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IN THE SUPREME COURT OF FLORIDA

ARTHUR LEE HUGHES,

Petitioner,

v. CASE NO. 89,919

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF ON THE MERITS

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PETITIONER'S INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on a certified question of great public importance from the First District Court of Appeal. Jurisdiction lies under Article V, Section 3(b)(4) of the Florida Constitution. As to the certified question, Hughes asserts that the trial court erred in denying his demand to represent himself, and that the district court erred in declining to reverse on this error. Hughes also argues that the trial court failed to adequately inquire into his demand to fire his lawyer, and erred in giving a misleading jury instruction on the defense of independent act.

In this brief, citations to documents in Volume I of the record on appeal appear as (R[page number]). Citations to consecutively-numbered transcript pages in the remaining volumes appear as (T[page number]).

STATEMENT OF THE CASE

The petitioner, **ARTHUR LEE HUGHES,** was indicted on June 3, 1993 for first degree murder, armed burglary, armed kidnaping, three counts of armed robbery and shooting a deadly missile. (R3-6) He was appointed conflict counsel on June 8, 1993. (R16-18) On April 6, 1994, counsel filed a motion to suppress statements which incorporated a memorandum prepared by Hughes. (R26-31) There is no record of a hearing or ruling on the motion. The case was continued. (R23-25) On December 27, 1994, Hughes filed a pro se motion for discharge on speedy trial grounds. (R32) On January 4, 1995, he filed a second pro se motion for discharge and a pleading entitled "Defendant's Give Judicial Notice," in which he stated that he was dismissing trial counsel, Richard D. Nichols. (R38-41)

The court entertained the defendant's pro se motions on February 10, 1995. (T16) Hughes stated unequivocally that he wanted to discharge Nichols. (T17) Upon being informed that he would not be appointed cocounsel, Hughes said he **was** prepared to do without counsel. (T18) He said he wanted to fire his lawyer because of disagreement, inadequate communication, the failure to keep him informed, and unwillingness to assert his right to a speedy trial. (T19, 25) The court asked counsel to provide an overview of the case, and queried Hughes about the disadvantages of proceeding *pro* se. (T19-25) Counsel said that, if he remained

on the case, he would probably refile Hughes' speedy trial motions in proper form. (T24) The court denied the motion to discharge counsel, finding that "there are unusual circumstances which would deprive Mr. Hughes of a fair trial if he were to conduct his own defense." (T25) The speedy trial motions were denied as unauthorized pro se pleadings by a represented defendant. (T26, R44-47)

On March 20, 1995, the court granted motions for continuance by the state and Hughes' counsel. (T31, R59-61, 63) The court entertained a "Final Motion for Discharge" filed by Hughes March 15, 1996, as a request for reconsideration, and denied it. (T56-57, 62, T42-43) Judge Davis said he was through with the speedy trial issue in this case. (T43)

On the day of jury selection, April 17, 1995, Hughes again stated his desire to fire Nichols. (T46) Stating he had received no depositions and felt he was going to trial blind, Hughes initially declined to participate in the proceedings. (T46-47) He complied with the court's order to sit next to his attorney. (T48)

Trial ensued on the murder, burglary and robbery counts. Hughes and a codefendant, Maurice Williams, were tried before separate juries. During the charge conference, Hughes' counsel proposed a special instruction on the defense of independent act. (R67, T746) Following extended argument, the court opted to give

a different independent act instruction, to which counsel acquiesced. (T746-769, 851, R78) During deliberations, the jury asked, "Does the principal theory apply to all five counts?" (T900) Again with the acquiescence of defense counsel after initial misgivings, the court responded simply, "Yes." (T900-907) A juror stated, "That answer is all we were waiting on," and declined the court's offer of lunch. (T908) Minutes later, the jury returned verdicts of guilty as charged on all counts. (T909, 924-925, R115-123)

The court adjudicated Hughes guilty of all offenses, and sentenced him to life imprisonment with a mandatory 25-year term for murder (Count 1), consecutive to life sentences as a habitual offender for the burglary and robberies (Counts 2, 4-6). (T936-937, R133-143) The habitual offender sentences are concurrent to one another.

Timely notice of appeal was filed, and the public defender was appointed to represent Hughes on appeal. (R150, T937) On direct appeal, Hughes argued that the trial court conducted an inadequate inquiry into his complaints against his attorney, wrongly denied his clearly expressed demand for self-representation, and gave a misleading instruction on independent act. The Court affirmed, addressing only the denial of self-representation. Hughes v. State, 1st DCA No. 95-2168, 22 Fla. L. Weekly D99a (1st DCA Dec. 30, 1996). The district court found

that 'ample precedent" supported the trial court's denial of self-representation. However, the court also observed that a sister court had questioned this use of the "fair trial" standard and so certified the same question of great public importance as in Bowen v. State, 677 So. 2d 863 (Fla. 2d DCA 1996) (en banc), rev. pending, Fla.Sup.Ct, No. 88,219:

> ONCE A TRIAL COURT HAS DETERMINED THAT A DEFENDANT HAS KNOWINGLY WAIVED HIS OR HER RIGHT TO COUNSEL, MAY THE COURT NONETHELESS REQUIRE THE DEFENDANT TO BE REPRESENTED BY COUNSEL BECAUSE OF CONCERN THAT THE DEFENDANT MIGHT BE DEPRIVED OF A FAIR TRIAL IF TRIED WITHOUT SUCH REPRESENTATION?

