IN THE FLORIDA SUPREME COURT

JACK BEHR,

Petitioner,

v. CASE NO. 85,024

FRANK L. BELL,
as Circuit Judge of the
1st Judicial Circuit,

Respondent.

_____/

ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner Public Defender will be referred to herein as either petitioner or public defender. Respondent trial judge is not the true party in interest. Accordingly, because the state is the true party in interest, respondent will be referred to as the state. References will be as used by petitioner in referring to the appendices attached to petitioner's initial brief.

STATEMENT OF THE CASE AND FACTS

Respondent state accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Section 27.51 authorizes trial courts to appoint counsel for indigents charged with felony offenses. The district court did not err in determining that the statute and case law authorize the use of "standby counsel" at the discretion of the trial court.

The state acknowledges that the appointment of standby counsel presents potential problems, and that, as a policy, the appointment of standby counsel should be rare and strictly circumscribed.

ARGUMENT

ISSUE

WHETHER A TRIAL JUDGE HAS THE DISCRETION TO APPOINT THE OFFICE OF THE PUBLIC DEFENDER TO ACT AS "STANDBY COUNSEL" TO ASSIST A DEFENDANT WHO IS EXERCISING THE RIGHT TO SELF REPRESENTATION?

Section 27.51(1), Florida Statutes (1993) states that public defenders "shall represent, without additional compensation, any person who is determined by the court to be indigent as provided in s. 27.52" who is under arrest for or charged with a felony. It is uncontroverted that defendant Hill in this case was indigent and was charged with a felony. It is also uncontroverted that Hill chose to represent himself and that the trial court recognized his right to do so. Nevertheless, in granting the right to self-representation, the trial court denied the public defender's motion to withdraw, deciding instead:

> 2. The Public Defender's Office for the First Judicial Circuit of Florida is appointed "standby counsel" to aid the Defendant if and when the Defendant requests help, and to be available to represent the Defendant in the event that termination of the Defendant's self-representation is necessary. As "standby counsel," the Public Defender's Office should continue to be involved in the trial process to the extent that a delay or continuance will not be required in the event that termination of the Defendant's self-representation is necessary.

The focus of petitioner's argument is the meaning of the statutory word "represent" in section 27.51(1). Petitioner argues that "represent", as it is generally understood in both

Black's Law Dictionary (Revised Fourth Edition) and Chapter Four of the Rules of Professional Conduct, cannot be adequately performed by "standby counsel" who is not fully armed with the authority and professional perquisites of an unrestricted counsel.

Petitioner's argument is misplaced for a number of reasons. Basically, the argument misperceives the nature of an appointment as "standby counsel." The defendant here exercised his right to self-representation pursuant to Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). The responsibility for his defense was entirely his own. As Faretta holds in relevant part:

> Of course, a State may - even over objection by the accused - appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. See United States v. Dougherty, 154 U.S.App.D.C. 76, 87-89, 472 F.2d 1113, 1124-1126.
>
> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel." (emphasis added). Faretta, 422 U.S. at 2541, 45 L. Ed. 2d at 2541, fn46.

This Court has repeatedly acknowledged that the appointment of standby counsel is consistent with Faretta and may be a

prudent device under appropriate circumstances to avoid the potential disruptions of trial court proceedings when it becomes necessary to revoke the right to self-representation or even to remove the defendant from the trial court. In Jones v. State, 449 So. 2d 253, 257 (Fla.), cert. denied, 469 U.S. 893, 105 S. Ct. 269, 83 L. Ed. 2d 205 (1984), the defendant combined disruptive courtroom behavior with self-representation. He argued on appeal that the trial court did not conduct an adequate inquiry into his waiver of counsel and that appointment of standby counsel was ineffectual because standby counsel declined to furnish legal advice when called upon. This court rejected these arguments with holdings that go directly to the public defender's concerns here:

> The record clearly shows that the court was faced with an obstreperous defendant who might well attempt to disrupt and obstruct the trial proceedings. Under these circumstances, it was prudent of the court to appoint standby counsel, even over defendant's objection, to observe the trail in order to be prepared, as well as possible, to represent defendant in the event it became necessary to restrict or terminate self-representation by shackling and gagging defendant or by removing him from the courtroom. We do not view the appointment of standby counsel over defendant's objection as interposing counsel between defendant and his sixth amendment right to self-representation. At one point during cross-examination of a witness, when defendant appeared to be opening up a subject which it was in his interest to avoid, the trial court on its own volition suggested that defendant consult with standby counsel. Attorney Wilson [standby counsel], not being familiar with the case or the purpose of the cross-examination, declined to advise defendant. This was understandable because defendant had refused to cooperate by familiarizing Wilson

> with the case or with defendant's trial strategy. The inability of counsel to prepare for trial and offer such assistance as defendant might request was not due to any action of the court or of the standby counsel. The fault lies squarely on defendant and his refusal to cooperate with the court and court-appointed counsels in their efforts to provide legal assistance. (emphasis added). Id.

The state does not suggest that the appointment of standby counsel is desirable or that such counsel can adequately prepare to take over active conduct of the trial. The inherent inability to effectively do so, however, as both Faretta and Jones point out, is the responsibility and the fault of the defendant who exercises his right to self-representation. The appointment of standby counsel, as in Jones, should not be understood as an attempt to undercut the defendant's right to self-representation or to save him from the probable folly of his exercise of that constitutional right or to create a hybrid representation where responsibility is everywhere and nowhere. Standby counsel is appointed to assist the court in attempting to conduct orderly and timely proceedings. As was pointed out, in Jones 449 So. 2d at 258-259, again relying on Faretta, the right to self-representation "is not a license to abuse the dignity of the courtroom," ...."or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices."

