IN THE SUPREME COURT OF FLORIDA

KHALID ALI PASHA,

Appellant,

v. **CASE NO. SC08-1129**
L.T. No. 02-CF-013748

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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A) Pasha's Pretrial Decision To Fire Defense Counsel, Proceed Pro Se And Subsequent Request For The Appointment of Counsel

Khalid Ali Pasha was indicted on September 4, 2002 for two counts of first-degree premeditated murder. (V1, 52-53). Pasha was initially represented by attorneys from the Hillsborough County Public Defender's Office. On November 4, 2003, the Honorable Chet A. Tharpe granted Pasha's motion to discharge his public defenders and appointed Daniel Hernandez and Brian Gonzalez to represent him. (SV-4, 144). While Pasha thought the assistant public defender Kenneth Littman rendered ineffective assistance, the court disagreed, noting that Littman adequately prepared a defense and that he was "extremely experienced in these cases." (SV-4, 144). But, since the State was seeking the death penalty, the court was going to err "on the side of caution" and remove the public defender.[1]

On June 24, 2004, a hearing was called on a motion to withdraw filed by Daniel Hernandez and Brian Gonzalez based upon Pasha's complaints regarding their representation. Hernandez explained that the only reason he filed the motion to withdraw was to "honor Mr. Pasha's request." (SV-4, 150). When asked by the court to explain his complaints, Pasha stated:

[1] The court conducted an inquiry pursuant to Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

> I don't want to start nothing that would imply mudslinging. I think Mr. Hernandez and Mr. Gonzalez both are good men, you know. But because of the seriousness of this case and the things that's happening in it, it's – it's beyond their - - I mean, I don't think they would be able to deal with it in the seriousness it would take."

(SV-4, 151). The trial court[2] wanted Pasha to explain why they would not be able to "deal with it" noting that Hernandez and Gonzalez were two of the most "competent, experienced attorneys in Hillsborough County, if not the State of Florida, when it comes to handling first degree murder cases where the State is seeking the death penalty." (SV-4, 151).

Pasha told the court that he heard things happening or not happening in his case that his attorneys "don't know anything about." (SV-4, 152-53). "And it's things that they should have brought to my attention being my attorneys, and they haven't. So apparently they don't know about them or else they are - - they're keeping it from me. So because of these issues here." (SV-4, 153). The trial court stated that attorneys are not mind readers and that he needed to discuss these matters or issues with his attorneys. (SV-4, 153). Pasha then stated that he "would like to continue with my case, if possible." (SV-4, 153).

[2] The Honorable William Fuente.

The trial court explained that Pasha had previously been represented by two very experienced public defenders who "conflicted off of your case at your request because you did not get along with those attorneys." (SV-4, 154). The court noted that nothing Pasha had said suggested that Hernandez or Gonzalez had represented him ineffectively and consequently, he would not remove them and reappoint new attorneys. (SV-4, 154). The court noted that "will only cause to prolong this case even further." (SV-4, 154). The court stated that Pasha was charged with first degree murder and the State was seeing the death penalty in a case that takes extensive discovery and a "considerable amount of time to prepare a defense." (SV-4, 155). Pasha told the court that he was not asking for different attorneys, but, did not "want them on my case anymore." (SV-4, 155). Pasha stated that he would look into hiring an attorney but in the meantime would represent himself, as "best I can." (SV-4, 155-56).

After a break, the court reconvened and conducted a Faretta inquiry with Pasha. When asked if he wanted to represent himself, Pasha wanted time to think it over and requested an in camera hearing. (SV-4, 159). The judge declined to conduct an in camera hearing with Pasha. (SV-4, 159-60). Next, Pasha offered an arrangement wherein if he proceeded to trial with

Hernandez and Gonzalez and “if something should appear to be in error during that trial that - - that I perceive to be an error, will I have the authority to make a personal objection without being charged with interrupting the Court?” (SV-4, 160). The trial court stated that it would not allow it and that as long as he has counsel “they will be the ones to make any and all objections on your behalf.” (SV-4, 160). Pasha and defense counsel addressed a pro se motion from Pasha relating to the transcript of the previous hearing on the motion to discharge his public defenders. After the judge agreed to listen to the transcript, Pasha and the court mutually agreed to put the motion to replace or discharge his attorneys on hold until August. (SV-4, 168-69).

On August 2, 2004 a hearing was called on Pasha’s request to proceed pro se. The court informed Pasha that Hernandez and Gonzalez were very experienced and had “handled hundred of criminal cases and numerous death penalty cases” and explained in detail the benefits he was foregoing by discharging them. (V18, 131-135). Pasha explained that although he did not feel those attorneys were incompetent, he had concerns that they would not protect his rights and put forth the best legal argument for his defense. (V18, 133). When Pasha complained about discovery and depositions in particular, Hernandez told

the court that “95 percent” of all depositions had been taken. (V18, 133-34). The State agreed that all key witnesses had been deposed. (V18, 135). Pasha insisted on representing himself, and the trial court, continued the Faretta inquiry. (V18, 136-42). Ultimately, at the conclusion of the inquiry, the following colloquy occurred:

> THE COURT: Okay. Having been advised of your right to counsel, the advantages of having counsel, the disadvantages and dangers of proceeding without counsel, the nature of the charges and the possible consequences in the event of a conviction, are you certain that you do not want to continue with the representation of Mr. Hernandez and Mr. Gonzalez?
>
> THE DEFENDANT: Yes, sir.

(V18, 148). Pasha requested and was appointed standby counsel, Gonzalez and Hernandez. (V18, 149). The court found Pasha knowingly and voluntarily waived his right to counsel. (V18, 154).

On September 1, 2004 a hearing was called before the Honorable Chet A. Tharpe to address Pasha’s discovery concerns. Pasha stated that that he did not receive his attorneys’ files since he had been pro se. Hernandez and Gonzalez agreed to provide a copy of the files to an investigator so that she could take it to Pasha. (V19, 165-69). Pasha also sought to remove Gonzalez and Hernandez as standby counsel. (V19, 174). The trial court denied Pasha’s request.

Pasha represented himself for approximately two years, complaining about his access to material in the jail at various points. On June 8, 2006, a pretrial hearing was held with Pasha and standby counsel to hear Pasha's complaints regarding access to discovery materials in the jail and other pretrial matters. The court heard from the major in charge of the jail, Major Robert Lucas, who explained that Pasha, due to jail regulations, was only allowed one box of materials in his cell at a time. Pasha wanted access to all of his boxes at once. Major Lucas explained that for security and sanitary reasons they are only allowed one box at a time if they are pro se. He explained that Pasha has four boxes of material. (SV-9, 253). Major Lucas advised the court that the jail has worked with Pasha and that "a lieutenant that spent quite a bit of time with him and did that and make sure he organized it. Mr. Pasha wants all or none." (SV-9, 254).

The prosecutor noted that the jail has security issues with Pasha, that contraband had been discovered in Pasha's cell. (SV-9, 255). Major Lucas testified: "Because of this motion I reviewed his case file inmate information sheet. He had a period of three years six different incidents where he had contraband in his room." (SV-9, 255). The contraband Pasha had improperly held in his cell included a "razor" and the major

noted that such a simple razor had recently caused a severe injury to an inmate. (SV-9, 255).

The prosecutor noted that Pasha had provided a witness list but Pasha failed to provide an address or phone number for his witnesses. (SV-9, 257-58, 263). Pasha complained again about access to material and that he has not compiled his final witness list. The court noted that Pasha had some "forty-five months" in jail to compile his list. (SV-9, 263). When Pasha complained about jail personnel not complying with his demands, the court noted that Pasha was warned he did not have the same advantages as those defendants who accept competent counsel. The court also noted that it was doing everything possible to help him and that Pasha had not complied with the discovery order. (SV-9, 265-66). The prosecutor stated that this case was set for August 21st and that the State was "going to strongly object to any continuances by the defendant." (SV-9, 269). The court also noted that this "case had been pending for four years" and that it would not be "continued." (SV-9, 269). The court adjourned for the day stating that Pasha would be allowed access to all of his material over night in order to organize it. (SV-9, 270).

On June 9, 2006, the court continued the pretrial hearing to address discovery matters, including Pasha's complaints about

not having access to all of his materials at the jail and his failure to comply with a prior order requiring him to disclose his witness list to the State. (SV-10, 273-331). The trial court began by conducting a Faretta inquiry and at the conclusion of the inquiry, Pasha reiterated his desire to represent himself, with the following colloquy:

> The Court: Having been advised of your right to counsel, the advantages of having counsel, the disadvantages and dangers of proceeding without counsel, the nature of the charges and possible consequences in the event of a conviction, are you certain you don't want me to appoint a lawyer to defense you?
>
> The Defendant: Yes sir.

(SV-10, 287). The court found that Pasha knowingly and intelligently waived his right to counsel. (SV-10, 288).

The prosecutor noted that Pasha's witness list was inadequate and incomplete. Pasha had been ordered on March 27th to turn over his witness list by June 8th. (SV-10, 296). Pasha again complained that he did not have access to his property. (SV-10, 296). The court advised Pasha that it was not going to order the jail to deviate from standard operating procedures:

> They have been designed and approved by authorities higher than me to protect the inmates, themselves, their fellow inmates and the personnel, law enforcement and otherwise who work at the jail. I am not going to override that in the interest of safety, particularly when I hear the major tell me that he has six instances where contraband has been discovered in

> his cell. I am not going to do it. That's the end of that discussion...

(SV-10, 300-01). The court gave Pasha two additional weeks to provide his witness list, including a method of contacting the witnesses he planned to call. (SV-10, 301).

After Pasha explained that he would like to be transported and housed in another jail based upon a perceived threat to his safety, the prosecutor noted that the jail has serious security concerns relating to Pasha. Jail personnel were probably aware that Pasha had escaped from jail in Indiana and shortly after that escape he was arrested for a bank robbery. (SV-10, 304-05). The prosecutor noted the efforts made by the State to assist Pasha in this case and that Pasha has been assisted in getting his records, depositions and other matters. (SV-10, 307-08). "The reason I am bringing this up my observations of what the jail is doing they are also trying and that's what I personally observed, trying to work and assist at least when we request in the flow of information, discovery and try to help Mr. Pasha." (SV-10, 309). Ultimately, the judge noted: "As things stand we keep coming back to the same thing. I keep saying I am giving him everything I think he is entitled to and more. I am not going any further than I have gone in regard to bending the rules and making him make special exceptions to the rules at the jail because there are matters of security that I

thoroughly understand. I find not only has he had contraband in his cell he has escaped from a state penitentiary before. I imagine that's on some minds out there."[3] (SV-10, 321).

Pasha continued to complain that he could not have all of his boxes with him at one time and that the four hours the court gave him to have all the boxes in his cell to organize it wasn't enough time. Consequently, Pasha stated that he was in no position to go to trial. "How much time I need? I can't tell." (SV-10, 327). After some additional back and forth between Pasha and the court, the trial court concluded the hearing, stating:

> ...You are going to operate within the framework and guidelines of the Hillsborough County Sheriff's Office. They have extended themselves for you. I have extended myself. The prosecutor has extended himself for you. You have standby counsel. You have a private investigator. You have everything you are entitled to and more.

(SV-10, 331).

