IN THE SUPREME COURT OF FLORIDA

ERIC EDENFIELD
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Case No.: SC10-2146
L.T. Case No(s).: 1D09-6554
2009-AP-34

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S CORRECTED[1] INITIAL BRIEF ON THE MERITS

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[1] The only corrections are the inclusion of "Page ii, Table of Contents" which was previously omitted in error and to amend the footnote number references which changed as a result of this newly added footnote.

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PRELIMINARY STATEMENT

In this brief, Petitioner shall be referred to as "Petitioner" or Edenfield. Respondent shall be referred to as "Respondent" or State. Reference to the appropriate pages of the Petitioner's Appendix attached to the Initial Brief on the Merits, shall be made by A. followed by the exhibit number.

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested and charged with driving under the influence on January 12, 2009. On that same date, a conviction was entered against the Petitioner based on a plea of nolo contendere. (A. 14-20, 34-37). The Petitioner, who was charged with an offense punishable by incarceration, was not represented at that time by counsel. Further the record does not establish compliance with Fla. R. Crim. P. 3.111 related to knowing and intelligent waivers of counsel. (A. 21-38). The trial court did not file a notice of "no incarceration."[2]

The issue in this case arose in the context of a plea entered at a first appearance bond hearing. The Petitioner appeared for his first appearance hearing after having been arrested for DUI several hours prior to his appearance. Prior to being called before the judge, the Petitioner was provided a form entitled "Plea of Guilty or No Contest." This form is referred to as a "blue form" and contains an advisement of rights, the minimum and maximum penalties for driving under the

[2] Fla. R. Crim. P. 3.111 provides that upon the filing of a notice of no incarceration, a defendant does not have to be provided counsel.

influence, a statement that the plea is freely and voluntarily entered, a statement that the defendant has been advised of his right to an attorney, that if he cannot afford one, one will be appointed, and that he is waiving that right to an attorney and requesting to represent himself. This form also contains a paragraph stating that the defendant has discussed all the aspects of his case with his attorney and that he is satisfied with his attorney's representation, if applicable. (A. 14-20).

The form also contains several paragraphs stating that the court has asked the Petitioner about the form, that he has had sufficient time for consideration of his choice to enter a plea, and that he understands that he could have had more time to reflect if he needed it, and that the court has advised the Petitioner that he has 30 days to appeal and that if he could not afford an attorney one would be provided for him. (A. 19-20).

Also prior to the beginning of Edenfield's first appearance hearing, a videotaped advisement of rights was shown to the entire group of defendants awaiting hearings along with him.[3] (A. 23-33). This videotape, played as a matter of course to all defendants awaiting first appearance hearings, addresses both felony and misdemeanor defendants. The videotape advises of the defendants' rights, including the right to counsel, including the advantages of being represented by counsel and the dangers of self-representation. (A. 23-25).

[3] County Court Judge Eleni Derke is speaking on the videotape.

The videotape advises those charged with felonies that the hearing about to begin is a probable cause determination and a bond hearing. (A. 25). The misdemeanor defendants are told that the hearing that is about to begin is their arraignment. They are further told that when they appear before the court it will be necessary to enter a plea. (A. 28). The videotape explains the types of pleas, and the maximum and minimum penalties for first and second degree misdemeanors. The videotape advises that the maximum and minimum penalties for the charge of driving under the influence are contained on the form that had been provided to the defendants charged with driving under the influence. (A. 27-28). The defendants are warned of the rights that they are waiving by the entry of a plea of guilty or no contest. (A. 29). During the course of the videotape, Judge Derke discusses, among other things, the possibility of release should a defendant plead not guilty, as well as other issues. (A. 30-33).

After the videotape was played in this case, the trial court asked the group of defendants as a whole whether there was anyone who did not have an opportunity to view the videotape or did not understand the rights conveyed by Judge Derke on the videotape. After Receiving no response, the trial court then proceeded to conduct individual first appearance hearings.

