**IN THE DISTRICT COURT OF APPEAL OF FLORIDA**
**SECOND DISTRICT**

CASE NO.: 2D19-1914
LOWER CASE NO.: 2017-MM-815

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**SCOTT HUMINSKI,**

Appellant,

- VS -

**THE STATE OF FLORIDA**,

Appellee.

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APPEAL FROM THE COUNTY COURT
LEE COUNTY, OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

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# THE APPELLANT'S INITIAL BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

This is an appeal from a final Order dated 16 March 2018 finding Scott Huminski in contempt of court. The Honorable Judge James R. Adams presided over pretrial motions, the non-jury trial, entered the final order, and sentenced the Appellant.

The appellate record consists of one (1) record (pages 1-2444) in 3 parts (an original and two (2) supplements). In this brief, the symbol "R." designates portions of the record on appeal, the symbol "S." designates portions of the supplemental record followed by a page number and line, and the symbol "TR." designates portions of the trial transcripts followed by a page number and line. Mr. Scott Huminski will be referred to by name or as "defendant" or "appellant," while the State of Florida will be referred to as "state" or "prosecution." All emphasis is supplied unless the contrary is indicated.

## STATEMENT OF CASE

The record in this case is convoluted, meandering, and disjointed. The Appellant[1] is/was an insistent *pro se* plaintiff in a Twentieth Circuit, Circuit Civil case number 17-CA-421, titled Scott Huminski, for himself and for those similarly situated vs. Town of Gilbert, AZ, et al. The Appellant, acting as his own attorney, filed dozens and dozens of motions, documents, and items with the court. Eventually, the trial court ordered him to not file any more pleadings, motions,

[1] The Appellant has been a *pro se* litigant and has had some limited success in a few dozen trial and appellate cases from around the country both in federal and state court in Arizona, Connecticut, Florida, and Vermont. According to the reporters, he even filed a *pro se* writ of prohibition/mandamus to the United States Supreme Court in an unknown matter which was summarily denied. In re Scott HUMINISKI, 134 S.Ct. 1550 (2014).

and/or documents without the assistance a licensed attorney. The Appellant persisted. (R. 52-54)

On 5 June 2017, Judge Elizabeth V. Krier issued an order to show cause ("OTSC") regarding the Appellant and has behavior, particularly his inability to cease filing documents with the court. (R. 52-54) The state attorney's office picked up the matter for prosecution. The matter was assigned to county court for prosecution under case number 17-MM-000815.

On 29 June 2017, the Appellant was informed of the allegations and plead not guilty with the assistance of counsel. (R. 2230-2254) While at the hearing, the prosecutor indicated that the State had not decided on what penalty to seek. (R. 2233, L. 2-19)

At some point, the court disagreed with the Appellant's legal appraisal of the situation (because the Appellant believed that the matter should be removed to federal bankruptcy court) and advised him of his rights. Judge Krier (who later recused herself) told the Appellant:

> … This is a criminal proceeding.
>
> And while we're on that subject, let me just make sure that you understand your rights. You have the right to remain silent. Anything you say in this court can be used against you and it's all being recorded. You have the right to an attorney. I'm appointing an attorney to represent you. You probably need to fill out some paperwork for that with the Public Defender's Office, but I'm appointing the Public Defender to represent you in this proceeding.

> This is a criminal proceeding. You can go to jail for this. You have violated - - it is alleged that you have violated court orders. It's alleged you have committed indirect criminal contempt. You can go to jail.
>
> There's two options, as I indicated to the State. They can proceed with a non-jury proceeding, in which case the most I can sentence you to is 59 jay - - 59 days in jail if I find that you are guilty with a non-jury trial or a jury trial, which the most I can sentence you to is up to six months.

(R. 2236, L. 10-25; 2237, L. 1-7) The court went on to wax about a mental health examination for the Appellant. (R. 2237, L. 21-25) None was ordered.

On 15 August 2017, the Appellant appeared before Judge James Adams. (R. 2255-2270) Throughout the hearing, the Appellant attempted to discuss with the court that it was the Appellant's position that this matter had been removed to federal bankruptcy court. The trial court disagreed. Id. On 18 August 2017, the office of the public defender was appointed to represent the Appellant. (R. 129)

On 1 September 2017, the Appellant appeared in court again. (R. 2271-2286) At that time, the Appellant completed an application for criminal indigency status and clerk made a finding of indigency. (R. 166) During the hearing, the Appellant indicated that he wanted a hybrid representation regarding appointed counsel (R. 2274, L. 9-11) Ultimately, the Appellant accepted the appointment. (R. 2274, L. 24) Regarding the potential penalty the State would seek, the prosecutor indicated that the State wanted to proceed forward with a non-jury. (R. 2281, L. 1-12)

On 22 September 2017, the Appellant was back in court for a status. (R. 2287-2291) The case was continued with a "continued waiver (of speedy trial)". Id.

On 27 September 2017, the office of the public defender declares conflict and moves to withdraw. (R. 253) On 29 September 2017, the trial court grants the motion and appoints regional conflict counsel to represent the Appellant. (R. 257)

On 27 October 2017, the Appellant is back in court. (R. 2292-2297) At the hearing, the office of the public defender indicates to the court that it has a conflict of interest. (R. 2294, L. 9-11)

On 2 November 2017, the State filed Notice of Intent to Seek Compulsory Judicial Notice. (R. 2431)

On 15 November 2017, the Appellant filed "Motion to Disqualify Conflict Counsel." (R. 322-324)

On 17 November 2017, the Appellant refused to come to court for his hearing. (R. 2298-2302) At the hearing, the attorney for regional conflict counsel appeared. (R. 2300, L. 14-16) Another hearing was set. Id.

On 20 December 2017, regional conflict counsel filed a motion to withdraw and appoint private counsel. (R. 541-542) The motion alleges, *inter alia*, that the Appellant has accused regional conflict counsel of ineffective assistance of counsel. Id.

On 21 December 2017, a hearing was held. (R. 2303-2313) Mr. Miller, regional conflict counsel, moved to withdraw. (R. 2305, L. 15-25) The court had a discussion with the conflict attorney about trial preparations.[2] (R. 2305-2309) The issue of withdraw and/or new appointment of counsel was not resolved.

On 22 December 2017 at 03:16 a.m., the Appellant filed "Notice of Appearance." (R. 543) The notice is e-signed by the Appellant, *pro se*. The Notice alleges that the Appellant will appear *pro se*. The Appellant claims he cannot trust regional counsel. (R. 543) The Appellant continued to e-file documents with the clerk throughout the early morning hours. At 09:42 a.m., the Appellant filed "Notice of Firing of Defense Counsel."[3] (R. 572) This Notice was filed five and half hours after he filed his appearance.

On 28 December 2017, the Appellant filed a demand for a jury trial.[4] (R. 592) The Appellant filed this document *pro se*.

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[2] The court inquired about trial preparations. The court was going to require a motion for depositions. It is unknown if depositions are authorized in a contempt proceeding. Fla. R. Crim. P. 3.840 does not address discovery and what is/is not permitted and/or authorized under Florida law.

[3] Many of the pleadings, notices, motions, and documents filed with the court are unorthodox and titled strange titles. The document often must be reviewed and read to determine the tenor of the specific document.

[4] It is unclear from the rules of criminal procedure if the rules, themselves, apply to a prosecution pursuant to Fla. R. Crim. P. 3.840. If the rules apply, which ones or all of them? The undersigned has no idea if there is a rule-based right to a speedy trial in a contempt prosecution.

On 29 December 2017, the Appellant filed a *pro se* motion titled motion to dismiss - ineffective assistance of counsel. (R. 598) The body of the motion does not comport with the requirements of Fla. R. Crim. P. 3.190 or 3.850. The next motion he filed that day was titled Motion to Disqualify Defense Counsel and Notice of Civil Claims of Legal Malpractice and Federal Civil Rights Violations Re: Atty. Neymotin. (R. 599-604) The Appellant wants his current counsel disqualified.[5] He next filed Motion of Intent to Seek Interlocutory Appeal if Disqualification of Conflict Counsel Denied and Proposed Motion to Stay Pending Appeal. (R. 605-609) The motion cites to Leake v. State.[6]

On 1 January 2018, regional conflict filed an amended motion to withdraw and appoint. (R. 614) On 4 January 2018, regional conflict filed another amended

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[5] The undersigned has no idea what "disqualified" means in this context. Does it mean that another attorney from regional conflict counsel assume the representation? Or, does it mean that no attorney from regional conflict could represent the Appellant and someone new should be appointed who free and clear from regional conflict counsel?

