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SID J. WHITE
OCT 14 1997
CLERK, SUPREME COURT
By_______________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOSEPH HENRY POTTS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 91-393
District Court of Appeal
4th District - No. 96-1769

---

# PETITIONER'S INITIAL BRIEF ON THE MERITS

GARY S. ISRAEL, P.A.
Attorney far Petitioner
315 11th Street
West Palm Beach, FL 33401
561-655-3825
FL Bar No. 270709

## CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner, JOSEPH HENRY POTTS, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Joseph Henry Potts
   (Petitioner)

2. The Honorable Virginia Gay Broome
   Circuit Court Judge
   15th Judicial Circuit of Florida
   Palm Beach County Court House
   205 North Pixie Highway, Rm. 10H
   West Palm Beach, FL 33401

3. Gary S. Israel, P.A.
   (Counsel for Petitioner)
   315 11th Street
   West Palm Beach, FL 33401

4. Attorney General
   1655 Palm Beach Lakes Blvd.
   West Palm Beach, FL 33401

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## PRELIMINARY STATEMENT

Petitioner was the Defendant in criminal proceedings in the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida, before the Hon. Virginia Gay Broome. For clarity, the parties will be referred to as they appear before this Honorable Court.

"A" - denotes references to Appendix.

"T" - denotes references to transcripts of proceedings before the lower court.

## STATEMENT OF THE CASE

petitioner was charged by Information filed October 12, 1995, with Sale of Cocaine (A 1). On January 19, 1996, Petitioner filed a pro se motion to dismiss his counsel (A 21 . A Motion to Withdraw as counsel was filed by Petitioner's counsel on January 25, 1996 (A 3).

On January 25, 1996, a hearing was held on the motion to withdraw. (T 1 - 14). This was followed by a status hearing on January 31, 1996 (T 25 - 20). On February 20, 1996, a "Faretta" hearing occurred, along with a hearing on the Motion to Suppress In Court and Out of Court Identification (T 21 - 85).

On February 21, 1996, another hearing occurred on the issue of counsel (T 86 - 96). The case was tried on February 22 - 26, 1996 (T 97 - 471). Upon Petitioner being found guilty, he was sentenced on April 24, 1996 (T 472 - 504).

An appeal was heard by the Fourth District Court of Appeal, from which a decision was rendered, certifying a conflict with the First District (A 6). A petition was filed for this court to accept jurisdiction (A 7).

## STATEMENT OF THE FACTS

petitioner was charged with Sale of Cocaine by Information filed on October 12, 1995 (A 1). On January 19, 1996, Petitioner filed a pro se motion to dismiss counsel, alleging that he never met his court appointed counsel until January 19, 1996, his counsel failed to inquire about defense witnesses, and Petitioner feared conviction without new counsel being appointed for him (A 2).

The hearing on the motion, and the Motion to Withdraw filed by the appointed Public Defender (A 3) occurred an January 25, 1996 (T 1 - 14). Counsel agreed that he had not met with Petitioner prior to "June 19" (sic - this should be January 19), but stated that he had spoken to Petitioner on two prior occasions in December, 1995 (T 3). Counsel claimed that he asked Petitioner for defense witnesses and Petitioner refused to cooperate with him by refusing to provide him with names and their addresses (T 4).

The Court heard from Petitioner, who complained about his counsel's lack of communication and that his counsel is argumentative (T 6, 7). At the conclusion of the testimony, the court ruled that Petitioner could either keep his present counsel or represent himself (T 8). Petitioner advised that he did not understand the court's ruling (T 8). He was told

by the Court that he did not state sufficient enough grounds to receive a new lawyer (T 8).

The Court then inquired about Petitioner's education (T 9). He advised that he had a tenth grade education, no legal training, that he knows how to call witnesses and to cross examine witnesses (T 9). He advised that he knew how to give an opening statement and a closing argument, but did not know how to make legal objection8 (T 9).

The Court ordered Petitioner to decide whether he wanted to represent himself or keep his present attorney (T 10). Petitioner chose to represent himself and the Court granted the Public Defender's Motion to Withdraw (T 10). The case was continued until the next calendar call (T 10 - 12).

On January 35, 1996, at a status check hearing, the prosecutor expressed concern over her belief that Petitioner was not capable of proceeding on the pending motion to suppress, filing of a notice of alibi, or selecting a jury (T 17). The Court again inquired if Petitioner wanted the court to reappoint the Public Defender to represent Petitioner, since the Court did not believe Petitioner possessed enough knowledge to represent himself (T 17). Petitioner agreed to have the Public Defender stand by to give him legal advice when needed. The Court reappointed the Public Defender as stand-by counsel (T 18).

On February 20, 1996, the Court conducted a "Faretta" hearing (T 21 - 85). Petitioner was again asked if he wished to proceed as his own attorney. The Court again inquired of Petitioner's education and ability to read (T 24). Petitioner advised of his understanding of the police reports and his past juvenile case (T 24 - 25). He again requested the appointment of a new attorney because of a conflict with hi8 present counsel (T 26).