On August 21, 2006, the case was called for trial before the Honorable J. Rogers Padgett. The State announced it was ready for trial, however, Pasha stated that he was not ready. Pasha added that if he had his property, he could be prepared for trial in "90 days." (SV-13, 377). Pasha needed the additional time to organize his materials "and put it in proper

[3] Pasha stated that he had "never been charged with escape." (SV-10, 321).

order and be ready to present it." (SV-13, 377). The court stated that "90 days is a long time for a case this old." (SV-13, 377). The prosecutor stated that Pasha had four or five boxes of material. When the court asked a sergeant from the jail if he had access to his material, Barletta stated that he "was given the opportunity to order all of his - - well actually categorize all of his legal material." (SV-13, 378). Sergeant Barletta stated: "He refused it. The jail policy is, whether it be Falkenberg or Orient, is one box of legal material. They can exchange it on a one-on-one basis." (SV-13, 378). Pasha wanted all "five or nothing." (SV-13, 379). The court noted that the rule is one box at a time and that Pasha had to live with the rule. And, the court told Pasha that this was one of the problems with choosing to represent himself, he was in jail and would have to abide by "jail rules." (SV-13, 380).

The court told Pasha that it would not get better and that if he continued the case it expected Pasha to be complaining about the same circumstances. "You're going to have to just fish or cut bait here." (SV-13, 385). Judge Padgett noted that if he continued the trial "the next time it comes up, you're going to trial" and that he would not be hearing any excuse concerning the one box rule. (SV-13, 387). Judge Padgett stated: "You'll never be any more prepared. I can see the

writing on the wall, and I think you can too." (SV-13, 390). Pasha replied that he could be prepared if he had the "opportunity" to which the court responded: "No, you've had too many opportunities to be prepared." (SV-13, 390. The court continued the case until the following Monday and it advised Pasha to be prepared and get his "stuff together" to argue pretrial motions.

Pasha represented himself until a pretrial hearing before the Honorable Wayne Timmerman on November 29, 2006. During this hearing which was called to discuss pretrial motions, Pasha sought an in-camera hearing to discuss a "matter." (SV-11, 335). The court declined and Pasha stated that he would like Mr. Gonzalez removed "as standby counsel." (SV-11, 335). Pasha explained that Mr. Gonzalez had not been to see him in the jail. Pasha also complained that he had a discovery issue regarding an envelope the prosecutor had dropped off to him which he put in property and which he subsequently could not retrieve. Pasha blamed Mr. Gonzalez for his advice to put such discovery in property at the jail. Pasha complained that Gonzalez was not doing him "any good" and was not serving any "purpose." (SV-11, 336). Mr. Gonzalez replied that he has always been available to answer legal questions and that "sometimes pro se defendants have the wrong impression as to what their standby counsel is

and what their standby counsel is for." (SV-11, 337). Mr. Gonzalez did suggest that items of discovery go into property but stated that he was sure the prosecutor would be "happy to reproduce it." (SV-11, 339).

The trial court openly questioned whether or not Pasha's complaints about standby counsel would require a Nelson inquiry. (SV-11, 339). Pasha told the court he was asserting that Gonzalez was rendering ineffective assistance. (SV-11, 339). The court however, explained that Pasha had elected to represent himself and that Mr. Gonzalez was not ineffective simply because "he hasn't come to see you." (SV-11, 339). Pasha stated that he had not requested Gonzalez as standby counsel. Gonzalez added that Judge Tharpe thought it was in Pasha's best interest "to have standby counsel based upon the seriousness of his allege[d] offenses." (SV-11, 340). Gonzalez offered that he would make an appointment to see Pasha to answer his legal questions and the prosecutor pointed out that there is a danger that standby counsel could impede Pasha's right to represent himself in this case. (SV-11, 341). Pasha responded: "To impede is to hinder. He is not enhancing it at all. Obvious according to Faretta, and you know Faretta better than me." (SV-11, 341). The trial court noted that Pasha probably knew Faretta better "than me because it has been read to you 46

times." (SV-11, 341). Ultimately, during this hearing, Pasha agreed to withdraw the motion to discharge standby counsel. (SV-11, 343).

At the conclusion of the hearing, the court noted that Pasha had the right to an attorney to be appointed to him at no charge. It was at this point that Pasha stated that he now wanted a lawyer. (SV-11, 358). When the court noted that Pasha had decided to represent himself, and, apparently, has changed his mind, the following colloquy ensued:

> The Court: You have elected to represent yourself.
>
> The Defendant: But I want a lawyer.
>
> The Court: Are you changing your mind now, sir? You want counsel to represent you?
>
> The Defendant: I always wanted counsel to represent me. I never wanted to be pro se. I am pro se because I am forced to be pro se.
>
> The Court: No, sir. You are pro se because you have elected to be pro se. You have been given your Faretta rights more time(s) than anybody can remember.
>
> The Defendant: Definitely.
>
> The Court: What is your answer going to be now? Are you going to say yes?
>
> The Defendant: I want a lawyer. But I don't want Mr. Gonzalez representing me.

(SV-11, 359).

The court noted that Pasha had discharged a number of lawyers, every one that had been appointed. (SV-11, 359). The

court also noted that after a number of Faretta hearings, Pasha had "said you don't want one and now you said you do." (SV-11, 359). When asked again if Pasha would like an attorney to represent him, Pasha stated: "I want an attorney to represent me." (SV-11, 360). After additional prodding from the court, Pasha again stated: "Yes, I want an attorney." (SV-11, 360). The court stated it would set another hearing to determine counsel, at which point Gonzalez suggested that another attorney be appointed, stating that he would not be the person to satisfy Pasha. Gonzalez also added that he had a number of other first degree murder cases on his schedule at this point. (SV-11, 361).

The court openly questioned whether or not Pasha was deliberately employing a strategy to indefinitely delay his case:

> This is going to necessitate - - but Mr. Harb, as you know, if we do this we are basically starting from scratch. This case is never going to get to trial. I am beginning frankly, beginning to wonder, Mr. Pasha you are not a stupid person. You say you don't want a lawyer then you say you do. You don't want one then you do. What you are doing is dragging the case out.

(SV-11, 361-62). When Pasha stated that it wasn't his intention to delay the case, the court stated the following:

> I am going to tell you right now. You are going to get one more shot at having a lawyer represent you. Whoever is appointed is going to be qualified. I am going to see to that. After that you are going to find

> it very difficult to fire somebody else and start the game all over again. You are going to find it very difficult. Therefore, I am going to ask you again. We will sit here and give you time to think. Have you decided in your mind that you now again want an attorney to represent you in this case?

(SV-11, 362). Pasha replied that he did want an attorney, but, not unless that attorney puts forth the effort he desired: "If I have those who don't put an effort I don't want them. If they put out an effort then I definitely want a lawyer." (SV-11, 363). The court took exception to the perceived attack upon lawyers who appear in his courtroom, noting that the defense attorneys took an oath to represent their clients and Pasha could expect their best effort on his behalf. (SV-11, 364). The court closed by warning Pasha: "We are not going to do this flip flopping anymore I am telling you right now. There is not going to be anymore game playing. I am giving you the benefit of the doubt today." (SV-11, 364). The court noted that it would not simply appoint someone off the street to represent him, that the court only appoints attorneys to handle death cases that are "qualified to do so." (SV-11, 364). On December 7, 2006, the court appointed Nick Sinardi and Robert Fraser to represent Pasha. (SV-12, 367-68).

B) Pasha's Complaints Regarding His Third Set Of Appointed Attorneys, The Nelson Hearing, And, Subsequent Morning of Trial Complaints Regarding Counsel And Faretta Hearing

About one week prior to the scheduled trial, Pasha moved to discharge appointed counsel for incompetence. A Nelson hearing was held on October 17, 2007 before the Honorable William Fuente. (V28, 303). Sinardi stated that a rift had developed based upon Sinardi's desire to explain a possible lesser included offense defense to the murder charges. (V28, 322). Sinardi stated that he had personally met with Pasha three times at the jail and that his investigators had met with Pasha "17 or 18 times, if not more." (V28, 322). Sinardi stated that he had investigated the names given by Pasha, but, that he did not see an alibi witness or guilt phase witness: "He has provided - - without going into detail, he has provided witnesses pertaining to his character, he has provided witnesses pertaining to some of his skills. We'll leave it at that." (V28, 323). Sinardi did explain that he had hired a forensic expert who examined the physical evidence, but, had not listed her as a witness. When the court reminded Sinardi that the trial was scheduled for Monday, Sinardi replied: "I know that and the possibility is the - - probability is we will not." (V28, 326). Pasha also thought that Sinardi should attack the credibility of the Sanchez's who witnessed Pasha at the murder scene and who called

the police. Sinardi explained: "I don't think it's an appropriate tactic to call an independent witness a liar when they have no basis to be lying, no reason to be lying." (V28, 339).

Pasha explained that in the April visit with Sinardi they "talked about the case pretty thoroughly." "On the September visit he mentioned that he brought a suggested defense to me that caused me to write this motion for termination." (V28, 342). Pasha explained that it upset him to hear about that tactic whereupon the judge explained: "You know, lawyers don't always tell their clients what they want to hear." (V28, 344). Pasha also complained that "Mr. Sinardi don't know enough about my case to defend me." (V28, 366). Pasha stated that he had talked to the investigator a number of times and that "I've discussed most of it I guess with attorney Fraser than I have with anybody." (V28, 367). Pasha finally stated that he did not have any confidence in Sinardi to defend him, to "speak to my side of the issues." (V28, 368).

After hearing Pasha's concerns, the trial court denied the motion to discharge counsel on the basis of incompetence, finding no legitimate grounds for discharge. The court stated that Sinardi has been through many of these cases, and the court knew him to be "competent, capable and effective." (V28, 377).

The court observed that today was Wednesday and that they would have Friday afternoon to resolve matters before the trial started on Monday. (V28, 377-78). Pasha stated the following after the court denied his motion to discharge counsel:

> As a right - - I have a right to have a lawyer appointed to me if I can't afford one. I also have the right not to have a lawyer to sit with me if I don't what to.

(V28, 384). The court noted that the only issue before him was the motion to discharge counsel, which he had ruled upon. The court stated that if Pasha had another request to put it in writing and that he would hear it before trial. (V28, 384). The hearing continued with counsel for the State and Pasha discussing pretrial evidentiary and jury selection matters. (V28, 386-405).

On the morning of trial, October 22, 2007 the court conducted a hearing to discuss pretrial matters including a motion in limine. (V29, 439-40). Sinardi raised the issue of a continuing dispute with Pasha over the best defense strategy and his view that Pasha may very well be best served by an argument for second degree murder, a view not shared by Pasha. (V29, 448-50). Sinardi noted that the facts will show overwhelmingly Pasha's participation in the murders. (V29, 449-50). When the court asked Pasha to comment, Pasha responded that he was filing a couple of motions "to proceed pro se from this point on."

(V29, 451). The court read the motion that was handed to him by Pasha [through the bailiff]:

> . . .it's entitled Motion to Proceed Pro Se and Mr. Pasha says he's facing the death penalty. He's of average intelligence. He believes that due to the negligence of counsel, counsel doesn't have his best interest at heart.
>
> It says that he believes that I guess Mr. Sinardi in an effort to under mind (sic) his ability to prepare for trial because you've known for more than a week that you wanted to proceed pro se, he sought that effort impeding your ability to ready yourself for trial.
>
> You believe that under the Fifth and Sixth and Fourteenth Amendments of the Constitution you have the right to counsel if that's your desire. . .

(V29, 452). So the nature of this pleading I guess is to allow you to proceed pro se and not allow Mr. Sinardi to further represent you. Pasha told the court that he wanted to proceed without counsel. (V29, 453).

The court told Pasha it thought he was making a "terrible mistake" but that it is "your constitutional right if this is what you want to do." (V29, 453). The court embarked upon a thorough Faretta inquiry, explaining the rights and advantages he has and is foregoing by choosing to represent himself. (V29, 454-71). The court continued with the Faretta inquiry until it advised Pasha it would not necessarily grant a continuance in this matter and that he should be prepared for trial, Pasha equivocated. The court noted that in his motion Pasha indicated that Sinardi had stymied him in his effort to represent himself

at trial. (V29, 462). Pasha stated: "I'm prepared to start I'm sure but with the picking of the jury, selecting of the jury and I'll have a chance – - I don't have all my material that's the hindrance that I was concerned about." (V29, 462).

