IN THE SUPREME COURT OF FLORIDA

TIMOTHY CARLTON VISAGE,

Petitioner,

v.

CASE NO. 86,999

STATE OF FLORIDA,

Respondent.

AMENDED PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PHIL PATTERSON
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 444774

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENT	7
ARGUMENT	9
ISSUE PRESENTED	
WHETHER A DEFENDANT MAY BE MENTALLY COMPETENT TO STAND TRIAL YET STILL LACK THE ABILITY TO MAKE AN INTELLIGENT AND UNDERSTANDING CHOICE TO PROCEED WITHOUT COUNSEL UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(d)(3)?	9
CONCLUSION	15
CERTIFICATE OF SERVICE	15
APPENDIX	

TABLE OF CITATIONS

CASES	PAGE(S)
Cerkella v. State, 588 So. 2d 1058 (Fla. 3d DCA 1991)	9,11,13
Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986)	13
Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)	10,13
Goode v. State, 365 So. 2d 381 (Fla. 1978)	11,13
Johnston v. State, 497 So. 2d 863 (Fla. 1986)	9,13
Klienfeld v. State, 568 So. 2d 937 (Fla. 1990)	11
Muhammad v. State, 494 So. 2d 969 (Fla. 1986)	9,10,13
CONSTITUTIONS	
Article I, section 16, Constitution of Florida	8,14
United States Constitution, Amendment Six	14
RULES	
Florida Rule of Criminal Procedure 3.111(d)(3)	9

IN THE SUPREME COURT OF FLORIDA

TIMOTHY CARLTON VISAGE,	:	
Petitioner,	:	
v.	:	CASE NO. 86,999
STATE OF FLORIDA,	:	
Respondent.	:	

:

AMENDED PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Timothy Carlton Visage, was the defendant in the trial court and the appellant in the district court. He will be referred to in this brief as petitioner or by his proper name. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the district court. Respondent will be referred to herein as the state.

The record on appeal will be referred to by use of the symbol "R," and transcripts of court proceedings by use of the symbol "T," each followed by the appropriate page number.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Petitioner was charged by information with two counts of burglary (R-5). Prior to trial, he moved the court for leave to discharge appointed counsel and to proceed in pro se (R 40-41). That motion was denied (T-16), and the case proceeded to trial.

Thereafter, petitioner was found guilty of both counts as charged (R-63). At sentencing, the court declared him to be a habitual felony offender, and imposed an aggregate sentence of 40 years imprisonment (R 68-82).

On appeal to the First District Court, petitioner argued, inter alia, that the lower court erred by not permitting him to waive counsel and represent himself at trial. The district court rejected that argument, but certified the following question as being one of great public importance:

> MAY A DEFENDANT BE MENTALLY COMPETENT TO STAND TRIAL YET STILL LACK THE ABILITY TO MAKE AN INTELLIGENT AND UNDERSTANDING CHOICE TO PROCEED WITHOUT COUNSEL UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(d)(3)?

Petitioner filed a timely Notice To Invoke Discretionary Jurisdiction in this Court, and this appeal follows.

STATEMENT OF THE FACTS

Petitioner was charged by information with two counts of burglary of a dwelling (R-5). Prior to trial he served notice on the court that he intended to discharge his court-appointed lawyer and proceeding in proper person (R-40).[1]

On January 3, 1994, defense counsel informed the court that petitioner "wishes to persist or continue in his desire to have me fired and to represent himself...." (T-10). The following was then heard:

> COURT: Mr. Visage, what's your problem?
> PETITIONER: The problem is the motions that should have been filed -- pretrial motions that should have been filed are not being filed unless I initiate them. They're elementary motions that should have been filed from day one.
>
> Also, I could not -- I have to use my own phone to even leave -- he don't even have a receptionist. He has an answering machine for a receptionist. I have to use my own money to be able to call and try to talk to him and very, very seldom does it ever happen and I do not feel he has my best interest in his mind. He hasn't showed me nothing. He came and saw me last week. The diagram that he's drawn isn't even nowhere close to the diagram of the crime scene, so I mean it's nothing even comparable. He doesn't have my best interest in mind and I wish to dismiss him. It's nothing of a personal matter. This is my life I'm dealing with and I don't believe he has my best interest in mind at all.
> COURT: Who do you spend (sic) to replace him with?
> PETITIONER: I can do better than what he's doing. I can do better than he's doing. That's bad. I can read a law book. I just don't know how to file a motion. There's elementary pretrial motions that should have been filed and they haven't been. That's ridiculous, but I could do -- I feel I could do better than he can. If I can't, I will live with losing my own fight.
> COURT: Have you ever tried a case before?
> PETITIONER: No, sir, but I've been reading. I've been in the law library everyday for the past three weeks so I'm ready for it. I'm ready to try it. It's not hard. I'm not trying

---

[1] Petitioner simultaneously filed a Notice of Discovery (R 35-39), a detailed Motion To Suppress In-Court Identification (R 42-47) which was subsequently adopted by defense counsel (T-10), and a Motion For Continuance (R 49-51).

to do it for the -- I'm tired of being here.
COURT: Mr. Visage, you've been convicted of some nine felonies?
PETITIONER: Yes, sir.
COURT: Any of those go to trial?
PETITIONER: No, sir, because I did them. I did those crimes. If I did something, I'll say I did it but I didn't do this and I ain't fixing to cop out to no -- that.
COURT: Mr. (defense counsel), has the co-defendant been deposed?
DEFENSE COUNSEL: Yes, Your Honor, he has. Judge, that seems to be one of the issues or bones of contention with Mr. Visage right now. We are having the deposition of the co-defendant transcribed. Up until the point in time that the co-defendant was, in fact, listed as a witness I had been riding coat-tails with the Public Defender's Office so it was necessary for me to get a motion to authorize or have the court authorize costs. It's my understanding that that deposition should have already been --
PETITIONER: Should have already been --
COURT: Mr. Visage, nobody interrupted you.
PETITIONER: I'm sorry.
DEFENSE COUNSEL: Judge, I was speaking with Ms. McCallum's office last week. I have told Mr. Visage as soon as I have a copy of that deposition he will have a copy.
COURT: The matter was set for trial on August the -- twice in September and now it's set for January. The co-defendant entered a plea when?
DEFENSE COUNSEL: I don't recall, Your Honor. It's been sometime, approximately five months ago.
COURT: Sometime after the last trial date in September?
DEFENSE COUNSEL: Yes, sir.
PROSECUTOR: Yes, sir.
COURT: Assuming that's what made the last continuance.
PROSECUTOR: Yes, Your Honor.
COURT: Mr. Visage, tell me about your schooling. Did you finish high school?
PETITIONER: Yes, sir.
COURT: Do you have any education beyond that?
PETITIONER: As a matter of fact, I'm a paralegal but it's kind of -- it's not returned. I'm not a lawyer, though.
COURT: When was the paralegal?
PETITIONER: Once again, I did it for gain time while I was incarcerated and I'm not a lawyer. You asked the question, that was the answer. Just research, it showed you how to Shepardize something and also go back through past cases. I mean I could use the law library if I have to.
COURT: Mr. (defense counsel), are there any other depositions necessary in this case?

DEFENSE COUNSEL: No, sir.
COURT: Any other discovery that you haven't received?
DEFENSE COUNSEL: No, sir.
COURT: There's some motions in limine.
DEFENSE COUNSEL: Yes, sir, there's a motion in limine and, of course, Mr. Visage's motion that I adopted.
COURT: Anything else you want to say, Mr. Visage?
PETITIONER: Yes, sir. Referring to what he was talking about as far as the deposition, there's a deposition of my co-defendant. For one thing, I've received no handwriting analysis of the two letters and I don't have copies of them no more. I don't have none of that stuff. He wrote -- my co-defendant wrote me two letters where I've got to pay him money. I gave them to him and I have not seen nothing since, heard nothing since. He did a handwriting analysis and that was it, no other response, and I was supposed to have a co-defendant deposition and then another witness deposition that they have and those are all key to my defense. How do I know if I want to take something to trial -- I'm sorry. My mouth is dry. How am I supposed to know if I want to take something to trial if I haven't read what these people are saying against me. You talking about I've got nine convictions. I'm being tried for burglary. I didn't do these burglaries and that's going to convict me easier than anything else, my past.
COURT: Unless you take the stand, Mr. Visage.
PETITIONER: I'm going to take the stand. I've got to.
COURT: Mr. Visage, I think you ought to let me finish. Unless you take the stand, your past is not going to come out anyway. I'm aware of it but the jury won't be aware of it.