Though he admitted no training in cross examining witnesses, Petitioner stated that he felt that he could do it because he had seen it on television and in his last trial (T 27). Petitioner advised that he had spoken to his witnesses and has filed his own motion to suppress in-court and out-of-court identification (T 28). We admitted that he has no training in making objections or how to make a hearsay objection (T 30).

Again, in spite of the court's attempts to convince Petitioner to accept counsel, he advised that he wanted to try his own case. He told the court that he was able to select a jury (T 32 - 33). He told the court that he had a conflict with his lawyer and did not have full faith and confidence in him (T 35 - 37). The Court refused to dismiss the Public Defender as back up counsel (T 38 - 39).

The Court then proceeded with the hearing on the motion to suppress identification, The Public Defender told the court he was not ready, since he had not read the motion in the time since he had given it to Petitioner (T 40). The Court proceeded with the hearing, anyway.

After the prosecution presented the testimony of Agent Trevor Cayson, a narcotic agent for the Palm Beach County Sheriff's Office, Petitioner requested permission to ask questions of the witness (T 43). The Court advised that he was not competent to do so (T 43). In spite of this statement, the court permitted Petitioner to cross examine Agent Cayson (T 57 - 69). This was followed by the Court giving the Public Defender the opportunity to question the witness (T 69).

Upon the completion of the testimony, the trial court denied the motion to suppress in-court and out-of-court identification (T 74). The Court expressed its opinion that Petitioner was capable of handling his own defense with the assistance of the Public Defender (T 74). The Court offered Petitioner one more opportunity to have counsel represent him (T 74). Petitioner advised that he wished to try the case himself (T 75).

At another hearing held on February 21, 1996, the Court again asked Petitioner to let the Public Defender try his case (T 89). Petitioner again refused (T 89). The Court offered

Petitioner to go through a mock trial (T 94). Petitioner refused (T 94).

At the beginning of trial on February 22, 1996, the Court again asked Petitioner about having the attorney try the case (T 99). Petitioner advised that it was his desire to try the case (T 99).

Trial in this cause occurred over three days, February 22, 23, and 26, 1996. The Public Defender was present to assist Petitioner in the case. The first witness was &gent Cayson of the Palm Beach County Sheriff's Office. Some objections were made to questions from the prosecution, but there were notable instances when no objection was made to statements by witnesses beyond the scope of the question asked (T 209 - 210). In addition, identifications were made of Petitioner from the stand which were the mere relation of hearsay comments, for which there was no objection (T 225, 226). Petitioner conducted his own cross examination of Agent Cayson (T 238 - 253).

During the testimony of William Heightman, the supervisor of the drug section, no objection was made to the failure to establish a proper chain of custody of the drugs (T 282 - 286). In fact, the trial court overruled any objection prior to it being made (T 286).

During the testimony of Officer Eddie Robinson of the Delray Beach Police Department, no objection was made to the leading questions about the person who sold the drugs to Agent Cayson, even though the witness did not have the opportunity to see this (T 298 - 299). Furthermore, during his testimony, Officer Robinson was able to answer not in response to a question, without objection (T 310). On each of these occasions, critical evidence against Petitioner was improperly heard by the jury,

A motion for judgment of acquittal and motion for mistrial were made by the Public Defender on Petitioner's behalf (T 351 - 354). The basis for these motions were the lack of identification of Petitioner, an objection to the court admitting the drugs into evidence, and the State only producing two officers identifying Petitioner, while arguing to the jury in its opening statement that three officers had identified him. The court denied the motions (T 354).

The defense put on its case and renewed the motion for judgment of acquittal (T 389). Petitioner arranged for a defense witness to appear on his behalf, Courtney Bellamy. The prosecution advised the court that it was prepared to present evidence that tha witness' statements of alibi for Petitioner was either mistaken or false (T 415 - 416). Based upon this presentation, the trial court refused to allow Mr. Bellamy to testify (T 416 - 417).

Petitioner attempted to present his closing argument to the jury (T 437 - 443). His original attempts were thwarted by objections by the prosecutor (T 437 - 438).

At the conclusion of the instructions to the jury, counsel for Petitioner again requested a mistrial because the court allowed hearsay of Officer Horrell's statements of identification of Petitioner (T 464 - 465). The motion was denied (T 466).

Following deliberations, the jury found Petitioner guilty of sale of cocaine, as charged (T 467). Petitioner was sentenced on April 24, 1996 (T 472 - 504). He was adjudicated guilty and placed on probation, with a special condition that he successfully complete the long track treatment at the Sheriff's Drug Farm (T 43 - 44).