STATEMENT OF THE FACTS

This case concerns the death by gunshot of James Timothy Channelle, which occurred April 24, 1993 during a robbery and burglary at the home of Thomas Lynch and Rose Montgomery in the Springfield section of Jacksonville. The burglary was carried out by Arthur Hughes, 20 years old, Maurice Williams, 21 years old, and Alexander Jones, 17 years old. (T396, 439, 629, 657-658) Jones committed the killing. (T669) The facts which follow focus on evidence bearing on the court's instructions on the defense asserting of independent act, Point III in the brief.

Hughes, Williams and Jones decided to rob Rose Montgomery, known as the "Weed Lady," in the belief that she possessed $20,000 she had gained by cheating an associate in a drug deal. (T401-402, 639-641) Jones was the only one of the three to carry a gun during the robbery. (T654) He testified that, in planning the robbery, Williams and Hughes told him that if anyone resisted, or "bucked the jack," he should pull the trigger. (T673, 684) There were no other discussions before the robbery whether anyone should be shot. (T669)

Jones, Williams and Hughes broke in through the front door of the house after being denied access by Montgomery's guest, Timothy Channelle. (T657-658) They subdued the occupants, Lynch, Montgomery and Channelle. (T249-250, 310-313) Jones, who took a plea bargain before trial, testified that Williams and Hughes

told him several times during the robbery to point the gun. (T659-662) After the three men went through the house and selected items to take, Hughes and Williams told Jones, "Let's go. We waste too much time here." (T668) Hughes was at the front door and Williams had just passed Jones on his way out when Jones turned and shot without looking toward the ground where Channelle and Montgomery lay. (T670, 685) He said he shot solely to see how it felt, and did not mean to hurt or kill Channelle. (T681) Neither Channelle nor Montgomery were resisting. (T684) At the point he shot, the robbery was over, Jones testified. (T684)

Rose Montgomery testified that she went into a closet when she thought the assailants were leaving. (T260) She heard a voice say "Arthur man, you don't have to shoot nobody." (T261) She then heard a gunshot followed by Channelle's cry that he had been shot. (T262)

Hughes gave a statement to police detective William R. Baer following his arrest. (T401-423) He said that, before they entered the house, he and Williams told Jones not to shoot anyone. (T421) Inside the house, Williams told Jones not to shoot Channelle because he was too old. (T409, 422) Hughes said Jones poked his head out of the room and said, "I'm going to kill the motherfucker." (T409) Hughes then heard a shot. (T409) Hughes stated that, after the robbery, Jones said he had fired because Channelle "was bucking, didn't want to give it up." (T422-423)

Next day, Jones laughed when he heard Channelle died. (T423)

A second police detective who helped take statements from witnesses and listened to the defendants' statements, said that as far as he could tell, Hughes never encouraged Jones to shoot anyone. (T529)

The medical examiner testified that Channelle died from blood loss after the bullet entered his left buttocks, tore thorough his inferior vena cava and liver, and exited from his right abdomen. (T599, 602-603)

The take in the robbery, divided by the three men, was 10 bags of marijuana, $300 cash, a pistol and some jewelry. (T422-423, 688-689).

SUMMARY OF THE ARGUMENT

I. A trial court may not deny self-representation to an accused who is aware of the dangers and disadvantages but nonetheless demands to proceed pro se. The court must permit exercise of this Sixth Amendment right, recognized in Faretta v. California, 422 U.S. 806 (1975), even in a case in which the state is seeking the death penalty. The pendency of capital trial proceedings alone cannot constitute 'unusual circumstances" sufficient to justify forcing counsel on an unwilling defendant who knowingly elects self-representation. Accordingly, if not rephrased, the certified question must be answered in the negative: Once a trial court has determined that a defendant has knowingly waived the right to counsel, the court may not require the defendant to be represented by counsel. A modified certified question, more suited to these facts, should be answered: The special status of a capital case is not, of itself, an unusual circumstance authorizing denial of self-representation by an accused who knowingly waives the right to counsel.

Both answers compel reversal of Hughes' convictions and remand for a new trial. Hughes made repeated unequivocal demands to represent himself. He participated in trial with counsel he did not want only in compliance with the trial court's command. He did not thereafter ratify counsel's representation or performance. Denial of this unequivocal demand to exercise a

constitutional right, which Hughes never abandoned either explicitly or implicitly, caused reversible error.

II. The trial court failed to conduct an adequate inquiry into Hughes' reasons for his demand to discharge appointed counsel. The court merely asked counsel for an overview of the case, which did not include responses to Hughes' specific grievances. Absent a specific inquiry into the grievances raised, the court could not determine whether good cause existed for discharge of counsel and appointment of substitute counsel, in accord with Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

III. Reversible error resulted from the trial court's instruction on independent act. Unlike the instruction proposed by the defense, the court's instruction hinged guilt or innocence solely on causal connection while it buried the crux of the defense, lack of proof that the killing was in furtherance of the felony, in arcane legal jargon disconnected from guilt or innocence. This instruction deprived Hughes of his defense and nullified an essential element of felony murder. The error was magnified when the judge answered a jury question by stating that the principal theory applied to all counts, including murder. The instruction on principal did not limit liability for felony murder to a killing committed in furtherance of the felony. As a result, the jury received incomplete, misleading instructions on the sole disputed issue at trial, causing fundamental error.

ARGUMENT

I. A DEFENDANT WHO MAKES A KNOWING WAIVER OF HIS RIGHT TO COUNSEL HAS A CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION IN A CAPITAL CASE, THE TRIAL COURT'S CONCERN THAT HE OR SHE MAY NOT RECEIVE A FAIR TRIAL NOTWITHSTANDING.