When the Petitioner first appeared before the trial court for his first appearance bond hearing, the trial court did not address the question of release

with the Petitioner. The complete colloquy between the trial court and the Petitioner is as follows:

> 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?
>
> Edenfield: 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?
>
> Edenfield: No, sir.
>
> The Court: Did you wish for me to appoint counsel or do you wish to handle the case yourself?
>
> Edenfield: I will do it myself.
>
> The Court: All right. Have you read through that blue form?
>
> Edenfield: Yes, sir.
>
> The Court: Okay. Do you understand all the rights on the blue form?
>
> Edenfield: Yes, sir.
>
> The Court: How do you plead to the charge?
>
> Edenfield: No contest.
>
> The Court: All right. If you will[,] please sign the blue form and the waiver of right to counsel form…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 the trial, the right to compel the attendance of witnesses to testify on your behalf, the right to confront and cross-examine any witness 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?
>
> Edenfield: Yes, sir.
>
> The Court : Are you entering this plea today because you believe it is in your best interest to do so?
>
> Edenfield: Yes, sir.
>
> The Court: All right. I will find that the plea is freely and voluntarily entered with the full understanding of its nature and consequences. I also find that there is a factual basis for the entry of the plea based on the sworn narrative in the arrest and booking report. At this time, Mr. Edenfield, on your plea I will adjudicate you guilty of DUI… (A. 34-36).

On February 17, 2009, the Petitioner filed a motion to withdraw his plea alleging that his right to counsel had been violated. (A. 39-42). At the hearing the Petitioner relied on the transcript of the plea proceedings. The trial court made it clear that the procedure used for Mr. Edenfield's and all other first appearance hearings was designed to save time:

> The county 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 the first appearance of over 100 defendants in each sessions…

(A. 54). The court then asked defense counsel, "[i]s 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?" (A. 54). After further discussion regarding what is required by a court, the trial court stated,

> 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 understand all their rights.

(A. 56-57). Before ruling, the trial court further noted,

> Either I have got to be there for 24 hours to handle a three-hour calendar before the next three-hour calendar comes up[4]. 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 because he is a J.E.A.[5] 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.

(A. 58-59).

[4] As reflected in the plea transcript, the first appearance proceedings in this case began at 1:48 and ended at 3:48. (A. 21, 37)
[5] Jacksonville Electric Company

After additional discussion, the trial court denied the motion to withdraw plea. On appeal, the circuit court affirmed the decision of the trial court without opinion. (A. 6). The Petitioner sought certiorari review in the First District Court of Appeal.

On August 10, 2010, the First District Court of Appeal entered a written opinion denying the Petitioner's petition for writ of certiorari. In that opinion, the district court found that the showing of the videotape, the written plea form, and the above colloquy were sufficient to meet the requirements of Fla. R. Crim. P. 3.111. The district court further noted, "[h]ad the County Court harbored misgivings over Edenfield's competency, it would not have accepted the waiver. Apparently, it had no concerns." *Edenfield v. State*, 45 So.3d 26, 32 (Fla. 1st DCA 2010), *reh'g denied* (Sept. 29, 2010), *review granted*, SC10-2146, 2011 WL 2772202 (Fla. June 17, 2011).

Motions for certification, rehearing, and rehearing *en banc* were timely filed on August 25, 2010. These motions were denied on September 29, 2010. The Petitioner's notice to invoke the discretionary jurisdiction of this Court was timely filed on October 28, 2010. Mr. Edenfield was not incarcerated.

SUMMARY OF ARGUMENT

The First District Court of Appeal held that as long as a defendant is advised of the right to counsel and advised of the dangers of proceeding without counsel,

an expressed desire to waive counsel is sufficient to meet the requirements of Fla. R. Crim. P. 3.111(d) that a court engage in a thorough inquiry into a defendant's comprehension of the offer of counsel and capacity to make a knowing and intelligent waiver of counsel. The decision of the First District Court of Appeal in the case at bar disregards the plain meaning of the word "inquiry" as set out in the rule, and misapplies the prior decisions of this Court. Further, it contravenes the right to counsel as established in sections 2 and 16 of article I of the Florida Constitution and applied by Florida Courts.

