IN THE SUPREME COURT OF FLORIDA

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

vs.

STATE OF FLORIDA,
Respondent.

____

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

EPSTEIN & ROBBINS

BY ________________________
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PRELIMINARY STATEMENT

The Petitioner did not address references to the Supreme Court Record in its Initial Brief. References to the portion of the record designated as Volume I will be referred to as "Vol. I" followed by the page number. References to the portion of the record designated as Volume II will be referred to as "Vol. II" followed by the page number.

REPLY ARGUMENT

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.

The tone of the State's Answer Brief wherein the State clearly set out its disdain for the Petitioner and/or Petitioner's counsel underscores the reasons that this Court and the district courts of appeal have heretofore mandated scrupulous compliance with the protections set out in Fla. R. Crim. P. 3.111. Although the State suggests that the Petitioner has altered and/or abandoned claims between the initial motion filed in this case and the brief before this Court, the Petitioner has never wavered in his claim. The only claim ever raised and argued by the

Petitioner is that the record of the plea proceedings evidences a failure by the trial court to comply with the dictates of Fla. R. Crim. P. 3.111; that this rule codifies the protections afforded a defendant under the Florida Constitution; and that such failure to comply by the trial court constitutes per se error. The Petitioner has not waived any arguments or claims.

The State makes several arguments which are irrelevant to the issue before this Court. As clearly set out from the beginning, the Petitioner never raised a claim of an involuntary plea, but limited his basis for relief to a violation of the right to counsel[1]. (A. 39-42; 47). Accordingly, the State's arguments in that regard are not relevant to this Court's determination of the issue in this case. Similarly, the State's repeated mention of the Petitioner "abandoning" his motion for rehearing in the trial court is irrelevant. As pointed out in the Initial Brief to the circuit court as well as the Petition to the First District Court of Appeal, a motion for rehearing filed in reference to a motion to withdraw plea under Fla. R. 3.170 is not an authorized rehearing motion. (Vol. I. 4, 126.). *See Fla. R. Crim. P.*

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[1] To the extent that this Court has found that a plea obtained in the absence of a proper waiver of the right to counsel should be deemed involuntary as a matter of law, the Petitioner's plea should be deemed involuntary. *See State v. T.G.*, 800 So.2d 204, 213 (Fla. 2001). The Petitioner did not, however, raise a separate claim of an involuntary plea based on a violation of Fla. R. Crim. P. 3.172 or any other grounds.

3.170 and 9.020(h). Therefore the motion for rehearing filed would not toll the time for filing an appeal. *Wagner v. Bieley, Wagner & Associates, Inc*., 263 So.2d 1 (Fla. 1972). Thus, the Petitioner had to choose between the possibility of the trial court changing its mind or his right to appeal.

The State also suggests that the Petitioner is touting form over substance in this case. The Petitioner would suggest that it is the State, as well as the courts below, that have relied on form over substance. There has been great weight given to the videotape shown in this case, the boilerplate forms, and the group inquiries. It is easy to point to these things and argue that the Petitioner was well-informed. What has been given short shrift is the circumstance under which the Petitioner purportedly entered his "knowing and intelligent" waiver of the right to counsel and the limited contact between the Petitioner and the trial court.

The Petitioner was arrested on January 12, 2011, at 2:25 a.m. (Vol. I. 33). The Petitioner was admitted into the jail at 3:21 a.m. on that same date. (Vol. I. 36). Later that day, at 1:48 p.m., less than twelve (12) hours after his arrest for driving under the influence of an alcoholic beverage, the Petitioner was brought to what was to be his first appearance hearing. (A. 21). By the time the hearings

were concluded at 3:48 p.m., the Petitioner had entered an uncounselled plea and was convicted of driving under the influence[2]. (A. 37).

As pointed out by the State, Fla. R. Crim. P. 3.130 provides that a defendant may waive counsel at his first appearance hearing. This rule also mandates, however, that a prisoner who has not been released **shall** be brought before the court for a **first appearance** hearing. The defendant is to be advised that they are not required to say anything; that they have the right to counsel; and that they have the right to communicate with counsel, family, or friends, and that reasonable means will be provided to do so. This rule also provides that the judge **shall** proceed to determine conditions of release. *Fla. R. Crim. P.* 3.130. The trial court never proceeded to determine conditions of release as required under R. 3.130, but proceeded immediately to a plea. (A. 34, 35).