The district court certified this question:

> ONCE A TRIAL COURT HAS DETERMINED THAT A DEFENDANT HAS KNOWINGLY WAIVED HIS OR HER RIGHT TO COUNSEL, MAY THE COURT NONETHELESS REQUIRE THE DEFENDANT TO BE REPRESENTED BY COUNSEL BECAUSE OF CONCERN THAT THE DEFENDANT MIGHT BE DEPRIVED OF A FAIR TRIAL IF TRIED WITHOUT SUCH REPRESENTATION?

Rephrased, the question essentially is whether a trial court may deny an accused his state and federal rights to self-representation, knowingly exercised, on grounds that the rights must in some circumstances yield to the interest in a fair trial. It calls, in short, for a balance of interests. Though appropriate for resolution of many legal questions, a balancing approach to self-representation is clearly contrary to Sixth Amendment jurisprudence, including a Second DCA opinion certifying the same question as in this case and two recent pronouncements from this Court.

In the Second DCA case, denial of self-representation led the district court to reverse convictions of second-degree murder and attempted first degree murder. Bowen v. State, 677 So. 2d 863 (Fla. 2d DCA 1996) (en banc), rev. pending, Fla.Sup.Ct. No. 88,219. Here, however, though it was presented with similar

facts and certified the same question, the district court affirmed. It found that the trial judge's reference to unspecified "unusual circumstances" which would preclude a fair trial if Hughes represented himself was supported by 'ample precedent" in the First District. It cited Smith v. State, 444 So. 2d 542 (Fla. 1st DCA 1984), in which the court's recitation of this principle is dicta.

Nothing in this record reflects the sort of unusual circumstance which might justify denial of self-representation. A recent case featuring such an unusual circumstance is Visage v. State, 664 So. 2d 1101 (Fla. 1st DCA 1995), cause dismissed, 679 so. 2d 735 (Fla. 1996), in which a history of mental instability was held sufficient to deny self-representation. The only unusual circumstance discernible from this record was the fact that the state was seeking the death penalty, and that therefore a separate penalty phase might be required-l Under this court's precedent, the fact that a case is in this posture is plainly insufficient to force counsel on an unwilling accused.

In Hill v. State, 21 Fla. L. Weekly S515a (Nov. 27, 1996), this Court affirmed a first-degree murder conviction and death sentence following trial proceedings in which the accused conducted his own defense. The Court wrote:

'Although the jury found Hughes guilty of first-degree murder, no penalty phase was held, and he received a life sentence.

> As to the nature and complexity of the case, there is nothing particularly complex about the defense of justification or necessity that would lead us to conclude that Hill was unable to make a fully intelligent and understanding choice to waive counsel under rule 3.111(d). **Nor does the fact that this is a death penalty case make it so complex that a defendant cannot make an intelligent choice to represent him or herself.** It was sufficient that the judge made sure that Hill knew the State would be seeking the death penalty.

21 Fla. L. Weekly at S516 (emphasis added). Likewise, there was nothing particularly complex in this case, in which the sole disputed trial issue was whether the killing was in furtherance of the felony, to warrant a conclusion that Hughes could not make an intelligent, understanding choice to waive counsel. Like Hill, Hughes knew he might be facing the death penalty.

The same day it decided Hill, this Court ruled in Rogers v. Singletary, 21 Fla. L. Weekly S503b (Nov. 27, 1996), that appellate counsel was not ineffective in declining to argue in the direct appeal that Rogers was wrongly granted self-representation in a capital case. This Court concluded that "the record establishes that Rogers knew what he was doing and his choice was made with eyes open." 21 Fla. L. Weekly at S504. Here, Hughes' responses to the trial court's inquiries concerning self-representation demonstrated that his decision was made "knowingly and intelligently" within the meaning of Faretta v. California, 422 U.S. 806 (1975), and Florida Rule of Criminal Procedure 3.111(d)(3). In fact, in pressing for self-

representation **in three different court appearances, Hughes** correctly cited appropriate statutory authority and accurately informed the trial court of its error in denying him self-representation. (T10, **46-47)**

Other precedent in conflict with the district court opinion includes Morris v. State, 667 So.2d 982 (Fla. 4th DCA), rev. dismissed, *673* So. 2d 29 (Fla. 1996), and Adams v. Carroll, 875 F. 2d *1441* **(9th Cir. 1989).** The Morris panel cautioned against denial of self-representation because of lack of legal knowledge, *667* **So**. 2d at 987, while the Carroll court granted *habeas* relief to a defendant who, though admittedly incompetent to defend himself, was wrongly denied his right of self-representation.

To its credit, the state acknowledged that the grounds for affirmance relied upon by the district court are insupportable. In its motion for clarification below (Appendix B), it cited Hill and Rogers, supra, and stated:

> These cases indicate that the legal skills of the defendant to try the case are irrelevant to the determination of a valid waiver of counsel.
>
> ...
>
> Consequently, difficulties presented to a pro-se defendant in litigating the death penalty do not per se invalidate an otherwise valid invocation of the right to self-representation.

Though respondent urged affirmance on this issue for other **reasons (see below), this amounts to a concession of error as to** the district court's rationale.

Therefore, the error of the trial court in denying self-representation and the error of the district court in approving this decision are clear. The trial court may not force counsel on a defendant who knowingly waives his or her right to counsel. For the same reasons, the district court must receive a negative answer to its certified question:

> ONCE A TRIAL COURT HAS DETERMINED THAT A DEFENDANT HAS KNOWINGLY WAIVED HIS OR HER RIGHT TO COUNSEL, MAY THE COURT NONETHELESS REQUIRE THE DEFENDANT TO BE REPRESENTED BY COUNSEL BECAUSE OF CONCERN THAT THE DEFENDANT MIGHT BE DEPRIVED OF A FAIR TRIAL IF TRIED WITHOUT SUCH REPRESENTATION?