## POINT ON APPEAL

WHETHER THE DECISION OF THE FOURTH DISTRICT BELOW FOLLOWS THE DICTATES OF THE UNITED STATES SUPREME COURT IN FARETTA v. CALIFORNIA, 422 U.S. 806, 96 S. Ct. 2525, 45 L.Ed.2d 562 (1975), CONCERNING THE EXTENT OF THE INQUIRY TO BE MADE PRIOR TO ALLOWING A DEFENDANT TO PROCEED TO TRIAL PRO SE?

## SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's decision in Potts v. State (A 6) is in conflict with decisions of the First district in Dortch v. State, 652 So.2d 154 (Fla. 1st DCA 1995), and the Second District in Jones v. State, 658 So.28 122 (Fla. 2d DCA 1995) in the Fourt District's refusal to require a trial court to inform a defendant of the possible sentence and habitualization consequences prior to finding his waives of counsel was freely and voluntarily made and allowing him to represent himself at trial.

## ARGUMENT

THE DECISION OF THE FOURTH: DISTRICT BELOW DOES NOT FOLLOW THE DICTATES OF THE UNITED STATES SUPREME COURT IN FARETTA v. CALIFORNIA, 422 U.S. 806, 96 S. Ct. 2525, 45 L.Ed.2d 562 (1975), CONCERNING THE EXTENT OF THE INQUIRY TO BE MADE PRIOR TO ALLOWING A DEFENDANT TO PROCEED TO TRIAL PRO SE.

The Fourth District Court of Appeal's decision below, on the requirements of a trial court to inform and inquire of a defendant, upon a request for self representation, as set forth in Faretta v. California, 422 U.S. 806, 96 S.Ct., 2525, 45 L.Ed.2d 562 (1975), is in conflict with the decision of the First District Court of Appeal in Dortch v. State, 651 So.2d 154 (Fla. 1st DCA 1995).

Petitioner herein was convicted after trial by jury for the sale of cocaine (A 5). He represented himself at trial and appealed his conviction to the Fourth District Court of Appeal, claiming that the trial court failed to conduct a proper inquiry, under Faretta, prior to permitting self representation at trial. It is uncontroverted that Petitioner "persistently and consistently" sought the discharge of his court appointed counsel at trial Potts (A 6). The Fourth District Court of Appeal upheld Petitioner's conviction and in its opinion, declined to follow the First District Court of Appeal's decision in Dortch concerning the proper inquiry prior to permitting eelf -presentation at trial, as required by Faretta.

Petitioner asserts that the Fourth District Court of Appeal erred in failing to reverse his conviction because of an insufficient Faretta inquiry by the trial judge. Specifically, the trial court erred in not advising him of the possible sentence and the possibility of habitualixation, if convicted,

The First District Court of Appeal in Dortch held that to satisfy the dictates of Faretta, the trial court must advise the accused of the possible sentence and possibility of habitualization. The conflict between the decisions of the Fourth District and the First District in Dortch, has been certified and is before this court in this posture.

The trial court is required to conduct a Faretta inquiry only whan there is an unequivocal request for self representation by the accused. Augsberger v. State, 655 So.261 1202 (Fla. 2d DCA 1992). See also Weems v. State, 645 So.2d 1098 (Fla. 4th DCA 1994). The purpose of the Faretta inquiry is to determine whether the accused has knowingly and intelligently waived his right to counsel. Faretta, supra. As required by the United States Supreme Court in Faretta, the trial court should inquire:

What is the Defendant's age, education and background?

What is the Defendant's mental condition?

Does the Defendant understand the dangers and disadvantages of self representation, including:

(a) The nature and complexity of the case;

(b) the seriousness of the charge;

(c) the potential sentence; and

(d) the possibility of sentence enhancement such as habitual offender, use of a firearm or use of a mask.

What is Defendant's experience in the criminal justice?

Does the Defendant understand the requirement8 to abide by the Rules of Courtroom Procedure?

Was Defendant represented by counsel before trial?

Is the waiver a result of coercion or mistreatment?

Following Faretta, the First District Court of Appeal in Dortch and Second District Court of Appeal in Jones v. State, 658 So.2d 122 (Fla. 2d DCA 1995) have held that the trial court must inquire of the Defendant's literacy, competency, and his understanding of his choice to represent himself. The court must be convinced that the accused is voluntarily exercising his informed free will. Id. Additionally, the trial court must advise the accused of the seriousness of the charges, the ramifications of a conviction and/or the consequencea of habitualization. Dortch. This court and district courts of appeal of the state districts have consistently held that the failure to conduct a Faretta

inquiry or the failure to conduct a complete Faretta inquiry is reversible error. State v. Young, 626 So.2d 655 (Fla. 1993) F.S.Ct.; Haslom v. State, 643 So.2d 59 (Fla. 4th DCA 1995), State v. Rivas, 21 FLW D2022 (Fla.4th DCA 1996); and Johnson v. State, 629 So.2d 1050 (Fla 2d DCA 1993).