[6] Leake v. State, 207 So.3d 343 (Fla. 2d DCA 2016) Leake filed a petition for a writ of certiorari challenging the denial of a motion to withdraw. Leake learned that two of the witnesses against her had signed letters of support to contribute and sponsor a fund raiser for the public defender. The State objected and cited to MacKenzie v. Super Kids Bargain Store, Inc., 565 So.2d 1332 (Fla. 1990) The trial court denied the motion to withdraw on the basis of MacKenzie, *supra*. The Second District granted the petition, quashed the order denying the motion, and remanded for further proceedings consistent with the opinion. Id. It is unknown if the court granted the motion to withdraw or denied the motion on other grounds. As this Court is well-aware, certiorari deals with specific denials of due process that cannot be corrected on appeal. The instant case is not one of those confined cases.

motion to withdraw and appoint. (R. 626-627) The amended, amended motion updated its factual basis to include the Appellant current actions.

On 8 January 2018, another hearing was conducted. (R. 2314-2329) At the hearing, regional conflict argued that the office should be allowed to withdraw and presented case law. (R. 2317-2319) The Appellant agreed that regional conflict should be allowed to withdraw. (R. 2319, L. 16-17) The court granted the motion. (R. 2320, L. 2-5) At this point, the State interjected that no new attorney should be appointed. (R. 2320, L. 9-15, 19-21)

The court then inquired if the Appellant wanted to represent himself. (R. 2321, L. 12-14) The Appellant requested counsel. (R. 2321, L. 15-16)[7] After listening to the Appellant, the Court concluded that Appellant was playing games and decided to not appoint another attorney. (R. 2322-2324) No Faretta hearing was conducted and incarceration was not waived. The matter was set for another court date.

On 9 January 2018, the Appellant moved for subpoenas to be issued. (R. 749-750) The record does not reflect a hearing on this motion. No subpoenas were

[7] The Appellant offered information about some new, unrelated lawsuit. The record is unclear as to how the Appellant fit into that matter. Apparently, the State Attorney's Office was prosecuting or suing a television station and there were corruption charges and the Appellant believed he was a witness to be called in that case. He could not name the defense attorney he spoke with about the matter, however. (R. 2321-2322)

issued. The Appellant also filed a motion to conscript counsel. (R. 751) Amongst other motions filed on that day, the Appellant filed a motion titled Motion for Appointment of Counsel Under the Sixth Amendment. (R. 755-756) The motion includes a list of registry attorneys and little else. The motion fails to request any relief.

On 11 January 2018, the trial court granted regional conflict counsel's motion to withdraw with a written order. (R. 762)

On 12 January 2018, the Appellant filed a motion titled Motion for Hearing – Denial of Huminski's Sixth Amendment Right to Counsel. (R. 764) The motion appears to be legally and factually insufficient. The Appellant then filed a motion titled Motion for ADA Accommodations. (R. 766-770) The motion alleges that the Appellant is on social security disability for 9 years with a diagnosis of post-traumatic stress disorder ("PTSD"), anxiety disorder, bi-polar disorder, and possibly early onset of Alzheimer's disease. He claims that he cannot adequately function under stressful situations. He attaches an explanation of benefits to the motion. Id.

On 17 January 2018, the trial court entered Order Striking Notice of Appearance and Denying Requests for Appointment of Counsel. (R. 793-795) In the order, the trial court finds that the Appellant has harassed his appointed

counsel. The court then provides a laundry list of examples from the court record demonstrating the rationale for the denial of counsel. Id.

On 24 January 2018, the trial court entered an order denying the motion without prejudice for the Appellant to provide documentation from a qualified health care provider. (R. 1004-1005) The order reiterates that the Appellant forfeited counsel by his prior behavior. Regarding transcripts, the court points out that misdemeanor proceedings are already electronically recorded.[8]

On 28 January 2018, the Appellant filed Motion for ADA Accommodations and to Allow the State to Respond to Defense Motions, the Court is not a Party. (R. 1115-1123) The motion is accompanied by an unsigned report drafted by Rebecca Potter, LMHC. Although unsigned, she opines that the Appellant suffers from PTSD, generalized anxiety disorder, and social phobia. She outlines the Appellant's physical and mental disabilities and necessary accommodations. Id. Although not the focus of her report, the report alludes that the Appellant may be incompetent under Florida law (albeit it does not actually state incompetence).

On 30 January 2018, the trial court entered Order Denying Motions for Jury Trial. (R. 1180) In the order, the trial court dispensed with the Appellant's jury trial rights. The order further ominously reads, "The Court has not determined sentence.

[8] An indirect contempt proceeding is neither a misdemeanor nor a felony under Florida law. Graves v. State, 821 So.2d 459 (Fla.2d DCA 2002)

However, the Court will not impose an incarcerative portion of the sentence which is more than six months in jail." Id. At the time of the order, the Appellant had yet to be tried.

On 2 February 2018, the Appellant filed Motion to Dismiss-Defendant is Not Competant (sic) to Act as His Own Attorney. (R. 1206-1208) A portion of the motion has been redacted. The motion rambles into a diatribe about show trials and lynchings, but otherwise alleges that the Appellant has no legal training, is under the care of a medical doctor, and has medical/psychological diagnoses of chronic PTSD, generalized anxiety disorder, generalized social phobia, and psychological disorders not otherwise specified. Id. Outside of the title to the motion, the motion does not move for either an evidentiary hearing and/or any relief.

On 3 February 2018, the Appellant also filed Motion to Dismiss – Judge Adams Sabotaged the Right to Counsel. (R. 1209) The motion alleges that the Appellant does not have any money and no other attorney will take the case. Further, the Appellant rhetorically asks how he as a disabled, uneducated man can prepare for trial. Id. Outside of the title to the motion, the motion fails to move to any relief.

On 9 February 2018, the Appellant filed Motion for Appointment of Counsel. (R. 1246-1248) The motion cites to Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) Id. The motion suggests that the Appellant

would like counsel as stated in the title to the motion, but motion fails to move in the body of the motion for the appointment of counsel. On 10 February 2018, the Appellant filed a correct Motion for Appointment of Counsel. (R. 1248-1250) There was a typo that was corrected.

On 11 February 2018, the Appellant filed Motion to Vacate Stripping Huminski of Counsel and to Conduct a Faretta Hearing. (R. 1279-1285) The motion cites to State v. Young, 626 So.2d 655 (Fla. 1993). The motion fails to move for any specific relief outside of the title of the motion. On the same day, the Appellant files case law in support of his motion to appoint counsel. (R. 1291-1373)

On 12 February 2018, the Appellant filed Motion for Nelson Hearing Re: Effectiveness of Counsel and Stripping the Defendant of Counsel. (R. 1398-1401) The motion points out that the court did not conduct a proper Nelson inquiry. Id.

On the same day, the trial court entered Order Denying Motion to Dismiss Regarding Jury Trial. (R. 1447) The trial court also issued Order Denying Successive Motions to Appoint Counsel and Order Denying Successive Motions (which includes Motion to Dismiss – Defendant Is Not Competent to Act As His Own Attorney and Motion to Dismiss- Judge Adams Sabotaged the Right to Counsel) (R. 1449, 1456-1457)

On 13 February 2018, the Appellant appeared in court *pro se*. (R. 2330-2335) The judge inquired about when the Appellant, *pro se*, could be ready for trial; the Appellant indicated that he was trying to hire an attorney, but was not having any luck. Id. On the same day, the Appellant filed Notice of Dismiss, Huminski is Incompetent to Conduct His Own Defense and Memo In Support of Motice (sic), IIuminski (sic) is Incompetent to Conduct His Own Defense. (R. 1406-1434) The memo cites to Indiana v. Edwards, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008).

