ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 85,909

JEFFREY ELY ROBERTS,

Respondent

PETITIONER'S INITIAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
BUREAU CHIEF, TALLAHASSEE
CRIMINAL APPEALS
FLORIDA BAR NO. 0325791

DANIEL A. DAVID
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0650412

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL. 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE No. 85,909

JEFFREY ELY ROBERTS,

Respondent,

_____/

PETITIONER'S INITIAL BRIEF

PRELIMINARY STATEMENT

Petitioner, State of Florida, Appellee below, will be referred to herein as Petitioner or "the State." Respondent, Jeffrey Ely Roberts, Appellant below, will be referred to as Respondent or by his proper name. References to the record on appeal will be by use of the symbol "R" followed by the appropriate page number(s). References to the transcript of the proceedings will be by use of the symbol "T" followed by the appropriate page number(s). All bold-faced emphasis is by Petitioner, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case comes to the Court based upon express and direct conflict between the decision of the First District in this case and decisions of this Court and of the Second District. This Court has jurisdiction pursuant to Art. V, §3(b)(3), Fla. Constitution and F. R. App. P. 9.030(a)(2)(A)(iv).

The relevant facts are as follows:

On January 9, 1993, Gainesville police arrested Respondent on a charge of Aggravated Assault (with a knife) upon the victim, Inga Oberst (R. 1). The police report alleged that Respondent had pulled the knife and pointed it at Oberst's throat at a Gainesville Bar known as "The Purple Porpoise." (R. 1).

On May 14, 1993, Respondent appeared for jury trial before the Circuit Court, Hon. David L. Reiman, Acting Circuit Judge, presiding, represented by Susan B. Wehlburg, Assistant Public Defender. (T. 196).

After the jury had been seated, defense counsel presented her opening statement. (T. 197). The court then directed the state to call its first witness, at which time the Respondent announced, "I wanted to fire my attorney." (T. 197). The court, at the request of defense counsel, ordered the jury removed. (T. 198).

The Court then asked Respondent if he wanted to be heard, and Respondent told the court he had only seen his attorney on three occasions since his arrest, and that the aggregate time of their three meetings totaled just 16 minutes. (T. 198). He stated he had differences with his attorney about which witnesses would or would not be called for the defense. (T. 198).

He stated that potential jurors had not been asked on voir dire the questions he felt were important, which were whether the jurors trusted and believed in God, and whether they believed in telling the truth, rather than "all that hoopla about 'Where do you work?' and, 'Who do you know?' and all this stuff." (T. 198-199). "Because to me the only thing that counts is the truth; that's what we're trying to get at." (T. 199). Respondent complained of being judged by jurors he himself could not question: "if I sit here and let my life be decided by people that I can't even question, then I don't feel right about it." (T. 199).

Respondent reiterated his differences with his attorney, questioning why somebody "that's supposed to be up for me, supposedly, looking out for my best interests in this case" would not "listen to me about" which witnesses would or would not be called by the defense. (T. 199). Respondent advised the court that witnesses he told his attorney he felt were important were deemed

to be unneeded by the attorney. (T. 199).

The court asked what he wanted done, and whether he wanted "to proceed by yourself, without counsel?" (T. 200). Respondent asked for a continuance and new counsel, (T. 200), stating that he had previously expressed his concerns to Judge Doughtie (T. 201) who assured him that the public defender would be more available, and, as a result, Ms. Wehlburg came to see him one more time. (T. 201).

Defense counsel Wehlburg stated that she had advised Respondent she had years of experience, had tried a number of cases, was aware of the rules of evidence, and that in her opinion, some of what he had asked her for was not relevant. (T. 201-202).

The Respondent stated "I have my own ideas about this thing, and I have had from the beginning[,]" and questioned again that if his lawyer "isn't out for me, how am I going to get a fair trial? I ask you, your Honor, how?" (T. 203).

The Court asked about specific witnesses he wanted called, and Respondent specified the bouncers, a Mr. Thurmon, and the bartender whom he had tipped $5.00. (T. 204). He also wanted measurements of the bar and to be placed in a lineup. (T. 204).

Roberts claimed that the public defender was not doing the job for him, he wanted an adequate investigation with an investigator, he wanted to fire current counsel, he wanted replacement counsel,

and he wanted a continuance so that the case could be prepared to put on his theory of defense. (T. 204-209). After a recess, defense counsel moved for a mistrial, with no objection from the state. (T. 208).

