IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 85,909

JEFFREY ELY ROBERTS, :

Respondent. :

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Respondent Jeffrey Ely Roberts was the defendant in the trial court, and the appellant before the District Court of Appeal, First District of Florida. In this brief he will be referred to as "respondent," "defendant," or by his proper name. Reference to petitioner's brief dated January 22, 1996, will be by use of the symbol "PB" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as set forth in petitioner's brief (PB-2-16), with the following additions and clarifications:

1. Regarding the proceedings of May 14, 1993, before Judge David Reiman, Acting Circuit Judge, when defense counsel moved for a mistrial based upon a comment made by the defendant in the presence of the jury, the prosecutor did not object (T-208). During the inquiry based upon Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), into the defendant's waiver of counsel, he was not told that, if he were to waive counsel, he could not thereafter seek relief on the ground of ineffective assistance of counsel (T-216-228). Further, after Judge Reiman ruled appellant could represent himself, he asked the state's position on continuing the trial to a later date. The prosecutor asked to be able to speak to a witness, and the record contains no objection by the state (T-228-229).

2. Regarding the proceedings of June 22, 1993, before Judge Aymer Curtin, Acting Circuit Judge, it appears that the inquiry into appellant's waiver of counsel was initiated sua sponte by Judge Curtin, and not by appellant, defense counsel, or the trial prosecutor (T-166-167). After an inquiry that largely plowed the same ground as that covered earlier by Judge Reiman, Judge Curtin ruled appellant did not have the "requi-

site knowledge" to represent himself (T-174). At no point did Judge Curtin inform respondent that, as a consequence of waiving counsel, he could not thereafter collaterally attack his own effectiveness (T-167-176).

3. Regarding the proceedings of June 25, 1993, a pretrial conference conducted before Judge Nath C. Doughtie, Circuit Judge, the inquiry of waiver of counsel was first raised by the prosecutor and appointed defense counsel (T-182-183). During the ensuing colloquy, the defendant was not told that, if he represented himself, he could not thereafter raise the issue of ineffective assistance of counsel by way of a motion for post-conviction relief (T-183-193). Judge Doughtie remarked:

> JUDGE DOUGHTIE: Yes, I think he can [represent himself]. Judge Reiman ruled, after an inquiry, that he was competent. I don't see any point in disturbing that. I think that Judge Curtin just made kind of a flash decision not to let him.

(T-193).

4. Jury selection was held July 12, 1993, before Judge Doughtie. While petitioner mentions that respondent did not request counsel at jury selection (PB-14), petitioner fails to mention (so respondent will) that no offer of counsel was made to the defendant on that date.

5. At appellant's jury trial conducted July 14, 1993, no offer of counsel was made to respondent (T-4-15).

6. Upon being found guilty by the jury, the defendant was sentenced to six months in jail, but given credit for six

months, and was placed on "court probation" for six months (R-37-38). Thus, respondent was effectively sentenced to time served.

7. On appeal, all three of the district judges who sat on the case agreed that the trial court erred. Roberts v. State, 655 So.2d 184 (Fla. 1st DCA 1995) The majority, Judges Mickle and Booth, ruled that respondent's query about "co-counsel" at the commencement of trial signaled to the trial court that the defendant was confused about whether he was entitled to counsel or to be represented by counsel, and therefore it was error to fail to conduct a Faretta inquiry. Judge Van Nortwick filed an opinion concurring in the result, opining that pursuant to Traylor v. State, 596 So.2d 957 (Fla. 1992) and Florida Rule of Criminal Procedure 3.111(d)(5), it was error to fail to renew the offer of counsel at jury selection and at trial. 655 So.2d at 186.

III. SUMMARY OF ARGUMENT

Respondent argues under Issue I, infra, that the district court reached the correct result, but used the wrong reasoning. It was error to hold, as the majority of the district court did, that the trial court erred in not conducting a fourth Faretta inquiry in response to respondent's inquiry about co-counsel. Respondent's position is consistent with that stated in Judge Van Nortwick's concurring opinion. Once counsel was waived, respondent contends that the law required that the offer of counsel be renewed at jury selection, and at trial. Since the offer of counsel was not renewed at either jury selection or at trial, the trial court erred.