It is the extent of the Faretta inquiry that is in question here. In Dortch, the accused unequivocally made known his desire to represent himself following a lengthy inquiry. The trial court accepted the Defendant's decision and the trial was conducted with the Defendant representing himself. The Defendant was convicted of possession of cocaine and appealed his conviction to the First District Court of Appeal, asserting that the trial court's Faretta inquiry was inadequate. Despite the lengthy inquiry conducted, the First District Court of Appeal reversed his conviction, finding that the requirements of Faretta had not been met. Specifically, the First District held that the trial court failed to advise the Petitioner of the seriousness of the charge, the potential **sentence facing** Petitioner if found guilty and the **consequences** of **habitualization.** Id. (Emphasis supplied) Thus, according to the First District, the definition of a knowing, intelligent, and voluntary waiver to counsel has been interrupted to mean that the accused has been fully informed of the consequences of a conviction, which includes information of a potential sentence and habitualization.

**Simply** telling a defendant that he could go to jail, is not enough.

In _Jones_, the defendant was convicted of aggravated battery with a firearm, attempted robbery with a firearm and possession of a firearm by a convicted felon. He appealed his conviction, asserting that the trial court had not made a proper inquiry under _Faretta_ into his desire for self representation. Following the _Faretta_ inquiry, the court determined that the defendant was not competent to represent himself and required court appointed counsel to represent him at the trial.

The Second District Court of Appeal reversed the conviction, holding that the trial court did not inquire fully into the defendant's age, mental Condition, education and lack of knowledge and experience in criminal proceedings, ramification8 of self representation, seriousness of the charges and ramifications of mandatory minimum sentencing and habitualization. The Second District explored the importance of warning the accused of the potential sentences and possibility of habitualization, The court held that without such warnings, "_Faretta's_ mandate that the record established that a defendant knowingly and intelligently exercises the right of self representation 'with eyes open' cannot be fulfilled." Hence, without warnings of the possible sentence

and habitualization, the decision to proceed pro se cannot be said to be truly voluntary.

A defendant who participates in his own defense must be aware of the overwhelming disadvantages of self representation, the seriousness of the charges against him and the potential sentence he might face if found guilty Taylor v. State, 610 So.2d 576 (Fla. 1st DCA 1992). Finding the inquiry insufficient, the Second District determined that the defendant's decision to represent himself was not made knowingly and voluntarily, "with eyes opened." Id.

In the instant case, although the court made numerous inquiries into Petitioner's desire to proceed pro se or, alternatively, to accept court appointed counsel, it failed to fully advise Petitioner of the consequences of a conviction and possibilities of habitualization and the court overlooked the deficiencies in Petitioner's background that rendered him incompetent to represent himself. The number of times the court inquired carries no weight, if the essential elements of the inquiry were lacking. Petitioner possesses only a tenth grade education (T 9), has no legal education (T 9), has no ability to make legal objections (T 9), has no training in the cross examination of witnesses and no training in how to establish a hearsay objection (T 30). These deficiencies were apparent at trial by his lack of objections to inadmissible testimony (T 209-210, 225-225, 282-286, 298-299 and 310), but

in spits of this, he was permitted to continue to represent himself throughout the course of trial. Rather than permitting Petitioner to continue his disastrous course of self representation, the trial court should have required court appointed counsel to represent Petitioner, rather than have him act as standby counsel. The trial judge below should have followed the trial court's decision in Jones - Petitioner should have been required to accept court appointed counsel at the beginning of trial or, at least the court should have counsel take over, when Petitioner's incompetency to repreaent himself at trial became all too evident.

The record clearly indicates that the trial. court never fully advised Petitioner of the ramifications of a conviction in this case, The failure to do this, in and of itself, should result in a reversal of the conviction under the Faretta dictates. The decision of the Fourth District in the instant case has essentially gutted the safeguards set forth in Faretta, positing that the court need only be convinced that the accused has the competence to waive his right to counsel, not that he has competence to represent himself.

The safeguards of Faretta have been codified in Florida Rule of Criminal Procedure 3.111(d)(3) which states:

> No waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of a mental condition, age, education, experience, the nature or complexity of the case, or other factors.

Based on Petitioner's lack of education, legal training and experience, the trial court erred under Rule 3.111(d) (3) and dictates of Faretta in accepting Petitioner's waiver of counsel as being knowing and intelligent.

Although the State cannot compel a Defendant to accept a lawyer he does not want, Faretta, supra, a Defendant's wishes to proceed pro se must be balanced against his ability to adequately represent himself. The factors set forth in Faretta and Rule of Criminal Procedure 3.111(d) (3), supra, should be the standard by which the right of self representation is granted or denied. From the record in this case, it is apparent that under Rule 3.111(d) (3), the Defendant's waiver was not knowing and voluntary; similarly, following Dortch and Jones, the Faretta inquiry herein was insufficient inasmuch as the trial court did not inform Petitioner of the sentencing and habitualization possibilities that could result from a conviction.