On 14 February 2018, the Appellant filed Motion to Set Nelson-Faretta Hearing with Compulsory Process.[9] (R. 1461-1463) The motion complains that the Appellant did not receive what he refers to a proper inquiry before stripping the Appellant of counsel.[10] The motion does not request any relief.

Hours later, the Appellant files Motion to Dismiss-Denial of Right to a Nelson and Faretta Hearing and to Compulsory Process at that Hearing and at

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[9] The record is a mess. The Appellant does not understand the basic concept of jurisdiction, complaint, and prayer or relief. He seems to manage to state his complaint but fails to ask for any relief or the authority for the relief. For instance, in a completely unrelated motion (Motion to Dismiss-Judge McHugh Declared the Protective Orders Void at Hearing on 2/13/2018), the Appellant requests that a hearing date should be scheduled for a Nelson/Faretta hearing. (R. 1464)

[10] Although the record is convoluted and disjointed, the record is devoid of any specific hearing geared towards the purpose of conducting any inquires pursuant to Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) or Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Trial. (R. 1465-1467) The motion is a rambling diatribe of complaints against the court. The motion additionally fails to request any relief.

On 16 February 2018 (two days later), the Appellant files Second Motion for Nelson-Faretta Hearing and For Compulsory Process Order in Support of Hearing. (R. 1474) On this time, the Appellant clearly states, "Huminski never asked for self-representation and is incompetent to conduct a criminal trial." Id. Hours later, the Appellant files Motion to Dismiss-Defendant is Incompetent to Conduct a Trial Huminski Admits He is Unable to Provide Effective Assistance of Counsel as He has Never Done So and Has No Law Degree. (R. 1476-1484) The motion clearly articulates the following: (a) the Appellant never waived right to counsel; (b) the court will not conduct a Nelson/Faretta hearing; (c) the court is refusing to allow to call defense witnesses and is allowing the State to call anyone;[11] and (d) is violating confrontation by refusing him to confront the Sheriff and Scribd employees. Other than the title, the motion fails to request relief.

Still later, the Appellant filed Second Motion for Competency Exam Re: Competence to Conduct His Own Defense, Huminski Is Competent to Stand Trial With Counsel. (R. 1485-1486) It is unclear from the title as it was typed what the

[11] Unclear from the motion, but it appears that the Appellant has filed several motions regarding subpoenas which all have been summary denied.

Appellant is requesting. The motion requests that a doctor and counselor be ordered to attend a hearing. The Appellant claims he never waived counsel. Id.

On 18 February 2018, the Appellant filed Notice of PTSD Defense Experts. (R. 1497-1499) The Appellant lists four expert witnesses. The notice indicates that the witnesses will testify to the impact of PTSD on the element of *mens rea*. The addresses of the witness were conspicuously absent. Id. The notice does not have any reports or curriculum vitae attached.[12] Later, the Appellant filed for an appeal from county to circuit court. (R. 1499-1500) The Appellant filed a request for indigency. (R. 1503) There is no clerk's determination.

On 20 February 2018, the Appellant filed Sworn Opinion of Expert Rebecca Potter, LMHC Conderning (sic) the Competence of Scott Huminski to Conduct his Own Criminal Defense Without the Assistance of Counsel. (R. 1576-1631) Attached to this document, there are several items, including, Counselor Potter's unsigned report. There is some sort of signed jurat but there are inconsistencies like the signatory's name appears to have been lifted from somewhere and recopied and the jurat does not appear to apply to any specific set of facts. Id.

On 21 February 2018, the trial court entered Order Denying Successive Motions to Appoint Counsel. (R. 1637)

[12] Counsel Potter's report has been attached to several motions. Dr. Lado has also been mentioned. Dr. Seth Silverman, M.D., and Karin Huffer, Ph.D. are new names.

On 22 February 2018, the Appellant filed Motion for Appointment of Counsel. (R. 1642-1643) An affidavit of indigency is attached.

On 27 February 2018, the Appellant filed Memorandum Concerning Violation of Huminski's Sixth Amendment Rights. (R. 1682-1688) He also filed Motion for State's Disclousure (sic) of Medical Witnesses Concerning Huminski's Competence to Act as His Own Attorney With His Disabilities. (R. 1696-1697) The motion does not request any relief.

On 28 February 2018, the trial court entered Order Denying Motion for Competency Examination. (R. 1702) The court also denied other successive motions. (R. 1704)

On 1 March 2018, the Appellant filed Motion to Dismiss-No Nelson/Faretta Inquiry (R. 1707-1714) The motion points out that both prior counsels withdraw because of conflicts of interest. The Appellant never requested self-representation. The motion goes on to state certain facts about the Appellant's background and includes a Florida Bar Journal article. The motion comes closer but fails to request a prayer for relief. Id. Later he files, Motion for Competency Exam per Finding of Judge Krier that Defendant is Delusional. (R. 1750) The motion references a

hearing on 29 June 2017, but there is no transcript. The Appellant finally moves for a competency exam.[13] Id.

On 5 March 2018, the trial court entered Order Striking Appointment of Public Defender. (R. 1779) On the same day, the Appellant filed Motion to Dismiss-Gideon v. Wainwright. (R. 1784-1785) The motion outlines the purpose and holding of Gideon v. Wainwright, 373 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The motion does not move for anything. Id.

On 6 March 2019, the Appears in court for a status. (R. 2336-2342) The court took issue with the Appellant's attempts to have the public defender's office appointed to represent him. The court states the following:

> … My understanding is that [Appellant] filed another affidavit of indigency for appointment of the Public Defender's Office. I've taken a look at it. I'm not going to reappoint the Public Defender's Office to represent you. They were - - originally filed a motion to withdraw from your case because of the nature of the conflict between you and them.
>
> Subsequent to that, Regional Conflict was appointed to represent you, as a result of the Public Defender's conflict. There were situations which I perceive as being your antagonistic - - antagonism towards them that caused them to withdraw from your case. I am not going to continue to appoint lawyers at public expense to represent you. I have stricken the order declaring you to be indigent for purposes of having access to a lawyer at public expense.

[13] Competency in some individuals may not be a static condition. Defendants can sometimes go from being competent to incompetent in a heartbeat and then back again to competent depending on their specific mental health issues and status.

> So, at this point I guess I need to find out from you if you are ready for trial.

(R. 2339, L. 1-24)

After court, the Appellant files Motion to Dismiss-5th Amendment Right to Remain Silent- Faretta inquiry. (R. 1789-1795) The motion complains about being stripped of counsel and the court's failure to conduct a Faretta hearing. The motion fails to move for anything. Id.

On 7 March 2018, the trial court issued Order Striking Successive Motions. (R. 1900) The Order covers Motion for Competency Exam.

On 14 March 2018, the trial court entered Order Striking Successive Motions. (R. 1922) The Order covers Motion to Dismiss-Gideon v. Wainwright; and Motion to Dismiss-5th Amendment Right to Remain Silent-Faretta Inquiry.

On 16 March 2018, the Appellant was tried. (R.1925, 1930, 2343-2405) The Appellant immediately asserted his right to counsel. (R. 2346, L. 20-23) The court summarily dispensed without a hearing or Appellant's argument or comment with all the pretrial motions that the Appellant had filed prior to court. (R. 2347, L. 12-15) During the hearing, the Appellant explained his disabilities. (R. 2353-2354) Regarding some late filed motions, the Appellant pleaded with the court:

> Just that there was no Faretta hearing, which is required to strip someone of counsel, like I was. It's Faretta versus California. And that's been adopted by the Florida Supreme Court as a standard in Florida, as well. And it's sort of like when you take a plea agreement, it goes

> through a specific colloquy with the defendant saying, you know, you understand you're giving up the right to attorney, et cetera, et cetera, just as - - similar to a plea agreement.