Fla. R. Crim. P. 3.111(d) requires both an advisement and an inquiry. The law is well settled that one without the other is not sufficient. A trial court must both fully advise a defendant of his right to counsel, including the dangers of proceeding without counsel, and engage in a discussion with a defendant regarding his understanding of that right. The fact that the defendant has been fully advised through a videotape and a written plea form does not absolve a court from having a conversation with a defendant sufficient to establish that the defendant fully understands both the right to counsel, the offer of counsel and the consequences of waiving counsel.

Furthermore, the district court's finding that Edenfield's waiver of counsel was sufficient based on the failure of the trial court to express any concerns is contrary to the well settled law. A trial court must engage in a thorough inquiry

into such matters as age, education, mental condition, prior experience with criminal proceedings, or any other inquiries which would assist a court in determining whether a waiver of the right to counsel is knowingly and intelligently entered and this inquiry must appear in the record of the proceedings. The record contains no such inquiry. Although there are no "magic words," a court must engage in some questioning of the defendant that will provide the court an opportunity to ascertain a defendant's level of comprehension regarding the waiver of the right to counsel. The mere fact that the trial court expressed no concern about the defendant's waiver is not sufficient to establish compliance with Fla. R. Crim. P. 3.111 or the Florida Constitution.

ARGUMENT

STANDARD OF REVIEW

The standard for review for a petition for writ of certiorari is whether or not the lower court "departed from the essential requirements of the law." *Combs v. State*, 436 So. 2d 93, 95-6 (Fla. 1983).

> The phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error.

State v. Steele, 921 So. 2d 538, 541 (Fla. 2005). *See also* 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").

ISSUE PRESENTED

ADVISEMENT REGARDING THE RIGHT TO COUNSEL AND AN EXPRESSED DESIRE TO WAIVE COUNSEL IS NOT SUFFICIENT TO MEET THE REQUIREMENTS OF FLA. R. CRIM. P. 3.111(D) THAT A COURT ENGAGE IN A THOROUGH INQUIRY INTO A DEFENDANT'S COMPREHENSION OF THE OFFER OF COUNSEL AND CAPACITY TO MAKE A KNOWING AND INTELLIGENT WAIVER OF COUNSEL.

As recognized by this Court in *Traylor v. State*, 596 So. 2d 957, 970 (Fla. 1992), this Court has promulgated Fla. R. Crim. P. 3.111(d) in order to ensure compliance with the requirements for a knowing waiver of the right to counsel afforded under the Florida Constitution. In setting out the requirements for such a waiver, this Court relied on *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 and. Fla. R. Crim. P. 3.111(d) provides:

> (1) The failure of a defendant to request appointment of counsel or **the announced intention of a defendant to plead guilty shall not, in itself, constitute a waiver of counsel** at any stage of the proceedings.
>
> (2) A defendant shall not be considered to have waived the assistance of counsel until the entire process of offering counsel has been completed **and a thorough**

> **inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver**. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation.

Compliance with the dictates of this rule is mandatory. *State v. Young*, 626 So.2d 655 (Fla.1993); *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988). *See also Tennis v. State*, 997 So.2d 375, 379 (Fla. 2008)("Under this Court's clear precedent, and that of the district courts of appeal, the trial court's failure to hold a *Faretta* hearing in this case to determine whether Tennis could represent himself is per se reversible error.").