Anybody else have anything they want to offer?
DEFENSE COUNSEL: No, Your Honor.
COURT: I'm going to deny the motion to dismiss counsel. It appears to me that Mr. (defense counsel) is a well-qualified attorney. He's done, within the frame work of the case that he has, an adequate and appropriate job for Mr. Visage. Also deny any motion for a continuance. I'm assuming that on the motion that you have adopted, Mr. (defense counsel), that that's going to be an evidentiary motion?

(T 10-16).

Later, the court denied each of the motions filed by petitioner that were not subsequently adopted by defense counsel (T-19).

After the jury was selected, but while they were out of the courtroom, the trial

judge made the following additional comments on petitioner's motion to discharge counsel:

> COURT: Two matters which we need to address. I think both of them have been addressed, at least implicitly. First the issue of the court's findings that Mr. Visage could not represent himself, my denial of that motion this morning, implicit in that, just so the record will be clear, I find that he does not have sufficient training, sufficient nor the understanding sufficient to allow him to represent himself and that it would not be appropriate to allow such representation, given the potential 60 year sentence that he is facing.
>
> Secondly, there was a suggestion filed at one point and the medical report has now been received and we've all been aware of it.
>
> Mr. (defense counsel), are you prepared to stipulate that your client is sane and is competent?
>
> DEFENSE COUNSEL: Yes, Your Honor, I'd stipulate to Dr. Miller's report at this time.

(T-21).

Thereafter, the case was tried before a jury and petitioner was found guilty of both offenses as charged. He was sentenced to a total of forty years imprisonment as a habitual felony offender.

This appeal follows.

SUMMARY OF ARGUMENT

The answer to the certified question is "Yes, but...." Yes, a person may be competent to proceed yet unable to knowingly and intelligently waive counsel, Johnston v. State, infra, Muhammad v. State, infra, Cerkella v. State, infra., but the record in this case does not support a finding that petitioner lacked the mental capacity to waive his right to counsel and to proceed in pro se.

A suggestion of incompetency was filed in the lower court. The reports submitted by the mental health experts, however, led counsel to stipulate that petitioner was competent to proceed without the court having to hold an evidentiary hearing on that question (T-21). The court accepted counsel's stipulation. Nothing in the record indicated that petitioner was experiencing any mental infirmity whatsoever, or that he was taking medication for a mental problem.

Furthermore, all depositions had been taken, and the discovery process was completed (T-14).

The record reflects that petitioner was an adult with a high school education. He had additional training as a paralegal and knew how to perform basic legal research (T-14). Indeed, petitioner's knowledge of the case and the applicable law was such that he was able to draft and file a motion to suppress in-court identification, which his court-appointed lawyer later adopted as his own (T-10). Furthermore, petitioner had studied the applicable law in the jail law library for three weeks and was ready to try the case (T-12). In short, petitioner understood what he was charged with and how to defend himself. He was, however, disgusted with the lack of effort on the part of his court-appointed lawyer and wanted to fire him and proceed in proper person.

Unquestionably, petitioner was competent, literate and understood the the case. See, Goode v. State, infra. He recognized that he was not a lawyer but was so put off

by appointed counsel's performance that he wanted to exercise his right to proceed in pro se. See, Art. 1, s. 16, Const. of Fla. And there was nothing in the record that would lead one to conclude that he did not understand what he was giving up by firing his lawyer and proceeding in proper person. See, Dorman v. Wainright, infra.

Consequently, the trial court abused its discretion by denying petitioner his constitutional right to self-representation. Art. 1, s. 16, Const. of Fla. See also, Faretta v. California, infra.