(R. 2365, L. 11-21) In response, the State had no comment. The Court explained its reasoning:

> All right. [Appellant], on that issue I didn't look at it necessarily as you saying I don't want a lawyer. I looked at your actions as being antagonistic towards all the lawyers that were appointed before you. And as I stated previously, the Public Defender's office was originally appointed to represent you. There were issues that arose between their representation of you their representation and your interaction with them that caused them to withdraw from continued representation of you in that case.
>
> Subsequent to that, Regional Counsel was appointed to represent you in the case. Mr. Miller came in on Regional Conflict's behalf and during the course of that representation I saw filings that indicated that it was your intention to file suits and hearings against (unintelligible) and, if I recall correctly, both in a personal capacity and as - - in a capacity as the head person for Regional Counsel. The relationship between you and the lawyers for Regional Conflict became very antagonistic to the point where they no longer continued - - wanted to continue to represent you.
>
> Based upon that and the prior instance in which you had had with the lawyers from the Public Defender's Office, both of which were appointed at public expense and it did not appear as if you were going to allow them to represent you and do their job. It was - - it was my impression that you were going to continue to act in a manner that would antagonize the lawyers that were appointed to represent you and we were not going to continue down that road at public expense. Therefore, I have declined to continue to represent counsel to you.

(R. 2365-2367) The Appellant politely and correctly pointed out that the both, the Public Defender and Regional Conflict were allowed to withdraw. (R. 2367, L. 14-17)

At the conclusion of the bench trial, the court found the Appellant in contempt of court and he was adjudicated. He was sentenced *inter alia* to 45 days in jail suspended, 6 months supervision, $500 fine, $50 cost of prosecution, $220 for crime-stoppers. (R. 1925-1926)

On 20 March 2018, the Appellant appealed the finding of contempt in 17-MM-815. (R. 1940) The appeal was naturally assigned to the Twentieth Judicial Circuit, circuit court sitting in its appellate capacity. On 20 March 2018, the Court entered Order Granting Court-Appointed Counsel's Motion to Withdraw and Appoint New Private Registry Attorney for Appeal. (R. 1938-1940)[14]

On that day, the Appellant filed Notice of Appeal – Supplemental (R. 1940-1943, 1945-1946) The appeal was accepted by the Circuit Court and assigned case number 18-AP-3.

On 5 June 2018, the undersigned filed Motion to Consolidate Appeals, Strike Pro Se Motions, and Transfer Jurisdiction to Second District. (Appendix) On 26 July 2018, the Circuit Court sitting in its appellate capacity issued Order

[14] There is a second order appointing the undersigned. (R. 1969-1970)

Granting Motion to Consolidate, Directing Clerk to Transfer Contents of Case Number 18-AP-9 to Case Number 18-AP-3, Granting Leave to File Directions to Clerk and Designations. (R. 1973-1976) The Order *inter alia* refused to transfer the appeal to the District Court.

On 7 August 2018, the undersigned filed Motion to Withdraw as Counsel. (R. 1977-1979) On 22 August 2018, the Circuit Court issued Order Dismissing Motion to Withdraw and Directing Appellant to File Initial Brief Within Twenty (20) days. (R. 1980-1981) The Order prompted Response to Show Cause. (R. 1982-2031).

On 30 August 2018, a warrant was issued for the Appellant's arrest regarding a violation of probation and affidavit. (R. 2032-2034).

On 11 September 2018, the undersigned filed Motion for Evidentiary Hearing. (R. 2035-2041)

On 29 October 2018, the circuit court entered an order to show cause why the appeal should not be dismissed.[15] (R. 2216-2218) On 31 October 2018, the

[15] Although the undersigned was not the original attorney at trial, the circuit court's order conscripts the undersigned attorney to essentially complete all of the tasks that should have been completed by the Appellant. In Lee County, the clerk treats appeals dealing contempt as civil matters and requires the attorneys to create the record. This caused a lot of confusion because the undersigned is part of the criminal registry and not accustomed to creating a civil record for a criminal appeal.

Appellant filed as directed Defendant's Amended Notice of Appeal. (R. 2221-2222) The Appellant also filed designations and directions to the clerk. (R. 2226)

On 29 March 2019, the Appellant filed a writ of prohibition with this Court regarding the appeal in an effort to curtail the Twentieth Judicial Circuit from exercising appellate jurisdiction over a contempt conviction from the Lee County, County Court. The writ was assigned case number 2D19-1247.

On 1 April 2019, the Appellant filed a motion pursuant to Fla. R. Crim. P. 3.800(b) to correct illegal sentence. (R. 2410-2419) The motion challenged the imposition of costs and fines. (S. 2410-2419) On 8 April 2019, the county court denied the Fla. R. Crim. P. 3.800(b) motion. (S. 2420-2421)

On 15 April 2019, the attorney general filed a response to the writ of prohibition. *See* 2D19-1247.

On 19 April 2019, the circuit court ruled on its order to show cause and dismissed the appeals in 18-AP-3 and 18-AP-9. (Appendix) On that day, the Appellant filed a petition for a writ of certiorari. The certiorari was assigned case number 2D19-1521.

On 22 April 2019, the petition for writ of prohibition was granted in the form of an order ordering Lee County to transfer the appeal to this Court and that case assigned 2D19-1914 (the instant case number).

On 14 May 2019, the Appellant filed Second Amended Motion to Correct Sentencing Error. (S. 2422-2425) On 6 June 2019, the lee county court denied the motion. (S. 2426-2427)

## STATEMENT OF FACTS

On 16 March 2018, the Appellant appeared for the evidentiary hearing on the OTSC. (R. 2343-2406) At the beginning of the hearing, the Appellant stated in response to the question if he was ready for trial, "No, I believe I have the right to counsel because the circuit court appointed counsel, overruling your ruling that I had no right to counsel." (R. 2346, L. 20-23) The Appellant pointed out that he had filed several last-minute motions that the court needed to rule on. (R. 2347)

During the discussion about the motions, the Appellant states the following:

> I have PTSD. I have generalized anxiety disorder.
> …
> I'm disabled and my memory is not as good as your memory - -
> …
> Or anybody else's memory. So, I - - I would rely on my disability.

(R. 2354-2344) A little later on in the hearing, the Appellant argued:

> Just that there was no Faretta hearing, which is required to strip someone of counsel, like I was. It's Faretta versus California. And that's been adopted by the Florida Supreme Court as a standard in Florida, as well. And it's sort of like when you take a plea agreement, it goes through a specific colloquy with the defendant saying, you know, you understand you're giving up the right to

> attorney, et cetera, et cetera, just as - - similar to a plea agreement.

(R. 2365, L. 11-21) In response, the State had no comment. The Court explained its reasoning:

> All right. [Appellant], on that issue I didn't look at it necessarily as you saying I don't want a lawyer. I looked at your actions as being antagonistic towards all the lawyers that were appointed before you. And as I stated previously, the Public Defender's office was originally appointed to represent you. There were issues that arose between their representation of you their representation and your interaction with them that caused them to withdraw from continued representation of you in that case.
>
> Subsequent to that, Regional Counsel was appointed to represent you in the case. Mr. Miller came in on Regional Conflict's behalf and during the course of that representation I saw filings that indicated that it was your intention to file suits and hearings against (unintelligible) and, if I recall correctly, both in a personal capacity and as - - in a capacity as the head person for Regional Counsel. The relationship between you and the lawyers for Regional Conflict became very antagonistic to the point where they no longer continued - - wanted to continue to represent you.
>
> Based upon that and the prior instance in which you had had with the lawyers from the Public Defender's Office, both of which were appointed at public expense and it did not appear as if you were going to allow them to represent you and do their job. It was - - it was my impression that you were going to continue to act in a manner that would antagonize the lawyers that were appointed to represent you and we were not going to continue down that road at public expense. Therefore, I have declined to continue to represent counsel to you.

(R. 2365-2367) The Appellant politely and correctly pointed out that the both, the Public Defender and Regional Conflict were allowed to withdraw. (R. 2367, L. 14-17) The Court quickly pointed out, "Right. Issues - - conflicts that you created." (R. 2367, L. 18-19) Nowhere in the record is there any explanation of how the conflicts came to be.