However, this Court may choose to rephrase the question. Previously certified in Bowen, supra, this question does not contemplate the status of a case as a capital case in pondering the trial court's authority to deny self-representation. While it appears Bowen was facing first-degree murder charges when he attempted to exercise his right to proceed pro se, 677 So. 2d at 864, the opinion does not reveal whether the state was seeking the death penalty. A question of great public importance better tailored to the circumstances of this case may be:

> DOES THE SPECIAL STATUS OF A CAPITAL CASE CONSTITUTE AN "UNUSUAL CIRCUMSTANCE" AUTHORIZING THE TRIAL COURT TO DENY SELF-REPRESENTATION TO AN ACCUSED WHO HAS KNOWINGLY WAIVED THE RIGHT TO COUNSEL?

Consistent with Hill and Rogers, supra, this question also must be answered in the negative. In accord with this answer, the

decision of the district court must be quashed and the case remanded with directions to reverse Hughes' convictions and remand for a new trial.

Though the state could not abide the district court's rationale for affirmance, it argued below that Hughes did not unequivocally invoke and maintain his right of self-representation. The district court opinion turned solely on whether the trial court was authorized to deny the request for self-representation because of "unusual circumstances," suggesting it perceived no lack of clarity in Hughes' request. The court stated that it was writing "to address the appellant's assertion that the trial court erred in denying his unequivocal request to represent himself." Slip op. at 1.

Moreover, the record belies any assertion that Hughes' demand was equivocal. From the February 3 hearing:

> THE DEFENDANT: See, I would like to object, Your Honor, because I don't -- I filed the Statute 454.18 --
> THE COURT: Hold on, Mr. Hughes. You filed a what? Statute?
> THE DEFENDANT: Gave judicial notice of 454.18 dismissing my counsel. And, see, I would like to invoke my rights. I find that on January 4th, that I'm invoking my rights to represent myself.
> THE COURT: YOU filed a request to discharge your court appointed attorney.
> THE DEFENDANT: Yes, sir. I gave judicial notice on January 4th. (T10)

From the February 10 hearing:

> THE COURT: ... Now, if you're asking that

> Mr. Nichols be discharged, I can pursue that matter with you. If you're asking to have him discharged and have someone else appointed, that's not going to happen. But I do need to have it clear what you're requesting this morning. Are you asking that Mr. Nichols be discharged?
> THE DEFENDANT: Yes, sir.
> THE COURT: Now, if he is discharged from your case, do you understand that you'll be left without an attorney.
> THE DEFENDANT: Yes, sir.
> THE COURT: Are you prepared to go forward without an attorney?
> THE DEFENDANT: Yes, sir. (T18)

And finally, from the proceedings on April 17, 1995, 18 days after the court had pronounced itself "through with the speedy trial issue in this case":

> THE COURT: . . . Mr. Hughes, do you have any difficulty in taking a seat at counsel table with Mr. Nichols this morning?
> THE DEFENDANT: Yes, sir. There's something I want to inform the Court, Your Honor. Your Honor, for over two years I haven't seen one deposition, haven't had one visit with Mr. Nichols; I don't even know what the state got against me. The only thing that he kept telling me is just something I already knew every time I come to Court.
> But I'm clearly in a bind, I'm blind, Your Honor, and now the trial court is trying to force me to go to court with an attorney I don't even want. Because I also invoke my right to represent myself, and also (inaudible)..... (T46-47)

Hughes' demands were similar in their clarity and consistency to those in Adams v. Carroll, supra. There the court found that the defendant's demand for self-representation if -- and only if -- the court would not replace appointed counsel with another lawyer

was unequivocal, though conditional.

> This conclusion is reinforced when tested against the purposes underlying the unequivocality requirement. Adams was not seeking to waive his right to counsel in a thoughtless manner; the trial court engaged him in extensive discussion regarding the difficulties of proceeding in pro per. Adams nevertheless persisted, choosing to fend for himself rather than rely on counsel whom he mistrusted. Nor was his request a momentary caprice or the result of thinking out loud; he made the same request over and over again, at nearly every opportunity. Had the request been granted, an appeal based on the denial of the assistance of counsel would have been frivolous, in light of the earnestness and frequency of his requests to represent himself. None of the purposes served by the requirement would be furthered by treating a conditional request for self-representation as equivocal.

875 F. 2d at 1445. These observations are equally true as to Hughes.

On the question whether Hughes' acquiescence in counsel's representation cures the court's error, Hughes will make several observations pending receipt of the answer brief. First, the record shows that Hughes sat at the defense table only in compliance with the judge's order, "whether you participate or not." (T47) Also, Hughes made no 'expressions of satisfaction" with counsel such as those which mooted the error in Scull v. State, 533 so. 2d 1137 (Fla. 1988). Finally, the law does not require a futile or useless gesture, and the appellate courts frown on persistence after an adverse ruling. Howard v. State,

616 so. 2d 484 (Fla. 1st DCA 1993); Jones v. State, 522 So. 2d 981 (Fla. 1st DCA 1988). Hughes must not be penalized for declining to disrupt the trial proceedings and for trying to make the best of a bad situation by consulting with his lawyer during trial. In short, no subsequent developments ameliorated the error of the trial court in wrongly denying self-representation. Hughes' convictions must be reversed.

