IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
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JERRY LAYNE ROGERS,

Petitioner,

v.

HARRY K. SINGLETARY
SECRETARY, DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA

Respondent.

Case No. ~~66,356~~ 86768

PETITION FOR WRIT OF HABEAS CORPUS

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action bears directly on the legality of a first-degree murder conviction and death sentence. A full opportunity to air the issues through oral argument would be entirely appropriate in this case given the seriousness of the claims and issues raised here. Mr. Rogers, through counsel, respectfully urges the Court to permit oral argument.

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IN THE SUPREME COURT OF FLORIDA

JERRY LAYNE ROGERS, Petitioner, v. HARRY K. SINGLETARY, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA Respondent.	)	Case No. 66,356

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Jerry Layne Rogers represented himself during his capital murder trial. He was convicted and sentenced to death; and this Court affirmed on direct appeal. During the colloquy with the trial court on his request to proceed pro se, Rogers was never warned "of the dangers and disadvantages of self-representation." Faretta v. California, 422 U.S. 806, 835 (1975). There was no colloquy to establish that Rogers's waiver of counsel was knowing and intelligent. The trial court never renewed the offer of counsel to Rogers at any subsequent stage of the proceedings.

Rogers's waiver of counsel was therefore in clear violation of the constitutional standard enunciated in Faretta and the related requirements of the Florida Rules of Criminal Procedure. See Fla. R. Crim. P. 3.111(d). Under settled case

law, this was reversible error. E.g., State v. Young, 626 So. 2d 655, 656 (Fla. 1993).

Appellate counsel did not raise this obvious Faretta issue on direct appeal. Counsel's failure to raise a clearly meritorious argument that would have required reversal of the conviction and death sentence deprived Rogers of his constitutional right to the effective assistance of counsel on direct appeal. Rogers accordingly petitions this Court for a writ of habeas corpus. Moreover, since it would be redundant to grant Rogers a new appeal to raise an unquestionably meritorious Faretta claim, the Court should on this petition reverse Rogers's conviction and sentence, and remand for a new trial.

PROCEDURAL HISTORY AND BASIS FOR JURISDICTION

Proceeding pro se, Rogers was tried on charges of first-degree murder in the Circuit Court for St. Johns County (Weinberg, J.) in October 1984. He was found guilty and sentenced to death; and the trial court entered a judgment against him on December 5, 1984. In July 1987, this Court issued its decision affirming the conviction and death sentence on direct appeal. Rogers v. State, 511 So. 2d 526 (Fla. 1987). This Court denied Rogers's petition for rehearing in September 1987. The United States Supreme Court denied certiorari in January 1988.

On August 25, 1989, Rogers filed a motion for collateral review of his conviction and sentence, pursuant to Fla. R. Crim. P. 3.850. Following an evidentiary hearing in the Circuit Court for St. Johns County (Weinberg, J.), the trial court denied the Rule 3.850 motion. On appeal, this Court reversed the denial of the Rule 3.850 motion on the basis that the trial judge should have recused himself from hearing the motion. Rogers v. State, 630 So. 2d 513, 515-16 (Fla. 1993). The Court remanded the Rule 3.850 motion for consideration by another trial judge. There has been no further proceeding on the Rule 3.850 motion.[1/]

Following this Court's reversal of the denial of the Rule 3.850 motion, within the past several months Rogers has secured the undersigned counsel to represent him on a pro bono publico basis.[2/] In their review of the case, counsel have identified the critical Faretta error addressed in this habeas corpus petition, and have undertaken to file this petition, now, in order to permit resolution in the first instance of this challenge to the direct appeal, which would obviate the

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[1/] The state's attorney has recently sought to schedule a hearing on the Rule 3.850 motion. Counsel for Rogers expect that any hearing on the Rule 3.850 motion will be deferred until after resolution of this habeas corpus petition.

[2/] The office of the Capital Collateral Representative ("CCR") prepared Rogers's initial Rule 3.850 motion, conducted the hearing on his behalf, and represented Rogers on appeal from the trial court's denial of the Rule 3.850 motion. Thereafter, CCR withdrew from the representation due to an asserted conflict of interest.

need for collateral review of Rogers's conviction and death sentence.

The proper means for challenging counsel's performance on direct appeal is through a petition for writ of habeas corpus. E.g., Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986), cert. denied, 481 U.S. 1016 (1987); Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). This Court has jurisdiction pursuant to Fla. Const. Art. V, subsections 3(b)(7) and (9).