Petitioner asserts Chat the decision of the Fourth District Court Appeal in this cause is aberrational and is a marked departure from the safeguards and requirements of Faretta. The Fourth District Court of Appeal is inconsistent in its treatment of Faretta. On the one hand, the Court has properly stated the important rule from Faretta:

> The crux of proper self representation under Faretta is voluntariness, by which the court means a knowing, intelligent waiver of counsel. Potts.

But it goes on to state,

> The accused need not be advised of sentencing and habitualization to make a knowing, intelligent decision to engage in self representation.

This is clearly a receding from the full extent of the dictates of Faretta.

The First and Second Districts in Dortch and Jones have recognized what the Fourth District Court of Appeal did not, that only when the accused has been warned as to potential sentencing and habitualization can his waiver of counsel be truly knowing and voluntary under Faretta. Petitioner's conviction should be reversed and this should adopt the dictates of the First and Second Districts in Dortch and Jones, and retreat from the Fourth District Court of Appeal's position in this cause,

## CONCLUSION

Based upon the foregoing legal authority and argument, Petitioner **requests** this Court to **reverse** his conviction and **remand** the case for a new trial.

**Respectfully** submitted,

By ______________________
GARY S. ISRAEL, ESQ.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, 1655 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 this 10 day of October, 1997.

GARY S. ISRAEL, P.A.
315 11th Street
West Palm Beach, FL 33401
FL Bar No. 270709
Attorney for Petitioner
561-655-3825

# Appendix

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA
FALL TERM 1995
CRIMINAL DIVISION "R" (RBF)

STATE OF FLORIDA ORIGINAL

vs.

JOSEPH HENRY POTTS; B/M, 05/28/72,

_______________________________________/

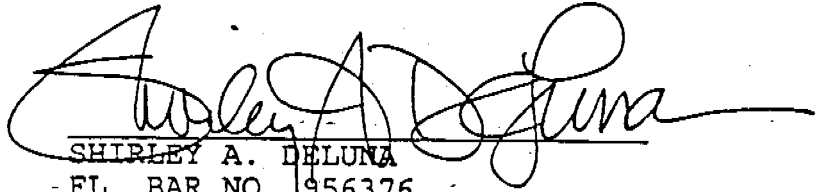
CASE NO. 95-09835-CF
BOOKING NO. 95031614

INFORMATION FOR:

SALE OF COCAINE

In the Name and by Authority of the State of Florida:
BARRY E. KRISCHER, as State Attorney for the Fifteenth Judicial Circuit, Palm Beach County, Florida, by and through his undersigned Assistant State Attorney, charges that JOSEPH HENRY POTTS on or about SEPTEMBER 20, 1995, in the County of Palm Beach and State of Florida, did. unlawfully and knowingly sell or manufacture or deliver or possess with intent to sell, manufacture or deliver cocaine or ecgonine, including any stereoisomer, salt, compound: derivative or preparation of cocaine or ecgonine,. a controlled substance, contrary to Florida Statute 893.13(1) (a). (2 DEG FEL) (LEVEL 5)

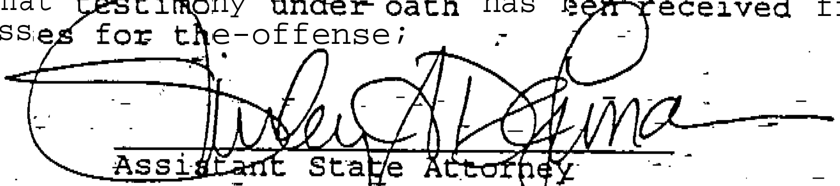
SAD/hw



SHIRLEY A. DELUNA
FL. BAR NO. 956376
Assistant State Attorney
Palm Beach County, Florida

STATE OF FLORIDA
COUNTY OF PALM BEACH

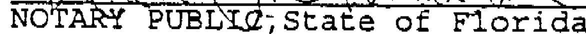
Appeared before me, SHIRLEY A. DELUNA Assistant State Attorney for Palm Beach County, Florida., personally known to me, who, being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged, that this prosecution is instituted in good faith, and certifies that testimony under oath has been received from the material witness or witnesses for the offense;



Assistant State Attorney

Sworn to and subscribed to before me this 10 day of October, A.D., 1995.

HEIDI L. WASHBURN
MY COMMISSION # CC382854 EXPIRES
June 14, 1998
BONDED THRU TROY FAIN INSURANCE, INC.