In the case at bar, the First District Court held that the following was adequate to meet the requirements of a "thorough inquiry" under the Florida Constitution and Rule 3.111 (d): 1) the showing of the aforementioned videotape, 2) providing documents to the defendant advising him of his right to counsel and the dangers of proceeding without counsel, 3) an assertion by the Petitioner that he did not want counsel appointed[6] and would represent himself, 4) an affirmative response by the Petitioner to the question of whether he understood the rights on the "blue form," and 5) another affirmative response from the Petitioner after the

[6] A review of the transcript also shows that the only choices afforded the Petitioner were waiver or the public defender. The Petitioner was not offered the choice of obtaining private counsel.

entry of his plea that he understood the rights he was giving up by the entry of his plea. The district court made this finding in spite of its acknowledgement that the transcript of the plea shows that the inquiry was "brief." The district court found only that, "[h]ad the County Court harbored misgivings over Edenfield's competency, it would not have accepted the waiver. Apparently, it had no concerns." *Edenfield*, 45 So.3d at 32. The decision holds, therefore, that the requirements of Fla. R. Crim. P. 3.111 are satisfied by an **advisement** of the right to counsel alone without any **inquiry**. This finding is in direct contravention of the rule and the well-settled law in this State.

In *Porter v. State*, 788 So. 2d 917 (Fla. 2001), the Florida Supreme Court recounted the factors outlined by the Eleventh Circuit in *United States v. Fant*, 890 F.2d 408 (11th Cir. 1989), for considering whether a defendant has made a knowing, voluntary and intelligent waiver of his right to counsel in a *Faretta* hearing. These factors included; (1) the background, experience and conduct of the defendant including his age, educational background, and his physical and mental health; (2) the extent to which the defendant had contact with lawyers prior to trial; (3) the defendant's knowledge of the nature of the charges, the possible defenses, and the possible penalty; (4) the defendant's understanding of the rules of procedure, evidence and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed, and the

extent to which he aided the defendant; (7) whether the waiver of counsel was the result of mistreatment or coercion; or (8) whether the defendant was trying to manipulate the events of the trial. *Porter* 788 So. 2d at 927. The record of the plea proceedings fails to establish that the trial court inquired, or was otherwise made aware of any of, or in any way considered the above factors.

It is important to note that these factors apply to a proceeding that is generally called in the middle of a case in response to a represented defendant's request to proceed *pro se*, often because he does not like the representation he has received. Indeed, by its very nature, a *Faretta* hearing is triggered when a *defendant* has requested a waiver of counsel and such request may only attach when it is "clear and unequivocal." *Faretta*, 422 U.S. at 825; *see also Hardwick v. State*, 521 So. 2d 1071, 1074 (1988) ("courts have long required that a request for self-representation be stated unequivocally"). In the scenario at bar, where the court *sua sponte* asks the defendants if they want to waive counsel, even further protection should be provided.

As set out in Petitioner's jurisdictional brief, the district court cited to this Court's decisions in *Bowen v. State*, 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). In *Bowen*, however, the issue was whether or not a court may require a defendant who knowingly and intelligently

waives counsel to be represented by counsel because of concern that the defendant might be deprived of a fair trial. This Court held that the dictates of *Faretta* were satisfied in that case by a discussion between the defendant and the court regarding the defendant's decision to waive the right to counsel which comprised nearly fifteen (15) pages of a transcript. In the case at bar the discussion between the court and the Petitioner, including the entire plea colloquy and part of the sentencing, comprised one and a half pages of a transcript.

Likewise, in *Potts,* although this Court found in *Potts* that there were no "magic words" which must be used in advising a defendant regarding the waiver of counsel, this Court held that the requirements of *Faretta*[7] were met because the court discussed self-representation with the defendant in detail and at length. The court on one occasion held a full-fledged *Faretta* hearing-comprising nearly fifteen pages of record transcript-wherein the court inquired in detail into Potts' age, education, and legal experience. *Id.* at 760.