The court asked Roberts if he wanted to proceed *pro se* and he stated that if he was given access to a law library, time to prepare, and subpoena service over the people he wanted to call in his defense, he would like to proceed as his own lawyer, else he wanted a different public defender. (T. 210). The Court advised him of "certain recognized complications for an individual in an incarcerated state in representing themselves." (T. 210). Among them, access to a law library. (T. 211).

After further exchanges, the court stated it was unable to find that the public defender had been inadequate, and denied respondent's motion to discharge her. (T. 214). Respondent then asked to be co-counsel, and this was denied. (T. 215).

Respondent then asked to proceed pro se and represent himself, and the court advised him that if that was his desire, proceedings would be stopped, a Faretta hearing would be conducted, and the court would make a determination as to whether he was competent to represent himself in a court of law. (T. 215-216). Mr. Roberts responded, "Let's do that." (T. 216).

The Court inquired of the Respondent, and established that he was a 39 year old high school graduate, had started some college courses in Key West, had several friends who had been law students, and had sat in on some of their mock trials, apparently at the University of Florida Law School. (T. 217). When asked if he knew how to examine a witness, he replied: "Well, to me the only thing that counts is the truth. So that's the only thing I'd be after." (T. 217). When asked if he knew the rules of evidence, he admitted he did not, but that he would obtain a book on the subject and study it. (T. 217). The court then inquired on Respondent's knowledge of laying "a proper predicate for the purposes of establishing the foundation for the admissibility of a piece of evidence" (T. 217) and who he would need to call "[t]o establish the chain of custody of a matter in evidence[.]" (T. 218). Respondent eventually replied, noting, "...I only got one piece of evidence. I mean, like, how can it get misconstrued?" (T.220).

A further recess was had, and the court resumed, noting its reliance upon, *inter alia*, Smith v. State, 546 So. 2d 61 (Fla. 1st DCA 1989) in resolving the adequacy of the Faretta inquiry. The court specifically inquired anew if respondent wanted to proceed *pro se*, and he replied that if he could not get a replacement public defender, that was what he wanted to do. (T. 220-221). The

judge advised him that the court had no power to order the appointment of any specific assistant public defender, and that his choices were to proceed to trial with Ms. Wehlburg or *pro se*. (T. 221).

Respondent stated he wanted to proceed as his own attorney, but would like to contact the public defender's office to see if a new assistant public defender could be assigned. (T. 221-222). The court determined that Respondent had no addiction to alcohol or drugs, and was taking no drugs for mental health reasons. (T. 223). It was further established that Respondent had been employed as a carpenter on construction jobs building a water tank and a parking lot, as a laundry worker at the University of Florida, had owned and operated his own business, and had attended a truck driving school. (T. 224-225).

The Court advised him that his incarcerated status would prevent him from conducting depositions at the courthouse, doing research at the University of Florida Law School, and going to the Purple Porpoise to post notices seeking potential witnesses. (T. 225).

In light of all the difficulties of preparing the case while behind bars, the court again asked if he still wanted to proceed *pro se*. Respondent replied, "I think it's imperative." (T. 227).

Finding that he had "the requisite intelligence and capabilities, and [did] not show any mental deficiencies that would preclude self-representation," the court granted Respondent's request to proceed *pro se*. He was also granted a mistrial and a continuance to prepare his defense. (T. 228). Assistant Public Defender Wehlburg was discharged as attorney of record. (T. 230).

On June 22, 1993, Respondent appeared for Docket Sounding before Hon. Aymer L. Curtin, Acting Circuit Judge. (T. 165). Judge Curtin asked Respondent if he had fired the public Defender's Office and did he still want to represent himself; Respondent replied in the affirmative to both queries. (T. 166). When asked if he was aware of the difficulties of representing himself, Respondent replied, "Well, the way I see it, sir, the only thing that counts is the truth. That's the only thing I'm after." (T. 167). When asked his educational level, Respondent advised he had completed high school, and had begun college courses at the Florida Keys Community college, but had not finished, coming to Gainesville with the intent of seeking a transfer. (T. 167). The court found this to be "a high school diploma or a GED and then one partial quarter of community college[,]" which summation Respondent endorsed. (T. 168). Respondent advised, in response to a query from the court that he had not represented himself in other criminal

proceedings. (T. 168). When asked by the court if he had any special training in the law, particularly criminal law, Respondent replied, "It's my destiny." (T. 168).