11. THE TRIAL COURT ERRED IN CONDUCTING AN INADEQUATE INQUIRY INTO HUGHES' REQUEST TO DISCHARGE COUNSEL.

Hughes was represented by court-appointed counsel, Richard Nichols. (R18) On December 27, 1994 and January 4, 1995, he filed motions for discharge, alleging he was denied his right to speedy trial. (R32-39) Also on January 4, he filed a pro se pleading captioned "Defendant's Give Judicial Notice," in which he asserted his right of self-representation and dismissed counsel. The trial court briefly addressed both matters in a hearing February 3, then passed the case to February 10. (T8-13)

On February 10, Hughes stated that he still wished to discharge Nichols. Placed under oath, he said his chief desire was to argue the speedy trial motions *pro* se, then obtain different counsel and act as cocounsel. (T17) Told he would not be appointed different counsel, Hughes maintained his desire to discharge Nichols. (T18) Asked why, he said:

> Because I feel like there's a conflict between me and Mr. Nichols. When we tried to talk with each other, we can't, and we end up arguing. Mr. Nichols hasn't come to see me. I've been incarcerated for 20 and a half months. Mr. Nichols hasn't been over, except for one time. And that was when he was first on the case. I never talked to him on the phone. I never hear anything about the case or how the progress is going. whenever, I try to talk to him, it goes in one ear and out the other. He also had a conflict with my mother once or twice. I don't feel I would get a fair representation if I was represented by Mr. Nichols. (T19)

Asked his perspective of the case, counsel said that a delay in obtaining depositions for one of the codefendants had delayed Hughes' trial, and that he had agreed to a continuance so that Hughes would be tried at the same time as more culpable codefendants. (T23-24) He said that, if he were retained, he would probably adopt and refile Hughes' speedy trial motions in proper form, though he expressed misgivings from a tactical standpoint. (T24) Hughes said Nichols' acquiescence in continuances and failure to discuss the speedy trial motions with him led him to file the *pro* se pleadings. (T25)

The trial court informed Hughes that it would not appoint another lawyer if Nichols were discharged. (T18) Hughes reiterated his demand to discharge Nichols, which the court eventually denied. (See Point I, infra.)

The trial court erred in failing to conduct an adequate inquiry into Hughes' reasons for wishing to discharge counsel. The court merely asked counsel for an overview of the case, which did not include responses to Hughes' specific claims against counsel. Absent a specific inquiry into Hughes' grievances, the court could not validly determine whether grounds existed for discharge of counsel.

In Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), the court set out the constitutionally mandated procedure for addressing an accused's request to discharge appointed counsel:

> [T]he trial judge, in order to protect the indigent's right to effective counsel, should make inquiry of the defendant as to the reasons for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for the finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute counsel. If a defendant continues to demand a dismissal of his court appointed counsel, the trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel.

Id. at 258-259 (citation omitted). This court has adopted the Nelson procedure. Hardwick v. State, 521 So.2d 1071 (Fla. 1988).

Appellate courts apply the review standard of abuse of discretion in deciding whether the trial court conducted an appropriate Nelson inquiry. Discretion is abused if the court fails to conduct the inquiry. Kearse v. State, 605 So.2d 534, 536 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 5 (Fla. 1993).

Here, the trial court erred in failing to inquire into Hughes' specific grounds of dissatisfaction with his attorney. Hughes complained, ***inter alia,*** of insufficient attorney-client

contact and of counsel's failure to provide him with copies of depositions, which counsel himself said were completed. These claims were sufficiently specific to trigger an inquiry of counsel as to their validity. Counsel addressed another facet of the complaint, the decision not to pursue a speedy trial, but never responded to the claims about insufficient communication.

Hughes' complaints about counsel were sufficient to trigger a more penetrating inquiry. In Scull v. State, 533 So.2d 1137 (Fla. 1988), this court addressed as a conflict of interest claim the defendant's motion to discharge counsel because of insufficient attorney-client contact, and held that the trial court did not adequately inquire into the reasons for the request. Id. at 1139-1141. Scull's subsequent expressions of satisfaction with his attorney's performance mooted the failings of the inquiry. Id. at 1141. Here, Hughes also based his request to discharge counsel on inadequate communication, a ground never explained by the trial court. Unlike Scull, Hughes never disavowed the request to discharge counsel and never stated that he was satisfied with his performance. Therefore, unlike Scull, the trial court's error was never ameliorated.

Hughes' complaints were not the vague allegations of general dissatisfaction which fail to trigger an inquiry of counsel. In Lowe v. State, 650 So. 2d 969 (Fla. 1994), this court ruled that a general allegation that counsel was not doing his best, without

further explanation, could trigger only a general inquiry. The court stated that, "[a]s a practical matter, a trial judge's inquiry can be only as specific and meaningful as the defendant's complaints." Id. at 975. Accord, Augsberger v. State, 655 So. 2d 1202 (Fla. 2d DCA 1995). Here, Hughes' specific complaints about lack of conferences and depositions were specific enough to trigger a response tailored to the grounds raised.

This case is distinguishable from Kenney v. State, 611 So. 2d 575 (Fla. 1st DCA 1992), and Lee v. State, 641 So. 2d 164 (Fla. 1st DCA 1994). In both cases the district court held that complaints about lack of attorney-client communication, alone, are insufficient to trigger a full Nelson inquiry. Here, Hughes made the "specific claims" missing from both cases when he asserted that both the lack of communication and the failure to provide depositions left him "blind" as he entered trial. In fact, he felt so ill-prepared that he did not wish to participate. As a practical matter, an accused who has received little information about his or her case has nothing on which to base a claim of incompetence except that he has been kept in the dark. This, in essence, was Hughes' complaint.