ARGUMENT

ISSUE PRESENTED

WHETHER A DEFENDANT MAY BE MENTALLY COMPETENT TO STAND TRIAL YET STILL LACK THE ABILITY TO MAKE AN INTELLIGENT AND UNDERSTANDING CHOICE TO PROCEED WITHOUT COUNSEL UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(d)(3)?[2]

The answer to the certified question is, "Yes, but...." Yes, a defendant may be competent to proceed yet unable to intelligently waive counsel, Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986), Muhammad v. State, 494 So. 2d 969, 974 (Fla. 1986), Cerkella v. State, 588 So. 2d 1058 (Fla. 3d DCA 1991), but, the record in this case does not support the district court's conclusion that petitioner was unable to knowingly, voluntarily, and intelligently waive counsel and proceed in proper person.

In Johnston v. State, supra, at 868, this Court determined that "Florida Rule of Criminal Procedure 3.111(d)(3) contemplates that a criminal defendant will not be allowed to waive assistance of counsel if he is unable to make an intelligent and understanding choice to proceed in pro se rather than with counsel because of, inter alia, his mental condition."

Similarly, in Muhammad v. State, supra, this Court held:

> "The test for determining the competence to waive counsel and to represent oneself at trial should be whether the defendant has the present ability to knowingly, voluntarily, and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to proceed without representation by counsel, to comprehend the nature of the charge and proceedings, the range of applicable punishments, and any additional matters

---

[2] This issue presents the question the First District Court of Appeal certified as being of great public importance. Petitioner originally framed this issue in the district court as follows: "The trial court abused its discretion and violated appellant's sixth amendment right to self-representation by denying his motion to waive counsel and proceed in proper person."

essential to a general understanding of the case.

Id. at 974.

In Muhammad v. State, supra, the accused was a death row inmate charged with stabbing a prison guard to death. His court-appointed lawyer, concerned with Muhammand's mental state, filed a suggestion of incompetence, and a notice of intent to claim the defense of insanity. Muhammad refused to even speak to the court-appointed psychologists. Consequently, the court ruled that he could not present any expert testimony to support his insanity claim.

Thereafter, Muhammad moved the court for leave to proceed in proper person. The trial judge denied that motion "because of the difficulty of preparing while on death row, or because of incompetence, or both." Later, a different judge granted Muhammad's motion for self-representation, and the case proceeded to trial. Muhammad was convicted of murder and sentenced to death.

On appeal, Muhammad argued that the trial court erred by not making sufficient inquiry to determine whether he was competent to make the decision to waive counsel and to conduct his own defense.

This Court rejected Muhammad's claim and noted that testimony proffered at his competency hearing indicated he suffered mental problems, "but [that] one need not be mentally healthy to be competent to stand trial." Id. at 973. The Court, citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), went on to opine: "Competency to waive counsel is at the very least the same as competency to stand trial. Id. at 975.

This Court noted that the Faretta standard to waive counsel does not require a determination that a defendant meets some special competency requirement as to his ability to represent himself. "Mental competency in the context of Faretta only relates

to the ability to waive the right to counsel." Id. The Court concluded, "Nothing in the record available to Judge Carlisle dispositively demonstrates Muhammad was incompetent" to waive counsel.

On the other hand, in Cerkella v. State, 588 So. 2d 1058 (Fla. 3d DCA 1991), the accused was examined by six mental health experts. Their reports to the court indicated that Cerkella did not speak English and was illiterate in his native language; that he only completed the first grade; that he had previously been in a mental hospital and was still under the care of a psychiatrist. He had the "mental age" of five years and eleven months and the memory function of a preschooler. His speech was impaired and he had difficulty paying attention. The district court concluded that, although he was competent to proceed to trial, he did not possess the mental capacity to waive counsel and proceed in proper person.

Having mental problems, however, does not automatically render one incapable of making a knowing and intelligent waiver of counsel. In Goode v. State, 365 So. 2d 381 (Fla. 1978), the accused was an escapee from a Maryland mental hospital who was charged with raping and killing a ten year old boy in Florida. A suggestion of insanity was filed. At an evidentiary hearing on that issue, four psychiatrists agreed Goode suffered from a mental disorder but only one concluded that he was incompetent to stand trial or assist in his defense. With the court's permission, Goode thereafter fired his court-appointed lawyer and proceeded in proper person. He was convicted of murder and sentenced to death.