The Petitioner does not contest the fact that Fla. R. Crim. P. 3.170 authorizes taking pleas at first appearance hearings. This rule provides only that pleas **may** be entered and does not obviate the requirements of Fla. R. Crim. P. 3.130.

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[2] Although the record does not contain the exact time the trial court spent with the Petitioner individually, these time periods can be discerned by reading the transcript and timing how long it takes to read the portion wherein the trial court addressed the Petitioner. There is less than a minute between when the Petitioner is called before the court, the waiver of counsel is obtained and the plea entered. In a little over one minute the plea is accepted. In less than two minutes, the Petitioner was sentenced and the plea hearing was over.

Notwithstanding the fact that the presumption of innocence had attached, prior to even appearing before the trial court, the Petitioner, was provided the plea form that only gave him two (2) choices as to how to plead; guilty or no contest. Not guilty was not even a choice on the form. There was no compliance with R. 3.130.

The Petitioner is unaware of any decision of this Court or any district court of appeal, other than the district court opinion in the case at bar, that even suggests that the waiver colloquy below was sufficient to establish a knowing and intelligent waiver of the right to counsel, nor has the State cited to any. The cases relied on by the State and the district court below are all cases in which out of context "buzz words" are relied on as support for the State's position. As set out in the Initial Brief, however, none of them approved a colloquy as limited as the one in the case at bar. *See Potts v. State*, 718 So. 2d 757, 760 (Fla. 1998)(requirements of *Faretta*[3] were met because the court discussed self-representation with the defendant in detail and at length and 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.); *Hill v. State*, 688 So. 2d 901, 904 (Fla. 1997)(trial court engaged in an "exhaustive inquiry" including inquiry into the defendant's age, education, experience, physical condition and mental condition.); and *Rogers v. Singletary*, 698 So. 2d 1178 (Fla. 1997)(inquiry

[3] *Faretta v. California*, 422 U.S. 806 (1963).

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.)

The State's reliance on this Court's recent decision in *McCray v. State*, 2011 WL 2637377 (Fla. July 7, 2011), suffers the same infirmity. In *McCray*, the defendant's initial request for self-representation was equivocal. The defendant first requested hybrid representation. This Court recognized that while a defendant has the right to be represented by counsel or for self-representation, there is no constitutional right to both. The defendant did, however, actually able to represent himself during closing argument.

This Court found that the **record** established that a sufficient inquiry was conducted. Specifically, this Court pointed to the fact that the trial court engaged in a conversation with the defendant wherein he inquired about the defendant's age, his education, and his experience in the legal field. The trial court advised the defendant of the charges against him, the potential sentence he might face, that he would be on his own if he chose self-representation, and that he would be bound by the rules of evidence and procedure. The court discussed with the defendant whether he had ever represented himself, and his work experience.

Prior to closing arguments, the trial court again engaged in an inquiry into his ability to knowingly and intelligently waive his right to counsel. This Court also considered the fact that the trial court had been involved in other hearings regarding this defendant and had gathered additional information at those hearings. Not only did the trial court in *McCray* engage in a more detailed inquiry, it was evident from the record in that case that the trial court had spent more than a minute or two with the defendant, as occurred in the case at bar.

Even in *Bowen v. State*, 698 So. 2d 248 (Fla. 1997), relied on by the district court, this Court held that the dictates of *Faretta* were satisfied because there was 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. This Court found only that once that inquiry was conducted, the trial court could look no further into the defendant's ability to self-represent. The question in the case at bar is the initial inquiry into waiver, not a secondary inquiry into the Petitioner's ability to self-represent.

The district court and the State have both misapplied this Court's decision in *Bowen*. Neither this Court's decision in *Bowen*, nor the subsequent amendment to Fla. R. Crim. P. 3.111, eliminated the requirement for a thorough inquiry into a defendant's waiver of the right to counsel, including the types of questions suggested by the Petitioner. To the contrary, at the time of the amendment to Fla.

R. Crim. P. 3.111 in response to the decision rendered in *Bowen*, this Court noted, "[a]fter considering the Court's request, the rules committee filed the instant petition to amend rule 3.111(d)(2)-(3) and advised the Court that it unanimously agreed that the Conference of Circuit Judges should be asked to develop a model *Faretta* colloquy to be used by trial judges. The Conference of Circuit Judges has since informed the Court that it has developed a model colloquy which has been made available to trial judges and is contained in Appendix B." *Amendment to Florida Rule of Criminal Procedure 3.111(d)(2)-(3)*, 719 So.2d 873 (Fla. 1998).