Without an adequate inquiry into Hughes' reasons for discharging counsel, the trial court could not validly determine whether grounds existed for relieving appointed counsel, a finding required by Nelson before the court could address the

question of self-representation. Reversible error resulted. This court may view this error either as an independent **basis** for a new trial or as a matter to be addressed on remand necessitated by the error in denying self-representation.

III. THE TRIAL COURT ERRED IN GIVING A JURY INSTRUCTION ON INDEPENDENT ACT THAT FOCUSED ON CAUSATION RATHER THAN THAT THE KILLING BE IN FURTHERANCE OF THE FELONY, AND IN INFORMING THE JURY THAT THE PRINCIPAL THEORY APPLIED TO ALL COUNTS (INCLUDING MURDER).

Hughes' trial defense focused on the murder count, specifically on the theory that the killing by an accomplice was an independent act not in furtherance of the robbery or burglary they had planned. Defense counsel proposed the following jury instruction:

> The felony-murder rule and the law of principals combine to make a felon liable for the acts of his cofelons, but the lethal act must be in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish.

(T67) The court stated its willingness to give that instruction, and added a sentence:

> Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants the requirements of premeditation for first-degree murder, there must be some causal connection between the homicide and the felony.

(T750) Hughes' counsel said he would not object to that instruction "just as you read it." (T750) After additional argument, the judge said he would give the instruction quoted above based on Bryant v. State, 412 So. 2d 347 (Fla. 1982), but would defer a final decision pending an acceptable substitute. (T768-769)

The next morning, before closing arguments, the state

renewed its objection to any independent act instruction. (T802) The court gave the following instruction:

> The felony murder rule and the law of principals combine to make a felon liable for the acts of co-felons, but this liability is circumscribed by the limitation that the lethal act must be in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish. Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants or replaces your requirement of premeditation for first degree murder, there must be some causal connection between the homicide of James Timothy Channelle and the robbery or burglary in order for you to find the defendant guilty of first degree murder.
>
> If you find that there is some causal connection between the homicide of James Timothy Channelle and the robbery or burglary, then you shall find the defendant guilty of first degree murder.
>
> If you find that there is not some causal connection between the homicide of James Timothy Channelle and the robbery or burglary, then you shall find the defendant not guilty of first degree murder.

(T851)

Fundamental, reversible error resulted from this instruction, which hinged guilt or innocence solely on the existence of a causal connection while it buried the crux of the defense, lack of proof that the killing was in furtherance of the felony, in **arcane** legal jargon disconnected from guilt or innocence. This instruction deprived Hughes of his trial defense and nullified an essential element of felony murder. The error was magnified when, in response to a jury question, the court

stated that the principal theory applied to all five counts, including the murder count. The instruction on principal, previously given, contained no language limiting liability for felony murder to a killing committed in furtherance of the felony. While the principal theory alone applied to the remaining counts, as to felony murder count the principal theory is qualified by the felony murder rule.

Liability for felony murder requires that the killing be in furtherance of the felony. Thus, cofelons are legally responsible for any homicide "committed to prosecute the initial common criminal design." Lovette v. State, 636 So. 2d 1304, 1306 (Fla. 1994), and cases cited therein. However, a felon is not responsible for "an act in which a defendant does not participate and which is outside of and foreign to, the common design." Id., quoting from Parker v. State, 458 So. 2d 750 (Fla. 1984), and Bryant, supra. This is the doctrine of independent act, which formed the heart of Hughes' trial defense. The evidence showed that the robbery and burglary were completed, and that Hughes was already heading out the front door, when his cofelon shot one of the victims for no better reason, he testified, than to see how it felt. Defense counsel relied on this evidence to argue that the shooting fell outside the common design and was not in furtherance of the just-completed robberies or burglary. A proper instruction on this defense was crucial to Hughes' case.

A defendant is entitled to an instruction on his theory of defense if it is supported by any evidence. Bryant v. State, supra, 412 So. 2d at 350; Williams v. State, 588 So. 2d 44, 45 (Fla. 1st DCA 1991). Rulings on requests for jury instructions are reviewable for abuse of discretion. Thomas v. State, 617 So.2d 1128 (Fla. 3d DCA 1993). The failure to correctly instruct a jury is fundamental error if the omission is pertinent or material to what the jury had to consider in order to convict. Ruffner v. State, 590 So. 2d 1054 (Fla. 3d DCA 1991).

Here, the trial court committed fundamental, reversible error in the instruction given, because it misled the jury on a matter material to the verdict. The instruction requested by Hughes was a correct statement of law given in layman's terms and focused specifically on the theory of defense. The instruction given by the court buried the theory of defense in difficult legal jargon, rendering it inert, while emphasizing a different aspect of felony murder as the determining factor in guilt or innocence.

While the requested instruction provided that "the lethal act must be in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish," the court's instruction provided that "liability is circumscribed by the limitation that the lethal act must be in furtherance or prosecution of the common design or unlawful act the parties set out

to accomplish." (T851) While the term "liability is circumscribed by the limitation" may be crystal clear to lawyers, it is probably clear as mud for most jurors. The language is directly from Bryant, supra. Its use here illustrates the pitfalls of casting jury instructions in language taken verbatim from appellate opinions written to guide lawyers and judges.Clarity, indeed content, is lost in the transition. Judges should not give jury instructions which are confusing, contradictory or misleading. Butler v. State, 493 So. 2d 451 (Fla. 1986). Cf. In re Instructions in Criminal Cases, 652 So. 2d 814 (Fla. 1995) (forbidding trial courts from giving instruction on inconsistent exculpatory statements taken directly from Florida Supreme Court opinion).

