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**FILED**

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OCT 29 1990

CLERK, SUPREME COURT  
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Appellant,

vs.

CASE NUMBER 76,576

JOSEPH BEACH,

Appellee.  
\_\_\_\_\_ /

ON APPEAL FROM THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA  
CERTIFIED QUESTIONS

RESPONDENT'S ANSWER TO PETITIONER'S

BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecuting authority in the trial court and the Appellee in the First District Court of Appeal, and will be referred to as "Petitioner" or "the State" in this brief. Respondent was the Defendant in the trial court and the Appellant in the First District Court of Appeal, and will be referred to as "Respondent" or "Defendant" in this brief. The record will be referred to as "R" followed by appropriate page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as being essentially accurate and correct.

### SUMMARY OF ARGUMENT

The Court should answer the certified question in the affirmative. When a Defendant questions the use of a prior conviction on a guidelines scoresheet to enhance the Defendant's sentence on the basis that the prior conviction was uncounselled, the Defendant sufficiently places both the Court and the State on notice of the basis of the challenge when in his motion and in his affidavit, the Respondent alleges that he was not offered or provided counsel. The State would have this Court adopt "form over substance" when it is, in fact, the substance that should be the concern of the Court.

## ARGUMENT

WHETHER THE DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NOT PROVIDED OR OFFERED COUNSEL AT THE PROCEEDINGS RESULTING IN PRIOR CONVICTIONS IS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT COUNSELED OR THAT COUNSEL WAS KNOWINGLY WAIVED ?

The starting point in answering this question should be an evaluation of what is actually happening: The State is trying to enhance the Respondent's sentence based upon prior convictions. The law in this State is clear that the guidelines law is to be strictly construed, that the burden is on the Court to insure that the guidelines scoresheet is accurate and correct, and that any doubt should be resolved in favor of the Respondent. It is the duty of the State to provide the Court with the guidelines scoresheet. Fla. R. Crim. P. 3.701. The State should not include prior convictions on the guidelines scoresheet to enhance the Respondent's sentence which are constitutionally or legally defective. The State should be ready to justify the inclusion of and to defend any included prior conviction.

In this regard, the Court should look to the decision in Delaine v. State, 486 So.2d 39 (Fla. 2nd DCA, 1986), wherein the District Court ruled that when a Defendant challenges the inclusion of a prior conviction in the guidelines scoresheet, the State must corroborate the prior conviction by more than a mere hearsay so that the Court may determine the true and correct recommended and presumptive sentence under the guidelines.

In Smelley v. State, 500 So.2d 318 (Fla. 1st DCA 1986), the Court allowed prior convictions to be challenged on the basis of "no recollection of the disputed prior convictions" and reversed based upon the trial Court relying solely on hearsay evidence to prove the prior convictions.

The trend appears to be towards an even more liberal approach to challenging prior convictions in general, and the uncounselled prior convictions in particular. In Hill v. State, 557 So.2d 238 (Fla. 1st DCA 1990), the Court found the objections voiced by counsel at the sentencing hearing were sufficient to compel the Court to require the State to corroborate the challenged prior uncounselled convictions.

In Webb v. State, 560 So.2d 1226 (Fla. 2nd DCA 1990), required corroboration if the issue uncounselled convictions were raised.

In Ousley v. State, 560 So.2d 422 (Fla. 4th DCA 1990), the Court required corroboration if the Defendant merely raised the issue of uncounselled prior misdemeanor convictions. The Court refused to enhance the Defendant's sentence unless the State could show that the Defendant was represented by counsel, or that there was a valid waiver of counsel, citing Smith v. State, 498 So.2d 1009 (Fla. 2d DCA 1986) and State v. Troehler, 546 So.2d 109 (Fla. 4th DCA 1989).

In Wills v. State, 561 So.2d 1355 (Fla. 2d DCA 1990), the Court required corroboration of prior convictions used in computing the guidelines scoresheet when the Defendant objected to their inclusion.