Only in the event this Court rejects respondent's position under Issue I will it be necessary to rule on Issue II, which argues that the collective Faretta inquires were insufficient because respondent was not told he was waiving his right to attack the effectiveness of his counsel should he be convicted. This issue was raised before the district court, but rejected. The Court has discretion to rule on it pursuant to Trushin v. State, 425 So.2d 1126 (Fla. 1982).

IV. ARGUMENT

ISSUE I
WHETHER THE DISTRICT COURT REACHED THE CORRECT RESULT, ALBEIT FOR THE WRONG REASON, WHEN IT HELD THAT THE TRIAL COURT ERRED IN NOT MAKING AN INQUIRY OF COUNSEL AT THE COMMENCEMENT OF RESPONDENT'S JURY TRIAL? (restated).

To a certain extent, respondent is in agreement with many of the arguments made by the state in this case. In particular, respondent agrees with petitioner about the seemingly burdensome requirement imposed under the majority opinion, in which the trial court was reversed for failing to conduct what would have amounted to a fourth Faretta inquiry in the case. Presumably, had respondent not inquired about co-counsel at the beginning of his jury trial, Judges Mickle and Booth, who were the majority, would have affirmed respondent's conviction, and Judge Van Nortwick's concurring opinion would have been a dissent. In other words, under the majority view, the entire result hinged upon respondent's inquiry at the commencement of trial.

Of all the parade of horribles listed by the state, petitioner failed to identify what respondent perceives as the worst aspect of the majority opinion. Under the majority opinion, the burden is placed on the defendant, who has previously purported to waive counsel, to bring up the subject of counsel. As noted, the majority would have affirmed but for respondent's inquiry at the start of his trial. In the first district, there

is a decision called Lamb v. State, 635 So.2d 184 (Fla. 1st DCA 1988), where the defendant waived counsel three weeks before trial, but the offer of counsel was not renewed at trial. The first district affirmed in Lamb, ruling it was not necessary to renew the offer of counsel at trial.

In this case, the majority distinguished Lamb by observing that respondent asked about co-counsel in this case at trial, whereas Mr. Lamb evidently was silent on the subject of counsel at trial.

Thus, in the first district a purported waiver of counsel lasts forever, the trial court is not required in the least to further deal with the issue of counsel, unless the defendant happens to personally raise the subject.

Respondent contends it is contrary to both established case law and the plain language of the rules of procedure to place the burden upon the defendant to raise the subject of appointed representation, where counsel was purportedly waived at an earlier stage of the proceedings.

Article I, Section 16, Constitution of the State of Florida, says: "In all criminal prosecutions the accused shall...have the right...to be heard in person, by counsel or both...." In construing this constitutional provision this Court in Traylor v. State, 596 So.2d 957 (Fla. 1992), held:

> Once the defendant is charged--and Section 16 rights attach--the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires

> the assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver. Any waiver of this right must be knowing, intelligent, and voluntary, and courts generally will indulge every reasonable presumption against waiver of this fundamental right. Where the right to counsel has been properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.

596 So.2d at 968.

Thus, under Traylor, one is constitutionally entitled to counsel at every "crucial stage" of the proceedings. Any waiver relates only to the stage then occurring, and does not apply to any subsequent "crucial stage." If waived at an earlier stage, the offer must be renewed at each subsequent "crucial stage."

Applying Traylor to the instant case, it is evident that the trial court erred in not offering counsel to respondent at both jury selection and the actual trial. Obviously, jury selection and the trial itself are each "crucial stages" of the prosecution. The transcript of the jury selection and the trial itself simply do not reveal that the trial court ever renewed its offer of counsel. It is well-established that a waiver of counsel will not be presumed from a silent record. Barker v. Wingo, 407 U.S. 514 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Boyd v. Dutton, 405 U.S. 1 (1972); Boykin v. Alabama, 395 U.S. 238 (1969)(guilty pleas); Doughty v. Maxwell, 376 U.S.