The State made no offer regarding the resolution of the case. (R. 2373, L. 8-12) Prior to the presentation of the evidence, the State explained, "Judge, just that we did file a notice of intent to seek compulsory judicial notice, under 90.202, 90.203 with respect to the civil court case, file number 17-CA-421." (R. 2375, L. 5-8) The Court did not inquire if the Appellant actually received the notice of intent, and if the Appellant received the Notice of Intent, then when to make a determination that the Appellant had reasonable notice. Also, the Court did not inquire if the Appellant had any legal objections to State proceeding with a notice of intent (to rely on judicial notice).

The Appellant asserted his Fifth Amendment right. (R. 2378, L. 2-3) The State called Brenda Horton. (R. 2378-2387) She works for the clerk of courts. (R. 2379, L. 15) She was familiar with the civil case Huminski v. Town of Gilbert, Arizona. (R. 2380, L. 11-13) Case number 17-CA-000421. (R. 2382, L. 1) She was able to identify the Appellant. (R. 2382, L. 14) She was also able to put the Appellant physically in the court room because she recorded his presence in the

court room on the "minutes" sheets. (R. 2382, L. 2-5) The minute sheets were admitted as exhibit 1 without objection. (R. 2383, L. 17-18)[16]

Next the witness was able to authenticate exhibits 2 through 20 which were certified copies of the circuit court judge's orders and the remainder were motions that were filed by the Appellant in violation of the circuit court judge's order. (R. 2386, L. 3-5)[17] The Appellant waived cross-examination. (R. 2387, L. 2-5)

The State next called Richard White (R. 2387- Deputy White works for Lee County Sheriff's Office. His current assignment has him working with the U.S. Marshall Service. (R. 2388, L. 15-18) Regarding exhibit 12, he served a copy of that document (*e.g.*, order to show cause) on the Appellant on 13 June 2017. (R. 2390, L. 13-19) He identifies the Appellant as the person he served with the order to show cause. (R. 2390, L. 17-23)

On cross-examination, the Appellant pointed out that the document that was served on him was different from the one in court. (R. 2391-2392) The document what was served on the Appellant was only 2 or 3 pages without any attachments. Id.

[16] The Appellant asserted his Fifth Amendment rights but did not voice a discernable legal objection to the admission the evidence.
[17] In response to the court's request if the Appellant had any objections to the admission of exhibits 2-20, the Appellant declared, "I assert my fourth and fifth amendment rights." (R. 2386, L. 1-2).

At the close of the evidence, the Appellant made a motion to dismiss. (R. 2393-2394) He unsuccessfully argued that he should have been served with all the documents involved with the order to show cause but was only served with three. The court denied the motion. (R. 2395, L. 1-7)

After a summation by the State, the judge found the Appellant guilty. (R. 2399, L. 2-4) The Appellant was placed on six-month probation. He was required to pay court courts, $50 cost of prosecution, and a fine of $500. As a condition of probation, the following, "Also, as a condition of the probation that, you know, any future filings that you have are to be under the signature of a licensed attorney." (R. 2399, L. 5-12) The court also imposed a 45-day jail sentence but suspended the sentence. (R. 2399, L. 21-24) Lastly, the court (at the State's behest) imposed a condition that the Appellant does not communicate with any of the participants from the civil proceeding. (R. 2400, L. 1-10; 2401, L.13-16) No specific persons were listed and the court merely stated, "what the state said" regarding the final condition imposed.

The Appellant timely appealed.

## STANDARD OF REVIEW

Pursuant to Fla. R. App. P. 9.210, the standard of review for a compliance with Fla. R. Crim. P. 3.840 is *de novo*; failure to strictly comply with Fla. R. Crim.

P. 3.840 constitutes fundamental error. Persoff v. Persoff, 589 So.3d 1007 (Fla. 4th DCA 1991).

## SUMMARY OF ARGUMENT

There are many constitutional errors in this proceeding requiring reversal, a new trial, the appointment of counsel, and competency evaluation to determine competency to proceed.

In this prosecution for indirect criminal contempt, the trial court failed to strictly comply with requirements outlined in Fla. R. Crim. P. 3.840. The Appellant, as an indigent defendant, was entitled to the appointment of conflict free counsel. After allowing the public defender's office and regional conflict counsel to withdraw for professional conflicts, the trial court decided that the Appellant was not worthy of further appointment of counsel. At this point, the Appellant was forced to proceed *pro se* over his ongoing and continuous objections that he was entitled to counsel.

Regarding the Appellant proceeding *pro se* to trial, the trial court failed to follow the requirements of Fla. R. Crim. P. 3.111(d) and Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). As this Court is aware, a Faretta hearing is a pretrial hearing with its singular purpose to determine whether an individual who is seeking to represent himself at trial is voluntarily waiving his right to counsel. Id. The failure to conduct a full and fair Faretta hearing is *per se*

reversible error in an indirect criminal contempt hearing. Stermer v. State, 609 So.2d 80 (Fla. 5th DCA 1992)

Regarding competency, the Appellant has a "due process" right to not be convicted while he is incompetent. Once the trial court forced the Appellant to proceed pro se, the Appellant filed at least four motions suggesting to the trial court that he was incompetent to proceed. The trial court ignored the requests and failed to follow the procedures outlined in Fla. R. Crim. P. 3.210-3.212; and Dougherty v. State, 149 So.3d 672 (Fla. 2014).

After the contempt conviction, the trial court imposed a $50.00 cost of prosecution pursuant to §938.27, Fla. Stat., as a misdemeanor cost. As the case law outlines, criminal contempt is neither a felony nor a misdemeanor, but a third category of crimes simply described as "common law crimes." As such, a conviction for contempt cannot authorize any costs under §938.27, Fla. Stat., and the costs must be struck and/or not imposed if there is a new conviction at a new trial. In this instance, the dual motions pursuant to Fla. R. Crim. P. 3.800(b) should have been granted.

Lastly, indirect criminal contempt is a "'common law' crime." It is not a felony nor a misdemeanor. Certain offenses in Florida are guaranteed a jury trial. Some of those offenses, *inter alia*, are: offenses punishable by more than six months, offenses that are malum in se, or offenses that were recognized or

indictable at common law. Contempt is an offense recognized at common law, is arguably a *malum in se*, and does not fall within the "petty crimes" exception. Florida recognizes that crimes that were indictable or recognized at common law (or are *malum in se* and are not "petty offenses") are guaranteed a jury trial. Contempt is, therefore, guaranteed a jury trial.

## ARGUMENT

THE TRIAL COURT FAILED TO STRICTLY COMPLY WITH FLA. R. CRIM. P. 3.840 WHEN IT FAILED TO APPOINT CONFLICT FREE COUNSEL AFTER BOTH THE PUBLIC DEFENDER AND REGIONAL CONFLICT COUNSEL WITHDREW.

The law construing Fla. R. Crim. P. 3.840 is direct, clear, succinct, and unambiguous. The Fourth District summarized the law as this:

> ***Indirect criminal contempt proceedings require strict adherence to rule 3.840.*** Levey v. D'Angelo, 819 So.2d 864, 869 (Fla. 4th DCA 2002). ***Failure to comply with the procedural requirements of rule 3.840 constitutes fundamental error.*** Baker v. Green, 732 So.2d 6, 7 (Fla. 4th DCA 1999). A party's failure to raise the issue of noncompliance with rule 3.840 will not bar full consideration of the issue on appeal. Persoff v. Persoff, 589 So.2d 1007, 1008-09 (Fla. 4th DCA 1991).
> Indirect criminal contempt is a proceeding in which the individual is protected by the full panoply of due process rights. Martin v. State, 743 So.2d 591, 592 (Fla. 4th DCA 1999). This court has reversed an indirect criminal contempt charge where the defendant was not provided formal written notice of the charge. Martinez v. State, 976 So.2d 1222, 1223 (Fla. 4th DCA 2008).
> Other districts have reached similar conclusions. *See* Maloy v. Judd, 209 So.3d 581 (Fla. 2d DCA 2015)

> (holding the trial court failed to comply with rule 3.840 by failing to issue a written order to show cause); J–II Investments, Inc. v. Leon County, 21 So.3d 86, 89 (Fla. 1st DCA 2009) (holding rule 3.840 requires the trial court to issue an order to show cause); De Castro v. De Castro, 957 So.2d 1258, 1260 (Fla. 3d DCA 2007) (reversing for failure to issue show cause order).
>
> Our supreme court has interpreted Rule 3.840 to require[ ] that the court issue an order to show cause with reasonable time allowed for preparation of the defense and further provides ***that the defendant is "entitled to be represented by counsel***, have compulsory process for the attendance of witnesses, and testify in his or her own defense." These necessary procedures for indirect criminal contempt proceedings were not followed in this case.
>
> Plank v. State, 190 So.3d 594, 607 (Fla. 2016) (emphasis added) (internal citations omitted).