Finally, after the Faretta inquiry, the trial court asked Pasha if he had any questions about his right to have an attorney, Pasha stated that "it is wiser to have a lawyer" but that he did not think "Sinardi put forth the effort in my situation."[4] (V29, 472). When asked by the court if he wanted a lawyer but did not want Mr. Sinardi, Pasha replied: "Yes, sir. But I don't have the choice to pick who I want so it means obvious the only other alternative is to be pro se." (V29, 472-73). The court found such a request equivocal and asked Pasha to clarify his position:

> I have to make a comment now that based upon what you've said to me I have to find that your request to represent yourself is equivocal, it's not an unequivocal request at this juncture but I'll continue. I've advised you of your right to counsel. The advantages of having counsel, the dangers and disadvantages of not having a lawyer.
>
> The nature of the charges and that it that you could get death - - a death sentence for either count and or you could receive a life sentence for either count.
>
> Are you absolutely certain that you do not want to continue with an appointed lawyer?

[4] However, Pasha stated that he had "no problem with Mr. Fraser" representing him. (V29, 456).

(V29, 473). Pasha replied: "As I stated I would love to have a lawyer definitely I would rather have a lawyer." (V29, 473). Pasha added, "[b]ut apparently I don't have that choice." (V29, 473-74).

The court went on to explain it could not let Pasha discharge counsel on such an equivocal request:

> Now by law you have a right to ask the court to allow you to represent yourself and before I can allow that to happen, two things have to occur.
>
> I have to make a finding that you knowingly and voluntarily and intelligently waiving your right to counsel. But the more important thing is you have to tell me unequivocally that you want to represent yourself.
>
> I cannot make that finding because you've told me very candidly and very honestly under oath that you would rather proceed with counsel but that you simply do not feel comfortable with Mr. Sinardi so having gone through this Faretta inquiry I'll respectfully deny your request to represent yourself and will proceed with Mr. Sinardi as your counsel and that matter will have to be addressed if I'm ruling incorrectly it will have to be addressed with an appellate court if it reaches that stage. . . .

(V29, 474-75).

The court recessed and reconvened later that morning on October 22nd. The court inquired as to the progress Sinardi made with Pasha regarding their differences on trial strategy. (V30, 484). Sinardi told the court he was not sure they made "any progress." (V30, 484). Sinardi was still of the opinion that second degree murder was the best strategy. The court stated: "So Mr. Sinardi will continue as counsel and I'll leave

it to the devices of Mr. Pasha and Mr. Sinardi to work out their differences." (V30, 484). The court went on to hear a motion to suppress statements made by Pasha to law enforcement and other pretrial matters. (V30, 485-516). Pasha did not make any request to revisit the issue or make an unequivocal request to proceed pro se for the remaining pretrial hearing.

The court reconvened after a lunch recess and brought in the first panel of jurors and Pasha was introduced to the venire as were his defense attorneys. (V30, 518). Pasha voiced no objection nor did he make any request regarding counsel at that time. (V30, 518).

On the afternoon of October 24th, after the jury panel had been sworn and strikes were about to be exercised, Pasha handed the court a note, [through the bailiff] stating that "I cannot in good faith put my life in the hands of someone who's simply working for the money which I am paying and not for justice. It's my firm and final decision, I want to proceed pro se." (V34, 1021). Sinardi told the court he was not sure if it applied to him and Fraser or just him. (V34, 1022). The court asked Pasha if he was referring to Mr. Sinardi or Mr. Fraser or "both." (V34, 1022). Pasha replied: "Mr. Sinardi." (V34, 1022).

The trial court denied the request to proceed pro se, stating:

> Mr. Sinardi. My understanding of the law if I'm wrong, I'm wrong is that first of all you've gone through two Ferretta (sic) inquiries and the first one was before another judge who allowed you to proceed pro se.
>
> Sometime later in the proceedings you opted to proceed with counsel and the most recent counsel that was appointed to represent you were Mr. Sinardi and Mr. Fraser and you and I went through this I think we started Monday with another Ferretta inquiry where you indicated you wanted to proceed pro se and you were equivocal at that time so I denied that request.
>
> At this juncture I'm going to deny the request because it is my belief that the law allows the Court the discretion to not allow you to proceed pro se once trial has commenced.
>
> We have now spent two and one half days in jury selection. Beyond what you've written in here you've chosen to say no more it's my impression that you're simply trying to delay the proceedings.
>
> Mr. Sinardi is doing a very admirable job as is Mr. Fraser and as is your prosecutor so without getting into the reasons you want to proceed pro se I'm going to simply deny that request out right.

(V34, 1023-24).

After opening statements, Pasha again raised this issue, during which the following colloquy occurred:

> The Defendant: I have no intention of hindering the Court or holding up the Court anything whatsoever. But my life is at stake here and to - - to be forced to go to Court with somebody who don't have my interest at heart, I mean I probably said that too strongly. Mr. Sinardi might have my issues at heart but he doesn't know enough about my case to defend me. There's some details, so many things about the case that he doesn't know, he just don't know. I don't have any witness - - one witness called on my behalf not one, not one.

The Court: To testify to what happened or didn't happen that night?

The Defendant: It can be. Yes, sir.

The Court: Well, why couldn't you give him those folks?

The Defendant: I did. I mean it was late, but there's other things. There's so much, Your Honor, that I'm aware of that I mean I'm just - - you're throwing me to the wolves to allow me to - - to allow this to continue as it is.

It's continuing to go on and go on. I tried this over a week ago to establish this pro se. I'd be in a lot better position. But even so now, I can still be in a better position than he is now because he have more knowledge of the law than I do. But I have more knowledge of the situation than he do.

(V34, 1114-16).

The trial court addressed Pasha, stating, in part:

Let me just say the following few things in response to what you - - not only what you said now, but the piece of paper that you filed about an hour or two ago.

You appeared before me, I don't know, two or three occasions - - I don't recall - - before the pretrial conference and my recollection serves me correctly, please correct me if I'm wrong, I don't think that you actually made the request of me to represent yourself until Monday, this Monday, this past Monday when we first got together for actual trial Monday.

But be that as it may, you did bring it up Monday. We addressed it Monday. I went through an entire Ferretta (sic) California inquiry with you and you were telling me that you wanted to represent yourself.

And I asked you very specifically are you certain that you want to represent yourself and your response was, and I'm paraphrasing, I'd rather have a lawyer. But given this lawyer, I'd be better off by myself. [Defendant: Yes sir.].

I made a ruling as a matter of law that your request to represent yourself was not unequivocal. It was equivocal. You equivocated. You did not tell me with absolute certainty that you wanted to represent yourself under Ferretta versus California and its prodigy that is absolutely required before I can let you do that.

And I went through everything and I told you in no uncertain terms it would be foolish for you or anyone to represent themselves in a trial this serious, so I made that ruling. Now, before that, last week you complained about Mr. Sinardi and I went through an entire discussion with you.

In fact, I asked you to – we started on the prior Monday and then when you complained about Mr. Sinardi, then we got together I think either Wednesday or Thursday the following week and we - - I gave you the opportunity to air everything out.

You gave me all your grievance about Mr. Sinardi and I listened to what you had to say. I listened to Mr. Sinardi's response and I conducted what's required by law a Nelson v. State inquiry.

I considered everything and I made a finding, rightly or wrongly, but I made my finding as I'm required to do that Mr. Sinardi was doing everything that any competent lawyer should do. So, therefore, I denied your request to remove him.

Now, at that time, that's all you asked me to do. You did not ask me to proceed pro se.

Now today we went through - - went through jury selection on Tuesday. We went through jury selection the entire morning today.

Your lawyers and the State's lawyer and these jurors have spent many, many hours going over lots and lots of things. It was a very grueling process and I will tell you I've watched a lot of jury selection processes.

All the lawyers here, your lawyers included, specifically Mr. Sinardi which is your concern right now, did what I perceive to be a very thorough and adequate and very competent job in voir diring, if you will, asking questions of the jurors.

Now, you made your request - - your second request by this written document which is in the court file wherein you said you wanted to represent yourself.

> Now, I told you on the record I guess it was this morning or this afternoon, I don't recall, that my understanding of the law is that once a trial is, quote, commenced, end quote, I'm not required to allow you to represent yourself.
>
> You take issue with that. Be that as it may, that's my ruling. And I'm relying on Parker versus State, 423 So.2nd 563. I think it's a Florida Supreme Court case and I'll give you specific authority for my ruling more specifically tomorrow.
>
> But I'm making a finding. I made a finding and I'll reiterate my finding and I'll reiterate it again tomorrow that once trial commenced – - and I believe trial commenced Monday.
>
> We swore prospective jurors for their initial questioning. The trial commenced and I'm not required, as a matter of law, to allow you to represent yourself at that time. That's my ruling now. . .

(V34, 1118-20)

C) <u>Guilt Phase Facts</u>

Victim Robin Canady and Pasha were married in the summer of 2002. (V37, 1464). Felicia Solomon testified that her mother had seven children and that her sister, twenty year old, Reneesha Singleton lived with her mother and worked for Nokia. (V37, 1463).

On the evening of August 23, 2002 Pasha drove his work van to the Aetna building in the Woodland Corporate Center, where victim Reneesha Singleton worked. Victim Robin Canady had driven to the AETNA building to pick up Reneesha who was in a Nokia [Pro Staff customer service] training class, which let out

a bit early, sometime around 11:00 on August 23, 2002.[5] (V37, 1465-66; V38, 1527).

When the class ended a fellow student of Reneesha's, Kenia Perez, observed a car in the lot which she recognized as the one owned or driven by Reneesha's mother. (V38, 1528). Perez observed two people in the vehicle, Reneesha's mom was in the front seat and another individual she believed was a man was sitting in the back seat. (V38, 1529). Perez believed the individual in the back seat was African American.[6] (V38, 1530).

Another individual who was a trainee with Reneesha, Carlos Smith, testified that the class let out around or shortly after 10:30 on August 23rd. (V40, 1855). He observed a Buick in the lot with a female in the front seat. Although the car was parked in a dark area of the lot, he observed an individual he believed to be a male sitting in the back seat behind the driver wearing light clothing. (V40, 1855-56).

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[5] Victim Canady also worked at the Corporate Center for a health company Gentiva. (V38, 1566).

[6] Another individual sat in a parked car waiting for his finance and observed the victim's car and also got a glimpse of another individual on foot coming from the side of the building, a six foot or so tall African American wearing a "white, zip-up suit that looks like a "painter's suit." (V38, 1556). Shortly after observing this individual the class let out and he drove his fiancé home. (V38, 1557). This individual was walking toward a car but he did not see this person get into a vehicle. (V38, 1559).

Jose Sanchez worked for Delta Airlines but also owned a business he operated with his wife, Gisela. On the evening of August 23, 2002 he was working at the Woodlands Center on floor maintenance. (V39, 1692-93). He was outside at a picnic table after 11:00 when he noticed a tall person of color walk by dressed in white with blood on him. Jose also noticed something shiny in this person's hand. (V39, 1694). Jose suspected "something" and got in his truck to follow this individual. (V39, 1695-96). Jose made an in court identification of Pasha as the individual he observed that evening. (V39, 1702-03).