STATEMENT OF FACTS

Facts Concerning Rogers's Decision To Proceed Pro Se

Before trial, at a hearing in January 1984 relating to his arraignment, Rogers told the trial court that he wished to represent himself. (ROA 4672-80.) Thereafter, at a pretrial hearing on February 22, 1984, the trial court was presented with a motion by the Public Defender to withdraw from representing Rogers. When asked whether he opposed the motion to withdraw, Rogers stated:

> "Your Honor, it is difficult for the Public Defender to withdraw since they have never represented me. . . . You only appointed them to represent me at the arraignment, for just those purposes. I stated I was going to proceed Pro se." (ROA 4686.)

The trial court granted the motion to withdraw, "based on the statement of the Defendant." (ROA 4686.)

The trial court then informed Rogers that it had contacted two lawyers who were willing to serve as standby counsel, and asked Rogers to consult with those lawyers "to decide whether this appointment can be reconciled with your request to act Pro se, because you should have counsel." (ROA 4687.) After a brief consultation between standby counsel and Rogers, counsel advised the Court that they would be "amenable to assist." (ROA 4688.) Rogers and the trial court then clarified that Rogers would be proceeding "as his own counsel Pro se with the assistance of appointed counsel":

> "MR. ROGERS: The main thing I want to establish here, on the record, is that I will be the attorney of record, the counsel of record. . . . [T]hese two gentlemen will be assisting me.
>
> THE COURT: You can't be attorney of record in a criminal proceeding. You can be your own counsel Pro Se with the assistance of appointed counsel.
>
> MR. ROGERS: That is what I want to do, then." (ROA 4689.)

The only other colloquy relating to Rogers's waiver of his right to counsel occurred later during the same hearing. The trial court stated: "I will be signing an order in [e]ffect allowing Mr. Rogers to proceed in leading the defense." The trial court then asked Rogers to "state your background and experience as to why you think you are qualified to handle this case." (ROA 4710-11.) The following discussion ensued:

"MR. ROGERS: Well, Your Honor, actually I only have a 12th grade education. I do have a small amount of college. It was job-related to a Navy skill that I had. I have proceeded Pro se in regards to four other cases, one of which I did go to trial where I was found not guilty.[3/]

. . .

THE COURT: Can you read and write well?

MR. ROGERS: Yes, Your Honor.

THE COURT: Have you done any study or home study of your own such as reading publications and keeping up with current legal matters in the criminal court system and criminal justice?

MR. ROGERS: While in Orange County, Your Honor, I went through the law library there, which is one of the best around. Actually, it is -- from what I understand it is better there than the one here at the county courthouse and I tried to educate myself in law. . . .

THE COURT: I have read your pleadings and some of the things you have written and, of course, they are coherent, they are rather lengthy and sometimes they skirt the main point, but they are coherent and comprehensible and I am able to understand them.

So, I feel at least from that standpoint your communication ability in writing is competent and adequate, and since you have the assistance of two able counsel, I think that would be appropriate now. . . ." (ROA 4711-12.)

After making general inquiries into the background and experience of the appointed standby counsel, the trial

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[3/] Rogers was referring to two robbery cases in which he had represented himself. Neither of these prior cases had involved a capital offense. Both the prior cases and this one arose from the same purported confession by Thomas McDermid. See pages 8-9, infra.

court asked about their willingness to serve in that role, and thereupon found Rogers "competent" to proceed pro se:

> "THE COURT: Even though Mr. Rogers's request is somewhat unusual, you don't feel put upon that he requested this procedure to be followed in the defense of his case? You feel you can work under those [parameters] as outlined or requested by Mr. Rogers?
>
> MR. TUMIN: He will have a difficult time, Your Honor, but he can.
>
> MR. ELLIOTT: I believe so, your honor.
>
> THE COURT: On that basis, I believe the defense is competent to proceed on that basis. . . ." (ROA 4713-14.)[4/]

There was no other discussion or colloquy relating to Rogers's decision to proceed pro se, at any time during the entire case. There was no discussion of the dangers or disadvantages of self-representation; and there was no discussion of the special difficulties presented by pro se representation in a capital murder case. There was no inquiry into whether Rogers had made a knowing and intelligent waiver of his right to counsel, and the trial court never renewed the offer of counsel to represent Rogers.