What little good the trial court did in the first half of the independent act instruction, it undid in the second. The conclusion negated any prospect that the jury would understand and apply the concept that a killing is felony murder only if committed in furtherance of the felony:

> Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants or replaces your requirement of premeditation for first degree murder, there must be some causal connection between the homicide of James Timothy Channelle and the robbery or burglary for you to find the defendant guilty of first degree murder.
>
> If you find that there is some causal connection between the homicide of James Timothy Channelle **and** the robbery or burglary, then you shall find the defendant guilty of first degree murder.
>
> If you find that there is not some causal

connection between the homicide of James Timothy Channelle and the robbery or burglary, then you shall find the defendant not guilty of first degree murder.

(T851) (emphasis added).

Had the court stopped before the underlined portions, it would have done no further damage. It had already informed the jury that it must find, as an element of felony murder, that the death occurred as a consequence of the felony. (T847) However, in then repeatedly focusing on "causal connection" in terms that fixed guilt on its existence and innocence on its absence, the court eclipsed to the vanishing point what little the jury may have understood about killings committed in furtherance of a felony. One can imagine what a juror trying to grasp the jargon containing that notion would retain when told immediately thereafter what verdict to return if he or she found "some causal connection." In short, the instruction on the defense theory did not stand a chance. By analogy to Bryant, supra, in which no independent act instruction was given, the jury had no comprehensible legal basis on which to consider the defense argument of innocence via independent act. 412 So. 2d at 350. The trial court essentially directed a verdict of guilt, denying Hughes due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 9 of the Florida Constitution.

Plausible alternative instructions were available. As an

alternative to the proposed instruction submitted by Hughes' counsel, counsel for codefendant Williams requested the standard instruction that had been recently submitted by the Supreme Court Committee on Standard Jury Instructions. (T758) It reads:

> An issue in this case is whether the crime of (alleged crime) was an independent act of another. If another person commits or attempts to commit a separate and distinct crime which the defendant did not intend to occur, in which the defendant did not participate, and which was not done in furtherance of or in the course of the original crime [or the underlying felony] contemplated by the defendant, you must find the defendant not guilty.

The Florida Bar News, Vol. 22, No. 6 (March 15, 1995), p.4.

An instruction tracking that given in Rodriguez v. State, 617 So. 2d 1101, 1102 (Fla. 2d DCA 1993), and approved by the appellate court, would have read:

> If you find that the killing of James Timothy Channelle was an independent act on the part of Alexander Jones and was not committed during the course of and in furtherance of the crime of attempted robbery, then you must find the Defendant, Arthur Lee Hughes, not guilty of murder in the first degree.

Either instruction tells a jury, in simple terms, how to apply a finding that the killing was not in furtherance of the felony. Neither hinges the verdict on a finding as to one aspect of the independent act doctrine at the expense of another. Neither confuses the jury with lawyerspeak. The instruction given by the trial court suffers both flaws.

The trial court worsened its error in giving a simple, affirmative response to the jury's question whether the principal theory applied to all counts. (T900) Compare Bryant, supra, in which jury questions reflected confusion over the felony murder count. 412 So. 2d at 350. Defense counsel dissented briefly from the proposed answer, reasoning that principal and the felony murder rule together applied to the murder count, but ultimately stated, "you can show that [the answer] as being without objection." (T907) The jury returned a verdict immediately thereafter. (T908-909)

In failing to explain to the jury that the principal and felony murder rules were limited by the requirement that the killing must be in furtherance of the felony, the court compounded its initial error. Were the jurors to rely solely on the principal instruction, which they may well have done given the de-emphasized, difficult instruction on independent act, they could have found Hughes guilty without concluding that the killing was in furtherance of the felony.

Though defense counsel did not object to the court's independent act instruction or its response to the jury question, he had requested a different instruction and did express concern over the response. Counsel for the codefendant continued to seek the proposed instruction instead of the court's version. Moreover, Hughes' counsel agreed to the independent act instruction

proposed by the court during the charge conference "just as you read it," (T750) not the materially different instruction read to the jury the next day. Additionally, the court made its ruling on the jury question before counsel stated that it would be without objection. On the whole, the matters now argued on appeal were brought before the court in a timely fashion. Cf. Walker v. State, 573 So. 2d 415, 416 (Fla. 5th DCA 1991), rev. denied, 595 So. 2d 558 (Fla. 1992) (issue on appeal brought into focus and fairly well stated in argument at trial by prosecutor).

In any event, the instruction and response caused fundamental error. As stated above, both were essential to what the jury had to consider in order to convict; i.e., the applicability of the independent act doctrine. Stated differently, the errors went to the foundation of the case, creating a denial of due process, since guilt or innocence of murder based on independent act was the sole disputed issue for the jury. See Castor v. State, 365 So. 2d 701 (Fla. 1978) (fundamental error must amount to denial of due process); Clark v. State, 363 So. 2d 331 (Fla. 1978) (fundamental error goes to the foundations of the case).

As in Point II, this court may view this issue as an independent basis for relief, or as one on which to offer guidance on retrial.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the petitioner requests that this Honorable Court quash the decision of the district court, answer the certified question in the negative, and remand with directions consistent with its disposition of this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Steven R. White, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this 18th day of March, 1997.