NOTARY PUBLIC, State of Florida

GES 4 5

Case # Prose motion to
95-9835 dismiss council

Dear Judge Broom

The reason why I'm writing this written motion to dismiss council is because we never met until this day of Jan 19, 1996. He never asked me about my witnesses, but he claims he did. We've talked over the phone and he says he has asked me about my witnesses which he did not. Due to the fact on Sept. 20, 1995, I was not present at the scene. I'm ~~[illegible]~~

FILED 96 JAN 19 [illegible] CLERK [illegible] PALM BEACH

because I know
that the police
officers are going
to lie like they
have before. This
is the reason why
I want to be appoint
ed a new attorney
so I'm capable of
being well represented
and I know that the
one will do so.

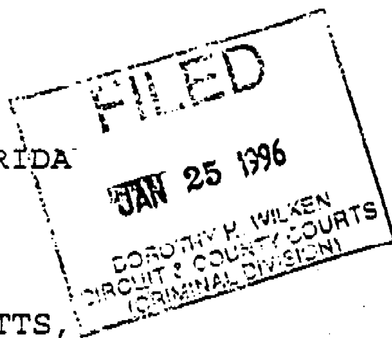
Thank you
Joseph Tatti
1/19/96

FILED
96 JAN 19 AM 11:59

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

CRIMINAL DIVISION: R

CASE NO.: 95-9835CFA02




STATE OF FLORIDA

VS.

JOSEPH H. POTTS,

Defendant.

---

**MOTION TO WITHDRAW AS COUNSEL**

The Public Defender moves this Court to allow the Public Defender's Office to withdraw as counsel and requests the Court to appoint a member of the Florida Bar who is in no way affiliated with the Public Defender's Office to represent the Defendant in this cause and as grounds would state:

1. The Defendant is charged with sale of cocaine, a 2nd degree felony, punishable by up to 15 years in prison.

2. The Defendant refuses to cooperate with counsel in the preparation of his case.

3. The Defendant has been verbally abusive and insulting to counsel and has repeatedly stated that he desires a new lawyer.

4. The Defendant provided counsel with the addresses of his two witnesses on the evening of January 22, 1996. On January 24, 1996 counsel informed the Defendant that counsel wished to speak with his two witnesses. Counsel asked the Defendant for help in locating his two witnesses. The Defendant refused stating he wanted a new lawyer. Counsel drove to Delray Beach, viewed the crime scene, and attempted, albeit unsuccessfully, to locate the

14

3

Defendant's two witnesses. Counsel called the Defendant while in Delray Beach and requested the Defendant for help in locating the witnesses. Counsel informed the Defendant counsel would pick him up at his house. The Defendant refused, stating that he wanted a new lawyer.

5. At the present time there is no attorney/client relationship between the Defendant and counsel. Counsel can not competently and effectively represent the Defendant under these circumstances. Counsel has yet to speak to the Defendant's two witnesses.

WHEREFORE, counsel respectfully requests the Court to grant this Motion and appoint private counsel to represent the Defendant.

**NOTICE OF HEARING**

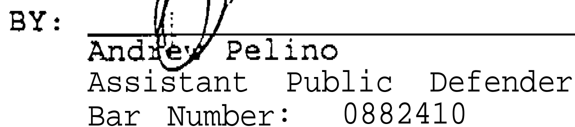
PLEASE TAKE NOTICE that the Public Defender will call up the above Motion for hearing before Judge Broome on January 25, 1996 at 8:45 a.m. in Room 10-H, 205 North Dixie Highway, West Palm Beach, Florida.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Office of the State Attorney by delivery on January 25, 1996.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
421 3rd Street
West Palm Beach, FL 33401
(407) 355-7500



BY: ______________________

Andrew Pelino
Assistant Public Defender
Bar Number: 0882410

IN THE CIRCUIT COURT OF PALM BEACH COUNTY, FLORIDA.

CRIMINAL DIVISION: R

CASE NO(S) : 95-9835CFA02

JOSEPH HENRY POTTS,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

______________________________/

**NOTICX OF APPEAL**

NOTICE IS GIVEN that JOSEPH HENRY POTTS, the Defendant/Appellant appeals to the District Court of Appeal, Fourth District of Florida, the judgment of conviction and sentence imposed in the above-mentioned case by the Honorable Virginia Gay Broome of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Criminal Division, rendered on or about April 24, 1996.

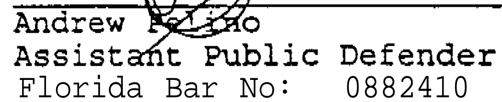
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery or mail to the Office of the State Attorney, Palm Beach County, The Criminal Justice Building, West Palm Beach, Florida, and the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, 3rd Floor, West Palm Beach, Florida, on May 17, 1996.

4

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7500



Andrew [illegible]
Assistant Public Defender
Florida Bar No: 0882410

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IN THE CIRCUIT/COUNTY COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. 95-9835 CF A02 DIV R

APR-29-1996 2:19pm 96-145063
ORB 9234 Pg 784

STATE OF FLORIDA

[ ] COMMUNITY CONTROL VIOLATOR

DOROTHY H. WILKEN, CLERK PB COUNTY, FL

v.