On appeal Goode argued that the trial judge should not have allowed him to represent himself. This Court disagreed and held that Goode "was literate, competent, and understanding. He was voluntarily exercising his informed free will even though the judge warned him it was a mistake not to accept representation." Id. at 384. See

also, Kleinfeld v. State, 568 So. 2d 937 (Fla. 1990) (error to deny right of self-representation to defendant because of health problems without holding a hearing even though there was evidence before the court that Kleinfeld was a 72-year-old diabetic who was impotent and anemic, who had bleeding hemorrhoids and bleeding ulcers which led to the removal of his stomach, and who had one heart attack and could have another at any time, especially if in a stressful situation).

In the case at bar, petitioner unequivocally informed the court of his desire to proceed in proper person (R-40; T 11-21). At an evidentiary hearing on the motion it was determined that pre-trial discovery had been completed, and depositions had been taken (T-14). And as petitioner advised the court, "I've been in the law library everyday for the past three weeks so I'm ready for it. I'm ready to try [the case]" (T-12). Petitioner understood the nature of the charges against him (T-15). He further advised the judge that assigned counsel had not filed "elementary motions that should have been filed from day one" (T-11), and that petitioner could not contact his court-appointed lawyer because he had an "answering machine for a receptionist" (T-11). As a result, petitioner was forced to file, inter alia, a pro se motion to suppress in-court identification which his lawyer subsequently adopted as his own (T-10). The fact that appointed counsel adopted petitioner's motion to suppress in-court identification belies the district court's contention that petitioner did not know how to file legal motions.

The court's inquiry of petitioner revealed the following: Petitioner, and adult, was a high school graduate with additional training as a paralegal that enabled him to do basic legal research, Shepardize cases, and generally use the law library (T-14). In fact, he had spent every day for the previous three weeks preparing for trial at the jail law library (T-12).

The motions filed by petitioner, one of which was adopted by his lawyer (T-10),

reflect an understanding of the case and the legal issues involved (R 35-51), even though "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." Faretta v. California, supra.

Although a pre-trial suggestion of incompetency was filed, it was essentially abandoned when defense counsel stipulated - without the necessity of a hearing - that petitioner was competent to proceed (T-21). There was no evidence that petitioner was experiencing mental problems or taking medication at that time. Cf. Cerkella v. State, supra. As in Muhammad v. State, supra, "Nothing in the record available to [the trial judge] dispositively demonstrates [petitioner] was incompetent" to waive counsel and to proceed in pro se.

Petitioner also expressed an understanding of the consequences of his decision to proceed in proper person. During the course of explaining why he wanted to rid himself of court-appointed counsel, petitioner advised the court, "I feel I could do better than he can. If I can't, I can live with losing my own fight" (T-12). Before ruling on petitioner's motion, the trial judge did not stress the danger of proceeding in pro se, or advise petitioner of the maximum sentence he faced if convicted. Nevertheless, the record is clear that petitioner was well aware of the constitutional right he was giving up by waiving counsel. See, eg., Dorman v. Wainwright, 798 F.2d 1358, 1367 (11th Cir. 1986).

In the final analysis, the record reflects that petitioner was unquestionably "literate, competent, and understanding," Goode v. State, supra, of the consequences of his decision to represent himself. Consequently, he was able "to make an intelligent and understanding choice to proceed in pro se." Johnston v. State, supra. Or, stated conversely, there was nothing in the record that dispositively demonstrated petitioner was incompetent to waive counsel. Muhammad v. State, supra. As a result,

petitioner's constitutional right to proceed in proper person was violated when the trial judge forced him to stand trial with unwanted, court-appointed counsel. U.S.C.A. amend. 6; Art. 1, s. 16, Const. of Fla.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, it is clear that this Court must answer the certified question in the affirmative, but go on to also find that petitioner was legally competent to waive counsel and proceed in pro se. Consequently, this Court must remand this case to the district court with directions to vacate petitioner's convictions and sentences, and grant him a new trial.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PHIL PATTERSON
Assistant Public Defender
Fla. Bar No. 444774
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William J. Bakstran, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, TIMOTHY CARLTON VISAGE, #098216, Charlotte Correctional Institution, 33123 Oil Well Road, Punta Gorda, Florida 33955, on this 8th day of January, 1996.

