charge that he did not mention. Indeed, additional experience would militate towards an even stronger finding of a knowing and voluntary decision to exercise a right to self-representation. Nevertheless, prior legal experience is not necessary to exercise the right to self-representation, even when seeking to do so for trial. *See McKenzie v. State*, 29 So. 3d 272, 280-81 (Fla.), *cert. denied*, 131 S. Ct. 116, 178 (2010).

"thorough" under Rule 3.111 unless the court engages in a "redundant exercise" of verbal questioning of information that is already before the court. *See Edenfield*, 45 So. 3d at 30 n.11. Indeed, implicit in Petitioner's theory is that an "inquiry" cannot be anything but entirely verbal, and that "inquiry" cannot be "thorough" unless it is lengthy in duration. Neither of these implications is true. A court can "inquire" both verbally and by examining the record before it. A court may inquire "thoroughly" even when the length of time it engages in the inquiry is brief or does not encompass extensive pages of transcript. Petitioner's argument for "Simon-says" jurisprudence elevates form over substance and is entirely meritless.

Plainly, as address above and below, the county court's statements at the plea withdrawal hearing indicate that it conducted a "thorough inquiry" into the "accused's capacity to make a knowing and intelligent waiver" by examining matters that were in the record. FLA. R. CRIM. P. 3.111(d)(2).

3. The constitutional right to self-representation in the plea context.

The cases Petitioner cites all involve self-representation for trial, rather than to enter a guilty or no-contest plea. Petitioner's reliance on such cases ignores two distinct and significant points necessary to the proper analysis of this case. First, Petitioner entirely ignores that he has failed in his burden of proof below. Second, Petitioner misapprehends that the waiver of counsel in the plea context offers substantial procedural and substantive differences from waiver of counsel for trial or

an evidentiary hearing.

a. The burden of proof on the withdrawal of a plea under Rule 3.170(l).

This case arises from a motion to withdraw a plea pursuant to Rule 3.170(*l*) of the Florida Rules of Criminal Procedure. That rule provides:

> A defendant who pleads guilty or nolo contendre without expressly reserving the right to appeal a legally dispositive issue may file a motion to withdraw the plea within thirty days after rendition of the sentence, but only upon the grounds specified in Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)(a)-(e).

FLA. R. CRIM. P. 3.710(*l*). Where a motion to withdraw a plea is filed after sentencing, this Court has held that the defendant has the burden of proving that a manifest injustice has occurred and that withdrawal is necessary to correct the manifest injustice. *See State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003). And, since involuntariness of the plea is a "manifest injustice," the burden lies upon the defendant to prove that his plea was involuntary, e.g. that the defendant was not fully informed and acting voluntarily when entering the plea. *Id.* at 1042.

Further, a defendant cannot merely point to the transcript, claim the record does not demonstrate he was asked a particular question or informed of a particular right and obtain withdrawal of his plea. As this Court has recognized, "[t]he defendant instead must establish that *in fact* he did not understand his legal rights or otherwise entered the plea involuntarily." *Johnson v. State*, 60 So. 3d 1045, 1051 (Fla. 2011) (emphasis in original); *see Rogers*, 698 So. 2d at 1180 ("The ultimate test is not the trial court's express advice, but rather the defendant's

understanding.");

Here, where Petitioner is claiming there is a manifest injustice because his plea was not knowing and voluntary, it was incumbent on Petitioner to present evidence that his plea was not knowing and voluntary, not that the trial court may have engaged in some type of technical defect by failing to utter certain words. *See Tanzi v. State*, 964 So. 2d 106, 114 (Fla. 2007) (finding under more defendant-friendly 3.170(f) standard, "[A]t the trial level, in order to show cause why the plea should be withdrawn, mere allegations are not enough; the defense must offer proof that the plea was not knowingly and voluntarily entered.") (internal quotation omitted).