[4/] On July 19, 1984, the trial court entered a pretrial order disposing of various defense motions and addressing again its decision to permit Rogers to proceed pro se. (ROA 2985-95.) In that order, the trial court "noted that the Defendant is proceeding with his defense under a modified Pro se basis" with the assistance of "co-counsel." (ROA 2987.) The court also observed that Rogers, not stand-by counsel, was making "final decisions in matters of Court and trial strategy." (ROA 2988.)

Facts Concerning Rogers's Pro Se Conduct Of The Trial

Rogers conducted virtually the entirety of his defense at the guilt-innocence phase of trial. He delivered the opening statement and closing argument. He handled almost all of the voir dire. Of the 48 total guilt-phase witnesses, Rogers conducted the entire examination of all witnesses but himself and his wife. Even with respect to those two witnesses, Rogers conducted the direct examination of his wife (ROA 7623-56), and he asked himself questions on rebuttal, from the witness stand, after the trial court refused to allow him to speak with standby counsel. (ROA 7854.)[5/]

The record discloses a consistent pattern of stumbling direct and cross-examinations, ineffectual or irrelevant lines of inquiry, and a host of strategic errors that could only be expected from a pro se defendant. An example illustrates the point:

Rogers was charged with first-degree murder for a killing that had occurred during an armed robbery of a Winn-Dixie grocery in St. Augustine. His principal accuser was Thomas McDermid, who had confessed to the Winn-Dixie attempted robbery and a number of other crimes (ROA 4071-72, 6562-67,

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[5/] Before his rebuttal testimony, Rogers asked to consult with standby counsel. The trial court would not allow this; nor would it permit Rogers to provide narrative testimony. The result was that Rogers was forced to ask himself questions while testifying -- thus placing him in the untenable position of being both pro se "lawyer" and witness at the same time. (ROA 7854-56.)

6576-78), had been convicted previously of seven felonies (ROA 6070-71), and had received a grant of immunity for the Winn-Dixie murder in exchange for testifying against Rogers. (ROA 6571-75, 6589-91.)[6]

The only trial witness other than the self-interested McDermid who could potentially place Rogers at the Winn-Dixie was Ketsy Day Suppinger, the cashier at the time of the robbery. Suppinger had been unable to describe Rogers accurately in her statements to the police immediately after the crime (ROA 4440-43), nor was she able to make a positive identification of Rogers in a photo line-up. (ROA 4453-54.)[7] Rogers, however, deposed Suppinger for several hours over the course of two days, and the state's attorney identified Rogers by name during the deposition as the defendant. (ROA 4448.) Not surprisingly, following the deposition, after staring at Rogers for hours across a table in a locked room, and having him identified by the prosecutor

[6] Rogers was self-employed and living in Orlando with his wife and family at the time McDermid accused him of these crimes. Rogers had no criminal record before being arrested on the strength of McDermid's accusations. At the Winn-Dixie trial, Rogers presented an alibi defense, supported by the testimony of several witnesses, that he had been at home in Orlando on the night of the Winn-Dixie murder and could not have committed a crime in St. Augustine, some 100 miles away. (ROA 8202-04.)

[7] The photo line-up was conducted by the prosecution in violation of a court order that forbid any such line-up outside the presence of Rogers's standby counsel. (ROA 4453-59.) During that improper line-up, Suppinger picked out two photos, one of which was of Rogers, but was unable to make a positive identification. (ROA 4453-54.)

as the accused, Suppinger then claimed to be able to identify him as one of the Winn-Dixie robbers. (ROA 6337.) Rogers's self-representation, and his blunder in deposing a critical eye-witness who could not previously identify him, thereby tainted the only witness aside from McDermid who could place him at the scene of the crime.

ARGUMENT

I. ROGERS PROCEEDED PRO SE IN VIOLATION OF THE CONSTITUTIONAL STANDARD OF FARETTA AND THE FLORIDA RULES OF CRIMINAL PROCEDURE

The trial court permitted Rogers to proceed pro se in this capital murder case without warning him of the dangers or disadvantages of that self-representation, or the special complexities of a bifurcated capital trial. The trial court focused solely on Rogers's "competence" to serve as his own lawyer, but made no determination that his waiver of counsel was knowing and intelligent. Furthermore, the trial court never renewed an offer of counsel to Rogers, at any stage of the trial. These were clear violations of the constitutional standards established by Faretta and many decisions of this Court, as well as the explicit dictates of the Florida Rules of Criminal Procedure. If these arguments had been raised on direct appeal, they would have resulted in the reversal of Rogers's conviction.