Respondent, when questioned by the court, admitted he had heard the old saying, "The attorney that represents himself has a fool for a client." (T. 168). The Court told the Respondent that due to lack of training and experience, if he represented himself, "it can lead to a result that you didn't want to happen."(T. 169). Respondent replied that he understood, but since in this case, where there was only one piece of evidence and a couple of witnesses, "I mean it's not no big case[,]" and reiterated his position that, "The only thing I'm concerned about is the truth and that's it and the truth is I didn't commit the crime." (T. 169).

The prosecutor advised the court that the last judge respondent had appeared before had conducted a similar Faretta inquiry and discharged counsel. (T. 169) To which the court observed that this was a critical stage and "what concerns me is certain psychological evaluations were done." (T. 169).

Former counsel Wehlburg advised the court that she had the results of the psychological testing: "I would be glad to tell the court that the psychological examination found him competent, found him capable, found him not insane and suffering from no mental

defect, but I'll still make it available to the court with Mr. Roberts' permission."(T. 171).

Respondent advised the court that he had been previously represented by the Public Defender in a criminal case and didn't like the end result, "so that's why I'm going to do this on my own." (T. 172). Respondent further admitted a false imprisonment conviction, which he attributed to his involvement in drugs, and further stated that persons he had been doing drugs with caused him legal problems and were still causing him problems. (T. 173).

The following then occurred:

> THE COURT: Mr. Roberts, have you ever been treated for mental illness?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you know what an arraignment is, Mr. Roberts?
>
> THE DEFENDANT: That's when you give me my charges.
>
> THE COURT: Do you know what voir dire is?
>
> THE DEFENDANT: Do I know what?
>
> THE COURT: What voir dire is.
>
> THE DEFENDANT: Not per se, I don't know what voir dire is.
>
> THE COURT: Do you know what a motion for judgement of acquittal is?
>
> THE DEFENDANT: That would mean that I had moved for

the charges to be dismissed.

THE COURT: At what point do you do that?

THE DEFENDANT: It depends on the case. Probably like in this case I would have done it on the ninety-day speedy trial that wasn't held up to that I asked to be filed for. I've been incarcerated since January 9th. Also, my name was misspelled and my SS number was incorrect.

THE COURT: Who proceeds first to make opening statements to the jury?

THE DEFENDANT: I guess that depends on who they decide. The DA did it the first time.

THE COURT: I find that I don't think he has the requisite knowledge to represent himself. Mr. Roberts, I don't think you have the requisite knowledge to represent yourself. You have not shown this court, based on its questions, that you understand the legal system or a criminal trial.

(T. 173-174).

Respondent rejoined that the prior judge "has already ruled on it and said that I can." (T. 174-175). The Court then stated that it was going to rule to the contrary, based on Roberts' responses to the court's questions, "based on your own counsel's reservations she had in her mind about your competency in her asking for an evaluation, so obviously there's something--" and that "your answers to my questions about motion for judgement of acquittal and voir dire and opening statements lead me to believe that you're not

familiar enough with trial practice to adequately represent yourself on an aggravated assault charge." (T. 175).

Respondent then complained of having counsel and not being able to ask questions. The court responded that the public defender was being re-appointed and a procedure employed where Respondent could forward questions over his counsel's objection to the judge, out of the presence of the jury; if the questions were approved by the judge, Respondent could then pose them to the jury. (T. 176). Respondent replied, "Well, I'd like the notation made in the court record that I object to this and that I'm fully competent and in my own right mind and would just as soon represent myself."(T. 176).

The public defender thereafter advised the court that the case was ready for trial, and the court ordered a further pre-trial, to be held before a different judge, Judge Doughtie. (T. 177). The court stated on the record that "...I don't think that based on the questions I asked him he understands the system well enough to be representing himself on a felony case. If this was carrying a concealed weapon or trespass, I might feel differently, but the consequences of this are much greater." (T. 177).

On June 25, 1993, Respondent appeared for pre-trial before Judge Doughtie. (R. 181). The judge asked Respondent, "In your own

mind, do you feel that you're able to proceed to trial?" (T. 183). Roberts replied in the affirmative, but said that he still needed some evidence that he had that was being kept at the jail, specifically referencing his umbrella. He also noted that his copy of the police report was illegible in part, and that apparently he did not get a copy of the bouncer's statement in discovery. (T. 184). Respondent advised the court that he had already prepared his case, and if he could get copies of these documents, "I would be ready to go on my own." (T. 184).