Included in Appendix B is a section devoted solely to pleas. In addition to the portions addressing the right to counsel, the advantages and disadvantages related to representation, and consequences of a plea, there is a section titled, "Competency to Waive Counsel Section." In the preceding sections there are questions related to a defendant's understanding of those aspects of the right to counsel. In the section on competency is the following suggested colloquy,

> I need to ask you a few questions about *yourself to determine if you are competent to make a knowing and intelligent waiver of counsel:*
> -How old are you?
> -Can you read? Can you write? Do you have any difficulty understanding English?
> -How many years of school have you completed?
> -Are you currently under the influence of any drugs or alcohol?
> -Have you ever been diagnosed and treated for a mental illness?
> -Has anyone told you not to use a lawyer?
> -Has anyone threatened you if you either *hire a lawyer or accept one appointed by the court?*

> -Do you understand that a lawyer *appointed by the court* will represent you for free?
> -Do you have any questions about having a lawyer appointed to defend you?
> -*(Omitted question about understanding dangers, disadvantages, because that is covered in the disadvantages section supra.)*
> *Having been advised of your right to an attorney, the advantages of having an attorney, the disadvantages of proceeding without an attorney, the nature of the charges against you, and the consequences of entering a plea,* are you sure you do not want me to appoint a lawyer to represent you at this plea hearing?
> *(Continue only if defendant insists he or she does NOT want an attorney.)*
> *If I allow you to represent yourself and* if you *request it,* I could *have* the Assistant Public defender act as standby counsel. *He or she would be available to you* if you have any questions in the course of these proceedings.
> -*Would you like me to appoint standby counsel to assist you?*
> *(Continue only if defendant ACCEPTS standby counsel).*
> *I will appoint standby counsel to assist you. However, you will still bear the entire responsibility for your case at the plea hearing. Do you understand that?*
> *(Make findings on the record as to whether defendant is competent to waive counsel, and whether his or her waiver of counsel is knowing and intelligent.)*
> *(After taking the plea, renew offer of counsel prior to imposing sentence.*

(Italics in original). Had it been this Court's intention to eliminate the requirement for a meaningful inquiry into waivers of the right to counsel, this Court would not have included this suggested inquiry with the amendment.

The State's suggestion that the cases cited by the Petitioner only apply to trial situations is incorrect. Although some of the cases cited by the Petitioner were trial cases, the Petitioner has also relied on cases wherein a defendant has

entered an uncounselled plea and violation of probation hearings. *See Curtis v. State*, 32 So. 3d 759 (Fla. 2d DCA 2010); *Watkins v. State,* 959 So. 2d 386 (Fla. 5th DCA 2007); *Davis v. State,* 10 So. 3d 176 (Fla. 5th DCA 2009); *Montgomery v. State*, 1 so.3d 1228 (Fla. 2d DCA 2009); *McGee v. State*, 983 So. 2d 1212 (Fla. 5th DCA 2008). The right to counsel contained in the Florida Constitution, or Fla. R. Crim. P. 3.111 applies equally to defendants who are entering a plea.

There is no question the proceedings themselves were quick and uncomplicated. This was all the more reason for the trial court to make a sufficient inquiry to determine whether the Petitioner truly understood the right he was giving up, not a reason for a lesser inquiry. By entering a plea at first appearance hearings, the Petitioner speedily waived all his other rights resulting in a criminal conviction. Furthermore, he did so without any significant break between the time of arrest and the plea and with no opportunity for reflection.

The State's suggestion that the Petitioner was required to present more evidence than the plea transcript at the hearing on his motion to withdraw his plea is also contrary to the law. Numerous decisions have been rendered wherein the first time the error regarding the sufficiency of waivers of counsel is raised during an appeal either by the defendant or by the reviewing court. *See State v. B.P.*, 810 So. 2d 918 (Fla. 2002)(error regarding insufficient waiver of counsel could be raised first by appeal); *Clary v. State*, 818 So. 2d 686 (Fla. 5th DCA

2002)(uncounselled plea without proper *Faretta* inquiry rendered plea fatally flawed); *Brown v. State*, 830 So. 2d 203 (Fla. 5th DCA 2002)(failure to renew offer of counsel at subsequent stage rendered plea invalid); *Sandoval v. State*, 884 So. 2d 214 (Fla. 2d DCA 2004)(*Anders* review by district court prompted court's inquiry into waiver of counsel)[4]; *Jones v. State*, 650 So. 2d 1095 (Fla. 2d DCA 1995)(*Anders* review by district court prompted district court's inquiry into waiver of counsel). The Petitioner could have raised the error in this case on direct appeal.