Indeed, as discussed above, this Court has consistently reiterated that the words the trial court employs are not the focus. Rather, the focus is whether the defendant has made "a knowing and voluntary waiver of counsel." *See Potts*, 718 So. 2d at 760; *Aguirre-Jarden*, 9 So. 3d at 602, *McKenzie*, 29 So. 3d at 280-81; *McCray*, 2011 WL 2637377 at *13.[7]

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[7] As the First District held in a slightly different context in *Allen v. State*, 463 So. 2d 351 (Fla. 1st DCA 1985):

> The key inquiry is not whether the trial court failed to follow proper procedure, but whether, as a matter of fact, the defendant, under the existing circumstances, knowingly and intelligently waived his constitutional rights. In other words, a conviction is rendered unreliable and void only when there is competent evidence to support a determination that the defendant *in fact* did not make a knowing and intelligent waiver.

Id. at 362 (italics in original, underline added, footnote and citations omitted); *State v. Caudle*, 504 So. 2d 419 (Fla. 5th DCA 1987) (agreeing with *Allen* that "key inquiry is not whether the trial court in the prior conviction had failed to follow the proper procedure in advising a defendant of his constitutional rights, but whether, *as a matter of fact*,

Further, this demonstration is even more critical in the posture of this case where Petitioner is seeking certiorari relief, because Petitioner must demonstrate a departure from the essential requirements of law "resulting in a gross miscarriage of justice." *Heggs*, 658 So. 2d at 527-28 (underline added).

Here, however, despite that the focus is on whether Petitioner actually knowingly and voluntarily waived counsel and exercised his right to self-representation, Petitioner not only failed to present any evidence at his hearing that he failed to in fact understand his rights, but specifically declined to do so:

> **THE COURT**: Isn't it incumbent upon you to present some evidence that the plea was involuntarily entered?
> **MS. COHEN**: No, sir. . . .

(Pet. App. 71.) Petitioner chose to offer no evidence or testimony that his plea was, in any way, involuntarily entered.

Petitioner also appears to complain (apparently divining from a cold record the length of time that he individually spoke to the trial court), that the trial court's inquiry did not take sufficient time for him to consider his waiver of counsel and decision to exercise his right to self representation. (IB. 15.) However, although provided a hearing on his motion to withdraw, Petitioner chose to present no evidence that his decision to engage in self-representation was involuntary because he did

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the defendant knowingly and intelligently waived those rights.") (italics in original).

not have sufficient time to consider his exercise of that right. (Pet. App. 71.)

Petitioner has utterly failed to meet his evidentiary burden that his plea was in fact involuntary and, therefore, cannot demonstrate that his plea resulted in a manifest injustice, much less that the Circuit Court's affirmance was a departure from the essential requirements of law resulting in a gross miscarriage of justice.[8]

b. Exercising the right to self-representation for entry of a plea, as compared to exercising the right for trial.

Additionally, waiving counsel for trial or an evidentiary hearing obviously involves far different dangers and disadvantages of self-representation than in the context of a plea. When a defendant wishes to engage in self-representation at a trial or an evidentiary hearing, the

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[8] In the First District, Petitioner cited numerous cases, often in the context of a defendant who wishes to discharge appointed counsel during trial, discussing the *per se* reversible nature of the absence of a *Faretta* inquiry and the failure to renew the offer of counsel at each critical stage. However, as stated, this case involves a plea. Rule 9.140 is unambiguous that a defendant may not appeal from a guilty or nolo contendre plea except, when based on "an involuntary plea, if preserved by a motion to withdraw plea." Fla. R. App. P. 9.140(2)(A)(ii)c. As indicated above, to successfully move to withdraw a plea after sentence, a defendant must demonstrate a manifest injustice. FLA. R. CRIM. P. 3.170(*l*); *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003). Accordingly, where a record provides a finding of a knowing and voluntary waiver of counsel and desire to exercise the right to self-representation, it is a defendant who must show that he did not in fact engage in "a knowing and voluntary waiver of counsel." *See Potts*, 718 So. 2d at 760; *Aguirre-Jarden*, 9 So. 3d at 602, *McKenzie*, 29 So. 3d at 280-81; *McCray*, 2011 WL 2637377 at *13. As mentioned, on certiorari, it is Petitioner's burden to demonstrate that a departure from the essential requirements of law resulted in a "gross miscarriage of justice."

trial court must ensure that the defendant knows he is expected to conduct a trial or evidentiary hearing in his defense. This requires far different considerations than when the defendant merely wishes to enter a guilty plea without counsel's assistance. Indeed, a defendant who waives counsel and exercises the right to self-representation for trial or an evidentiary hearing must recognize that, among other things, he is required to make objections necessary to preserve error, present evidence, secure the appearance of witnesses, pursue an appeal, and waives any claim of ineffectiveness of counsel during the trial or evidentiary hearing. None of this is required when a defendant chooses to represent himself for a plea.