Jose followed Pasha through the parking lots of several businesses before picking up his wife in his truck from the AETNA parking lot. (V39, 1709). She called 911 and they returned to the parking lot of Nokia. (V39, 1711). They drove through the parking lot of State Farm where Jose again observed Pasha. (V39, 1713-14). Pasha was still wearing the white suit, carrying a shiny object, and, wearing white boots. (V39, 1715). Pasha went into the bushes and emerged a couple of minutes later wearing a white t-shirt and was not wearing boots. (V39, 1716, 17). Pasha got into the van and drove out of the Woodlands Center. (V39, 1717-18). They followed the van while Gigi remained on the phone to 911 until the police stopped the vehicle at a light outside of the Woodlands Center. (V39,

1720). Jose made contact with police and showed them the area they first observed Pasha, an area where the bodies were discovered. (V39, 1722).

Gisela Sanchez was working on the night of August 23, 2002, with her husband Jose Sanchez. (V38, 1617). After receiving an excited call on the walkie talkie from her husband, he arrived to pick her up in his red pickup truck. Gisela observed a person, she later identified in court as Pasha (V38, 1646), "fast walking" wearing a white one piece "jumpsuit." (V38, 1625). She observed what appeared to be blood on the jumpsuit. (V38, 1627). Gisela also noted Pasha was wearing white boots and had a shiny object like a knife in his hand. (V38, 1645, 1640, 1666). Her husband was driving the truck and she continued to observe this individual walking past the Nokia building to State Farm. Gisela was relaying this information contemporaneously to the 911 operator. Near this building Gisela observed Pasha go into the "bushes." (V38, 1627). When Pasha emerged, he was no longer wearing the white jumpsuit. Pasha was wearing a white color t-shirt and walked over to a white colored van. (V38, 1628). Gisela remained on the phone with 911 and observed Pasha get into the van and drive it toward Waters Avenue. (V38, 1629-30).

Gisela and her husband followed the van as it left the Woodlands Center going towards Waters Avenue when the police stopped it. (V38, 1631). The police made contact with the driver. The person driving the van, Pasha, was the same person she observed wearing the white jumpsuit with blood on it, and, the same person she observed coming out of the bushes without the jumpsuit. (V38, 1631).

A sheriff's officer dispatched in response to the 911 call stopped the van matching the eyewitness description close to the scene of the murders, at the entrance of the corporate center. (V37, 1408-09). Deputy James Stahlschmidt and his partner responded to a call at the Woodland Corporate Center Park on August 23, 2002 at 11:21 p.m. When he arrived only 30 to 40 seconds after receiving the call, he observed a white van leaving the complex and observed a vehicle following behind it flashing its lights. (V37, 1435). The driver of the second vehicle was waiving her hand out the window and pointing at the van. (V37, 1436). He approached the van which was stopped at a red light and observed one person in the van, the driver. (V37, 1437).

Stahlschmidt made contact with the people in the vehicle following the van, Mr. and Mrs. Sanchez. They directed him to an area of the corporate park in a cul de sac where he

ultimately found a pool of blood, a pair of shoes, and a car which had crashed into a cinder block wall. (V37, 1441-42). Stahlschmidt approached the vehicle and observed a large amount of blood and searched the area for possible victims. (V37, 1442-43). He observed what appeared to be drag marks coming from the large pool of blood and followed it to the wood line to find two female victims, who appeared to have suffered "extreme" trauma. (V37, 1443-44). He checked for signs of life, but, testified "it was pretty obvious that they were at that point deceased." (V37, 1445).

Stahlschmidt later returned to the van to observe Pasha behind the steering wheel. "He was sweating profusely." Stahlschmidt also observed a red substance on Pasha's clothing. (V37, 1446). Looking back into the van, Stahlschmidt observed a pair of boots and a white garment in a bucket. The garment appeared to have "blood on it or a red substance." (V37, 1447).

Deputy Hughes arrived at the scene within five minutes of receiving the call to look for a suspicious vehicle, a white van, driven by a black male. (V37, 1410). Pasha was sitting in the driver's seat of the van. (V37, 1412). Pasha was wearing a white tank top, dress pants, and no shoes, and was "sweating profusely. (V37, 1413). The officer noticed a red substance on Pasha's shirt, consistent with blood. (V37, 1415). The officer

observed a pair of white rubber boots in the back of the van "covered in a red substance" and what looked like a jumpsuit "covered in the red substance, also." (V37, 1416).

Through his job at HAS Engineering Pasha was issued a white work van and had access to a white Tyvek environmental suit.[7] That suit is not routinely worn by field technicians like Pasha but is occasionally issued when working on a "hazardous" materials cite. (V38, 1577). Pasha's co-worker, William Hutchings, identified the suit in evidence as the type a technician like Pasha has access to. (V38, 1577). The suit is disposable and is meant to be worn over a person's clothes. (V38, 1578). Similarly, work boots found in the van are issued by the company. (V38, 1579-80). However, neither a knife nor a club [baseball bat], as found in the van, were issued to employees. Nor did Hutchings think those items would be useful on the job. (V38, 1583-84).

Evidence linked to the crimes was found inside Pasha's van, including bloody boots, a broken club/baseball bat covered in blood, a knife with blood, gloves with blood, and the jump suit with blood. DNA evidence established the blood on the broken bat/club found in the van driven by Pasha matched victim Canady at all 13 loci, the frequency of such a profile "is

[7] Pasha had sole possession or access to the van for approximately six months prior to the murders. (V40, 1850).

approximately one in 800 quadrillion Caucasians, one in 2.2 quadrillion African-Americans and 1.1 quintillion Southeastern Hispanics." (V40, 1784-85). The knife yielded a DNA profile [from blood] that was consistent with the profile of Reneesha Singleton. (V40, 1829). A boot found in the van had blood matching victim Canady at 10 loci yielding "frequency of occurrence at "one in 96 trillion Caucasians, one in 400 billion African Americans, and one in 68 trillion Southeastern Hispanics."[8] (V40, 1789-90). The tan pants Pasha was wearing when he was arrested had blood on them which matched victim Reneesha Singleton at 12 loci.[9] (V40, 1793). One of the rubber gloves seized from the van matched victim Reneesha Singleton at 9 loci, yielding population frequency of "one in 20 trillion Caucasians, one in 140 billion African-Americans, and one in 11 trillion Southeastern Hispanics." (V40, 1794-95). The Tyvek suit revealed a mixture of profiles consistent with DNA profiles of victims Singleton and Canady, yielding population frequency statistics of "one in one trillion Caucasians, one in 6.7

[8] The rubber boots found in Pasha's work van had a "similar tread design to the impressions that were left at the crime scene." (V37, 1390, 1400).

[9] Swabs were taken from Pasha on areas with suspected blood stains. Four swabs were taken from the right side of Pasha's head and two swabbings from the left side. (V36, 1287). Clothing was also taken from Pasha, a tan pair of pants and a white tank top. (V36, 1285).

billion African Americans, and one in 580 billion Southeastern Hispanics." (V40, 1796). The swab from Pasha's right face and head revealed a mixture of DNA, with the major donor profile matching victim Reneesha Singleton, but, the minor contributor of the profile could not be determined. (V40, 1797).

Senior Crime Laboratory Analyst with the FDLE, Lynn Ernst, testified that she examined the victims' vehicle and observed a large amount of blood. Ernst also observed linear cuts in the ceiling liner of the vehicle which were consistent with knife cuts. (V35, 1314-15). Insulation from the car roof was falling out of the headliner as a result of the cuts. (V36, 1322). Ernst found two purses in the front of the car belonging to victims Singleton and Canady. (V36, 1315). This finding was consistent with the two victims being seated in the front of the car at the time of the attack. (V36, 1316). Moreover, significant amounts of blood were found in the front seat area, with an "excessive amount on the dash and windshield, interior of the windshield." (V36, 1316-17). Further, there were "excessive" amounts of blood found on the rear view mirror. (V36, 1317). The blood pooling and patterns were also consistent with the two victims being seated in the front of the car at the time of the attack. (V36, 1316-17). Photographs

depicted very little blood on the back seat when compared to the front seat. (V36, 1321).

The medical examiner's testimony established that Robin Canady received approximately 25 stab and blunt force injuries, and that Reneesha Singleton received approximately 27 stab and blunt force injuries. Each victim had her throat slit. Victim Robin Canady suffered five stab or incised wounds to her head and neck. (V40, 1864). The most serious wound was an "incised wound" to her neck 15 centimeters in length and 2 centimeters in depth. This was a fatal wound because it penetrated "several vital organs and artery, carotid artery, jugular vein, trachea and esophagus." (V40, 1865). There were seven incised wounds to Canady's torso, including a stab wound which penetrated the right lung. (V40, 1866). Canady also suffered a number of incised wounds to her arms, which the medical examiner did not count: "Several. I didn't count the exact number because in the forearm there is multiple lacerations and cuts." (V40, 1870-71).

Canady had a cut on her finger which was consistent with her grabbing the knife or sharp object to prevent injury, a defensive wound. (V40, 1882). Also, cuts on her arm were consistent with defensive wounds from putting up her arms. (V40, 1883). The knife recovered from Pasha's van was

consistent with having caused the incised wounds found on victim Singleton. (V40, 1884).

Canady also suffered blunt trauma wounds, indicated by three to four medium sized lacerations of the scalp, with another on the left forehead. (V40, 1872). None of those blunt impact wounds would be fatal. (V40, 1872). Because Canady had thick hair, the force used to cause those injuries must have been significant. (V40, 1873). The broken bat recovered from Pasha's van could possibly have caused the blunt force injuries to Canady. (V40, 1884-85). All of the injuries inflicted upon Canady were inflicted when she was alive with the exception of some abrasions consistent with dragging the body. (V40, 1885).

Victim Reneesha Singleton suffered eight incised or stab wounds on or about her head and neck. (V40, 1887). The only fatal wound was a incised wound to the neck, seven centimetres in length and 1.5 centimeters deep, which transects the muscle of the neck and the "left jugular vein, left carotid artery and stops in the muscle on the - - around that." (V40, 1888-89). Singleton also suffered four wounds to her torso. (V40, 1889). Singleton, like, Canady, also suffered blunt impact wounds to her head, neck, and arms. (V40, 1890). The medical examiner counted a total of eleven such wounds to Singleton. (V40, 1891). Singleton's injuries were the result of the application

of considerable force. Her skull was fractured and her brain was bruised from the blunt force trauma. (V40, 1890). Her nasal bone was also fractured.

The stab and incised wounds were similar to those inflicted upon Canady but the daughter suffered more significant blunt impact trauma. (V40, 1892). The daughter also had wounds characterized as "defensive." (V40, 1892). Most of the wounds were inflicted while Singleton was alive with the exception of a single stab wound to the abdomen. (V40, 1893). The incised and blunt trauma wounds were "consistent" with having been inflicted by the baseball bat and knife recovered from Pasha's van. (V40, 1894).

D) Penalty Phase Facts

The State generally accepts the facts set forth in Pasha's brief as to the penalty phase, and notes that the trial court extensively summarized the evidence presented in its order imposing two death sentences for the murders of Reneesha Singleton and Robin Canady. (V11, 2141-57).

SUMMARY OF THE ARGUMENT

ISSUE I —- Pasha's morning of trial request to proceed pro se was properly denied as equivocal. After a thorough Faretta inquiry, Pasha vacillated and expressed a clear preference for counsel. Moreover, under the circumstances of this case, the trial court was well within its discretion not to entertain Pasha's day of trial request to proceed pro se, even if it had been clear and unequivocal. Pasha had either discharged or sought to discharge three sets of attorneys, elected to proceed pro se, then changed his mind and demanded counsel. By his conduct and vacillation on the issue of counsel, Pasha successfully delayed his trial for years.