After discussion with former counsel Wehlburg on Respondent's ability to follow trial procedure and directives from the bench, the judge stated he agreed with her assessment that Respondent was intelligent and not incompetent.(T. 184-185). The Court then advised Respondent that it had seen Ms. Wehlburg render effective assistance in the past, and asked why would he not want a good competent lawyer assisting him. (T. 185). Roberts' responded that he was on the scene when the crime occurred and he could more effectively question the witnesses and nail them down if they uttered any inconsistencies. (T. 186). He stated he had nothing personal against Ms. Wehlburg, had changed his life around after quitting drug use, and believed the only relevant voir dire questions for jurors was if they believed in God, and if they

believed in telling the truth (T. 187). When advised by the court that he could not ask jurors about their belief in God, Respondent told the court he would rephrase the question or eliminate it from his list of voir dire questions. (T. 188). "With that one omission, I don't see any problem with you representing yourself." (T. 188). The court continued, "I think you're articulate. I think you can tell the story. You can ask questions. You've got a good grasp of what's going on." (T. 188).

Ms. Wehlburg promised to make herself available to him pre-trial to answer his questions regarding procedure (T. 189) and to forward Respondent legible copies of the discovery paperwork. (T. 192).

The court found that he was able to, and would, be allowed to represent himself (T. 193). During jury selection, Respondent made no request for counsel, unequivocal or otherwise. (T. 128-162). During the guilt phase, at which he proceeded *pro se*, after the prosecutor had concluded opening statement, Respondent advised the trial judge that he would reserve his own opening statement until the start of the defense case. (T. 15). The following then occurred:

> THE DEFENDANT: Yeah, but I would like to mention that I would like the witnesses in the courtroom and the gag removed. And I'd also like to know where my

co-counsel is -- Susan.

THE COURT: Okay. Well, I don't think you've got, really, a co-counsel in the case.

THE DEFENDANT: Anyway, can we get the witnesses in here and just kind of move them around? I don't want the --no gag out there, because I know how people are when they're hanging around outside chatting.[1] (T. 15-16, footnote added).

After the jury returned its verdict, the following colloquy occurred:

THE COURT: At this point, Mr. Roberts, the jury, having rendered its verdict, then, it is up to the Court to pronounce sentence. You have waived counsel for the trial phase. You still have the right to have a lawyer represent you on the sentencing phase, and I'll be glad to reappoint --

THE DEFENDANT: I don't need anyone, Your Honor. I see what's going on. I do want an appeal. (T. 120).

Appellant argued on appeal that the trial court erred in not renewing its offer of counsel during jury selection and at trial and failed to make an adequate inquiry into his waiver of counsel. The district court held that the trial court erred in not conducting another Faretta inquiry during the guilt phase when appellant asked where co-counsel was instead of informing him that he had no co-counsel. Roberts v. State, 655 So. 2d 184 (Fla. 1st

---

[1]Respondent was referring to the witness sequestration rule, as the colloquy between the court and the respondent at T. 16 clearly establishes.

DCA 1995).

SUMMARY OF ARGUMENT

The district court erred as a matter of law in holding that the casual and inaccurate reference to a non-existent co-counsel was sufficient to warrant a fourth Faretta inquiry.

The Faretta hearing mandated by the First District would have been the **fourth** such inquiry in this case. Respondent had been granted his right to self-representation after he clearly and repeatedly argued that he be permitted to exercise that right. The record shows beyond any doubt that respondent intended to represent himself and was competent to do so.

Controlling case law does not require that additional inquiries be *sua sponte* initiated by trial courts during the guilt phases of trials where defendants have properly been granted the right to self-representation and are doing so.

Further, the presence *vel non* of standby "co-counsel" is an irrelevancy. Even if respondent had co-counsel (which he clearly did not have in this case) it would have no impact on the resolution of this issue because he bears "the entire responsibility for his own defense," Behr v. Bell. It is not the responsibility of trial courts to keep counsel advised of the

whereabouts of co-counsel, assuming there is co-counsel.

Cases such as this, where defendants assert their right to self-representation at trial and obtain reversals on appeal by taking contradictory positions are an abuse of the system which should be emphatically stopped.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE TRIAL COURT WAS REQUIRED TO CONDUCT A FOURTH FARETTA HEARING DURING THE COURSE OF THE GUILT PHASE WHEN THE SELF-REPRESENTED DEFENDANT ERRONEOUSLY REFERRED TO A NON-EXISTENT CO-COUNSEL?