Furthermore, a defendant can often make a rational choice to engage in self-representation for a plea. A defendant who knows that he is not indigent may decide that the expense of hiring counsel is not necessary when he knows the likely sentence for his offense, such as when they are set out on the Duval County blue form. A non-indigent defendant who knows that he is guilty may determine that he does not need to hire counsel when he believes that counsel may charge him for representation that will not provide any significant benefit to the result of his case. A defendant may determine that he does not wish to post a bond, be appointed or hire an attorney and return to court for later court appearances and miss work for a case where he knows he is guilty. Nevertheless, the reason <u>why</u> a defendant chooses to exercise his constitutional right to self-representation to enter a plea is not decisive; only that a defendant

knowingly and voluntarily chooses to do so "with eyes open." *See McCray*, 2011 WL 2637377 at *13.

This is why many of the cases Petitioner relies upon, do not demonstrate that the Circuit Court departed from the essential requirements of law by affirming the county court. First, Petitioner ignores that none of these cases involve certiorari relief. Second, Petitioner ignores that the cases he relies upon from this Court involve a defendant waiving his right to counsel ***for trial***.

Indeed, even the factors included within Petitioner's own brief from *Porter v. State*, 788 So. 2d 917 (Fla. 2001), expressly address issues that are appropriate for a defendant who seeks to represent himself at trial, such as "the extent to which the defendant has had contact with lawyers prior to trial," "the defendant's understanding of the rules of procedure, evidence and courtroom decorum," "whether standby counsel was appointed and the extent to which he aided the defendant," and "whether the defendant was trying to manipulate the events of the trial." (IB. 12-13.) Petitioner chastises the trial court for not expressly inquiring these factors. Yet, to require a trial court to expressly ask such questions supports the State's point. Petitioner's "magic words" theory, that the county court cannot allow Petitioner to exercise his right to self-representation for purposes of a plea and accept that plea without considering factors that are entirely irrelevant to that determination and, as set out above, is legally erroneous.

Petitioner also implies---misleadingly---that a defendant must

unilaterally, presumably without being informed that he has a constitutional right to represent himself, and unequivocally exercise his desire to exercise his right to self-representation before a court can inform him of the dangers and disadvantages of that right. (IB. 13.) This argument, like Petitioner's requirement for a "magic words" colloquy, meritlessly elevates form over substance.

After having been extensively informed of his constitutional right to counsel, the dangers and disadvantages of self-representation via a lengthy video presentation,[9] Petitioner knowingly and voluntarily chose to exercise his right to self representation:

> **THE COURT**: Eric Edenfield. All right. Mr. Edenfield, you are charged with driving under the influence. Same question to you as to the others. You are not required to respond but if you do, it must be truthful.
>
> Do you have any prior convictions for DUI here or anywhere else?
>
> **DEFENDANT**: No, sir.
>
> **THE COURT**: All right. You appear to fall into the same minimum mandatories.
>
> Do you want me to go back over them with you?

---

[9] To the extent Petitioner complains or implies that an advisement by video presentation is improper, his claim has been both abandoned and affirmatively waived. Although Petitioner states in his Initial Brief before this Court, "He was also advised, via lengthy videotape, often in legal terms, regarding his rights, advantages of being represented by counsel, general minimum and maximum penalties, and the types of pleas that could be entered." (IB. 15 (underline added).) However, in his Reply Brief before the First District, Petitioner stated, unequivocally, "The Petitioner does not take issue with the ability of the court to advise defendants of their rights in a group, through the use of written forms, or through a videotape." (1st DCA RB. 10.) This Court does not address arguments on discretionary review that were not made to the intermediate appellate court. *See, e.g., Tillman v. State*, 471 So. 2d 32, *34-35 (Fla. 1985) (refusing to consider argument different than that made to appellate court).