A. **The Trial Court Was Required to Make a Determination on the Record That Rogers's Waiver of Counsel Was Knowing and Intelligent**

In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court held squarely that a defendant cannot be permitted to proceed pro se unless the record demonstrates that he "knowingly and intelligently" waived his right to counsel. Id. at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)). This requires, in particular, that the defendant "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Id. at 835 (quoting Adams v. United States, 317 U.S. 269, 279 (1942)).[8] Similarly, Fla. R. Crim. P. 3.111(d)(3), adopted in 1972, provides: "No waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of a mental condition, age, education, experience, the nature or complexity of the case, or other factors."

The trial court's obligation to ensure that a defendant's waiver of the right to counsel is "knowing" and

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[8] Accord, e.g., Hayes v. State, 566 So. 2d 340, 342 (Fla. 2d DCA 1990) ("The trial court must advise the defendant of the benefits and disadvantages of self-representation."); Tucker v. State, 440 So. 2d 60, 61 (Fla. 1st DCA 1983), review denied, 447 So. 2d 888 (Fla. 1984) ("When a defendant indicates a desire to represent himself, the trial court has a duty to make the defendant aware of the benefits he must relinquish, and the dangers and disadvantages of self-representation.") (citations omitted).

"intelligent" is not affected by the involvement of standby counsel. This is made clear by Faretta itself, where the Supreme Court held that a defendant must be made aware of the "dangers and disadvantages of self-representation," but simultaneously held that the trial court may appoint standby counsel to participate in the defense "even over objection of counsel." 422 U.S. at 835 n.46. In undertaking to represent himself, the pro se defendant is waiving his right to be represented by counsel -- even if standby counsel is available to assist.[9/] Thus, Faretta makes clear that the trial court's obligation to conduct an adequate colloquy with the defendant, before he exercises his right to self-representation and waives the right to counsel, does not depend on whether the trial court decides to appoint standby counsel.

This holding of Faretta was reaffirmed in McKaskle v. Wiggins, 465 U.S. 168 (1984). The trial court had appointed standby counsel over the defendant's apparent objection. On appeal, the defendant contended that standby

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[9/] For instance, in Maynard v. Meachum, 545 F.2d 273, 277 (1st Cir. 1976), the court held that, "whatever label is attached" to the arrangement between a pro se defendant and standby counsel, "the net result [is that a defendant] had less than the full representation by counsel to which, absent a valid waiver, he was entitled to under the [Constitution]." See also Connecticut v. Frye, 617 A.2d 1382, 1386 (Conn. 1992) ("The pitfalls of self-representation await defendants who choose to play a role in their defense, whether they represent themselves without any assistance from counsel, participate extensively in presenting their defense, or play a limited role in their defense.").

counsel had interfered with his right to proceed pro se. The Court held that, so long as the defendant remained in control of the defense, and gave that appearance to the jury, standby counsel could actively participate in the case even over the defendant's objection. Id. at 178-87. A defendant may therefore exercise his right to self-representation even when standby counsel participates actively in the case; and Faretta establishes the exacting inquiry that must be made before a defendant can be permitted to exercise that right and concomitantly to waive his right to counsel.[10]

Several Florida decisions have held explicitly that the presence of standby counsel does not alter the trial court's obligation to conduct a proper Faretta inquiry to ensure that the defendant's waiver of counsel is knowing and intelligent. In Taylor v. State, 610 So. 2d 576 (Fla. 1st DCA 1992), the trial court allowed the defendant to proceed pro se and directed the public defender "to sit at the counsel table . . . and 'to answer questions and provide any assistance that [the defendant] would want.'" Id. at 578. Notwithstanding the involvement of standby counsel, the court of appeals reversed the conviction because the trial court had failed to

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[10] E.g., Parren v. State, 523 A.2d 597, 599-600 (Md. 1987). ("[W]hen an accused desires to represent himself he must assert that right, and its grant is conditioned upon a valid waiver of the right to assistance of counsel. . . . [T]here are only two rights of representation, by counsel or pro se. They are independent of each other and may not be asserted simultaneously.").

conduct an adequate colloquy concerning the "dangers and disadvantages" of self-representation. Id.