In Annechino v. State, 557 So.2d 915 (Fla. 4th DCA 1990), the Court required corroboration to show a valid waiver of counsel at each critical stage of the proceedings before the prior conviction could be used to enhance the Defendant's sentence. The waiver must be knowingly and intelligently made with the proper colloquy by the Court on the record, and the offer of counsel must be renewed at each subsequent stage of the proceedings. Fla. R. Crim. P. 3.120 (d) (4) and (5). The Annechino, supra, case is on point with the issues in this case.

In our case, the Respondent objected to inclusion of the prior convictions as being uncounselled in four different ways: 1) the Defendant's Motion to Correct Scoresheet (R 2-3); 2) the Defendant's Affidavit (R 4); 3) through argument of counsel and testimony of the Defendant at the motion hearing (R 23-49); and 4) through argument of counsel at the sentencing hearing (R 53-60). Such sworn and unrebutted testimony as a matter of law cannot be disregarded. See State v. Moreno, 558 So.2d 470 (Fla. 3d DCA 1990).

The Petitioner's position is that even though it is trying to enhance the Respondent's sentence through prior convictions and the Petition and the Court are on actual notice of the exact challenge, the challenge should be ignored by the Petitioner and the Court if the Respondent does not use "magic words." The Petitioner wants the Court to adopt form over substance.

The Petitioner wants a presumption of representation of counsel which the Respondent must overcome, even though such a presumption from a silent record is constitutionally

impermissible. Carnley v. Cochran, 369 U.S. 506 (1962). This is true with misdemeanor convictions without incarceration. Harrell v. State, 469 So.2d 169 (Fla. 1st DCA, 1985) and Fla. R. Crim. P. 3.111 (b)(1).

The Respondent takes exception to the Petitioner's analysis of Baldasar v. Illinois, 446 U.S. 222 (1980) and Scott v. Illinois, 440 U.S. 367 (1979) in an attempt to avoid the application of Argensinger v. Hamlin, 407 U.S. 25 (1972). Justice Blackman's concurring opinion in Baldasar, supra, is based upon his dissenting opinion in Scott, supra, but the Petitioner's analysis goes way beyond what Blackman said.

The Petitioner's analysis of the Harrell, supra, and Troehler, supra, decisions avoids a previous decision by this Court that a prior uncounselled misdemeanor conviction cannot be used to support habitual offender treatment unless there is a valid waiver of counsel. McKenney v. State, 388 So.2d 1232 (Fla. 1980).


The criminal sentencing scheme in this State is based upon guidelines scoresheets. The law is clear that uncounselled prior convictions cannot be scored unless there has been a valid waiver of counsel in the record at each critical stage of proceedings. Without such a waiver or actual representation by counsel, the uncounselled conviction cannot be used to enhance the Defendant's sentence. Once the issue is brought to the Court's attention, corroboration should be required or the prior conviction should not be scored. It is time for the Florida Supreme Court to make this determination absolutely clear.

The Petitioner's closing argument concerning the Public Defender system in this State and the specific statement that "it is absurd to permit a Defendant to blithely assert, without any proof, that he was denied counsel... and shift the burden to the State ..." ignores what this case is all about. Only proper prior convictions can be used to enhance the sentence of a Defendant. Uncounselled prior convictions without a knowing and valid waiver of counsel cannot be used to enhance the Defendant's sentence. The State must corroborate the prior conviction, or the prior conviction cannot be counted. We need substance over form, and not vice versa, as requested by the Petitioner.

CONCLUSION

The Court should clarify the area of challenges to uncounselled prior convictions. First, the Defendant should be required to make a sworn, timely challenge to the prior conviction so that the Court and the State are on notice of the challenge prior to sentencing. Second, the Court should continue any sentencing to allow the State a reasonable period of time to corroborate the prior conviction. With this Court determining what is a reasonable period of time, if necessary, and third, this Court should require no more than reasonable prior notice of the basis for the challenge before the State is required to corroborate the prior conviction or delete it from the scoresheet.

Respectfully submitted, this 29th day of October, 1990.

  
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