DEFENDANT: No, sir.
THE COURT: Did you wish for me to appoint counsel or do you wish to handle the case yourself?
DEFENDANT: I will do it myself.

(Pet. App. 48-49.) Petitioner's implication that the trial court's question whether Petitioner wanted to represent himself is in some way inappropriate is entirely meritless.

4. The Circuit Court did not depart from the essential requirements of law resulting in a gross miscarriage of justice by affirming the county court where Petitioner knowingly and voluntarily waived counsel and exercised his constitutional right to self-representation.

Although Petitioner appears to have abandoned the argument here, Petitioner also contended before the District Court that the county court "failed to comply with the dictates of [Rule 3.111(d)] by failing to engage in an individual inquiry into the Petitioner's waiver of counsel." This is simply an incorrect statement of fact.

First, after Petitioner was advised of his right to counsel and the disadvantages of self-representation, the county court asked Petitioner, along with the other defendants, whether he had viewed and understood the video. (Pet. App. 37-49.) The County court then specifically asked Petitioner, "Did you wish for me to appoint counsel or do you wish to handle the case yourself?" (Pet. App. 49.) Petitioner then stated, "I will do it myself." (Pet. App. 49.)

Second, the trial court then asked Petitioner if he "read through that blue form," which Petitioner stated he had. (Pet. App. 49.) The trial court then asked Petitioner whether he understood "all the rights on the

blue form," which Petitioner stated he did. (Pet. App. 49.) Petitioner then signed the blue form. (Pet. App. 49.)

The blue form states:

> **ADVISEMENT OF RIGHTS**
> I understand that by entering a plea of guilty or no contest to the charge(s) I am giving up the following rights:
> . . .
> B. The right to have the assistance of a lawyer;
> . . .
> **WAIVER OF RIGHT TO COUNSEL (if applicable)**
> I have been advised that I have a right to have an attorney present with me during all stages of these proceedings. I have been advised by the Court and understand that if I desire to have an attorney, and if I am financially unable to employ or retain an attorney to represent me, one will be appointed for me by the Court, without cost or obligation on my part at this time. I understand that I am waiving my right to a court appointed attorney and request that I be allowed to represent myself.
> . . .
> **READ AND EXPLAINED BY JUDGE IN OPEN COURT**
> The Judge of this Court asked me if I understood this plea of guilty or no contest form in open court and explained any questions that I may have had. The Judge of this Court asked me if I wanted to plead guilty or no contest and give up these rights. I told the judge that I understood the contents of this form, understood my rights and wanted to plead guilty or no contest to this charge.

(Pet. App. 17-23 (bold in original, underline added).)

Third, Petitioner was provided and signed another Waiver of Right to Counsel form. (Pet. App. 49.) That form provides:

> I have been advised that I have a right to have my lawyer present with me during all stages of these proceedings.
> I have been advised by the Court and understand that if I desire to have a lawyer, and if I am financially unable to employ or retain a lawyer to represent me, one will be appointed for me by the Court, without cost or obligation on my part.
> I understand that I am charged in this Court with DUI.
> . . .
> I hereby waive my right to a court appointed lawyer and request that I be allowed to represent myself and that I be tried without a lawyer.

(Pet. App. 16 (underline added).)

Accordingly, on no less than six times on three occasions, Petitioner was informed of and waived his right to counsel. As the First District recognized:

> (1) [Petitioner's] "blue form" ("Plea of Guilty or no Contest") stated "I understand that I have the following rights . . . and that by entering a plea of guilty or no contest to the charge I am giving up these rights: [including] The right to have the assistance of a lawyer."
> (2) The "blue form" later repeated this claim, stating "I understand that I am waiving my right to a court appointed attorney and request that I be allowed to represent myself."
> (3) The Waiver of the Right to Counsel form stated "I have been advised that I have a right to have my lawyer present with me during all stages of these proceedings . . . I hereby waive my right to a court appointed lawyer and request that I be allowed to represent myself and that I be tried without a lawyer."[10 originally fn 12]
> (4) Following the conclusion of the video, the County Court asked Edenfield and the other defendants, collectively, whether they understood the video's content, including its discussion of the dangers of self-representation. There was no response, which the County Court reasonably accepted as tacit understanding.
> (5) During the individual colloquy that followed, Edenfield was asked if he understood each of the rights printed on the "blue form." He responded, "Yes, sir."
> (6) During the individual colloquy, Edenfield was again asked whether he "underst[ood] that by entering the plea [he was] giving up . . . the right to the assistance of a lawyer during trial." He responded, "Yes, sir."