Respectfully submitted
& Served,

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COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

ARTHUR LEE HUGHES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

CASE NO. 89,919

INDEX TO APPENDIX

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

ARTHUR LEE HUGHES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-2168

Opinion filed December 30, 1996.

An appeal from Circuit Court for Duval County.
Henry E. Davis, Judge.

Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Stephen R. White, Assistant Attorney General, Tallahassee, for Appellee.

ALLEN, J.

The appellant challenges his convictions and sentences for first degree murder, armed burglary and armed robbery. Although we affirm, we write to address the appellant's assertion that the trial court erred in denying his unequivocal request to represent himself.

Prior to trial, the appellant filed several pro se motions in an attempt to dismiss his court-appointed counsel and pursue a discharge on the basis of the speedy trial rule. In response to

the appellant's request to represent himself, the trial court inquired about the appellant's age, education, and ability to conduct his own defense. The court emphasized that the state was seeking the death penalty in his case and that the defendant would have to prepare for a penalty phase should he be convicted of the murder charge. Despite the appellant's representations that he could handle such a defense, the trial court denied his request, concluding that "there are unusual circumstances which would deprive Mr. Hughes of a fair trial if he were permitted to conduct his own defense."

Although ample precedent from this court supports the trial court's ruling, see, e.g., Smith v. State, 444 So. 2d 542 (Fla. 1st DCA 1984), the Second District sitting en banc has recently questioned the "fair trial" standard and concluded that it is inconsistent with the strictures of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). We accordingly affirm the convictions and sentences, but certify to the supreme court the same question certified in Bowen v. State, 677 So. 2d 863 (Fla. 2d DCA 1996) (en banc):

> ONCE A TRIAL COURT HAS DETERMINED THAT A DEFENDANT HAS KNOWINGLY WAIVED HIS OR HER RIGHT TO COUNSEL, MAY THE COURT NONETHELESS REQUIRE THE DEFENDANT TO BE REPRESENTED BY COUNSEL BECAUSE OF CONCERN THAT THE DEFENDANT MIGHT BE DEPRIVED OF A FAIR TRIAL IF TRIED WITHOUT SUCH REPRESENTATION?

MICKLE and LAWRENCE, JJ., CONCUR.

Gifford

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

ARTHUR LEE HUGHES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-2168

APPELLEE'S MOTION FOR CLARIFICATION

Pursuant to Florida Rule of Appellate Procedure 9.330, the Appellee, the State of Florida, moves this Honorable Court for clarification, and in support of this Motion states:

1. This Court issued its opinion on December 30, 1996, affirming Appellant's conviction. In certifying a question to the Florida Supreme Court and holding that Appellant would have been denied a fair trial without counsel, the opinion's reasoning relied upon the trial court's observation that the State was seeking the death penalty at the time of the pertinent hearing.

2. Subsequent to oral argument, the State, as represented by an officer of the Court, supplemented with Hill v. State, 21 Fla. L. Weekly S515 (Fla. Nov. 27, 1996), and Rogers v. State, 21 Fla. L. Weekly S503 (Fla. Nov. 27, 1996). These cases indicate that the legal skills of the defendant to try the case are irrelevant to the determination of a valid waiver of counsel. Hill, a death penalty case, reasoned: "Nor does the fact that this is a death penalty case make it so complex that a defendant

cannot make an intelligent choice to represent him or herself. It was sufficient that the judge made sure that Hill knew the State would be seeking the death penalty." 21 Fla. L. Weekly S516. Posers quoted Waterhouse v. State, 596 So. 2d 1008, 1014 (Fla. 1992), in explaining that the test for an effective waiver of counsel is whether the "choice is made with eyes open": "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation . . . ." 21 Fla. L. Weekly S504.

Consequently; difficulties presented to a pro-se defendant in litigating the death penalty do not **per-se** invalidate an otherwise valid invocation of the right of self-representation. See Faretta v. Cal., 422 U.S. 806, 837, 95 S.Ct. 2525, 2540-41, 45 L.Ed.2d 562 (1978) (discussed "fair trial" then reasoned that, nevertheless, lawyer cannot be forced on defendant; "technical legal knowledge, as such," irrelevant).

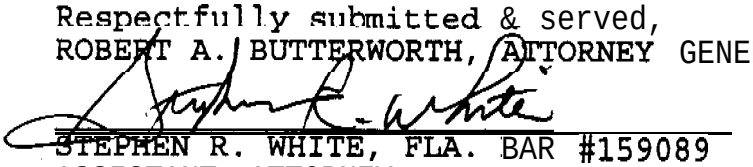
However, the State continues to contend that Appellant did not unequivocally invoke **and, throughout pertinent trial-court proceedings, unequivocally maintain** his right of self-representation. See, e.g., Fields v. Murray, 49 F.3d 1024, 1028-49 (4th Cir. 1995) ("*** So important is the right to counsel that the Supreme Court has instructed courts to 'indulge in every reasonable presumption against [its] waiver.' ***"; quoted at length at AB 18-19). **A fortiori**, the State continues to contend that "Appellant waived any purported unequivocal assertion of his right of self-representation." (See AB **26** n. 8, 27).

WHEREFORE, the State respectfully requests that (a) the trial court be affirmed on a ground/grounds other than potential death penalty proceedings and (b) the question not be certified under the facts of this case.

S GNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE.

I certify that a copy hereof has been furnished **by** U.S. Mail to Glenn P. Gifford, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, this **9th** day of January, 1997.

Respectfully submitted & served,
ROBERT A. BUTTERWORTH, ATTORNEY GENERAL



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