The State has tried to minimize the importance of an individual discussion between the trial court and a defendant. In doing so, the State suggests that the "inquiry" required by R. 3.111(d) is not a verbal inquiry, but one that can be conducted by looking at the record; and that a "thorough" inquiry can be brief. The State fails to consider that whether verbal, written, or brief, the purpose of the inquiry is to gain information about the defendant and his actual comprehension of the right to counsel. As recognized by the numerous decision cited in briefs before

[4] In this case, notwithstanding the proceeding wherein the violation occurred was a sentencing hearing where the defendant was facing a mandatory life sentence, the state pointed out, "there is a constitutional imperative that must be honored. 'An 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.'' *United States v. Cronic,* 466 U.S. 648, 653, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (footnote omitted) (quoting in part *Gideon v. Wainwright,* 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963))." *Sandoval* at 216.

this Court, the district court of appeal, and the circuit court, as well as the original motion filed in this case, the purpose of the inquiry mandated by the rule is not just to provide information to a defendant, but to insure that a defendant actually understands the extent of the right to counsel. This includes the right to hire counsel and the right to appointed counsel, in addition to the defendant's right to waive counsel. The record should show that the defendant actually understands the advantages to representation by counsel, the disadvantages of proceeding without counsel, and the proceedings they are participating in.

Although there are no "magic words" there must be an adequate amount of words to enable the court to know if a defendant really has any understanding of their right to counsel. Further, the issue raised is not one of the adequacy of the advisement provided, but of the adequacy of the trial court's inquiry into whether the Petitioner had any actual understanding of what he had been told. The question is whether the Petitioner actually comprehended the right to counsel and his ability to knowing and intelligently waive that most important constitutional right. The Petitioner would suggest that an appearance before the court that lasts less time than it takes to order a cup of coffee is not sufficient to determine a defendant's ability to knowingly and intelligently waive anything much less the right to counsel, regardless of how many movies are shown or how many forms are provided. The Petitioner does not suggest that each and every question set out in

the case law is required, but that some combination of questions by which a trial court can actually determine what is going on in the defendant's mind is required.

The First District Court of Appeal in this case found, "[h]ad the County Court harbored misgivings over Edenfield's competency, it would not have accepted the waiver. Apparently it had no concerns." (A. 13). Not only is this finding in direct conflict with the decisions of this Court and the remaining district courts that require that the record reflect a court's basis for finding a valid waiver, it is concerning given the facts in this case. In addition to the facts and arguments set out above, a review of the transcript of the hearing before the trial court sheds light on the trial court's reasoning for finding the waiver sufficient. As set out in the Initial Brief, the trial court stated,

> 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 we are going to have to grapple with the reality of what we do in County Court. 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[5]…

[5] If the proceedings were in fact conducted as first appearance hearings, there would be no issue such as in this case. It is the fact that the county court apparently uses these proceedings to reduce caseloads that has created the problem in this case.

(A. 54). The trial court further 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.
>
> 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.**

(A. 56-57).

> Either I have got to be there for 24 hours to handle a three-hour calendar before the next three-hour calendar comes up[6]. 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. lineman he has a certain level of smarts? He knows not to put electric

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[6] As reflected in the plea transcript, the first appearance proceedings in this case took 2 hours. (A. 21, 37).

> plugs in his mouth and then plug them into a wall socket[7]. He's at a certain level.

(A. 58-59). It is evident that the trial court relied very little on its contact with the Petitioner in determining a knowingly and intelligently waiver of counsel.

Simply put, the question before this Court is whether the finding of the First District Court of Appeal that the necessity of an inquiry into a waiver of counsel is met by the showing of a video, written forms, and a very brief conversation between a defendant and the court conflicts with the prior decisions of this Court and the other district courts of appeal. There is no question about what happened during the plea proceedings. Based on the record of the plea proceedings, and the decision of the First District Court of Appeal, this Court should grant certiorari relief.

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.

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[7] The trial court failed to address how this impacts the Petitioner's knowing and intelligent waiver of his right to counsel in criminal proceedings.

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.

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CERTIFICATE OF FONT AND TYPE SIZE

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

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