When Pasha finally made his unequivocal request to proceed pro se, it was made after more than two days of jury selection, when strikes were about to be exercised by the attorneys. The trial court specifically made a finding that Pasha's request was untimely and made to delay his case. Once again, given Pasha's history of vacillation on counsel and the fact that the trial had been delayed for years [five years from the indictment] largely, if not entirely through Pasha's actions and demands surrounding representation by counsel, it cannot be said the trial court abused its discretion in denying Pasha's request.

ISSUE II -- Pasha's argument that Florida's death penalty statute is unconstitutional pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), is also without merit. This Court has consistently rejected Pasha's argument on the merits. Similarly, this Court has repeatedly rejected Pasha's argument that Florida's death penalty statute is unconstitutional because it allows non-unanimous jury recommendations.

ARGUMENT

ISSUE I

WHETHER APPELLANT WAS DENIED HIS RIGHT TO SELF-REPRESENTATION GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

Pasha asserts that the trial court erred in failing to grant him the right to represent himself during his capital murder trial. The State disagrees.

A) Preliminary Statement On Applicable Legal Standards

i) *Standard of Review*

There are two aspects of legal rulings at issue here, whether or not the trial court erred in finding Pasha's request for self-representation equivocal at the beginning of trial, and, second, whether the trial court erred in finding Pasha's subsequent unequivocal request untimely because it was made after the trial had started. It is the State's position that each of these rulings is subject to an abuse of discretion review on appeal. Holland v. State, 773 So. 2d 1065, 1069 (Fla. 2000)("A trial court's decision as to self-representation is reviewable for abuse of discretion."); Kearse v. State, 605 So. 2d 534, 537 (Fla. 1st DCA 1992)("trial court's ruling on the issue of self-representation is reviewed for an abuse of discretion). De novo review does not recognize the superior

vantage point of the trial court and provides insufficient deference to the trial court who is faced with making a judgment call between two competing and conflicting rights. Fields v. Murray, 49 F.3d 1024, 1030-32 (4th Cir. 1995)(en banc)(because of trial court's superior ability to evaluate factors such as the manner in which a statement is made the question of whether the defendant made an unequivocal invocation of the right to self-representation is a finding of fact for habeas corpus review); People v. Marshall, 13 Cal.4th 799, 919 P.2d 1280 (Cal. 1996)(a motion for self-representation not made a reasonable time prior to trial is addressed to the sound discretion of the trial court); Robards v. Rees, 789 F.2d 379, 384 (6th Cir. 1986)(applying abuse of discretion standard to the denial of day of trial request for self-representation).

ii) *The Conflict Between The Right To Counsel And The Right To Proceed Pro Se*

Courts have recognized the tension between the right to counsel and the right to proceed pro se under the Sixth Amendment of the Constitution. Of the two rights, however, courts have generally held that the right to counsel is preeminent given the inherent and obvious disadvantages a criminal defendant has in conducting his or her own defense. As noted by U.S. v. Singleton, 107 F.3d 1091, 1096 -1097 (4th Cir.

1997) the tension between the two rights often requires a trial court to walk a "fine line":

> In order to preserve both the right to counsel and the right to self-representation, a trial court must proceed with care in evaluating a defendant's expressed desire to forgo the representation of counsel and conduct his own defense.
>
> A trial court evaluating a defendant's request to represent himself must "traverse ... a thin line" between improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. A skillful defendant could manipulate this dilemma to create reversible error.
>
> *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir.1995) (en banc) (citations omitted). Of the two rights, however, the right to counsel is preeminent and hence, the default position. *Id.* at 1028; *United States v. Gillis*, 773 F.2d 549, 559 (4th Cir.1985); *Tuitt*, 822 F.2d at 174 ("Where the two rights are in collision, the nature of the two rights makes it reasonable to favor the right to counsel which, if denied, leaves the average defendant helpless").

Indeed, the Supreme Court has instructed courts to "indulge in every reasonable presumption" against waiver of counsel. Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L.Ed.2d 424 (1977); See also Patterson v. Illinois, 487 U.S. 285, 307, 108 S. Ct. 2389, 101 L.Ed.2d 261 (1988)(the Court noted the "strong presumption against" waiver of the right to counsel). Consequently, a defendant who asserts his right to proceed pro se must "clearly and unequivocally" waive the right to counsel.

Stano v. Dugger, 921 F.2d 1125, 1144 (11th Cir. 1991)(en banc), cert. denied, 502 U.S. 835 (1991).

B) The Trial Court Did Not Abuse Its Discretion In Refusing To Discharge Counsel After A Pre-trial Faretta Hearing Because Pasha's Request Was Equivocal And He Expressed His Clear Preference For Representation By Counsel

While it is "well settled" that an accused has the right to proceed proceed pro se, "it is also settled that the defendant must unequivocally elect to represent himself." Aguirre-Jarquin v. State, 9 So. 3d 593, 602 (Fla. 2009)(citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975) and State v. Craft, 685 So. 2d 1292, 1295 (Fla. 1996)). See also Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988)(a request for self-representation must be stated unequivocally.). An equivocal, vacillating, or uncertain request for self-representation is not sufficient to waive the assistance of counsel.

Appellant's counsel misreads the record when he states that Pasha unequivocally indicated that he wanted to represent himself prior to trial. During the Monday October 17, 2007 hearing, Pasha indicated that he was unhappy with Mr. Sinardi's representation and that he wanted him removed from his case. Pasha indicated he had no problem with one of his two appointed attorneys, Mr. Fraser and, that his only concern or problem was

with the perceived inattention or incompetence of Mr. Sinardi. Pasha also indicated he and Sinardi differed over defense strategy. When asked about removing Mr. Fraser, Pasha clarified: "No, no, not Mr. Fraser." (V28, 367). Pasha indicated that he had discussed this case probably more with Mr. Fraser than anyone else. (V28, 367). At no point during the October 17th hearing did Pasha request to represent himself. Not only was Pasha's request for self-representation on October 17th clearly not unequivocal, it was not even equivocal based on this record.

The trial court properly denied Pasha's motion to discharge Sinardi on the "eve" of trial based upon his allegation of incompetence. Indeed, based upon this record, and, Pasha's record of firing competent counsel, proceeding pro se, and, then changing his mind on the "eve" of a prior trial date, it can be said this was an abusive and obvious attempt to delay his long overdue trial. Jones v. State, 449 So. 2d 253, 259 (Fla.), cert. denied, 469 U.S. 893, 105 S. Ct. 269, 83 L.Ed.2d 205 (1984)("[A] defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices [of self-representation and appointed counsel]"); Harris v. State, 979 So. 2d 372, 376 (Fla. 4th DCA 2008)(concluding the ambiguous

complaints about counsel on the "eve" of trial was simply a "delay tactic.").

Once the trial court denied Pasha's attempt to fire his third set of attorneys, Pasha did not make any request to proceed pro se during the October 17th hearing. Pasha was clearly mulling his options, stating:

> As a right - - I have a right to have a lawyer appointed to me if I can't afford one. I also have the right not to have a lawyer to sit with me if I don't want to."

(V28, 384). The court then went on to state that the issue before the court was the motion to discharge counsel, and, to put anything else in writing that he wanted and he would hear it before trial. (V28, 384).

Appellate counsel's suggestion that Pasha was about to invoke his right to represent himself during the October 17th hearing (Appellant's Brief at 38), only to be cut off by the trial court, is not only speculative, it is contradicted by the fact that during numerous pretrial hearings, Pasha was not the least bit hesitant to express himself. Moreover, the October 17th hearing did not conclude at the point Pasha made those remarks, with the court continuing to discuss pretrial evidentiary and jury selection matters. (V28, 386-405). At no point during the remainder of the hearing did Pasha ask to be

heard or otherwise indicate he desired to proceed without counsel.

Rather than immediately asserting his desire to proceed pro se, or, putting a request for self-representation in writing, Pasha waited five days, until October 22nd, the day the trial was scheduled to start, to make his request to proceed pro se. Even though at this point the trial court would certainly have been able to question the timelines of Pasha's request to represent himself, the trial court, nonetheless, was prepared to discharge counsel and let Pasha represent himself.[10] Given the history of this case and the previous judge's warning to Pasha that he was not going to let him "game" the system and delay his case further by maneuvering around Nelson and Faretta, the trial court would have been well within its discretion to deny a Nelson and Faretta hearing altogether.

As observed by the Fourth District in Tyler v. State, 945 So. 2d 662, 663-64 (Fla. 4th DCA 2007):

> This and other appellate courts have made clear that they will not permit the right to counsel to be used "for the sake of arbitrary delay or to otherwise subvert judicial proceedings." *Foster v. State*, 704 So.2d 169, 173 (Fla. 4th DCA 1997) (*citing Holley v. State*, 484 So.2d 634, 636 (Fla. 1st DCA 1986)). "Judges must be vigilant that requests for appointment of a new attorney on the eve of trial should not

[10] The court told Pasha he was making a "terrible mistake" but that it was his "constitutional right" to proceed pro se. (V29, 453).

> become a vehicle for achieving delay." *Id.* Here, the record supports the trial court's determination that Tyler's *Nelson* and *Faretta* maneuverings were an attempt to delay prosecution, rather than a genuine exercise of rights under those cases.

The court in Tyler noted that the defendant's complaints regarding counsel were an obvious attempt to delay trial in a case in which he was caught "red handed." Id.

Similar to Tyler, Pasha was literally caught "red handed" leaving the scene of the murder with the victims' blood on him, his Tyvek suit, boots, bat and knife in the van. Pasha was also observed at the scene of the murders wearing the white jumpsuit and boots covered in blood and holding a shiny object. Pasha's counsel completely ignores the history of this case and Pasha's machinations concerning counsel and pro se status. Pasha's legal maneuvers had already been successful in delaying his conviction and resulting punishment for several years. In fact, two previous judges on this case had questioned whether Pasha's tactics were employed to deliberately delay his trial.

After a continuance was requested by Pasha on the eve of a previous trial date in 2006, with Pasha claiming he was unprepared, Judge Padgett stated: "You'll never be any more prepared. I can see the writing on the wall, and I think you can too." (SV-13, 390). Judge Padgett continued: "No you've had too many opportunities to be prepared." Id. Finally, Judge

Padgett advised Pasha that if he continued the trial [as he ultimately did at Pasha's request] "the next time it comes up, you're going to trial" and that the court would not entertain any excuse concerning the jail's one box rule.[11] (SV-13, 387).

In a hearing to discuss pretrial matters before yet another approaching trial date before the Honorable Judge Timmerman, Pasha changed his mind regarding self-representation. Pasha now stated that he wanted a lawyer to represent him. "I always wanted counsel to represent me. I never wanted to be pro se. I am pro se because I was forced to be pro se." (SV-11, 359). After Pasha disavowed his pro se status and requested counsel, Judge Timmerman noted that Pasha had previously discharged every single appointed lawyer and that at a number of prior Faretta hearings Pasha claimed he did not want a lawyer and now "you said you do." (SV-11, 359). Judge Timmerman openly questioned whether or not Pasha was employing a deliberate strategy of delay:

> This is going to necessitate - - but Mr. Harb, as you know, if we do this we are basically starting from

[11] At yet another hearing on January 15, 2005 when Pasha represented himself Pasha asked for an extension of the scheduled March trial date, stating: "Because of these new motions that's coming up and other things that happened, I would like an extension on my trial date from March." (SV-6, 190). The court granted Pasha a continuance and when asked about a trial date, Pasha stated that he did not want the court "to put it on the trial docket, please." (SV-6, 191-92).

> scratch. This case is never going to get to trial. I am beginning frankly, beginning to wonder, Mr. Pasha you are not a stupid person. You say you don't want a lawyer then you say you do. You don't want one then you do. What you are doing is dragging the case out.