Edenfield, 45 So. 2d at 31-32.

As the First District also recognized, "These objective facts are

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[10] Written plea forms are demonstrative of a knowing and intelligent waiver, and as long as the court does not rely on them entirely, they are probative. *See Hen Lin Lu v. State*, 683 So. 2d 1110, 1111 (Fla. 4th DCA 1996). The trial court must only conform that the defendant has read and comprehends the forms' content. *Id.* Such confirmation occurred here, as on three separate occasions Edenfield indicated he fully understood the consequences of waiving his right to counsel (i.e. reasons (4)-(6) above.)

accompanied by the County Court's ability to personally observe [Petitioner] and evaluate his competency at the time he waived his right to counsel." *Id.* at 32 (citing *Potts*, 718 So. 2d at 759 ("Because the court's ruling [regarding the waiver of counsel] turns primarily on an assessment of demeanor and credibility, its decision is entitled to great deference."); *Beaton v. State*, 709 So. 2d 172, 173-74 (Fla. 4th DCA 1998)).

Further, as the First District also recognized, the County Court discussed with Petitioner whether he had prior convictions, whether he wished to rehear the mandatory minimum penalties for DUI, whether he wished to represent himself, whether he had read and understood the rights on the "blue form," and how he wished to plead. *Id.* at 32. The record provides an ample basis for the County Court to have concluded that Petitioner's waiver of counsel was knowing and voluntary. Petitioner has failed to demonstrate that the Circuit Court departed from the essential requirements of law when it denied Petitioner's motion to withdraw his plea.

Finally, Petitioner engages in a lengthy diatribe at the conclusion of his brief of what he perceives to be improper actions by the county court in taking self-represented pleas at first appearance. This rhetoric is entirely empty. The Rules of Criminal Procedure expressly contemplate such a procedure in misdemeanor cases. Rule 3.130(c)(4) expressly permits a defendant to waive counsel at first appearance, and provides:

> The defendant may waive the right to counsel at first appearance. The waiver, containing an explanation of the right to counsel, shall be in writing and signed and dated by the defendant. This written waiver of counsel shall, in addition, contain a statement that it is limited to first appearance only and shall in no way be construed to be a waiver of counsel for subsequent proceedings.

See FLA. R. CRIM. P. 3.130(c)(4) (underline added). Furthermore, Rule 3.170(a), which addresses the entry of a plea, specifically indicates that "[i]f the sworn complaint charges the commission of a misdemeanor, the defendant may plead guilty to the charge at the first appearance under rule 3.130, and the judge may thereupon enter judgment and sentence without the necessity of any further formal charges being filed." FLA. R. CRIM. P. 3.170(a) (underline added). Accordingly, the entry of a self-represented misdemeanor plea at first appearance is expressly contemplated by the criminal rules themselves. Petitioner can hardly demonstrate a departure from clearly established law.

It is also noteworthy that Rule 3.180(d) recognizes that, in misdemeanor cases, that a defendant may, by choice and with leave of court, not even be present for any critical stage of a misdemeanor prosecution, including the entry of a guilty or nolo contendre plea. *See* FLA. R. CRIM. P. 3.180(d). Additionally, Rule 3.111(d)(4) permits a defendant to waive counsel without being present in court, permitting the determined competency to do so to be by two witnesses instead. *See* FLA. R. CRIM. P. 3.111(d)(4).

Accordingly, Petitioner has utterly failed to demonstrate that the Circuit Court erred in affirming the order denying the motion to withdraw plea, much less committed a departure from the essential requirements of law.

CONCLUSION

Based on the foregoing, the State respectfully requests the decision of the District Court of Appeal, First District declining to issue a writ of certiorari be approved, and the decision of the Fourth Judicial Circuit Court and the Duval County Court denying the motion to withdraw the plea be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on October 11, 2011:

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