[ ] PROBATION VIOLATOR

Joseph. Henry Potts
DEFENDANT

FILED
APR 24 1996
CIRCUIT & COUNTY COURTS
CRIMINAL DIVISION

# JUDGMENT

The above Defendant, being personally before this Court represented by J. Potts / A. Palino (attorney)

| [X] Having been tried and found guilty of the following crime(s): | [ ] Having entered a plea of guilty to the following crime(s): | [ ] Having entered a plea of nolo contendere to the following crime(s): |
|---|---|---|

| COUNT | CRIME | OFFENSE STATUTE NUMBER(S) | DEGREE | CASE NUMBER | OBTS NUMBER |
|---|---|---|---|---|---|
| One | Sale of Cocaine | 893.13 | 2°F | 95-9835 | |
| | | | | | |
| | | | | | |
| | | | | | |

[X] and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

[ ] and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating to sexual battery (ch. 794) or lewd and lascivious conduct (ch. 800) the defendant shall be required to submit blood specimens.

[ ] and good cause being shown: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

SENTENCE STAYED

[ ] The Court hereby stays and withholds imposition of sentence as to count(s) and places the Defendant on [ ] Probation and/or [ ] Community Control under the supervision of the Dept. of Corrections (conditions of probation set forth in separate order).

SENTENCE DEFERRED

[ ] The Court hereby defers imposition of sentence until __________

The Defendant in Open Court was advised of his right to appeal from the Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

MAM

JUDGE, COUNTY/CIRCUIT COURT

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DONE AND ORDERED in Open Court at Palm Beach County, Florida, this date APR 24 1996

CLIENT COPY
Date Sent: 7/31

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1997

JOSEPH HENRY POTTS,

Appellant,

v.

STATE OF FLORIDA,

Appeilee.

CASE NO. 96-1769

Opinion filed July 30, 1997

Appeal from the C&it Court for the Fifteenth Judicial Circuit, Palm Beach County; Virginia Gay Broome, Judge; L.T. Case No. 95-9835 CFA02.

Gary S. Israel of Gary S. Israel, P.A., West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

FARMER, J.

We affirm the Conviction for sale-of cocaine but write briefly on the issue involving self. representation at trial by defendant. Without detailing all of the events that led to the discharge of appointed counsel., it is enough to say that defendant himself persistently and consistently sought the discharge. The trial court's inquiry was sufficient under *Hardwick v. State,* 521 So. 2d 1071 (Fla. 1988); cert. *denied*, 488 U.S. 871 (1988), and *Nelson v. State*, *274 So.* 2d 256 (Fla. 4th DCA 1973). We also concludethat the trial court complied with *Faretta v. California,* 422 U.S. 806 (1975).

In *Faretta the Court rejected the* notion that the state can compel a defendant, to accept a lawyer he **does** not want. In the words of the Court:

"The value of state-appointed counsel was not unappreciated by the Founders, yet the notion-of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."

422 U.S. at 833-34. Indeed, as the Court further explained its holding:

"It is undeniable that in most criminal prosecutions defendants could better defend with **counsel's guidance than** by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant-can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances. the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The **defendant, and** not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conducthis own defense ultimately to his own detriment, his choice must be honored out of 'that. respect for the individual which is the lifeblood of the law: '"

422 U.S. at 834. Hence if is-obvious that a defendant has a right to represent himself and may not be required to accept the lawyer given him by the state.

The crux of proper self-representation under *Faretta is* voluntariness, by which the Court means a knowing and intelligent waiver of counsel. To return again to the words of the Court:

"When an accused manages his own defense, he **relinquishes. as a** purely factual matter, many of the traditional benefits associated with the-right to counsel. For this reason. in order to represent himself. the accused must knowingly and

intelligently' forgo those relinquished benefits. 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 the record will establish that 'he knows what he is doing and his choice is made with eyes open.'

"Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thou&t it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govem challenges of potential jurors on voir dire." [e.s.]

422 U.S. at 835-36.

While the Court required that the defendant claiming the right to represent himself "should be made aware of the dangers and disadvantages of self-representation," the Court then proceeded to note in the record before it that "[t]he trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel." In giving this warning, the trial judgi in *Faretta* apparently did not engage in any extensive colloquy with him about all of the possibie dangers lying within self-representation. More importantly, the Court's opinion does not suggest that the warning there included a recapitulation of the nature of the charges against the defendant and the possible penalties, or the. like. Thus, there is nothing *in Faretta* suggesting that a knowing and intelligent assertion of self-representation depends on the trial court engaging in a catalog check list of every possible criminal law and procedure that may bear on the defense of the case. Nor does the opinion even hint that the court must cover matters presumably taken up at the arraignment. such as the nature of the charges and all the possible penalties, if the self-representation proves unsuccessful.