(SV-11, 361-62). When Pasha stated that it wasn't his intention to delay the case, the court stated the following:

> I am going to tell you right now. You are going to get one more shot at having a lawyer represent you. Whoever is appointed is going to be qualified. I am going to see to that. After that you are going to find it very difficult to fire somebody else and start the game all over again. You are going to find it very difficult. Therefore, I am going to ask you again. We will sit here and give you time to think. Have you decided in your mind that you now again want an attorney to represent you in this case?

(SV-11, 362)(emphasis added).

Despite Judge Timmerman's prior admonition to Pasha, Pasha waited until the scheduled date of trial to make his request, equivocal as it was, to discharge counsel before yet another judge. Under the circumstances of this case, the trial court was well within its discretion not to entertain Pasha's morning of trial request to proceed pro se, even if it had been clear and unequivocal. Pasha had either discharged or sought to discharge two previous sets of attorneys, elected to proceed pro se, then changed his mind and demanded counsel. Pasha was indicted on September 4, 2002, and his machinations surrounding counsel and electing to proceed pro se were entirely responsible for delaying his trial until October of 2007, more than five

years. (V1, 52-53). The latest request was clearly a delay tactic, an attempt to evade yet another trial date in a case wherein the State possessed overwhelming evidence of his guilt, and, to which he had no defense. Certainly, at some point, the people of the State of Florida were entitled to have Pasha answer for his crimes.

In Haram v. State, 625 So. 2d 875 (Fla. 5th DCA 1993), rev. denied, 634 So. 2d 624 (Fla. 1994), the defendant "caused" the discharge of two prior court-appointed counsel and then requested the court relieve the public defender and appoint a private attorney. The trial judge refused and the defendant stated that he desire to represent himself, which the court also denied. On appeal, the Haram court held that the trial judge was not required to allow the defendant to represent himself where his various conflicting requests respecting his representation were not made in good faith, but were designed solely for the purpose of delaying the proceedings "**which had already stretched 17 months from arrest to trial**." Haram, 625 So. 2d at 875. (emphasis added).

Similarly, vacillation and the potential for manipulation was cited in State v. Crosby, 6 So. 3d 1281, 1286 (La.App. 2 Cir. 2009) for upholding the denial of a request for self-representation. The court stated:

> In the instant case, both of the district judges who considered this issue concluded that defendant's vacillation concerning self-representation was merely an effort to manipulate the legal system and to foment a reversible error in the proceedings. Defendant affirmed in December 2007 that he would be happy to have the ID office represent him "if they will meet my criteria." However, on the first day of the trial, defendant insisted upon his right to represent himself and disrupted the proceedings with allegations that, among other things, he had not received all of the relevant material in discovery. The record amply supports the conclusion that defendant's insistence on self-representation, made on the morning of trial, was merely an effort to create an error in the trial proceedings which defendant might later raise in a higher court. Defendant's request to represent himself was equivocal, not genuine or sincere, and untimely. *See State v. Santos*, 99-1897 (La.09/15/00), 770 So.2d 319.

Crosby, 6 So. 3d 1281, 1286 (La.App. 2 Cir. 2009).

Given the history of this case, of which the trial court was generally aware, the trial court would be well within its discretion to outright deny Pasha's day of trial demand to proceed pro se. Instead of denying Pasha's request out of hand as untimely and abusive, the court embarked upon a thorough Faretta inquiry. The trial court informed Pasha of the advantages of having a lawyer and the disadvantages of proceeding pro se, an inquiry which had been previously conducted numerous times with Pasha.

Appellant's counsel focuses, understandably, on Pasha's statements prior to the Faretta inquiry in which he did indicate unequivocally a desire for self-representation. (Appellant's

Brief at 38-39). However, Appellant's counsel largely ignores Pasha's responses to the trial court's inquiry; the responses which the trial court found equivocal.[12] That is, of course, the point of requiring a Faretta inquiry, to advise the defendant of what he is giving up by discharging counsel and to give the defendant an opportunity to change his or her mind.

At the conclusion of the Faretta inquiry, the trial court asked Pasha if he would like a lawyer to represent him; Pasha vacillated. When the court asked Pasha if he understood the advantages and disadvantages of counsel, Pasha replied that it was "wiser" to have a lawyer" but that he did not believe "Sinardi put forth the effort in my situation." (V29, 472). And, when the trial court specifically asked whether or not Pasha wanted a lawyer, Pasha replied: "**Yes sir**. But I don't have the choice to pick who I want so it means obvious the only other alternative is to be pro se." (V29, 472-73). The trial court then advised Pasha that such a request was equivocal and asked Pasha: "Are you absolutely certain that you do not want to continue with an appointed lawyer?" (V29, 473). "**As I stated I would love to have a lawyer definitely I would rather have a lawyer**." (V29, 473) Pasha added: "But apparently I

[12] If Pasha had maintained a consistent desire for self-representation, the court would probably have discharged counsel even at this late date.

don't have that choice." (V29, 473-74). It was at this point the court denied Pasha's request, noting that the court could did not find a knowing, voluntary waiver of counsel. See Meeks v. Craven, 482 F.2d 465, 467 (9th Cir. 1973)("An 'unequivocal' demand to proceed pro se should be, at the very least, sufficiently clear that if it is granted the defendant should not be able to turn about and urge that he was improperly denied counsel.").

The trial court observed that Pasha had not unequivocally stated he wanted to proceed pro se, that, more accurately, he simply was uncomfortable with Mr. Sinardi's representation. (V29, 474-75). This was merely a continuation of Pasha's baseless complaints about Sinardi and did not represent a clear invocation of his right to proceed pro se. See Gibbs v. State, 623 So. 2d 551, 553-54 (Fla. 4th DCA 1993)(statements made after refusing to discharge counsel on grounds of incompetence that I "want to fight" pro se and relieve him "I [will] to this myself" was an emotional response to the trial court's refusal to appoint substitute counsel and did not mandate a Faretta inquiry).

A defendant like Pasha who vacillates between expressing a desire to represent himself and expressing a desire to be represented by counsel places the trial court in a difficult

position. See Meeks v. Craven, 482 F.2d 465, 467 (9th Cir. 1973)("We can find no constitutional rationale for placing trial courts in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules."). If the court had discharged counsel on these facts Pasha could legitimately claim on direct appeal that he had been unfairly denied the right to counsel, i.e., that he was forced into defending himself on a double homicide case on the first day of trial despite stating that he wanted an attorney, would "love" to have counsel and that it was "wiser" to proceed with counsel. Fortunately, appellate courts generally take the legal tightrope a trial court must walk into account in placing a burden upon a defendant to make an explicit choice, and, if he equivocates, as Pasha did in this case, he has presumed to have continued in his desire for counsel. U.S. v. Miles, 572 F.3d 832, 836-37 (10th Cir. 2009)(noting the potential for reversible error no matter how the trial court rules, on self-representation). Because a waiver of the right to counsel should not be lightly inferred, a defendant's election to represent himself must be clearly and unequivocally asserted. See Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L.Ed.2d 424 (1977)(courts should "indulge in every reasonable

presumption against waiver" of the right to counsel); Aguirre-Jarquin, 9 So. 3d at 602 (it is well "settled that the defendant must unequivocally elect to represent himself.").

In Hardwick v. State, 521 So. 2d 1071, 1073 (Fla. 1988)this Court found no error in refusing to let a defendant represent himself at trial, in part, because the defendant's request for self-representation was not clear and unequivocal. This Court stated:

> During the course of the proceedings below, Hardwick complained to the court about the alleged incompetence of his trial counsel. The court conducted hearings on this question. On each occasion, Hardwick stated that he felt unable to conduct his own trial, but would rather do so than proceed with his court-appointed counsel. However, Hardwick also emphasized that he did not wish to act pro se. Partly because of the ambiguity of Hardwick's statements, the court denied Hardwick's requests. (emphasis supplied).

Hardwick, 521 So. 2d at 1073.

Pasha's reliance upon State v. Modica, 136 Wash.App. 434, 442, 149 P.3d 446, 450-51 (Wash.App. Div. 1 2006) is misplaced. First, the court was reviewing Modica's challenge to the trial court's ruling allowing him to discharge counsel and proceed pro se. The court was therefore employing an abuse of discretion review in favor of the trial court's ruling discharging counsel as opposed to the posture of this case, with Pasha challenging the trial court's ruling below. The Modica court recognized that the defendant made "a strategic choice to assert his right

to self-representation in order to proceed to trial more quickly than the four to six weeks it would take his new attorney to adequately prepare." Notably absent from the opinion are any words of vacillation or equivocation that Pasha used in this case e.g., "love to have an attorney." Consequently, Modica does not support finding an abuse of the trial court's discretion in this case.

Even after the court advised Pasha that it was finding his request equivocal, Pasha did not clarify or fortify his request to discharge counsel and represent himself. If anything, Pasha appeared to retreat from his request for self-representation: "As I stated I would love to have a lawyer definitely I would rather have a lawyer." (V29, 473). Thus, Pasha expressed a clear preference for representation by an attorney. Reese v. Nix, 942 F.2d 1276 (8th Cir. 1991)(statement that he did not want "no counsel then" was more likely an expression of frustration with the trial court's refusal to substitute counsel rather than invocation of the right to self-representation); State v. Woods, 143 Wash.2d 561, 588, 23 P.3d 1046, 1062 (Wash. 2001) (defendant's statement was not an unequivocal expression of the desire to represent himself but frustration at the delay of his trial).

Pasha's counsel ignores the prior history of this case, which establishes that Pasha knew how to invoke his right to self-representation, and, in fact, had previously invoked that right. Unlike Pasha's last request though, his previous requests and, in particular, his responses to prior Faretta inquiries were not at all ambiguous or equivocal. Appellant's contention that the conflicting statements made by Pasha on the eve of trial were the understandable result of frustration emanating from his conflict with counsel, is not an excuse for Pasha's failure to clearly and expressly waive his right to counsel. See e.g. V-18, 148 (after extensive Faretta inquiry when finally asked if he was certain he did not want to continue with counsel, Pasha replied: "Yes, sir."); SV-10, 287 (At the conclusion of the Faretta inquiry when the court asked if Pasha was certain he did not want the court to appoint an attorney for him, Pasha replied: "Yes sir."); SV-5, 174 (After offer of counsel, Pasha declined, stating: "No, sir. Thank you."). Pasha's responses on the morning of the scheduled trial are clearly equivocal in light of Pasha's responses to previous Faretta inquiries.

Given Pasha's equivocal responses to the trial court on the morning of trial, it cannot be said the trial court abused its discretion in refusing to discharge counsel. Pasha expressed a

clear preference for representation by counsel. Furthermore, on this record, Pasha's continued maneuvers surrounding counsel were nothing more than a further attempt to delay his trial and the forseeable outcome.

C) The Trial Court Did Not Abuse Its Discretion In Denying Pasha's Request For Self-Representation Where That Request Was Only Made After Two Days Of Voir Dire And Was Therefore Untimely And Dilatory

Finally, after jury selection had been under way for more than two days, Pasha sent a note to the judge, asking for an in camera hearing, stating, in relevant part:

> "I cannot in good faith put my life in the hands of someone who's simply working for money which I am paying and not for justice. It's my firm and final decision, I want to proceed pro se."

(V34, 1021).

When the judge asked Mr. Sinardi to comment, he responded by saying he was not sure it applied simply to him or Mr. Fraser, or "all of us, I'm not clear." (V34, 1022). Pasha clarified his request, stating that he only wanted to fire Mr. Sinardi. (V34, 1022). The trial court then noted the tangled history of this case, where Pasha had previously decided to proceed pro se, then requested counsel, and, had gone through two [in fact, numerous] prior Faretta inquiries, and found the request untimely.