Sandelier v. State, 238 So.3d 831, 834-5 (Fla. 4th DCA 2018) (Emphasis added)

Further, in Aaron v. State, 284 So.2d 673 (Fla. 1973) and Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985), the Florida Supreme Court recognized that indirect criminal contempt was akin to a criminal process and, as such, all of the constitutional criminal "due process" protections needed to be afforded the contemptor in that prosecution.

In this case, the Appellant was and has always been determined to be "indigent." Based on the holdings of Aaron, *supra*, and Bowen, *supra*, the Appellant was entitled to the appointment of counsel (as a basic constitutional

criminal right).[18] *See* Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); and Fla. R. Crim. P. 3.111.

As the record clearly demonstrates, the Appellant is mentally ill to some degree.[19] This appeal apparently came to be because the Appellant's behavior has been difficult for a few judges and a couple of attorneys to deal with during throughout these proceedings. Nevertheless, the trial judge dealing with the contempt matter unconstitutionally stripped the Appellant of counsel in the law.

In this case, the public defender's office and regional conflict counsel both filed motions to withdraw citing conflicts. (R. 253, 541) Neither motion outlines or states what the particular conflict is other than certifying that there is a conflict of interest and that that office can no longer properly and ethically represent the Appellant. *See* Young v. State, 189 So.3d 956 (Fla. 2d DCA 2016). The trial court,

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[18] Further, under Fla. R. Crim. P. 3.111, there were no exceptions to the rule that applied. For instance, there was no judicial order indicating "no incarceration." Further, contempt is not a misdemeanor or a violation of a municipal ordinance, but in an unlisted category. Basic statutory construction dictates that counsel is mandatory (because it would have been optional had the rule makers allowed for "opting-out" like misdemeanors or ordinance violations can.

[19] The Appellant told the court on a couple of occasions in open court and filed several motions with attachments that would lead a reasonably prudent person to suspect that there is something amiss with the Appellant. In this case, the Appellant filed dozens of incomplete motions with the court. Looking at the nature of the offense alleged (refusal to abide by a court order), the dozens of inconsequential motions, the admissions of a party opponent stating a known mental health diagnosis, the sworn exhibits to a few of motions, there was ample evidence to at least have the court look into the Appellant's competency and sanity at the time of the offense.

which from time to time voiced its suspicions, has no idea what the actual conflict might between the Appellant and these different counsels.

Based upon the withdraws, the court inappropriately concludes that the Appellant must be the root cause of the problem and decides that the Appellant will no longer be afforded counsel. At the hearing, the State strongly suggests that the court does not have to appoint conflict free counsel at this point. (R. 2320, L. 9-15)[20] In fact, the State opines that the Appellant is causing the conflicts without any sworn evidence to support that conclusion. Id.

This is a major reversible error. The Appellant was entitled to counsel. In fact, at his trial, the Appellant pointed this specific error out to the court. The court concluded that based on the numerous filings that the Appellant had caused the conflicts. (R. 2366-2367) In response, the Appellant correctly explains, "Both

[20] The Appellant had no idea that he needed to object to the State's argument. The State's position was completely improper. The conduct may have violated Rule 4-3.8 Special Responsibilities of a Prosecutor. Specifically, "The prosecutor in a criminal case shall: (b) not seek to obtain from an unrepresented accused a waiver of important pre-trial rights such as a right to a preliminary hearing;" Although the mentally ill Appellant was difficult, the Appellant was unrepresented and requesting counsel. There are procedures in place already for the court to adhere to. The fact that the State openly advocating stripping the Appellant of counsel, when the State is well-aware of Rule 3.111, Faretta, *supra*, and Gideon, *supra*, is unconscionable and unfair. The prosecutor knew or should have known better of this and either remained silent on the issue of counsel or pointed out the well-established case law. Instead, the State's argument completely undercut the Appellant's absolutely correct position on the appointment of counsel.

conflict counsel and public defender were let off the case on their own motions for conflict of interests, if you look at the record." (R. 2367, L. 14-17)

To which, the court retorts, "Right. Issues - - conflicts that you created." (R. 2367, L. 18-19) The problem with the trial court's conclusion is that there is no evidence in this record and/or before the court regarding what the actual conflict of interest might encompass. Based on Young, *supra*, the court cannot know the nature of the conflicts. Regional and the public defender could have *bona fide* conflicts with other current or past clients that because of the attorney-client privilege those counsels cannot disclose. The trial court is guessing and making assumptions about the nature of the conflicts. This is legally incorrect.

Based on the reasoning above, this Court should reverse and vacate the adjudication, and remand this Appellant's case back to the trial court for a new trial. At that new trial, the Appellant should be afforded appointed, conflict free counsel. In an abundance of caution, a new judge should be assigned for the new trial.

## THE TRIAL COURT FAILED TO FOLLOW THE REQUIREMENTS OF FARETTA WHEN IT FORCED THE APPELLANT TO PROCEED TO TRIAL PRO SE.

As stated above based on Aaron, *supra*, and Bowen, *supra*, the Appellant is entitled to all the constitutional criminal "due process" rights. Id. There is no doubt or any misunderstanding from the record before this Court, the Appellant wanted,

desired, requested, and even begged for the appointment of counsel, but was ultimately forced to proceed *pro se* to trial in spite of these requests. Forcing the Appellant to proceed pro se violates Gideon, *supra*, and Fla. R. Crim. P. 3.111.

On several occasions, both in writing and orally, the Appellant informed the trial court that (a) he wanted counsel appointed; (b) that he was indigent; (c) that he had not waived the appointment of counsel; and (d) that the trial court had ignored he requests for a Faretta hearing. *See* Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); and Fla. R. Crim. P. 3.111(d). As this Court is aware, a Faretta hearing is a pretrial hearing with its singular purpose to determine whether an individual who is seeking to represent himself at trial is voluntarily waiving his right to counsel. Id. The failure to conduct a full and fair Faretta hearing is *per se* reversible error in an indirect criminal contempt hearing. Stermer v. State, 609 So.2d 80 (Fla. 5th DCA 1992) (Failure to inquire into the appellant's waiver of his right to counsel, otherwise referred to as a Faretta hearing, constitutes reversible error). *See* Cooper v. State, 576 So.2d 1379 (Fla. 2d DCA 1991); and Hadden v. State, 633 So.2d 486 (Fla.1st DCA 1994) (Reversible error for trial court to fail to conduct a Faretta hearing).

The trial court paternalistic approach to the prosecution of this case violated the Sixth Amendment, Gideon, *supra*, Faretta, *supra*, and Fla. R. Crim. P. 3.111(d). The Appellant did not waive his right to be represented by counsel. In

fact, he was entitled to the appointment of conflict free counsel as an indigent defendant facing indirect criminal contempt. *See* Stermer, *supra*.

Based on the reasoning above, this Court should reverse and vacate the adjudication, and remand this Appellant's case back to the trial court for a new trial. At that new trial, the trial court should conduct a Faretta hearing should the Appellant want to proceed *pro se*. If the Appellant does not want to proceed pro se, then the trial court should appoint conflict free counsel. In an abundance of caution, a new judge should be assigned for the new trial.

## THE TRIAL COURT FAILED TO COMPLY WITH FLA. R. CRIM. P. 3.210 WHEN THE APPELLANT RASIED HIS COMPETENCY AS A PRO SE DEFENDANT.