The district court held that the trial judge (Hon. Nath C. Doughtie) committed reversible error in not *sua sponte* conducting a **fourth** Faretta hearing during the guilt phase of the trial. The First District's decision, Roberts v. State, 655 So. 2d 184, 185 (Fla. 1st DCA 1995) holds:

> At the beginning of the actual trial, when Appellant affirmatively questioned his attorney's whereabouts -- "I'd also like to know where my co-counsel is--Susan" -- this statement should have signalled to the trial court, at a minimum, that Appellant was confused as to whether

> he was represented by counsel at that time. The trial court should have stopped the proceedings at that point and conducted a *Faretta* inquiry.

There are two preliminary points to note about this holding. First, the reference to the nonexistent co-counsel did not occur at the "beginning of the actual trial;" it occurred after the guilt phase started and after the prosecutor finished opening argument. Thus, we are not in the posture where the burden was on the trial court to affirmatively advise the defendant of his right to an appointed counsel. Jones v. State, 449 So. 2d 253 (Fla. 1984), cert. denied, 469 U.S. 893, 105 S. Ct. 269, 83 L. Ed. 2d 205 (1984). Second, neither party relied on, or even referred to, the "co-counsel" remark in the district court, presumably because both recognized its legal and factual irrelevancy. As will be developed below, the district court not only substituted its judgment for that of the trial court, it also substituted itself for appellate counsel.

The district court erred in at least four self-reinforcing respects. First, the presence or absence of "co-counsel," assuming there was co-counsel, was legally irrelevant. This Court's recent decision in Behr v. Bell, 21 Fla. L. Weekly 57 (Fla. Jan. 4, 1996) is onpoint. Public Defender Behr opposed the appointment of standby co-counsel on the ground that there was no statutory

authority for such appointments. Rejecting this narrow construction of the statute and relying on Faretta v. California, 422 U.S. 806, 95 S. CT. 2525, 45 L. Ed. 2d 562 (1975) and Jones v. State, 449 So. 2d 253 (Fla.), cert. denied, 469 U.S. 893, 105 S. Ct. 269, 83 L. Ed. 2d 205 (1984), this Court held "that the appointment of standby counsel ... is constitutionally permissible, but not constitutionally required." Id. Further, the "purpose of standby counsel is to assist the court in conducting orderly and timely proceedings." (e.s.)Id. Under Florida law, trial courts "should reserve the appointment of standby counsel for the limited circumstances where such action is necessary to preserve orderly and timely proceedings." Id. Finally, and dead onpoint to the case here:

> [A] defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel. Such a defendant cannot thereafter complain that the quality of his defense was a denial of 'effective assistance of counsel.' Faretta, 422 U.S. at 835 n.46.".(e.s.) Id.

In sum, there is no right to the assistance of co-counsel. It matters not whether respondent was momentarily confused about whether he had co-counsel. When the trial court immediately and accurately pointed out that he had no co-counsel, respondent made no objection, presumably because he realized that no co-counsel had been appointed and he had no right to such assistance:

> THE DEFENDANT: Anyway, can we get the witnesses in here and just kind of move them around? I don't wan't the -- no gag out there, because I know how people are when they're hanging around outside chatting. T15-16

If, and nothing in the record supports this proposition, respondent elected self-representation in the belief he would receive co-counsel, it was his responsibility as counsel to both maintain contact with co-counsel and to immediately object to the judge's ruling that no co-counsel had been appointed. Moreover, a "confused" counsel is not necessarily ineffective and, as Faretta, Jones, and Behr make clear, a self-represented defendant bears the entire responsibility for his defense. Whether as counsel or co-counsel at trial, Respondent cannot now claim on appeal that the trial court or the state caused his confusion or had the responsibility for relieving it.