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Our reading of ***Faretta*** is consistent with recent decisions of the Florida supreme court on the subject. In ***Hill*** v. ***State,*** 688 So. 2d 901 (Fla. 1996), a death penalty case, the court affirmed a waiver of counsel under *Faretta*, saying:

> We emphasize that a defendant does not need to possess the technical legal knowledge of an attorney before being permitted to proceed pro se. As ***the Supreme Court stated in*** *Godinez* ***v. Moran,*** 509 U.S. 389, 399, 113 S.Ct. 2680, 2686-87, 125 L.Ed.2d 321 (1993), 'the competence that is required of a defendant seeking to waive his right to counsel is the competence to ***waive the right,*** not the competence to represent himself.' Thus, the judge was not required to give Hill a lesson on how to try a lawsuit before finding that Hill was making a knowing waiver of his right to counsel. It Was enough for Hill to be alerted generally to the difficulties of navigating the legal system, and in this case the inquiry went beyond the minimum requirements to warn Hill of the particular difficulty of laying a predicate for a defense." [e.o.]

688 So. 2d at 905. M&e-recently, in ***State v.*** *Bowen*, 22 Fla. L. Weekly S208, 1997 WL 196637 (Fla. Apr. 24, 1997), the court held that:

> "once a court determines that a competent defendant of his or her own free will has 'knowingly and intelligently: waived the-right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented. The court may not inquire further into whether the defendant 'could provide himself with a substantively qualitative defense' . . . for it is-within the defendant's rights, if or she so chooses, to sit mute and mount no defense at all."

Slip Op. at 3. Neither case, however, expressly disapproves earlier district court opinions requiring more extensive inquiry than that in *Faretta* itself.

For the above reasons, we disagree with *Dortch* ***v. State. 65 1 So.*** 2d **154** (Fla. 1st DCA 1995), in which the first district concluded that the obligation to warn a defendant of the "disadvantages of self-representation" necessarily requires that the

trial judge tell the defendant of the "seriousness of the charges against him, the potential sentence he might face if found guilty, [and] the consequences of habitualization." 651 So. 2d at 157. As the supreme court explained concerning the death penalty in *Hill:*

> "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. *E.g., Hamblen v. State,* 527 So.2d 800 (Fla.1988); *Muhammad v. State,* 494 So.2d 969 (Fla.1986); *Goode v. Stare,* 365 So.2d 381 (Fla.), *cert. denied,* 441 *U.S. 967,* 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979)."

688 So. 2d at 904. We know of no reason why in noncapital cases the court must review the possible sentencing alternatives to find that a waiver of counsel under *Faretta* is knowing and intelligent.

Actually, we agree with Judge Barfield in dissent in *Dortch* where he said:

> "None of this is required by *Faretta*. The accused doesn't have to be very good at representing himself or know much about the law. He must only understand that judges don't think self-representation is a good idea, and most defendants would be better off with a lawyer. The accused must understand there are serious consequences that may flow from a criminal trial."

651 So. 2d at 158. Our own reading of *Faretta is* exactly like Judge Barfield's.

Here the trial judge twice told defendant that it would be a big mistake for him to represent himself. She frankly told him at one point that she doubted that he had sufficient legal knowledge to do an adequate job. In these comments, the court was adequately conveying the thought that there was considerable danger in rejecting the services of the lawyer. Nevertheless, defendant insisted that he would prefer to represent himself rather than take his chances with the appointed lawyer, whom he characterized as argumentative. We reject defendant's late-arising perception that he should not have been allowed to have the "fool for the client."

AFFIRMED; CONFLICT CERTIFIED.

GUNTHER and POLEN, JJ., concur.

**NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.**

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P. O. BOX 3315, WEST PALM BEACH, FL 33402

JOSEPH HENRY POTTS, CASE NO: 96-01769

Appellant,

v. L.T. CASE NO: 95-9835 CF A02
DIVISION "R", PALM BEACH

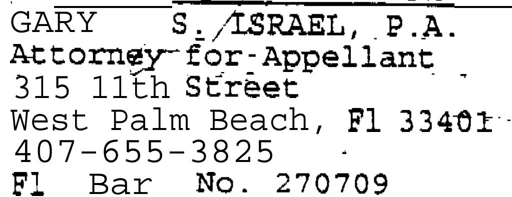
STATE OF FLORIDA,

Appellee.

**APPELLANT'S AMENDED NOTICE TO INVOKE DISCRETIONARY JURISDICTION**

NOTICE IS GIVEN that JOSEPH HENRY POTTS, Appellant/Defendant, invokes the discretional jurisdiction of the Supreme Court to review the decision of this Court rendered on July 30, 1997. The decision certifies a conflict between this District and the First District from its decision in Dortch v. State, 6.51 So.2d 154 (Fla. 1st DCA 1995).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to David M. Schultz, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401, this 4 day of September, 1997.



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