PHIL PATTERSON

IN THE SUPREME COURT OF FLORIDA

TIMOTHY CARLTON VISAGE,

Petitioner,

v. CASE NO. 86,999

STATE OF FLORIDA,

Respondent.

APPENDIX TO AMENDED PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PHIL PATTERSON
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 444774

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

TIMOTHY VISAGE,

Appellant,

v. CASE NO. 94-660

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 11, 1995.

An appeal from the Duval County Circuit Court, Alban E. Brooke, Judge.

Nancy A. Daniels, Public Defender; Phil Patterson, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; William J. Bakstran, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant was convicted on two counts of burglary of a dwelling following a jury trial. On appeal, he argues that the trial court abused its discretion in denying his request for self-representation. Although we affirm the convictions, we must reverse the restitution that was ordered without notice to the appellant.

Prior to trial, the appellant sought leave to represent himself. At a hearing on the matter, the trial judge inquired as to appellant's education and legal experience, ultimately finding

that appellant lacked sufficient knowledge and training to permit self-representation. Appellant proceeded with counsel, and he was convicted as charged in the information.

On appeal, it is argued that there was no record support for the trial court's findings, and, even if the record established inadequate legal experience, this could not by itself justify denying appellant the right to self-representation.

The trial court's decision as to self-representation is reviewable for abuse of discretion. Crystal v. State, 616 So. 2d 150, 152 (Fla. 1st DCA 1993); Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 5 (Fla. 1993). Thus, we will not overturn the trial court so long as reasonable persons could differ as to the propriety of the ruling. See Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

By this standard, we cannot conclude that the trial court abused its discretion. The record is equivocal concerning appellant's lack of legal experience. Although the appellant indicated that he could do rudimentary legal research and that he had previously been convicted of at least nine felonies, he conceded that he did not know how to file a motion and that his previous convictions all resulted from guilty pleas. In addition, the record contains motions prepared by the appellant which Judge Brooke could consider in assessing appellant's ability.

Appellant's further contention relies upon this court's

holding that it constitutes an abuse of discretion to deny a defendant the right to self-representation solely because the defendant lacks adequate legal training. See Kearse, 605 So. 2d at 538 ("[A] person need not be schooled in the law in order to competently elect to represent himself."); Crystal, 616 at 153 (quoting Kearse). However, the record before us indicates that the appellant was handicapped by more than merely a lack of legal experience. A suggestion of mental incompetency was filed in this case, and Judge Brooke had a psychiatric report prepared. As a result, Judge Brooke was aware that the appellant had a psychiatric history that included a suicide attempt and hospitalization. More importantly, the appellant had been diagnosed with bipolar disorder for which he was presently taking anti-depressant, tranquilizing and anti-manic medications. Although the report concluded that appellant's cognitive faculties were intact, and he was adjudged mentally competent to stand trial, this in no way mandated a finding that he was capable of making what Florida Rule of Criminal Procedure 3.111(d)(3) describes as "an intelligent and understanding choice" to proceed without counsel. See Reilly v. State, Dept. of Correct., 847 F.Supp. 951, 960 (M.D. Fla. 1994); Muhammad v. State, 494 So. 2d 969, 975 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987); Cerkella v. State, 588 So. 2d 1058 (Fla. 3d DCA 1991). A defendant may be deemed mentally competent to stand trial, yet still be prohibited

from waiving the assistance of counsel where, due to a mental condition, the lack of education or experience, or some other factor, he appears unable to make an intelligent and understanding choice to proceed without counsel. See Fla.R.Crim.P. 3.111(d)(3). Because reasonable minds could differ as to whether the appellant was able to make an intelligent choice given his mental condition and lack of legal experience, we cannot find an abuse of discretion.[1] Consequently, we affirm the challenged convictions. Because there appears to be some confusion on the relationship between mental competence to stand trial and the capacity to waive counsel, we certify the following question as one of great public importance:

> MAY A DEFENDANT BE MENTALLY COMPETENT TO STAND TRIAL YET STILL LACK THE ABILITY TO MAKE AN INTELLIGENT AND UNDERSTANDING CHOICE TO PROCEED WITHOUT COUNSEL UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(d)(3)?