Second, under Florida law, Faretta inquiries are only necessary when there is an unequivocal request for self-representation. See, Watts v. State, 593 So. 2d 198, 203 (Fla. 1992) ("Because there was no unequivocal request for self-representation, Watts was not entitled to an inquiry on the subject of self-representation under Faretta."); Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988) ("We note that the courts have long required that a request for self-representation be stated

unequivocally."); and Augsberger v. State, 655 So. 2d 1202, 1205 (Fla. 2d DCA 1995) ("Appellant never made an unequivocal request for self representation, which is the essential prerequisite for a Faretta inquiry."). The district court decision that the question "where is my co-counsel" is sufficient to trigger still another Faretta inquiry and to re-examine for the fourth time whether respondent wished to and was competent to represent himself is completely inconsistent with this caselaw which places the responsibility on defendants to make unequivocally clear their desires on self-representation. Contrary to the language used by the district court, "at the beginning of the actual trial," this exchange took place well after the guilt phase started at a point when the respondent was entirely responsible for his own defense. Respondent had made it unmistakably clear over the course of several months, an aborted trial, and numerous hearings that he vehemently intended to exercise his right to self-representation. The misplaced question, where is my co-counsel, may represent momentary confusion but, if so, it was immediately removed by the trial court response. The misplaced question simply will not carry the load which the district court erroneously placed on it.

Third, the district court erred in substituting its judgment based on a cold record for that of the trial judge who was present

and directly observed the demeanor of counsel/respondent Roberts both when he asked where co-counsel was and when the trial judge accurately pointed out that there was no co-counsel. It is the trial court, not the appellate court, which is the best judge of the significance and meaning of such exchanges as this[2].

This Court's seminal statement of this principle is in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (1980): "the appellate court must fully recognize the superior vantage point of the trial judge[,]" and "[t]he trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participants and events of the trial." Id. at 1202. The trial court here either discerned no signals of confusion or, if it did, immediately acted to remove the confusion by accurately pointing out, without objection, that respondent had no co-counsel. As this Court held in Canakaris at 1203, when "a true discretionary act" of the trial judge is being reviewed, "[i]f reasonable men could differ as to the propriety of the action taken

---

2. A routine example of this bedrock principle of appellate review can be seen in Finley v. State, 378 So. 2d 842, 843 (Fla. 5th DCA 1979) where the appellate court upheld a trial court's denial of a motion to suppress a confession: "We therefore cannot substitute a contrary judgement for that of the trial judge who heard the witnesses and who was in a much better position to judge of their credibility than we should do from the reading of the cold record herein."

by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Petitioner submits that the district court clearly erred in holding that the trial court had fundamentally abused its discretion in simply advising counsel respondent that he had no co-counsel, without objection, instead of *sua sponte* conducting still another Faretta inquiry.

Finally, there can be no doubt on this record that respondent was repeatedly and fully apprised of the difficulties involved in self-representation. Note, for example, the explicit restrictions on conducting research at the University of Florida, conducting depositions at the courthouse, or visiting the crime scene and posting notices for witnesses. T225. In the same vein, there can be no doubt of the respondent's vehement determination to represent himself directly and without the shield of co-counsel. See, for example, the hearing of 25 June 1993 beginning at T185 where trial judge Doughtie questioned respondent on why he did not wish the assistance of counsel.

> THE COURT: Let me ask this. I know Ms. Wehlburg has been very effective as a trial counsel in a lot of cases. I mean I've seen her to be very effective.
> You don't have to tell me if you don't want to, because I don't want to invade, you know, anything that you all might have discussed, but just why is it that you would not want a good competent lawyer to assist you?
> THE DEFENDANT: Your Honor, to begin with, I was there that evening. Okay?

. . . .

THE COURT: What you're saying is that Ms. Wehlburg wasn't there that night . . .
THE DEFENDANT: Right.
THE COURT: . . .therefore, you think that you could ask questions perhaps more effectively than she could . . .
THE DEFENDANT: Exactly. Exactly.

T185-86.

The record also shows the limited assistance that Ms. Wehlburg was to provide respondent, pretrial, in turning over her responsibilities as <u>former</u> counsel to respondent who was assuming his responsibilities as his own counsel.

THE COURT: With that one omission, I don't see any problem with you representing yourself. I think you're articulate. I think you can tell the story. You can ask questions. You've got a good grasp of what's going on.
Let's go ahead and . . .
THE DEFENDANT: If I can get this paperwork, I'd really appreciate it, especially a legible copy of Oberst's thing, because she said . . .
THE COURT: Would you like to have her . . .
THE DEFENDANT: If she'd like to help me, that would be fine, but like my main thing is I would like to ask the questions.
THE COURT: **Not have her as counsel, because if she runs the case, then she's got to be in charge,** (e.s.) but she could .-- you know, she could be available not . . .
THE DEFENDANT: To keep me out of trouble.
THE COURT: Well, she doesn't want to -- she couldn't do that, but if -- you know, as far as the paperwork goes, she could certainly be available to do all that.
MS. WEHLBURG: **And between now and the trial, (e.s.)** your Honor, I'll be glad to answer any questions Mr. Roberts has regarding procedure.