As stated above based on Aaron, *supra*, and Bowen, *supra*, the Appellant is entitled to all the constitutional criminal "due process" rights. Id. This invariably includes the right to not be tried and convicted while incompetent to proceed. The Florida Supreme Court outlined this issue in Dougherty v. State, 149 So.3d 672 (Fla. 2014). The Court explained that the procedures outlined in Fla. R. Crim. P. 3.210-3.212 were enacted to determine whether a defendant was competent to proceed. Dougherty, 149 So.3d at 676-7.[21] None of these procedures were followed by the trial court as the trial court ignored the Appellant's requests.

[21] Defendants have a "due process" right to not be convicted while incompetent. "In Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975),

In January 2018, the trial court allowed regional conflict counsel to withdraw for a conflict of interest. At that time, the trial court refused to appointed conflict free counsel. Without a choice, the Appellant proceeded *pro se* at this point and muddled through his representation the best he could. Admittedly, he is not an attorney and has little idea what to actually do.

Shortly after he was stripped of counsel in January, the Appellant filed a motion that requested accommodations pursuant to the American's with Disabilities Act ("ADA") (R. 1115-1123) The motion was legally and factually insufficient, did not cite to the ADA, or actually request any relief. In fact, this motion, like almost all of the motions that the Appellant filed in this case, was utterly incomplete in its form as to render the motion meritless. In this instance,

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the United States Supreme Court recognized that "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Procedural due process requires adequate notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." Jones v. State, 740 So.2d 520, 523 (Fla.1999) (*quoting* Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). Further, "'[i]t is well-settled that a criminal prosecution may not move forward at any material stage of a criminal proceeding against a defendant who is incompetent to proceed.'" McCray v. State, 71 So.3d 848, 862 (Fla.2011) (*quoting* Caraballo v. State, 39 So.3d 1234, 1252 (Fla.2010)); *see* Fla. R. Crim. P. 3.210(a). "An individual who has been adjudicated incompetent is presumed to remain incompetent until adjudicated competent to proceed by a court." Jackson v. State, 880 So.2d 1241, 1242 (Fla. 1st DCA 2004) (*citing* Holland v. State, 634 So.2d 813, 815 (Fla. 1st DCA 1994)); *see also* Corbin v. State, 129 Fla. 421, 176 So. 435 (1937); Erickson v. State, 965 So.2d 294 (Fla. 5th DCA 2007); and Molina v. State, 946 So.2d 1103 (Fla. 5th DCA 2006)." Dougherty, 149 So.3d at 676.

however, the Appellant attached for the first time an unsigned report drafted by Rebecca Potter, LMHC. Although the report is unsigned, she opines that the Appellant suffers from PTSD, generalized anxiety disorder, and social phobia. She outlines the Appellant's physical and mental disabilities and necessary accommodations. Id. In her professional opinion, she believes that the Appellant will struggle with his own representation. Id. Although not the focus of her report, the report alludes that the Appellant may be incompetent under Florida law (albeit it does not actually state incompetence).

Again, on 2 February 2018, the Appellant filed Motion to Dismiss-Defendant is Not Competant (sic) to Act as His Own Attorney. (R. 1206-1208) A portion of the motion has been redacted. The motion rambles into a diatribe about show trials and lynchings, but otherwise alleges that the Appellant has no legal training, is under the care of a medical doctor, and has medical/psychological diagnoses of chronic post-traumatic stress disorder ("PTSD"), generalized anxiety disorder, generalized social phobia, and psychological disorders not otherwise specified. Id. Outside of the title to the motion, the motion does not move for either an evidentiary hearing and/or any relief.

On 13 February 2018, the Appellant also filed Notice of Dismiss, Huminski is Incompetent to Conduct His Own Defense and Memo In Support of Motice (sic), IIuminski (sic) is Incompetent to Conduct His Own Defense. (R. 1406-1434)

The memo cites to Indiana v. Edwards, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008). By way of explanation in Edwards, the United States Supreme Court held that the Constitution permits states to insist upon representation by counsel of persons who are competent to enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct the trial proceedings by themselves. Id.

On 16 February 2018 (two days later), the Appellant files Second Motion for Nelson-Faretta Hearing and For Compulsory Process Order in Support of Hearing. (R. 1474) On this time, the Appellant clearly states, "Huminski never asked for self-representation and is incompetent to conduct a criminal trial." Id. Hours later, the Appellant files Motion to Dismiss-Defendant is Incompetent to Conduct a Trial Huminski Admits He is Unable to Provide Effective Assistance of Counsel as He has Never Done So and Has No Law Degree. (R. 1476-1484)

On at least four occasions, the Appellant attempted to raise his competency. Having been conscripted into proceeding *pro se*, the Appellant was muddling through the representation the best he could. Although he did not file a motion pursuant to Fla. R. Crim. P. 3.210-3.212, it is obvious what the Appellant was driving at with his flurry of motions. All of this should have triggered the slightest of curiosities in the trial court to appoint doctors to determine if the Appellant was

competent to proceed. Unfortunately, none of that occurred. The error is reversible *per se*.

Based on the reasoning above, this Court should reverse and vacate the adjudication, and remand this Appellant's case back to the trial court for a new trial. At that new trial, the trial court should conduct a competency determination to determine if the Appellant is, in fact, competent to proceed. In an abundance of caution, a new judge should be assigned for the new trial.

## THE TRIAL COURT ERRED IN IMPOSING COST OF PROSECUTION UNDER §938.27, FLA. STAT., WHEN THE INDIRECT CRIMINAL CONTEMPT IS NEITHER A FELONY OR MISDEMEANOR.

As this court is well-aware, contempt is neither a misdemeanor nor a felony, but rather a common-law crime. Giordano v. State, 32 So.3d 96 (Fla. 2d DCA 2009). This Court explained:

> ***Criminal contempt is neither a felony nor a misdemeanor, but a third category of crimes simply described as "common law crimes."*** *See* Graves v. State, 821 So.2d 459, 460 (Fla. 2d DCA 2002) ("Contempt is a common law crime in Florida,…."); Dep't of Juvenile Justice v. State, 705 So.2d 1048, 1049 (Fla. 2d DCA 1998) ("Contempt is neither a felony nor a misdemeanor."); Welch v. Rice, 636 So.2d 172, 173 (Fla. 2d DCA 1994) (noting that contempt is not a misdemeanor offense). Common law crimes, such as criminal contempt, which have not been separately reclassified by statute as either a felony or a misdemeanor retain their status as common law crimes. *See* § 775.01, Fla. Stat. (2005) (providing that where there is no statute to the contrary in Florida, the common

> law of England with respect to crimes is in effect). ***Hence, criminal contempt must still be regarded as a common law crime.***

Id, at 98. (Emphasis added)

During sentencing, the trial court imposed $50.00 cost of prosecution under §938.27, Fla. Stat. To correct this problem, the Appellant filed two motions pursuant to Fla. R. Crim. P. 3.800(b). In response, the Court reasoned:

> Fla. Stat. §938.27(2)(a) provides that the trial court 'shall impose the cost of prosecution and investigation not withstanding the defendant's ability to pay.' Fla. Stat. §938.27(8) provides that the minimum cost of prosecution fee for a misdemeanor case is $50, and that the trial court 'may set a higher amount upon a showing of sufficient proof of higher costs incurred.

Id. The trial court reasoned that because this matter was prosecuted in the county court the matter was a misdemeanor.

Putting aside the mandates of Diaz v. State, 901 So.2d 310 (Fla. 2d DCA 2005) and Phillips v. State, 942 So.2d 1042 (Fla. 2d DCA 2006) and the reasons why the imposition of the cost of prosecution was illegal, the trial court is flat incorrect about the offense. Indirect criminal contempt is a common-law crime that is not a felony nor a misdemeanor. Giordano, *supra*; and Graves, *supra*. The trial court cannot legally assess a $50 cost of prosecution under §938.27, Fla. Stat., because that code section does not apply. The dual motions pursuant to Fla. R. Crim. P. 3.800(b) should have been granted. There is no provision on Florida law

that allows court costs, cost of prosecution, and/or cost of investigation regarding contempt matters.