Similarly, in Payne v. State, 642 So. 2d 111 (Fla. 1st DCA 1994), the trial court refused the defendant's request to discharge his lawyer. Instead, the defendant was permitted "to conduct his own defense with the assistance of standby counsel." Id. at 112. The court of appeals held that a trial court must "give the same warnings to a defendant who has standby counsel as one who does not." Id. at 113. The court emphasized the holdings of several state courts that, when a defendant participates in his own defense, even with the assistance of standby counsel, "he has less than the full representation he is entitled to under the Sixth Amendment and must be adequately informed of the dangers outlined in Faretta." Id. at 112 (citing Michigan v. Dennany, 519 N.W.2d 128, 445 Mich. 412 (1994)). The court of appeals thus held that the same Faretta inquiry must be conducted, whether or not standby counsel is involved, since the trial court "cannot predict how much of his own defense a defendant will conduct." 642 So. 2d at 113. The "only way for a trial court to ensure that a defendant is adequately informed of the risks he undertakes in representing himself when the defendant proceeds with co-counsel or standby counsel is to inform the defendant at the beginning of the trial of the dangers of self-representation." Id. (citing Connecticut v. Frye, 617 A.2d 1382, 1386 (Conn. 1992)).

Furthermore, to satisfy the requirements for waiver of the right to counsel, the trial court is required to conduct a thorough inquiry on the record. See Young, 626 So. 2d at 656-57.[11] This requirement is codified in Fla. R. Crim. P. 3.111(d)(2), which provides: "A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make an intelligent and understanding waiver." See also Fla. R. Crim. P. 3.111(d)(4) (waiver must be made on the record).

This Court has made clear that the Faretta inquiry is essential and that the failure to conduct one constitutes reversible error. "[It] is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, and the court commits reversible error if it fails to do so." Hardwick v. State, 521 So. 2d 1071, 1074 (Fla.), cert. denied, 488 U.S. 871 (1988). A "Faretta inquiry is necessary even when the defendant is very familiar with the criminal justice system. . . . We conclude that the United States Supreme Court decision in Faretta and our rule 3.111(d) require a reversal

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[11] See also Westbrook v. Arizona, 384 U.S. 150 (1966) (per curiam) (reversing conviction where there was no inquiry on the record into the defendant's waiver of counsel).

when there is not a proper Faretta inquiry." State v. Young, 626 So. 2d 655, 657 (Fla. 1993).

As that language makes explicit, the "harmless error rule does not apply" to the failure to conduct a proper inquiry. Id. at 656-67.[12] And for good reason: the failure to ensure a knowing and intelligent waiver of the right to counsel strikes at the very heart of the criminal justice system. "[I]t is undeniable that, in most criminal prosecutions, defendants could better defend with counsel's guidance than by their own unskilled efforts." Faretta, 422 U.S. at 834. The fundamental fairness of a trial is almost invariably compromised when a defendant chooses to proceed without counsel; and reversal is therefore required if the record does not establish a knowing and intelligent waiver. Young, 626 So. 2d at 657.

Under these standards, the courts of this state have consistently reversed convictions where a pro se defendant was not warned on the record of the dangers and disadvantages of representing himself. For example in Smith v. State, 549 So. 2d 1147 (Fla. 3d DCA 1989), the trial judge -- as in this case -- asked the pro se defendant "a number of questions

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[12] Consistent with this Court's holding in Young, many earlier Florida cases held that reversal was required where a trial court failed to determine whether a waiver of counsel was knowing and intelligent, as mandated by Fla. R. Crim. P. 3.111(d). See Tucker, 440 So. 2d at 61; Williams v. State, 427 So. 2d 768, 769 (Fla. 2d DCA 1983); Drago v. State, 415 So. 2d 874, 876 (Fla. 2d DCA 1982).

pertaining to his education and life experience." Id. at 1147. Among other things, the defendant -- as here -- "related that he had successfully represented himself on several previous occasions" in an exchange that "adequately reflected his ability to act pro se." Id. (emphasis added). In reversing the conviction, the appellate court stressed that the defendant "was not advised of the pitfalls of acting as his own lawyer, . . . nor was he advised of the potential sentence he might face if found guilty." The court held that, without "adequate warning as to the severity of the charge or its possible penalty, we cannot confirm that the defendant made an 'intelligent and understanding choice.'" Id.