T188-89.

The state submits that an exchange and the provision of

limited assistance, such as above, would have occurred had Ms. Wehlburg been routinely turning over her duties as former counsel to a newly appointed or retained counsel who was assuming full responsibility as new counsel. Nothing that was said remotely suggest that Ms. Wehlburg would appear at trial and act as co-counsel.

There is also pertinent language and a relevant holding from this Court's decision in Jones v. State, 449 So. 2d 253, 258-89 (Fla. 1984) where the defendant insisted on self-representation and then, having exercised his right to such self-representation, claimed that the trial court erred in granting him his right to represent himself.

> Defendant now urges that the trial court failed to renew the offer of counsel at the sentencing stage and that this constitutes reversible error. We disagree, as this would exalt form over substance.
>
> . . . .
>
> We consider it implicit in Faretta that the right to appointed counsel, like the obverse right to self-representation, is not a license to abuse the dignity of the court or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices.

Respondent has already abused the judicial system by obtaining one mistrial by a belated claim during the guilt phase of his first trial that he wished to exercise his right to self-representation.

The trial court there properly conducted a Faretta hearing and determined that respondent wished to and was competent to represent himself. However, having elected self-representation **during** the course of the trial phase, respondent should have been required to proceed with the trial with only a short recess. As this Court made clear in Jones, the obverse rights to self-representation or appointed counsel are not devices for frustrating orderly procedures.

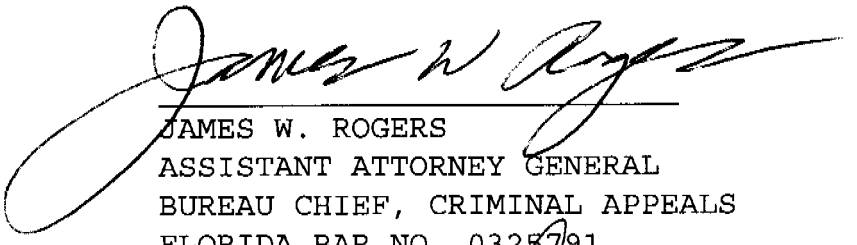
The state suggests that the caselaw of recent years clearly shows that these obverse rights have become a device for frustrating orderly procedures. See, for example, Dortch v. State, 651 So. 2d 154 (Fla. 1st DCA 1995), particularly Judge Barfield's dissent at 157, and Payne v. State, 642 So. 2d 111(Fla. 1st DCA 1994), particularly Judge Kahn's concurring opinion, and the cases cited within Dortch and Payne. The district court here did not have the benefit of Behr at the time of its decision. Behr should help in clarifying the law regarding self-representation, and particularly the hybrid co-counsel version. However, the state urges this Court to reiterate the Jones strictures against these abusive practices which are causing unnecessary retrials and appeals.

CONCLUSION

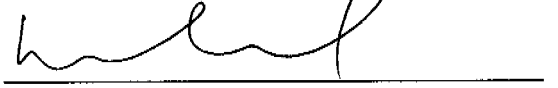
The district court erred in fact and law in its decision that the trial court had committed reversible error by not *sua sponte* conducting a fourth Faretta inquiry when the respondent erroneously referred to a non-existent co-counsel. There was no trial court error, reversible or otherwise. The district court decision should be quashed and the trial court judgment reinstated.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
ASSISTANT ATTORNEY GENERAL
BUREAU CHIEF, CRIMINAL APPEALS
FLORIDA BAR NO. 0325791



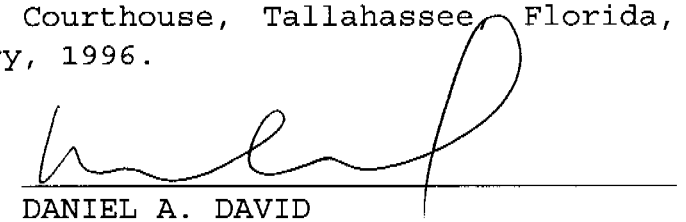
DANIEL A. DAVID
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0650412

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL. 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true an correct copy of the foregoing has been furnished by U.S. Mail to Carl McGinnes, Esq., Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida, 32301, this 22nd day of January, 1996.



DANIEL A. DAVID