The trial court did not abuse its discretion in finding his request untimely when it came after more than two days of jury selection. Pasha's conduct in repeatedly firing, or seeking to fire competent defense attorneys, proceeding pro se, and, changing his mind, had delayed the start of his trial for years. Moreover, as further colloquy developed, it is clear that Pasha was not truly invoking his right to proceed pro se, but, wanted a hybrid arrangement, clearly expressing his desire to retain attorney Fraser.[13] (V29, 456; V34, 1022). Pasha had no right to such a hybrid arrangement, even if he had made a timely request for such an arrangement before the trial court. See Mora v. State, 814 So. 2d 322, 328 (Fla. 2002)(defendant has no right to "hybrid representation at trial.")(citing McKaskle v. Wiggins, 465 U.S. 168, 183, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984) and State v. Tait, 387 So.2d 338, 340 (Fla. 1980)).

Under the circumstances of this case, the trial court did not abuse its discretion in finding the request untimely and for the purpose of delay. The trial court stated, in part: "We

[13] While Fraser was appointed to handle the penalty phase he also participated in pretrial proceedings and jury selection on guilt phase matters. Fraser argued guilt phase pretrial matters such as relevance of a ski cap found at the scene, (V28, 396), testimony concerning a knife (V28, 402) and moved to exclude reference to the gun found in Pasha's van. (V28, 403-04). Thus, Pasha's request to proceed pro se remained equivocal if he was suggesting some type of hybrid arrangement as it appears from this record.

have now spent two and one half days in jury selection. Beyond what you've written in here you've chosen to say no more **it's my impression that you're simply trying to delay the proceedings**." (V34, 1023-24). While Pasha maintains that he was not seeking a delay or continuance, the history of this case suggests otherwise.

In seeking to fire Sinardi one week prior to trial, Pasha was well aware that substituting attorneys will buy him extra time, as it clearly had each time he had employed this maneuver in the past. Moreover, taking this history into account, the trial court was well advised to be skeptical when Pasha asserted he did not "intend" to delay the case, particularly when Pasha once again complained that he could be ready if only he had "access" to his materials. (V29, 462). Pasha complained that it was "late," that Sinardi did not have one witness to call on his behalf, "not one." (V34, 1114-16). When asked why he did not give this named witness or witnesses to Sinardi, Pasha explained "I did" but "it was late" and "there's other things." Id. Consequently, while Pasha claimed he did not "intend" to delay the case, the trial court was certainly entitled to assume that Pasha would need or expect a delay to prepare his defense. Thus, contrary to Pasha's assertion, the record as a whole suggests that Pasha's request was intended to delay his trial.

Appellant's counsel attempts to minimize the history of Pasha's gamesmanship on the issue of counsel by suggesting Pasha was chastised or browbeaten into finally requesting counsel after his earlier election to proceed pro se. (Appellant's Brief at 55). However, an examination of the record establishes that the court and the State bent over backward to facilitate Pasha as pro se counsel.[14] The court properly advised Pasha he was at a disadvantage because he chose to represent himself and did repeatedly renew the offer of counsel. When it finally appeared Pasha was running out of time and would have to go to trial on his own, Pasha requested assistance of counsel, knowing full well his election would serve to delay his case.

Pasha's reliance upon Fleck v. State, 956 So. 2d 548 (Fla. 2d DCA 2007) and Lyons v. State, 437 So. 2d 711 (Fla. 1st DCA 1983) is misplaced. Those cases did not address a defendant like Pasha who had fired, or attempted to fire every single competent attorney who had represented him. After firing two sets of attorneys, Pasha elected to proceed pro se, represented

[14] The only restriction on Pasha which was a point of contention was Pasha's desire to have all boxes of material [4 or 5] at the same time. For safety and security, jail policy only allowed inmates to have one box of material at a time. The jail was not going to change its policy for Pasha, who had been found with contraband in his cell, including a razor, and, who had previously escaped or attempted to escape from an Indiana prison. (SV-10, 304-05, 321, 331)

himself for two years, then, requested and received yet another pair of experienced capital litigators, only to attempt to fire lead counsel on the eve of trial. Again, Pasha's tactics had already delayed his trial for five years from the date of his indictment.

The Second District in Fleck found it dispositive that the trial court did not find, nor, did the record support any suggestion the defendant was seeking to delay or disrupt his case. The Fleck court stated:

> We cannot agree with the State's argument. The trial court made no finding that Fleck was improperly attempting to delay and frustrate the proceedings, and it does not appear that Fleck had engaged in previous behavior designed to do so. Further, his responses to the trial court's questions as to his desire to self-represent do not support such a conclusion.

Fleck, 956 So. 2d at 550 (emphasis added). That situation stands in stark contrast to this case, where the court specifically found Pasha was not sincere in his request and was simply seeking to delay the proceedings, a finding which has ample support in the record.

Potential jurors had been sworn and had been subject to extensive voir dire examination by Pasha's defense attorneys and the prosecutor at the time Pasha made his request to represent himself. See United States v. Walker, 142 F.3d 103, 109 (2d Cir. 1998)(the defendant's request for self-representation was

untimely although he made it before empaneling of the jury because he asserted the request after nineteen days of voir dire). Pasha's attempt to explain or excuse his delay in seeking to discharge counsel and proceed pro se based upon a difference in strategy which only occurred close to trial is less than convincing on this record. Indeed, Pasha's first letter seeking to fire the experienced public defender assigned to his case in October of 2003, raised a similar complaint: "4. Counsel of record have made accusations to me that they believe that Petitioner is guilty, while stating that he had not reviewed all of the discovery; 5. Petitioner, believe that with such a negative mind set, it would be impossible for Counsel of Record, Mr. Kenneth Littman to put forth a serious defensive endeavor." (V1, 197). Thus, rather than a legitimate last minute difference in strategy, it seems that Pasha was simply engaging in a similar complaint that his attorney did not believe in his innocence in a ploy to obtain substitute counsel and indefinitely delay his trial.[15] See State v. Young, 626 So. 2d 655, 657 (Fla. 1993)(while finding the court erred in not conducting a Faretta inquiry, this Court stated: "Our cases make clear that a trial judge is not compelled to allow a

[15] Ultimately, Pasha acquiesced to representation by counsel and was observed assisting counsel during the trial. (V36, 1375-1376).

defendant to delay and continually frustrate his trial."); U.S. v. Frazier-El, 204 F.3d 553, 560 (4th Cir. 2000)(defendant's motion to proceed pro se properly denied because defendant's waiver of counsel was a tactic for delay and an attempt to manipulate the system).

Once again, Pasha was in an untenable legal situation. Pasha, as more than one judge assigned to this case had opined, may have viewed delay as his best and only tactic of defense to these capital murder charges. Under these circumstances, Pasha's demand, made after more than two days of jury selection, was abusive, dilatory and properly denied. See United States v. Edelman, 458 F.3d 791, 809 (8th Cir. 2006)(no abuse of discretion in denying defendant right to represent himself when request was made five days before start of scheduled trial and was done to delay or disrupt trial); Hirschfield v. Payne, 420 F.3d 922, 927 (9th Cir. 2005)(state court ruling denying self-representation for defendant one day prior to trial was not unreasonable where defendant had moved several times to substitute counsel and every time he moved for a new attorney it was "close to trial.").

This Court has not specifically formulated a bright line in which a request for self-representation must be considered timely. Pasha urges this Court adopt a narrow rule, finding

timely any request made prior to the swearing and empanelment of the jury. However, Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975), does not compel or even suggest such a timeline as a matter of federal constitutional law. Faretta involved a defendant who "clearly and unequivocally" invoked his right to self-representation "weeks" prior to trial. See Marshall v. Taylor, 395 F.3d 1058, 1061 (9th Cir. 2005)("Because the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely."). The bright line suggested by Pasha ignores the realities of criminal litigation, and, capital litigation in particular, with complex cases, in which an accused is in no position to represent himself or herself, at the last minute prior to the jury being selected and empaneled. A trial judge should have discretion to deny a request for self-representation which comes at the veritable twelfth hour, as in this case, after two days of jury selection, immediately prior to the prosecutor and defense attorneys exercising cause and peremptory challenges.[16] See United States v. Dunlap, 577 F.2d 867, 868

[16] Pasha states that he exhibited exemplary behavior during trial. However, this is not entirely correct. The prosecutor was advised by his investigator that Pasha was "mouthing to her

(4th Cir. 1978)(a defendant does not have an absolute right to dismiss counsel and proceed pro se after trial has begun because of need "to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury"); United States v. Lawrence, 605 F.2d 1321 (4th Cir. 1979)(where defendant asserts right to self-representation after jury had been selected but not sworn, decision to allow defendant to proceed pro se rests in the sound discretion of trial court).

Meaningful trial proceedings have begun in this case where the jury panel had been sworn and extensive voir dire had been conducted through counsel. The Supreme Court has held that voir dire is "a critical stage of the criminal proceeding" and that trial "commences" when the work "of empanelling the jury begins." Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L.Ed.2d (1989)(citations omitted). While there is a split of authority among jurisdictions on the question of timeliness, in the State's view, the better policy is to vest a trial court with discretion to deny a day of trial request as

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[Felicia, the daughter of victim Canady and sister of victim Singleton] on the witness stand, so I've asked the deputy to" - - (V37, 1489). In fact, one juror brought this to the attention of the court and parties, noting that while Felicia was testifying, Pasha "was clenching his fist and you could really tell that he was making threatening comments to her and just - - it just made me uncomfortable. Both times he came up to - - he had his fists raised and clenched." (V37, 1493).

untimely.[17] Indeed, this is the view followed by a number of jurisdictions, with several applying a reasonable time prior to trial standard. See e.g. People v. Frierson, 53 Cal.3d 730, 742, 808 P.2d 1197 (Cal. 1991)(applying a "reasonable time prior to trial" standard and finding defendant's request untimely where request was made "on the eve of trial over 10 months after counsel had been appointed."). See also United States v. Edelmann, 458 F.3d 791, 808-09 (8th Cir. 2006)(finding the trial court acted within its discretion in denying request for self-representation in part because it was made four or five days before trial); United States v. Smith, 413 F.3d 1253, 1280-81 (10th Cir. 2005)(finding request for self-representation untimely when made six days before trial, trial had already been continued, and allowing self-representation would necessitate

[17] As explained by the California Supreme Court in People v. Jenkins, 22 Cal.4th 900, 959, 997 P.2d 1044, 1085, 95 Cal.Rptr.2d 377, 422 (Cal. 2000):

> ...When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion." (*People v. Bradford, supra*, 15 Cal.4th at p. 1365, 65 Cal.Rptr.2d 145, 939 P.2d 259.) In exercising this discretion, the trial court should consider factors such as "'the quality of counsel's representation of the defendant, **the defendant's prior proclivity to substitute counsel**, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" (emphasis added)(string cites omitted).

yet another continuance to give defendant time to prepare); Robards v. Rees, 789 F.2d 379, 384 (6th Cir. 1986)(request not timely where the "clerk had called the roll of jurors before Robards made his request for self-representation."); Stenson v. Lambert, 504 F.3d 873, 884 (9th Cir. 2007)(state court denial of motion for self-representation "made on the morning trial began as untimely was neither contrary to nor an unreasonable application of clearly established federal law...").

