IN THE SUPREME COURT OF FLORIDA

KHALID ALI PASHA,	:	
Appellant,	:	
vs.	:	Case No. SC08-1129
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, KHALID ALI PASHA, was the defendant in the trial court. In this brief, he will be referred to as appellant or by name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. References to the record on appeal are by volume, followed by page number. References to the supplemental record are designated “SR”, followed by volume and page number. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

[Facts relating to the denial of appellant's request for self-representation are set forth in Issue I, Parts C, D, and E].

Khalid Ali Pasha was charged by indictment in Hillsborough County with two counts of first degree murder in the deaths of his wife Robin Canady (age 43) and his stepdaughter Reneesha Singleton (age 20)(1/52-55;see 37/1522). The case proceeded to trial before Circuit Judge William Fuente and a jury in late October 2007, and appellant was convicted as charged on both counts (10/1925-26;42/2117). The circumstantial evidence presented by the state at trial[1] is summarized in Judge Fuente's sentencing order as follows:

> ...on the evening of 23 August 2002 Khalid Ali Pasha drove his work van to the Aetna building in the Woodland Corporate Center, where victim Reneesha Singleton worked. Victim Robin Canady was also at that location to pick up her daughter Reneesha Singleton. Ms. Canady and Mr. Pasha had recently married.
>
> Witnesses saw a black male go into the woods behind the Aetna building wearing a jump suit and boots, and then come out of the woods; they then saw him take off his white clothes, and observed he was wearing a white t-shirt covered with blood, carrying an object in his hands, possibly a knife. The witnesses saw him enter a van then drive away. The husband and wife witnesses were on the telephone with the 911 operator describing their observations.
>
> The evidence further established that a deputy sheriff immediately stopped the described van, which Mr. Pasha was driving, and which was found to contain evidence of the crimes, including boots, a broken club, a knife with blood, gloves with blood, and the jump suit with blood.
>
> The DNA evidence established that blood found on Mr. Pasha's face and on his pants was that of one of the

[1] The defense presented no evidence and appellant did not testify (41/1960-61,1971).

> victims. The evidence also established that blood from both of the victims was found inside of their vehicle, on a water jug found in the immediate area, and on a boot, jumpsuit, and gloves seized from the Defendant's van.
>
> 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 had her throat slit.
>
> The State did not present evidence of an admission or confession by Mr. Pasha, and did not present evidence of motive.

(11/2140-41).

Following the penalty phase, the jury recommended the death penalty by a 7-5 vote as to each count (10/2000-01;44/2371-72). On May 30, 2008, Judge Fuente imposed two death sentences (11/2138-58). Three aggravating circumstances were found and given great weight or considerable (but less than great) weight: (1) previous conviction of a violent felony (based on the contemporaneous homicides); (2) especially heinous, atrocious, or cruel; and (3) under sentence of imprisonment (based on appellant's parole status)(11/2145-50). [The judge did not find the cold, calculated, and premeditated aggravating factor, although he had instructed the jury on it (11/2146-47)]. The mental mitigating factor of impaired capacity was found and given moderate weight, along with several nonstatutory mitigating factors which were also given moderate weight (11/2155-56).

SUMMARY OF THE ARGUMENT

Appellant's initial and renewed requests for self-representation, made orally and in writing after his motion to discharge his appointed lawyer Nick Sinardi were denied, were timely and unequivocal. Since the Faretta inquiry conducted by the trial court clearly established that appellant is literate, competent, understanding, and fully capable of voluntarily waiving his right to counsel (and nobody contended otherwise), the lower court's denial of this constitutionally guaranteed right is per se reversible error.

The trial court's denial of self-representation cannot be justified on a theory - - unsupported by the record - - that appellant was disruptive (to the contrary, he was repeatedly complimented for his good behavior and cordial demeanor even when the issues under discussion were vigorously contested); or that his request for self-representation was motivated by an intent to delay or manipulate the proceedings. Appellant was not requesting a continuance. Moreover, the record of the Nelson and Faretta hearings demonstrates that appellant had an obvious good faith basis for his dissatisfaction with Mr. Sinardi. Appellant adamantly maintained his innocence, and his goal was an acquittal at trial; while Mr. Sinardi insisted that the only viable strategy was to concede appellant's guilt of the lesser degree offense of second degree murder. Mr. Sinardi further stated in open court that he could not effectively represent appellant in any other

manner. Under these circumstances, while appellant did not have a right to replace Mr. Sinardi with substitute counsel (having failed to convince the trial judge in the Nelson hearing that Sinardi was providing ineffective assistance), he did - - under Faretta and the Sixth Amendment - - have the right to decline Sinardi's services and represent himself.

"An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for, in a very real sense, it is not his defense." Faretta v. California, 422 U.S. 806, 821 (1975) (emphasis in opinion). "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" Faretta, 422 U.S. at 834.