Similarly, in Taylor v. State, 610 So. 2d 576, 578 (Fla. 1st DCA 1992), the trial court -- as here -- had made "brief inquiry regarding appellant's age, education and mental condition." But reversal was required because "nowhere in the record does there appear any indication that the trial court ever warned appellant about 'the dangers and disadvantages of self representation' . . .; the seriousness of the charges against him; or the potential sentence he might fact if found guilty. Likewise, we are unable to discern from the record that appellant comprehended the significance of his decision, or the magnitude of the task that he would be taking on."[13]

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[13] Many other Florida decisions have likewise reversed convictions of pro se defendants who were not adequately warned of the disadvantages of representing themselves. E.g.,
(continued...)

B. Rogers Was Never Warned of the Dangers and Disadvantages of Representing Himself

We have quoted above (pages 5-6) the colloquy between the trial court and Rogers relating to his desire for self-representation. As that record makes apparent, the trial court's sole focus was on determining whether Rogers was "qualified to handle this case." (ROA 4712.) Thus, the trial court asked questions only about Rogers's education and familiarity with the law. (ROA 4711-12.) Similarly, the trial court's decision to permit Rogers to proceed pro se was framed solely in terms of Rogers's competence or ability: "I have read your pleadings and . . . they are coherent . . . so I feel . . . your communication ability in writing is competent and adequate" and "I believe the defense is competent to proceed" (ROA 4712-14.)

But the issue under Faretta and the Florida Rules of Criminal Procedure is not merely competence. See Smith, 549 So. 2d at 1147. For instance, in Young, this Court noted that

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[13] (...continued)
Dortch v. State, 651 So. 2d 154, 157 (Fla. 1st DCA 1995) ("the trial court failed to adequately apprise appellant of the dangers and disadvantages of self-representation"); Taylor v. State, 605 So. 2d 958, 959 (Fla. 2d DCA 1992) ("the judge failed to warn Taylor of: the complexity of a jury trial, the dangers of self-representation, and the mandatory minimum sentence"); Hayes, 566 So. 2d at 341-42 (trial court did not "adequately inform [defendant] of the dangers of self-representation"); Tucker, 440 So. 2d at 62 (trial court's statement that "only a fool represents himself" did not provide adequate warning of the dangers of self-representation); Drago, 415 So. 2d at 877 (defendant "was not advised of the pitfalls of acting as his own lawyer").

the defendant's answers to the trial court's questions, and his written pleadings, "may suggest a competent defendant," but they did not establish a knowing and intelligent waiver of the right to counsel. See Young, 626 So. 2d at 657.

The trial court was obliged to warn Rogers of the "dangers and disadvantages of self-representation," Faretta, 422 U.S. at 835, and it failed entirely to do so. Rogers was never told that he faced the death penalty; or that these were complex, bifurcated proceedings unlike any he could have encountered before; or that there were grave disadvantages to self-representation. The trial court never told Rogers about the concept of mitigating evidence or the special legal requirements that would govern a capital sentencing. In short, Rogers was never told the risks and overwhelming drawbacks of representing himself in a capital trial; he was never "advised of the pitfalls of acting as his own lawyer." Drago, 415 So. 2d at 877. The trial court considered only Rogers's "competence," without making any of the further determinations and record inquiries that are clearly required under Faretta and Fla. R. Crim. P. 3.111(d) before a waiver of counsel can be deemed "knowing and intelligent."

The trial court was required to conduct this Faretta inquiry notwithstanding that Rogers had previously represented himself pro se in a few other cases involving lesser charges. This Court has already addressed that very issue, holding that a "Faretta inquiry is necessary even when the defendant is

very familiar with the criminal justice system." Young, 626 So. 2d at 657 (citing Amos v. State, 618 So. 2d 157, 163 (Fla. 1993)).[14] And the need for a full Faretta inquiry was particularly acute in this case, because Rogers had never before faced first-degree murder charges or a possible death sentence. The waiver of the right to counsel takes on even greater significance in a capital case, given the far greater complexity of a capital trial, and because "the penalty of death is different in kind from any other punishment under our system of justice." Gregg v. Georgia, 428 U.S. 153, 188 (1976).[15]