202 (1964); Swenson v. Bosler, 386 U.S. 258 (1967)(on appeal); Carnley v. Cochran, 369 U.S. 506 (1962); and, Adams v. United States ex rel McCann, 317 U.S. 269 (1942). Traylor itself notes that the courts will indulge in every presumption against waiver of counsel.

Even before Traylor, our procedural rules required that, if counsel is waived, the offer of counsel must be renewed at each subsequent stage. Florida Rule of Criminal Procedure 3.111(d)(5) provides:

> (5) If a waiver [of court-appointed counsel] is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

It should be observed that the rule does not say the offer of counsel must be renewed at each critical stage at which the defendant appears without counsel. Instead, the rule simply says the offer must be renewed at each "stage," without regard to criticalness. This is consistent with the underlying rationale of providing counsel and accommodating changes of mind on the part of criminal defendants. Appellant contends that the rule contemplates a renewal of counsel at each court appearance where the defendant is without counsel.

Since the trial court, after having permitted the defendant to represent himself, did not renew the offer of counsel at either jury selection or the trial itself, Rule 3.111(d)(5)

and Traylor required the first district to vacate the conviction and sentence appealed from, and remand the case to the trial court with directions to conduct a new trial.

Respondent has several other observations to make. First of all, the fact that there were repeated Faretta inquiries in this case was not caused by respondent, but rather by the court(s) below. Certainly the state would not argue that, once the defendant concluded that he wished to represent himself, Judge Reiman should not have conducted the Faretta inquiry. It was then that the issue of self-representation was first presented to the trial court. The state's argument that, once it was decided to allow appellant to represent himself the trial court should have made him go to trial then and then and not order a continuance is without merit (PB-25-26) because the continuance was not objected to by the prosecutor, nor did the state seek any review of that ruling.

The second Faretta hearing was initiated by the new judge on the case, Judge Curtin, not by respondent. And the third Faretta inquiry, by Judge Doughtie, was clearly aimed at restoring the status quo reached initially by Judge Reiman.

This case is radically different than the one faced by the Court in Jones v. State, 449 So.2d 253 (Fla. 1984), relied upon by petitioner (PB-18-19, 25). Respondent merely asserted his right to represent himself under Faretta, and all of the hearings that ensued (except for the required first one) were

neither initiated nor desired by him.

Under respondent's analysis of the case, there needed to be only one Faretta hearing, the one conducted by Judge Reiman on May 14, 1993. Thereafter, each time respondent appeared before the trial court, the trial court was not obligated to conduct a new inquiry, but could simply renew the offer of counsel as required by Traylor and Florida Rule of Criminal Procedure 3.111(d)(5). It might take all of thirty seconds. If respondent declined these new offers, there would not have been an appellate issue, this Court would be pondering some other case, and the parade of horribles outlined by the state would not occur.

With all due respect to both the trial judge and the majority district court panel, how onerous is it to simply follow the rule as written, namely, that once counsel is waived, the offer (not a full-blown Faretta inquiry) is required to be renewed at each subsequent stage at which the accused appears without counsel?

In place of what appears to be a simple, straight-forward rule, the majority would have required a fourth full-blown Faretta hearing, simply because respondent asked about co-counsel at his trial.

Two final observations. First, while respondent clearly does not rely, as did the majority, on the fact that respondent asked about co-counsel, his question took place before any

evidence was presented. Thus, the state's Jones-based argument that it came too late is without merit, for in Jones the Court was faced with a situation where the issue about counsel did not occur until the second day of the trial, after the state had commenced its case. 449 So.2d at 257.

Secondly, the failure to renew the offer of counsel at jury selection and at trial cannot be dismissed as harmless error. The nearest the state's brief comes in arguing harmless error appears to be its quotation from Jones, where this Court ruled the trial court did not err in not renewing an offer of counsel at sentencing (PB-25).