We also affirm appellant's sentences, except for the orders imposing restitution. The state correctly concedes that restitution should not have been imposed without giving the appellant notice and an opportunity to be heard. See Palag v. State, 622 So. 2d 1151 (Fla. 1st DCA 1993); Hamrick v. State, 648 So. 2d 274 (Fla. 4th DCA 1995). Accordingly, we reverse the

---

[1]We reject appellant's assertion that the trial court exclusively relied upon the lack of legal training without mentioning appellant's mental condition. Although much of the discussion concerned appellant's lack of training, Judge Brooke also noted that the psychiatric report had been received and that he was aware of its findings.

restitution orders and remand with directions to conduct a hearing on the amount of restitution appellant will be required to pay.

AFFIRMED in part, REVERSED in part and REMANDED with directions.

ERVIN and MINER, JJ., CONCUR; BENTON, J., DISSENTS WITH WRITTEN OPINION.

BENTON, J., dissenting.

The right of a criminal accused to stand trial without counsel is wisely exercised seldom, if ever. Even so the right is embodied in both the Florida, State v. Cappetta, 216 So. 2d 749 (Fla. 1968), cert. denied, 394 U.S. 1008, 89 S. Ct. 1610, 22 L. Ed. 2d 787 (1969); Deeb v. State, 131 Fla. 362, 179 So. 894, 899 (1937) ("a mandatory organic rule of procedure in all criminal prosecutions"), and the federal constitutions. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Moore v. Michigan, 355 U.S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167 (1957); Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1948).

Appointing standby counsel does not violate the right of self-representation, McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); Allen v. State, 20 Fla. L. Weekly S397 (Fla. July 20, 1995); Cappetta, and the right does not extend to appellate proceedings. Hill v. State, 656 So. 2d 1271 (Fla. 1995). But the right is not contingent on "a defendant['s] meet[ing] some special competency requirement as to his ability to represent himself." Muhammad v. State, 494 So. 2d 969, 975 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987); Crystal v. State, 616 So. 2d 150 (Fla. 1st DCA 1993); Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992), review denied, 613 So. 2d 5 (Fla. 1993).

Here the trial court elicited from appellant that he was a "paralegal" (during a previous incarceration) with a high school education, who had prepared for trial in the present case by spending every day for three weeks in a law library. The trial court nevertheless denied what it treated as appellant's pretrial motion to dismiss counsel and for leave to represent himself at trial, stating:

> I'm going to deny the motion to dismiss counsel. It appears to me that [defense counsel] is a well-qualified attorney. He's done, within the frame work of the case that he has, an adequate and appropriate job for Mr. Visage.

After selecting the jury and in their absence, the trial court stated:

> [M]y denial of that motion this morning, implicit in that, just so the record will be clear, I find that he does not have sufficient training, sufficient nor the understanding sufficient to allow him to represent himself and that it would not be appropriate to allow him to represent himself . . . given the potential 60 year sentence that he is facing.
>
> Secondly, there was a suggestion filed at one point and the medical report has now been received and we've all been aware of it.

Even an accused facing serious criminal charges who cannot represent himself well has the right to go to trial pro se. Faretta; Muhammad. The issue is the defendant's ability freely "to make an intelligent and understanding choice," Fla. R. Crim. P. 3.111(d)(3), not how well he is likely to do on his own at trial.

"[I]n the absence of unusual circumstances an accused who is mentally competent and sui juris has the right to conduct his own defense without counsel by virtue of Section 11, Declaration of Rights, Florida Constitution." Cappetta, 216 So. 2d at 750. Superseding former section 11, the present state constitutional provision specifies in identical language that in "all criminal prosecutions the accused shall . . . have the right . . . to be heard in person, by counsel or both." Art. I, § 16, Fla. Const. (1968).