Whatever a defendant's background or prior experience, this Court has held explicitly that a Faretta violation, involving as it does a waiver of the right to counsel, cannot be harmless error and requires reversal of the conviction. Young, 626 So. 2d at 657; see pages 16-18, supra. Moreover, in this case, there was harm in the error. Without warning of the consequences, Rogers badly damaged his defense through his self-representation, most obviously by deposing a critical eyewitness and thereby tainting her identification. See pages 8-10, supra. Rogers was not properly equipped to

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[14] See also Taylor v. State, 610 So. 2d at 577 (reversing conviction for failure to conduct proper Faretta inquiry, despite defendant's previous pro se representations).

[15] See Williams, 427 So. 2d at 769-71; (court should consider the complexity of the charges in assessing whether representation by counsel is necessary); accord, Tucker, 440 So. 2d at 61.

represent himself in a capital murder trial; but he was never made "aware of the overwhelming disadvantages of self-representation." Payne, 642 So. 2d at 113.

C. The Trial Court Failed to Renew the Offer of Counsel

It has long been settled under Florida law that trial courts must renew an offer of counsel to a pro se defendant at each critical stage of the proceedings. Sampson v. State, 466 So. 2d 1181, 1182 (Fla. 1st DCA), review denied, 476 So. 2d 675 (Fla. 1985); Tucker, 440 So. 2d at 62. This requirement is codified in Fla. R. Crim P. 3.111(d)(4): "If a waiver [of 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."

The rule has a clear purpose: To ensure that the pro se defendant does not operate under the misapprehension that he has irrevocably waived his right to counsel once he makes an initial decision to represent himself. Sampson, 466 So. 2d at 1181-1182. Otherwise, a pro se defendant may well stumble from one error to the next (as did Mr. Rogers), thinking that he is forever bound to his initial decision at the outset of trial to proceed pro se.

Both voir dire and trial constitute separate critical stages of the proceedings at which the trial court must renew the offer of counsel. Jones v. State, 650 So. 2d

1095, 1096 (Fla. 2d DCA 1995) (voir dire); Sampson, 466 So. 2d at 1182 (trial). Sentencing is another distinct phase at which the offer of counsel must be renewed. Tucker, 440 So. 2d at 62. Particularly in a capital case, with its specialized legal principles relating to the development of mitigating evidence, renewal of the offer of counsel at sentencing is critical. See Parker v. State, 539 So. 2d 1168, 1169 (Fla. 1st DCA 1989), review denied, 547 So. 2d 1210 (Fla. 1989); Baranko v. State, 406 So. 2d 1271, 1272 (Fla. 1st DCA 1981), prob. juris. noted, 412 So. 2d 463 (Fla. 1982); Billions v. State, 399 So. 2d 1086, 1086-87 (Fla. 1st DCA 1981).

In this case, the trial court never renewed the offer of counsel to Rogers. After the initial colloquy in which the court permitted Rogers to proceed pro se, the subject was never again discussed. The trial court never told Rogers -- either during that initial colloquy or at any subsequent stage of the trial -- that he was not forever bound by his initial decision to proceed pro se and that he could later be provided counsel to represent him at voir dire, or trial, or sentencing.

This failure to renew the offer of counsel, standing alone, constitutes reversible error. Young, 626 So. 2d at 665; Parker, 539 So. 2d at 1169; Baranko, 406 So. 2d at 1272. Florida law "clearly mandates that the trial court renew its offer to appoint counsel." Billions, 399 So. 2d at 1087.

II. ROGERS WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, DUE TO COUNSEL'S FAILURE TO RAISE AN OBVIOUS BASIS FOR REVERSAL OF HIS CONVICTION AND SENTENCE

A criminal defendant has a constitutional right to the effective assistance of counsel on direct appeal. E.g., Evitts v. Lucey, 469 U.S. 387, 394-96 (1985); Johnson v. Wainwright, 498 So. 2d 938, 938-39 (Fla. 1986). This Court, applying the standards of Strickland v. Washington, 466 U.S. 668 (1984), has held on numerous occasions that a defendant is deprived of his right to the effective assistance of appellate counsel if counsel fails to raise an issue on appeal that would have resulted in reversal of the defendant's conviction. E.g., Johnson, 498 So. 2d at 939 ("appellate counsel provided ineffective assistance by not bringing . . . to our attention" an issue that constituted reversible error); Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986) (counsel was constitutionally ineffective in failing to advance "a compelling appellate argument"; that "substantial omission by appellate counsel and resulting prejudice to the appellate process [is] sufficient to undermine confidence in the outcome").