The Supreme Court of Minnesota determined that commencement of voir dire constituted the initiation of meaningful trial proceedings for the purpose of invoking the right to self-representation and questioned the precedential value of those cases which find timely any request made prior to the swearing of the jury. State v. Christian, 657 N.W.2d 186, 192-93 (Minn. 2003). The court stated:

> Although this latter line of cases suggests that "meaningful trial proceedings" do not occur until the jury is sworn, none of these cases actually involved a motion for self-representation that was made after jury selection had begun. Thus, their focus on jury empanelment is made in the abstract and, in our view, is based on an incomplete analysis. In fact, we have only found a single case dealing with a self-representation motion that was made during jury voir dire and that case held that "meaningful trial proceedings" commenced with the beginning of jury selection. *See Robards v. Rees*, 789 F.2d 379, 382 (6th Cir.1986) (holding a self-representation request untimely where made after voir dire had begun, but before the jury had been empaneled). The court ruled the motion untimely and recognized the discretion of

the district court to deny it, stating that defendant Robards' self-representation request, if granted,

> would have impermissibly delayed the commencement of the trial. The clerk had called the roll of jurors before Robards made his request for self-representation. Had the request been granted, the trial judge would have been obliged to postpone the commencement of the trial for an extended period of time in order to allow Robards a sufficient amount of time to prepare his defense. It was within the discretion of the trial judge to deny Robards' request. His denial was not an abuse of discretion. Moreover, this Court believes that this denial by the state court was not tantamount to a constitutional violation.

Id. at 384.

We reached a similar conclusion in an analogous situation in *State v. Worthy*, 583 N.W.2d 270 (Minn.1998). In *Worthy*, two defendants expressed dissatisfaction with their court-appointed attorneys and moved for substitute counsel during jury voir dire. *Id.* at 274. We held that this motion was untimely, stating that it was made "on the morning of trial." *Id.* at 278-79.

We conclude that, for the purpose of applying the *Wesley* standard, trial begins at the commencement of jury voir dire. Thus, when a self-representation motion is made after jury voir dire begins, the district court must exercise its discretion to balance "the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." *Wesley*, 798 F.2d at 1155-56.

Christian, 657 N.W.2d at 192.

In Russell v. State, 270 Ind. 55, 62-63, 383 N.E.2d 309, 314-15 (Ind. 1978), the Supreme Court of Indiana provided a

cogent analysis of its reasons for finding "morning of trial" requests untimely. The court stated, in part:

> . . .We thus think that the defendant's right to counsel will be best respected if we require a pre-trial assertion of the self-representation right, so that it can be the subject of a pre-trial hearing and inquiry. Finally, the orderly administration of the courts will be facilitated by such a requirement. Day of trial assertions of the self-representation right, whether before or after empaneling of the jury, disrupt the time schedules of judges, counsel, and potential jurors, all who have been assembled for the occasion, and who can be assembled only at the expense of extra time and money. The counsel waiver inquiry on the day of trial may also disrupt the time schedules of other matters on the court's schedule, which have been planned around the present trial.

Russell, 270 Ind. 55, at 62-63, 383 N.E.2d at 314–15.

In any case, even those jurisdictions which generally presume any request made prior to the swearing of the jury is timely allow the lower court to reject the assertion if it appears the demand is made to simply delay or disrupt the proceedings. For example, in Chapman v. United States, 553 F.2d 886 (5th Cir. 1977), the Court held that a defendant's right of self-representation is unqualified if the defendant asserts that right before the jury is empaneled, **absent any indication that the defendant is attempting to delay the proceedings**. Chapman, 553 F.2d at 895 ("Finally, there is no suggestion in the record that Chapman's assertion of his pro se right was designed to achieve delay or tactical advantage, that it would in fact have

resulted in any delay, or that the trial court denied Chapman's request on the assumption that it would result in delay."). *Sub judice, t*he trial court made a finding that Pasha's request was dilatory. Consequently, the cases in which a defendant makes a good faith attempt to invoke the right to self-representation prior to the jury being sworn have no application here.

In conclusion, the trial court was well within its discretion to deny Pasha's request to proceed pro se when it was untimely, dilatory, and merely an extension of his earlier and baseless complaints about counsels' competence. See People v. Ruiz, 142 Cal.App.3d 780, 792, 191 Cal.Rptr. 249 (1983) (When a trial court exercises its discretion to deny a motion for self-representation on the grounds it is untimely, a reviewing court must give "considerable weight" to the court's exercise of discretion and must examine the "total circumstances" confronting the court when the decision is made.). Under the unique circumstances confronting the court in this case, it cannot be said the trial court abused its discretion in denying Pasha's request to proceed pro se.

ISSUE II

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLE OF THE CIRCUIT JUDGE OVER THE TRIAL JURY IN THE DECISION TO IMPOSE A DEATH SENTENCE, AND WHICH ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY (7-5) VOTE OF THE JURORS, IS CONSTITUTIONALLY INVALID?

Pasha challenges the trial court's denial of his motion to declare Florida's death penalty statute facially unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). Pasha also contends that allowing a non-unanimous death recommendation renders Florida's capital sentencing scheme unconstitutional. As this is a purely legal issue, appellate review is *de novo*. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

Pasha's arguments have been consistently rejected by this Court. See State v. Steele, 921 So. 2d 538 (Fla. 2005)(noting that the lack of notice of specific aggravating circumstances in an indictment does not render a death sentence invalid); Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005)(noting that this Court has rejected Ring in over fifty cases); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003)(Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury);

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

Additionally, Pasha's Ring claim is without merit in the instant case given his prior violent felony convictions. Pasha was convicted of a prior violent felony (robbery) and was convicted of a contemporaneous first degree murder for each of his two death sentences. Because the defect alleged to invalidate the statute - lack of jury findings as to an aggravating circumstance - is not even implicated in this case due to the existence of the prior felony convictions, Pasha has no standing to challenge any potential error in the application of the statute. See Deparvine v. State, 995 So. 2d 351, 379 (Fla. 2008)(rejecting argument that Florida's death penalty statute is unconstitutional because it allows a judge, rather than a jury, to find the aggravating factors for a death sentence, and because it does not require jury unanimity in making its recommendation; "claim is without merit since it is undisputed that [defendant] has prior felony convictions and this Court has held that the existence of such convictions as aggravating factors moots any claim under Ring"); Marshall, supra (citing the numerous cases wherein this Court rejected Ring arguments when the defendant had a prior felony conviction); Winkles v. State, 894 So. 2d 842 (Fla.

2005)(rejecting Ring claim when defendant has prior felony conviction and rejecting argument that aggravating factors must be charged in the indictment); Frances v. State, 970 So. 2d 806, 822-23 (Fla. 2007)(rejecting Ring argument in light of prior violent felony aggravator based on contemporaneous convictions for murder and robbery), cert. denied, --- U.S. ---, 128 S. Ct. 2441, 171 L.Ed.2d 241 (2008). Accordingly, based on this Court's prior precedent, the instant claim should be denied.

Similarly, Pasha's argument regarding the non-unanimous jury recommendation has been repeatedly rejected by this Court. See Aguirre-Jarquin v. State, 9 So. 3d 593, 601 (Fla. 2009) (rejecting allegation "that the bare majority vote for death is unconstitutional" noting that the "Court has repeatedly rejected similar arguments.")(citing Franklin v. State, 965 So. 2d 79, 101 (Fla. 2007)). See also State v. Steele, 921 So. 2d 538, 550 (Fla. 2005)(same). Pasha offers no compelling reasons to depart from the now well settled precedent of this Court. Accordingly, this claim must be denied.

Proportionality

Although understandably not raised by Pasha on appeal, this Court conducts a proportionality review in every capital case. This Court provided the following parameters of such a review in Franklin v. State, 965 So. 2d 79, 100 (Fla. 2007)

> ...This Court has explained that "a proportionality review is inherent in this Court's direct appellate review and the issue is considered regardless of whether it is discussed in the opinion or raised by a party." *Patton v. State*, 878 So.2d 368, 380 (Fla.2004). Our review involves "a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990); *accord Tillman v. State*, 591 So.2d 167, 169 (Fla.1991).

The trial court found three aggravating circumstances, the murders of each victim were heinous atrocious and cruel, prior violent felony (robbery and contemporaneous murder), and Pasha was on parole at the time he committed the murders. Balanced against a single statutory mitigator of substantially impaired capacity (paranoid and mixed personality disorder), and non-statutory background evidence, Pasha's sentence is clearly proportional.

This Court has stated that heinous atrocious or cruel is one of the strongest aggravators to be considered in this Court's proportionality review. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). See also Guzman v. State, 721 So. 2d 1155 (Fla. 1998)(affirming sentence where victim received nineteen stab wounds to face, skull, back, and chest, and a defensive wound to a finger on his left hand). This Court has also upheld as

"especially weighty" the aggravating factor of prior violent felony convictions such as presented in the instant case. Lindsey v. State, 636 So. 2d 1327 (Fla.), cert. denied, 513 U.S. 972 (1994)(contemporaneous first degree murder and prior second degree murder); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993)(death sentence affirmed where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators).

This was a coldly planned and executed heinous, atrocious and cruel slaughter of two women.[18] Pasha came armed with two deadly weapons, a knife and a baseball bat, parked his van away from the victims' car, and committed the murders dressed in a suit, boots, and gloves. The environmental suit worn by Pasha was an obvious attempt to eliminate or minimize trace/blood evidence and showed considerable planning. Pasha waited to strike until Reneesha got out of class and could ensure her

[18] Although the trial court did not ultimately find CCP in this case, the facts certainly support it. Pasha armed himself in advance with two deadly weapons [knife and baseball bat], parked his van some distance from the victims' car, and, most tellingly, was wearing an environmental hazard suit to minimize the possibility of leaving behind trace evidence or getting blood on his shoes and clothing. These facts suggest the murders were committed with cool, calm, reflection and advance planning sufficient to support the CCP aggravator. See Sireci v. Moore, 825 So. 2d 882, 886-87 (Fla. 2002)(factors such as advance procurement of weapon, ensuring the victim would be present, being dropped off near the scene supported finding CCP).

death, along with his wife's. Pasha brutally attacked the two defenseless women from the back seat of the car. Pasha stabbed and beat both women, inflicting numerous injuries upon each victim. Most of the victims' injuries were inflicted upon them while they were still alive. Each victim suffered defensive type injuries, indicating that they were aware of their grave predicament. Under these circumstances, the death sentence is clearly proportionate for each of these murders. See Spencer v State, 691 So. 2d 1062, 1063 (Fla. 1996)(death sentence proportionate for HAC murder of Spencer's wife, with prior violent felony of aggravated assault, battery, and attempted murder balanced against significant mitigation, including both statutory mental mitigators); Pope v. State, 679 So. 2d 710 (Fla. 1996), cert. denied, 519 U.S. 1123 (1997)(death sentence proportional for murder of defendant's former girlfriend with aggravating circumstances of prior violent felony convictions and murder committed for pecuniary gain while mitigation included extreme mental or emotional disturbance and the defendant's capacity to conform conduct to the requirements of the law was substantially impaired); Blackwood v. State, 777 So. 2d 399 (Fla. 2000)(upholding death sentence in strangulation murder of ex-girlfriend where single aggravator of HAC outweighed one statutory mitigator and numerous nonstatutory

mitigators); Merck v. State, 975 So. 2d 1054 (Fla. 2007)(finding death sentence proportionate where two aggravating factors of HAC and prior violent felony outweighed one statutory mitigator, the defendant's age, and numerous nonstatutory mitigators including defendant's difficult family background, his alcoholism and alcohol use on the night of the murder, and his capacity to form and maintain positive relationships); Doorbal v. State, 837 So. 2d 940 (Fla. 2003)(HAC, pecuniary gain and prior violent felony in a double homicide case).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the convictions and sentences imposed below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this 21st day of September, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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