> INDIRECT CRIMINAL CONTEMPT IS A "COMMON LAW CRIME" AND, THEREFORE, IS ENTITLED TO A JURY TRIAL REGARDLESS OF PENALTY.

As was explained above, contempt is neither a felony nor a misdemeanor, but is classified as a "'common law' crime." *See* Graves, *supra*. Specifically, this Court explained:

> Common law crimes, such as criminal contempt, which have not been separately reclassified by statute as either a felony or a misdemeanor retain their status as common law crimes. *See* § 775.01, Fla. Stat. (2005) (providing that where there is no statute to the contrary in Florida, the common law of England with respect to crimes is in effect). ***Hence, criminal contempt must still be regarded as a common law crime.***

Giordano, 32 So.3d at 98. (Emphasis added)

In Green v. United States, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958), the United States Supreme Court provided a useful history of the court's contempt power. The Court explained:

> An evaluation of this argument requires an analysis of the course of development of federal statutes relating to criminal contempts. The first statute bearing on the contempt powers of federal courts was enacted as s 17 of the Judiciary Act of 1789, 1 Stat. 73, 83. It stated that federal courts 'shall have power to * * * punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same * * *.' The generality of this language suggests that

> s 17 was intended to do no more than expressly attribute to the federal judiciary those powers to punish for contempt possessed by English courts at common law. Indeed, this Court has itself stated that under s 17 the definition of contempts and the procedure for their trial were 'left to be determined according to such established rules and principles of the common law as were applicable to our situation.' Ex parte Savin, 131 U.S. 267, 275—276, 9 S.Ct. 699, 701, 33 L.Ed. 150.2 At English common law disobedience of a writ under the King's seal was early treated as a contempt, 4 Blackstone Commentaries 284, 285; Beale, Contempt of Court, 21 Harv.L.Rev. 161, 164—167; Fox, The Summary Process to Punish Contempt, 25 L.Q.Rev. 238, 249, and over the centuries English courts came to use the King's seal as a matter of course as a means of making effective their own process. Beale, at 167. It follows that under the Judiciary Act of 1789 the contempt powers of the federal courts comprehended the power to punish violations of their own orders. (footnote omitted)
>
> So much the petitioners recognize. They point out, however, that, at early English law, courts dealt with absconding defendants not by way of contempt, but under the ancient doctrine of outlawry, a practice whereby the defendant was summoned by proclamation to five successive county courts and, for failure to appear, was declared forfeited of all his goods and chattels. 4 Blackstone Commentaries 283, 319. In view of this distinct method at English common law of punishing refusal to respond to this summons, which was the equivalent of the present surrender order, petitioners argue that s 17 of the Judiciary Act of 1789, incorporating English practice, did not reach to a surrender order, and that the unique status of such an order subsisted under all statutory successors to s 17, including s 401(3) of the existing contempt statute.

Green, 356 U.S. at 635-6 It is clear that the court's contempt power grew up and evolved from the contempt power created in England under its common law. The

power to punish certain disobedience to the court is the crime of indirect criminal contempt. It was a criminal offense recognized at common law. Based on Florida interpretation, contempt is not a felony nor a misdemeanor, and falls within the grouping of common law crime. Giordano, *supra*; and Graves, *supra*.

To begin, Art. I, Sec. 22, Fla. Const. (1968 Revision) guarantees jury trials. It reads, "SECTION 22. Trial by jury. - The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law." Based on Art. I, Sec. 22, the Florida Supreme Court recognized in Whirley v. State, 450 So.2d 836 (Fla. 1984) certain classes of criminal offense that necessarily enjoyed a jury trial determination of guilt. Under Whirly, "petty offenses" were punishable by not more than six months and a $500.00 fine and not entitled to an automatic jury trial. Whirly, at 838. *See* Reed v. State, 470 So.2d 1382 (Fla. 1985) On the other hand, offenses that were recognized or indictable at common law, automatically enjoy a jury trial determination of guilt. Id.

Contempt is an offense recognized at common law, is arguably a *malum in se*, and does not fall within the "petty crimes" exception. Florida recognizes that crimes that were indictable or recognized at common law (or are *malum in se* and are not "petty offenses") are guaranteed a jury trial. Contempt is, therefore,

guaranteed a jury trial.[22] *See* Antonacci v. State, 504 So.2d 521 (Fla. 5th DCA 1987). *See also* Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968) (Serious contempts are subject to jury trial provisions of Constitution, binding on states, and traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring demand for jury trial.)

The Appellant understands and appreciates that Aaron v. State, 345 So.2d 641 (Fla. 1977) (Aaron II) and Aaron v. State, 284 So.2d 673 (Fla. 1973) (Aaron I) hold that contempt is a criminal procedure. Both Aaron I and II, taken in conjunction, outline that indirect criminal contempt may be entitled to a jury trial if the court contemplates the imposition of a six-month sentence of incarceration or greater. Id.[23]

Aaron I and Aaron II were decided before the Florida Supreme Court had the benefit of having decided the question presented in Whirley and Reed. Id.

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[22] Contempt is guaranteed a jury trial as a common law offense regardless of the manipulation of the penalty by the court and/or State. Whirley, *supra*; and Reed, *supra*.

[23] Allowing the trial court to manipulate the sentence from twelve month to less than six grants the trial court hearing the contempt trial the ability to completely obliterate the contemptor's jury trial right under the Sixth Amendment. Why would the trial court go through the hassle of a empaneling a jury for a jury trial when the trial court could simply limit the incarceration to less than six months and hold a bench trial? Simple and expedient, right? The question scarcely escapes its own statement. Historically, there are no reported cases involving jury trials in contempt proceedings. And why would there be any reported cases if the trial court can simply limit the penalty to avoid the jury trial?

Based on the logic of Whirley and Reed, contempt (an offense recognized and indictable at common law, that is not a "petty offense" by design, and is a *malum in se* offense), is guaranteed a jury trial under Florida Law. Although Aaron I and Aaron II still provide guidance on contempt as a criminal offense, their legal and constitutional logic falls under the rules of construction articulated and posited by Whirley and Reed. Id Contempt is a common law offense that is entitled to a jury trial regardless of whether the trial court limits any incarceration to six months or less. Otherwise, contempt's criminal classification as a "'common law' crime" advanced in cases like Aaron I, *supra*; Aaron II, *supra*; Giordano, *supra*; Graves, *supra*; Dep't of Juvenile Justice v. State, *supra*; and Welch, *supra*, is completely meaningless.

Based on the reasoning above, this Court should reverse and vacate the adjudication, and remand this Appellant's case back to the trial court for a new trial. The trial court should afford the Appellant a jury trial unless all the parties waive a jury trial. Fla. R. Crim. P. 3.260. In an abundance of caution, a new judge should be assigned for the new trial.

## CONCLUSION

For the reasons stated above regarding the various issues, this Honorable Court should reverse the Appellant's conviction and remand it for a new trial in accordance with the arguments stated above.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to Fla. R. Jud. Admin 2.516, a copy of the foregoing Initial Brief of the Merits has been furnished via the e-portal to (attorney general) crimapptpa@myfloridalegal.com and Scott Huminski s_huminski@live.com on this 11th day of October 2019.

Respectfully submitted,

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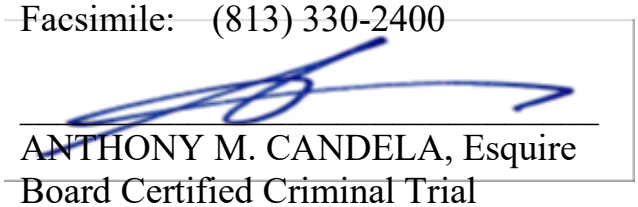

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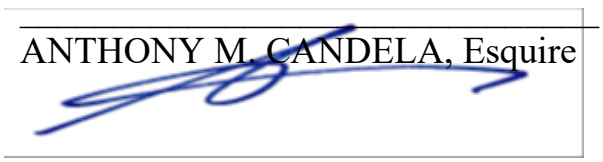
## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that I have complied with the provisions of Fla. R. App. P. 9.100 (1) and Fla. R. App. P. 9.210 (a)(2) with respect to the proper form and font (Times New Roman 14-point type).



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