For instance, in Wilson v. Wainwright, 474 So. 2d 1162, 1163-64 (Fla. 1985), counsel failed to raise a challenge on appeal to the sufficiency of evidence supporting the conviction. This Court held that the "decision not to raise this issue cannot be excused as mere strategy or allocation of

appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case. . . . To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Id. at 1163.

So, too, here, the Court confronts a fundamental and indefensible error by appellate counsel. Rogers's waiver of his right to counsel went to the very heart of the trial. E.g., Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("in our adversary system of justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"). Appellate counsel overlooked a reversible error that involves the most fundamental right of a defendant -- to be represented by counsel. "[A]ppellate counsel who fails to raise a meritorious issue which is a fundamental and intrinsic part of his client's case is ineffective." Smith v. Wainwright, 484 So. 2d 31, 31 (Fla. 4th DCA 1986), review denied, 492 So. 2d 1336 (Fla. 1986).[16/]

[16/] Accord, e.g., Meyer v. Singletary, 610 So. 2d 1329, 1331 (Fla. 4th DCA 1992) ("Appellate counsel may be deemed to have rendered ineffective assistance in failing to raise a meritorious issue on appeal."). See also Jackson v. Dugger, 580 So. 2d 161, 162 (Fla. 4th DCA 1991) (appellate counsel held ineffective for failing to appeal trial court's erroneous admission of improper other-crimes evidence); Smith, 484 So. 2d at 31-32 (appellate counsel held ineffective for failing to appeal trial court's admission of an identification made during a line-up without presence of counsel).

There can be no strategic reason for appellate counsel's failure to raise such a basic issue, which implicates the fundamental question of whether Rogers received a fair trial, and which clearly presented grounds for reversal under settled Florida law. See Wilson, 474 So. 2d at 1163 (the decision not to raise an issue crucial to the validity of the conviction "cannot be excused as mere strategy or allocation of appellate resources"). Just as in Johnson, Rogers was denied his right to the effective assistance of counsel by the failure of his appellate lawyer to bring a reversible error to this Court's attention on direct appeal.

III. ROGERS'S CONVICTION AND DEATH SENTENCE MUST BE REVERSED AND REMANDED FOR A NEW TRIAL

The last question presented on this habeas petition is the nature of the relief that should be granted to Rogers based on the denial of his right to the effective assistance of appellate counsel. This Court has held that, where reversible error occurred at trial, and appellate counsel was ineffective in failing to present that issue on appeal, a new appeal would be "redundant." In these circumstances, the appropriate relief is the grant of a new trial rather than a new appeal. Johnson, 498 So. 2d at 939.[17]

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[17] See also Disinger v. State, 574 So. 2d 268, 269 (Fla. 5th DCA 1991) ("[I]f appellate counsel had brought the confrontation issue to our attention on direct appeal, a new trial would have been granted. In this case, a new appeal would be redundant . . . .").

That principle should govern here. The failure to conduct a proper Faretta inquiry at trial, and the failure to renew an offer of counsel to a pro se defendant, both constitute reversible error under settled case law and the Florida Rules of Criminal Procedure. It would therefore be a wasted step to grant a new appeal. Rather, the Court should reverse Rogers's conviction and sentence and remand for a new trial.

REQUEST FOR RELIEF

WHEREFORE, Petitioner Jerry Layne Rogers prays:

1. That this Court issue a writ of habeas corpus vacating his conviction and death sentence, and ordering a new trial; and

2. That this Court grant such other relief as may appear just, proper, and necessary in light of the facts and circumstances of this case.

Respectfully submitted,

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October 31, 1995

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CERTIFICATE OF SERVICE

I do certify that a copy of the foregoing Motion to Appear Pro Hoc Vice has been furnished by First Class Mail this 31th day of October, 1995 to:

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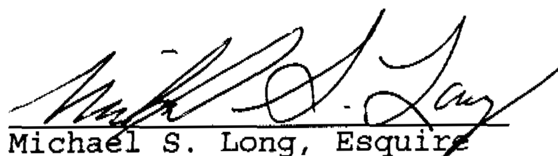

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