The state submits that the trial court order here appointing "standby counsel" was consistent with the language of section 27.51, as the district court below found, and that there is no

basis for a general holding that trial courts do not have the discretion under appropriate circumstances to appoint standby counsel to represent indigents should it become necessary to terminate self-representation. It would not be appropriate to dwell on the facts of the underlying prosecutions in this case, as an appeal from the convictions and sentences will eventually be heard by this Court, but the Court should notice that the wide notoriety and unusual facts of the underlying prosecutions make the appointment of such counsel particularly appropriate and prudent here.

OTHER CONSIDERATIONS

The state argued in its jurisdictional brief that there was no direct and express conflict on which to base jurisdiction but suggested that the importance of the issue here and the potential for misuse of standby counsel under inappropriate circumstances might justify this Court's acceptance of jurisdiction as a question of great importance to both the public and to the orderly administration of justice. This argument is briefly set out in the following.

There are a number of reasons why appointment of standby counsel is undesirable as a general policy or practice. Appointment of such counsel, if not carefully considered and implemented, may create a potential for hybrid representation where it is not clear whether defendant is self-represented or is represented by standby counsel. Standby counsel is not a substitute for fully informing the defendant of the disadvantages

of self-representation pursuant to Faretta. Nor should it become a device for defendants to indulge their ego by disrupting orderly and timely proceedings because of their lack of legal knowledge or experience. Nor should it be a device for obtaining reversals of convictions based on requiring trial courts to "exalt form over substance" as this Court held in Jones, 449 So. 2d at 258. For an apt, recent example of the this abuse, see Roberts v. State, 655 So. 2d 184 (Fla. 1st DCA 1995). There, the trial court conducted multiple inquiries on the disadvantages of self-representation and ultimately granted the defendant's repeated demands for self-representation. However, after trial commenced, the defendant inquired as to the whereabouts of his "co-counsel," his former counsel who at one time had been appointed as standby counsel. Based on this inquiry, he secured a reversal on appeal, thus obtaining by his own actions at least two bites of the apple and total frustration of orderly and timely proceedings in the trial court.

There are numerous other recent examples where the issue of self-representation has created reversible error in the view of the district court below because the trial court either granted or denied self-representation. See, e.g., Dortch v. State, 651 So. 2d 154 (Fla. 1st DCA 1995)(Trial court granted self-representation but also furnished standby counsel to furnish technical assistance; district court reversed because trial court "failed to adequately apprise appellant of the dangers and disadvantages of self-representation"); Kennedy v. State, 643 So. 2d 676 (Fla. 1st DCA 1994)(Reversed, trial court erred in

refusing request for self-representation); Payne v. State, 642 So. 2d 111 (Fla. 1st DCA 1994)(Reversed, presence of standby counsel does not relieve trial court of duty to instruct on dangers of self-representation); Douglass v. State, 634 So. 2d 693 (Fla. 1st DCA 1994)(Reversed, trial court erred in failing to inform defendant he could represent himself if unreasonably dissatisfied with appointed counsel); Hadden v. State, 633 So. 2d 486 (Fla. 1st DCA 1994)(Solvency of defendant does not relieve trial court of duty to inform of dangers of self-representation); Crystal v. State, 616 So. 2d 150 (Fla. 1st DCA 1993)(Reversed, trial court erred in denying request for self-representation); Moore v. State, 615 So. 2d 874 (Fla. 1st DCA 1993)(Reversed, trial court inquiry insufficient to show that choice of self-representation knowingly and intelligently made); Taylor v. State, 610 So. 2d 576 (Fla. 1st DCA 1992)(Reversed, defendant's previous self-representation, trial court's inquiry, and appointment of "standby counsel" to sit with defendant during trial "to answer questions and provide any assistance that [appellant] would want" insufficient); Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 5 (Fla. 1993)(Reversed for failure to make adequate inquiry on motion for new counsel and for failure to permit self-representation).

The state maintains that the above cases show that form has become elevated over substance, contrary to Jones, in determining whether a defendant should or should not be permitted self-representation and that the orderly administration of justice would be served by clarifying the law on this subject. It should

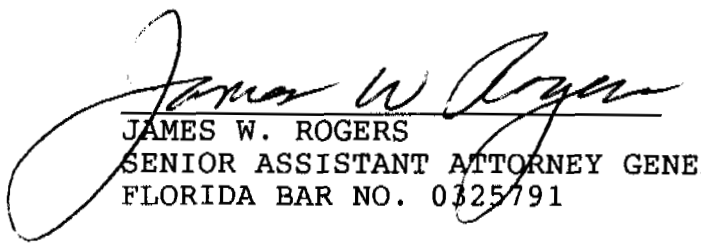
be made clear that the appointment of standby counsel is largely an ineffectual and wasteful undertaking which should be resorted to only under very limited circumstances.

CONCLUSION

The district court should be affirmed and a clarifying statement of the law issued.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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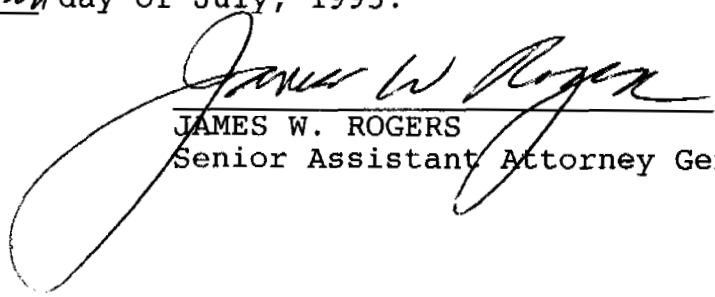
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Earl D. Loveless, Assistant Public Defender, 190 Governmental Center, Pensacola, Florida 32501, this 24th day of July, 1995.



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