While there is language in Johnston v. State, 497 So. 2d 863 (Fla. 1986) and Cerkella v. State, 588 So. 2d 1058 (Fla. 3d DCA 1991) suggesting that "lawyering ability"--as opposed to the ability to decide between self-representation and representation by counsel--is a pertinent consideration, these cases may also be read more narrowly, in conformity with the vast body of precedent on this point.

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that record will establish that "he knows what he is doing and his choice is made with eyes open."

Jimmy Lee Smith v. State, 407 So. 2d 894, 900 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864 (1982) (citations omitted). The record here does not show that appellant did not know what he was doing in asking to represent himself or

that he made the choice blindly. While, if waiver had been allowed, more careful advice and questioning might have been required under Rule 3.111(d) to make a record invulnerable to appellate censure, the record that was in fact made reveals no reason why appellant should not have been allowed to exercise his constitutional right to appear pro se at his criminal trial.

The present case is distinguishable from Johnston where "reports of psychiatrists show[ed] mental impairment," 588 So. 2d at 1060, and Cerkella where different IQ tests put that defendant's mental age between five years one month and five years eleven months. An intellectual deficit may render a defendant incapable of appreciating the significance of waiving representation by counsel. Here the psychiatric report (on which the trial court relied in adjudicating appellant competent to stand trial and to which the parties apparently stipulated), while acknowledging a history of emotional disturbance, concluded that "[o]n examination now, [appellant's] cognitive facilities are intact." There is no finding of illiteracy, misunderstanding, or duress, nor any evidence that appellant's attempted waiver was anything other than voluntary and intelligent. In finding appellant competent to stand trial, moreover, the trial court also implicitly resolved the "emotional competence component" of the competence to waive counsel question. Muhammad.

In my view, Muhammad controls the present case. There, as

here, questions of competence had arisen and a psychiatrist had examined the defendant. But there the trial court did allow the defendant to represent himself at trial. On appeal, Muhammad contended the waiver was ineffective because he had been incompetent to waive counsel. On this question, our supreme court said:

> The Faretta Court noted that the question of whether the defendant had sufficient technical legal skills to represent himself was irrelevant to waiver of counsel. If one may be intellectually incompetent in legal skills yet waive counsel, then no standard of mental competence beyond competence to stand trial is required. Mental competency in the context of Faretta only relates to the ability to waive the right to counsel. Competency may be, however, only one of several factors to be considered when a defendant waives a right, as in the case of waiver of counsel--Faretta requires that the court find that the defendant is not only competent, but also "literate ... and understanding, and that he [is] voluntarily exercising his informed free will." 422 U.S. at 835, 95 S.Ct. at 2541. The requirements of literacy and understanding appear to be the factors suggested in Massey, which in combination with competency constitute "capacity to stand trial without benefit of counsel." 348 U.S. at 105, 75 S.Ct. at 145.
>
> Inherent in appellant's argument is the assumption that the level of competency necessary to waive counsel is greater than the level required to simply stand trial. Competency to waive counsel is at the very least the same as competency to stand trial. Faretta.

Muhammad, 494 So. 2d at 975. Unlike Muhammad, appellant was not permitted to waive his right to counsel. But whether the defendant

was competent to waive counsel was an issue in both cases. Unless appellant was incompetent to waive counsel, he had the constitutional right to do so. Faretta; Cappetta.

It is impossible not to sympathize with the trial judge charged, on one hand, with protecting the accused's right to be represented by counsel, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Traylor v. State, 596 So. 2d 957 (Fla. 1992), and, on the other, with protecting the accused's right not to be represented by counsel. Faretta; Cappetta. A welter of district court decisions on various aspects of the subject has not alleviated the dilemma. See, e.g., Dortch v. State, 651 So. 2d 154 (Fla. 1st DCA 1995). As a practical matter, appointing standby counsel for a pro se defendant intent on representing himself has much to commend it. See Cappetta. The majority is wise to look to the supreme court for guidance in this area, even if the case does not hinge on the precise question certified. On the merits, I respectfully dissent.