In *Hill,* this Court did find that the inquiry need only ensure the defendant is "alerted generally to the difficulties of navigating the legal system," as noted by the First District Court, however, this Court again recognized that the trial court

[7] *Faretta v. California*, 422 U.S. 806 (1963). Although the inquiry under Fla. R. Crim. P. 3.111(d) is also referred to as a *Faretta* inquiry, R. 3.111(d) is grounded in the Florida State Constitution and provides even greater protections than the U.S. Constitution. *Traylor v. State*, 596 So. 2d 957, 970 (Fla. 1992); *Iowa v. Tovar*, 541 U.S. 77, 94 (2004).

had engaged in an "exhaustive inquiry" including inquiry into the defendant's age, education, experience, physical condition and mental condition. *Id.* at 904. In *Rogers*, this Court found that the inquiry was sufficient based upon the fact that the trial court had held a hearing on the defendant's waiver of his right to counsel during which the trial court determined that the defendant had represented himself on at least four occasions, three times successfully.

In contrast to the above, the Petitioner in the case at bar appeared before the court, at what was supposed to be a first appearance and bond hearing, as one of numerous defendants who had been recently arrested. Prior to appearing before the court, he was given a form which contained information regarding his rights and the penalties for driving under the influence. This form contained two choices, either guilty or no contest as well as several boilerplate paragraphs addressing the requirements of Fla. R. Crim. P. 3.172 for the taking of pleas.

He was also advised, via a 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. The Petitioner then appeared before the trial court for two (2) minutes at most, during which time he was advised of the charges against him, asked about counsel, entered a plea, and was convicted of a crime. The application by the First District Court of Appeal of

the above decisions to the stated facts in *Edenfield* is a misapplication of these decisions.

This Court has previously interpreted the requirements of Fla. R. Crim. P. 3.111 and the right to counsel under the Florida Constitution. In *Young, supra,* the defendant was appointed three (3) different attorneys due to repeated requests by the defendant to remove the counsel he had been appointed. The court refused to appoint a fourth attorney and required the defendant to represent himself. On appeal, the State argued that the court did not need to engage in an inquiry regarding the waiver of counsel due to the defendant's deliberate abuse of the right to counsel. The State essentially contended that the trial court could infer that the defendant was waiving counsel by his actions. The State further argued that even if an inquiry was required, the court could discern a *Faretta* inquiry if the various colloquies were pieced together and that even if there was an error, it was harmless. This Court rejected each of these arguments. This Court found that even if the trial court could presume that the defendant was requesting to represent himself, the defendant could not be presumed to waive the right to counsel **absent a proper inquiry**. This Court further found that although the colloquy may have suggested that the defendant was competent to represent himself, his responses did not establish that he had waived his right to counsel. In rejecting the State's harmless error argument, this Court further found that the dictates of Fla. R. Crim.

P. 3.111(d) require a reversal when there is no proper inquiry and that the harmless error rule does not apply. *Id.* at 657.

In its consideration of the inquiry required regarding waivers of counsel, this Court stated,

> ...The United States Supreme Court has determined that a defendant in a state criminal trial has the constitutional right of self-representation and may forego the right of assistance of counsel. *Faretta,* 422 U.S. at 836, 95 S.Ct. at 2541. In so holding, the United States Supreme Court clearly stated that it is incumbent on the trial judge to examine the defendant to determine whether the waiver of this important right is made knowingly and intelligently before allowing the defendant to proceed without the assistance of counsel.

Id. at 656. It is clear from *Young* that a trial court must engage in a discussion with a defendant during which there are questions and answers from which a court can determine the extent of a defendant's comprehension of issues of counsel.

In reaching the above decision in *Young*, this Court relied on its prior opinion in *Hardwick, supra*. In *Hardwick*, the defendant attempted to dismiss his court-appointed counsel which the trial court took as an assertion of his desire for self-representation. This Court noted,

> [w]e recognize that, when one such as appellant attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. *Jones v. State*, 449 So.2d 253, 258 (Fla.), *cert. denied*, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, and the court commits reversible error if it

> fails to do so. *Faretta,* 422 U.S. at 835, 95 S.Ct. at 2541; *Smith v. State,* 444 So.2d 542 (Fla. 1st DCA 1984).

Id. at 1074.