In Jones, after the defendant was found guilty, there was a hearing on the subject of representation as sentencing. Evidently, the offer was not renewed when the formal sentencing hearing began. On these facts, the Court found no error, since it was "...clear from the record that the issue of counsel was before the court and that defendant was merely repeating his earlier meritless argument that he was entitled to a lawyer of his choice." 449 So.2d at 258.

Here, by contrast, the subject of counsel was not discussed at all relative to jury selection and the trial. Therefore, Jones does not apply.

Respondent would argue that most persons would agree that it is better for the defendant and the court if defendants keep their court-appointed counsel. The rule and Traylor are

obviously based on the notion that, even once counsel is waived, the law will quickly accommodate a change of mind. Only if it can be established beyond a reasonable doubt that respondent would not have accepted a renewed offer at both jury selection and at trial, could the error be considered harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Since no offer was made, it would be sheer speculation to say the offer would have been refused if it were made. In other words, from the fact that the defendant vigorously asserts his Faretta right to represent himself, it does not follow that the passage of time and events would not soften the defendant's view in the future. Indeed, the only legal significance of respondent's question regarding co-counsel at trial is that, if a formal offer of counsel had then been made, he may well have accepted it. It certainly cannot be said beyond a reasonable doubt that he would not.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT TO REPRESENT HIMSELF, SINCE THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY INTO THE DEFENDANT'S WAIVER OF COUNSEL, THEREBY DEPRIVING APPELLANT OF HIS RIGHTS TO THE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW SECURED BY ARTICLE I, SECTIONS 9 AND 16, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS V, VI, AND XIV, CONSTITUTION OF THE UNITED STATES OF AMERICA.

The record shows that the defendant was allowed to represent himself at trial. Since the trial court erred by not conducting an adequate inquiry into respondent's waiver of counsel, respondent argues the trial court erred in allowing him to represent himself.

In Faretta v. California, supra, the Supreme Court ruled that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. In Faretta, the Court pointed out that when an accused manages his own defense, he relinquishes many of the traditional benefits associated with the right to counsel. In order to represent himself, the accused must knowingly and intelligently forgo these benefits. Although the defendant need not himself have the skill and experience of a lawyer, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that the accused knows what he is doing and his choice is made with eyes wide open. See also Florida Rule of Criminal Procedure 3.111(d).

In essence, in the instant case there were three Faretta inquires before three different judges. The first, occurring May 14, 1993, was before David Reiman, Acting Circuit Judge. Judge Reiman concluded, after inquiry, that respondent would be allowed to represent himself (T-197-230).

The second inquiry was conducted June 22, 1993, before Aymer Curtin, Acting Circuit Judge. Judge Curtin ruled, after inquiry, that respondent was not competent to represent himself (T-165-178).

The third inquiry was conducted before Nath C. Doughtie, Circuit Judge. Judge Doughtie ruled, after inquiry, that respondent would be allowed to represent himself (T-182-192).

Respondent contends that, even after three so-called Faretta inquires, the scope of the inquiries was inadequate.

The primary reason why the inquiries were insufficient were because, at no point, was appellant advised that, not only was he waiving his right to counsel, he was also waiving a future right to collaterally attack his conviction.

If the defendant had retained court-appointed counsel, and that counsel rendered ineffective assistance of counsel, the defendant could obtain a new trial via Florida Rule of Criminal Procedure 3.850. Yet a pro se defendant, even one who makes the same error that would result in a new trial had it been done by appointed counsel, is not allowed to attack his own ineffectiveness. As stated in Faretta:

> The right to 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 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."

45 L.Ed.2d at 581, note 46 (emphasis supplied). This Court recently made the same observation in Behr v. Bell, 21 Fla. L. Weekly S7 (Fla. Jan. 4, 1996).

Since none of the colloquies covered this important aspect of Faretta, respondent contends the trial courts failed to conduct a sufficient Faretta inquiry, and the majority of the district court erred in failing to reverse on that basis.

V. CONCLUSION

Based upon the foregoing analysis and authorities, respondent requests the Court to approve the result reached by the district court in Roberts v. State, supra.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Dan David, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, this 6th day of February, 1996.

CARL S. McGINNES