The Florida Courts of Appeal have also repeatedly found that the record must contain a showing that a trial court has engaged in an inquiry with a defendant prior to permitting a defendant to proceed pro se. In *Curtis v. State*, 32 So. 3d 759 (Fla. 2d DCA 2010), the Second District Court of Appeal found that the trial court, in addition to advising of the dangers and disadvantages of proceeding without counsel, must inquire into such matters as a defendant's age, education, mental condition, and experience and knowledge of criminal proceedings. The district court further found that it was only **after** the court is satisfied that the accused has made a knowing and intelligent waiver of the right to counsel that the accused should be permitted to proceed *pro se*. *Id.* at 760, 761.

In *Neeld v. State*, 729 So. 2d 961 (Fla. 2d DCA 1999), although the issue was the denial of the defendant's desire to represent himself, the district court expressly set out the requirements for determining that a defendant is knowingly and intelligently waiving the right to counsel. The district court held that Fla. R. Crim. P. 3.111(d)(2) requires a trial court make a thorough inquiry into a defendant's capacity to waive the right to counsel. The district court further noted that the record showed that the trial court neither appropriately advised the

defendant of the dangers and disadvantages of proceeding without counsel, nor engaged in a sufficient inquiry. The Second District Court again recognized the necessity of an inquiry into such things as age, mental condition, education, and lack of knowledge and experience in criminal proceedings and the requirement that this inquiry be established in the record in *Montgomery v. State*, 1 So.3d 1228 (Fla. 2d DCA 2009).

In *Rodriguez v. State* 982 So. 2d 1272 (Fla. 3d DCA 2008), the Third District Court held that under *Faretta* a trial court must inquire into things such as age, mental status, and lack of knowledge and experience in criminal proceedings. The district court specifically held that although a court need not follow a model colloquy to the letter, the court must both make sure that a defendant is advised of the dangers and disadvantages of self-representation, and that the court make a determination that the defendant is knowingly and intelligently waiving his or her constitutional right. *Id.* at 1274.

In *Smith v. State*, 956 So. 2d 1288 (Fla. 4th DCA 2007), the defendant requested to represent himself. The district court found that upon receiving that request, the trial court was obligated to conduct an inquiry before permitting the defendant to proceed without counsel. The district court found that the inquiry conducted was not sufficient to demonstrate that the defendant understood his rights and the consequences of proceeding pro se, which is the focus of the inquiry

required under R. 3.111(d). In *Smith*, the inquiry included asking about the defendant's experience with the criminal justice system, whether he believed he was capable of representing himself, whether he would be ready for trial, and whether he would behave like a gentleman. According to the defendant's responses, he had prior limited experience in the criminal system. In reversing the order of the trial court, the district court found that there was nothing in this exchange that indicated that the defendant had any real idea what he was up against in making the decision to proceed pro se.

Similarly, the Fifth District Court of Appeal, in *Davis v. State,* 10 So. 3d 176 (Fla. 5th DCA 2009), found that a *Faretta* inquiry is not sufficient unless the court advises a defendant of the dangers and disadvantages of self-representation, advises of the advantages of representation by counsel, **and** inquires into a defendant's age, education, ability to read and write, or any mental or physical conditions. *Id.* at 178. An offer of counsel is not sufficient to meet the requirements of Fla. R. Crim. P. 3.111(d). The district court further held that if the trial court was relying on grounds other than a *Faretta* inquiry to find a knowing and intelligent waiver of the right to counsel, the trial court had to set out specific findings on the record for reaching that conclusion. *Id.* at 179.

In *McGee v. State*, 983 So. 2d 1212 (Fla. 5th DCA 2008), the district court, making reference to the model *Faretta* colloquy, again held that if a trial court does

not engage in a full *Faretta* inquiry, the court must make a sufficient record indicating its basis for determining that a defendant is competent to waive counsel *Id.* at 1214, 1215. The same holding was set out by the Fourth District Court of Appeal in *Beaton v. State*, 709 So. 2d 172 (Fla. 4th DCA 1998), where the court recognized that even when a judge is familiar with a defendant and therefore may know about his competency to waive counsel from prior experience, the trial court must establish on the record how the defendant's background, including his age, mental status, and education, affects his capacity to waive his right to counsel. *Id.* at 174. There is nothing in the record of the plea proceedings in the case at bar that satisfies the requirement of a valid waiver on the record.

In *Watkins v. State,* 959 So. 2d 386 (Fla. 5th DCA 2007), the defendant fired his attorney and indicated his desire to proceed *pro se.* The trial court advised the defendant of the maximum penalty for the offense with which he was charged and permitted him to enter a plea. The trial court then conducted a plea colloquy. The district court found that the trial court was required to inquire about the defendant's age, education, mental condition, and experience and knowledge of criminal proceedings prior to permitting him to proceed without counsel. In a footnote in the case at bar, the First District Court found that the version of Fla. R. Crim. P. 3.111(d) as amended in 1998, does not require the type of inquiry suggested by the

Petitioner. This finding by the district court is contrary to all of the above opinions.

In *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972), the United States Supreme Court noted, in discussing whether the protections of the right to counsel should be expanded to misdemeanor offenses,

> [b]eyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in 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. **In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result**." (emphasis added)

The United States Supreme Court further stated in *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938),

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious.

(citation omitted).

As also recognized by the United States Supreme Court in *United States v. Cronic*, 466 U.S. 648, 653-54 (1984),

> [a]n accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

(citation omitted). Although these decisions address the right to counsel under the Sixth Amendment of the United States Constitution, the federal Constitution sets the floor, not the ceiling, with regard to the extent of personal rights and freedoms afforded by the State of Florida. *State v. Kelly*, 999 So.2d 1029, 1042 (Fla. 2008). Given the recognized importance of the right to counsel, courts generally will indulge every reasonable presumption **against** waiver of this fundamental right. *Traylor v. State*, 596 So.2d 957, 968 (Fla. 1992). The actions of the trial court and the finding by the First District Court of Appeal in the case at bar are not consistent with this presumption against waiver.

In *Traylor*, this Court, in discussing the right to counsel under the Florida Constitution, found,

> 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 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:
> These rights [enumerated in the Declaration of Rights] curtail and restrain the power of the State. It is more important to preserve them, even though at times a guilty man may go free, than it is to obtain a conviction by ignoring or violating them. The end does not justify the means. Might is not always right. Under our system of constitutional government, the State should not set the example of violating fundamental rights guaranteed by the Constitution to all citizens in order to obtain a conviction. *Bizzell v. State*, 71 So.2d 735, 738 (Fla.1954). Thus, even here—especially here—where the rights of those suspected of wrongdoing are concerned, the framers drew a bright line and said to government, "Thus far shalt thou come, but no farther."

Id. 963-64. The case before this Court is a perfect example of that which this Court warned about in *Traylor*. The desire for speedy resolutions of misdemeanor cases has resulted in a system which has turned mandated first appearance hearings into arraignment hearings wherein pleas are taken before any consideration of conditions of release. Due to the volume of defendants appearing at first appearance hearings and the concerns regarding the time it would take to engage in a proper inquiry with each misdemeanor defendant, short cuts have been instituted which have resulted in the entry of pleas without respect for the Constitutional right to counsel or the requirements of Fla. R. Crim. P. 3.111. Although this strategy may successfully reduce court caseloads, the cost is the minimization of

the fundamental rights of the Petitioner and all similarly situated defendants. As recognized by this Court in *Traylor*, the ends do not justify the means.

CONCLUSION

The decision rendered by the First District Court of Appeal conflicts with the well-settled precedent regarding Florida's constitutional right to counsel and the dictates of Fla. R. Crim. P. 3.111.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Office of the Attorney General, Criminal Appeals Division, 107 W. Gaines Street, Room 361C, Tallahassee, Florida 32399, counsel for the Respondent, by U.S. mail, this 12th day of August 2011.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed in Times New Roman 14.

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