Since the denial of this constitutionally guaranteed right impacts much more than the outcome of the trial, the erroneous denial of an accused's right to self-representation is per se reversible error; "[t]he right is either respected or denied; its deprivation cannot be harmless." McKaskle v. Wiggins, 465 U.S. 168,177 n.8 (1984).

ARGUMENT

ISSUE I

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

A. Introduction

Appellant's initial and renewed requests for self-representation, made orally and in writing after his motion to discharge his appointed lawyer Nick Sinardi were denied, were timely and unequivocal. Since the Faretta inquiry conducted by the trial court clearly established that appellant is literate, competent, understanding, and fully capable of voluntarily waiving his right to counsel (and nobody contended otherwise), the lower court's denial of this constitutionally guaranteed right is per se reversible error.

The trial court's denial of self-representation cannot be justified on a theory - - unsupported by the record - - that appellant was disruptive (to the contrary, he was repeatedly complimented for his good behavior and cordial demeanor even when the issues under discussion were vigorously contested); or that his request for self-representation was motivated by an intent to delay or manipulate the proceedings. Appellant made it clear that he was not requesting a continuance (and in any event the judge would not have been obligated to grant one). While it is true that appellant was pro se for a period of time during the pretrial

proceedings, he was continually chastised for his persistence in that decision, and was told that his severely limited access to materials and evidence was because of his pro se status; a lawyer would readily be able to obtain those things. Thus, when he finally relented and asked for counsel, he was simply doing what two successive judges (neither of whom was the judge who presided over the trial) had been urging him to do.

The lead attorney who was then appointed was Mr. Sinardi; and appellant's motivation for seeking to discharge Mr. Sinardi and (when that was denied) seeking to represent himself is absolutely clear on the record. Over the course of ten months - - and especially during and after Mr. Sinardi's third and last visit with appellant - - an irreconcilable rift developed between them, due to Sinardi's insistence that the only viable defense was to concede appellant's guilt of second degree murder, despite appellant's vehement objection to that strategy and his desire to maintain his innocence. During the Faretta hearing, immediately before the inquiry, Mr. Sinardi stated to the judge in appellant's presence that (1) he expected the evidence to be overwhelming to establish appellant's participation in the murders; (2) the only realistic hope was that the jury would accept a concession to second degree murder; (3) he did not believe he could effectively represent appellant in any other manner; and (4) he didn't think anyone could. Mr. Sinardi also cited caselaw holding that an attorney is not automatically ineffective for conceding guilt of a lesser degree murder (where the record does not expressly

establish the defendant's consent), and argued those cases to support his intention (which he ultimately did not follow through on)[2] to concede guilt of second degree murder over appellant's express and strenuous objection.

For purposes of this appeal, it doesn't matter whether Mr. Sinardi was right or wrong, whether his assessment of the case was sound or unsound, or whether appellant would have been wiser to accept his advice or not. Nor does it matter whether or not Mr. Sinardi's interpretation of the caselaw was correct. Appellant is not challenging the trial court's decision after the Nelson inquiry to deny the motion to replace Mr. Sinardi with substitute counsel. Instead, appellant is challenging the trial court's decision after the Faretta inquiry to deny appellant his right to represent himself at trial, when he clearly and unequivocally stated that he would prefer to do so rather than be represented by Mr. Sinardi. Appellant's obvious, rational, and legitimate motivation for wanting to exercise his right is perfectly clear on the record; there is simply no basis to conclude that he was trying to manipulate the system. The right to defend is personal; the defendant and not his lawyer will bear the consequences in the

[2] After the judge denied appellant's request for self-representation, Mr. Sinardi indicated that it remained his intention to proceed on a theory of second-degree murder notwithstanding appellant's vehement opposition. The judge and Sinardi agreed that the latter was "on the horns of a dilemma"; the judge also suggested that Sinardi might have to abide by appellant's refusal to concede guilt though "I can't advise you how to proceed" (29/475-79). Ultimately, Sinardi made no express concession of appellant's guilt (though he did make arguments to the jury which appellant believed undermined his defense)(see 41/2056-57;11/2022-25;45/2388-92).

event of a conviction; and the constitution does not permit a judge to force an unwanted lawyer on an accused. Faretta v. California, 422 U.S. 806 (1975).

B. Constitutional Right of Self-Representation – The Applicable Law

Based on this country's bedrock tradition of respect for personal autonomy, the Sixth and Fourteenth Amendments provide a constitutional right of self-representation; a defendant in a state criminal trial may proceed without counsel when he voluntarily and intelligently elects to do so, and the state may not force a lawyer upon him when he insists that he wants to conduct his own defense. Faretta v. California, 422 U.S. 806 (1975). The Faretta Court emphasized that the Sixth Amendment (applied to the states through the Fourteenth):

> speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant-not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master [footnote omitted], and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. [Citations omitted]. This allocation can be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by

> the Constitution, for, in a very real sense, it is not his defense.

422 U.S. at 820-21 (Emphasis on "his" in opinion).

> ...[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders [footnote omitted], yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice [footnote omitted].
>
> *** ***
>
> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' [Citation omitted].

422 U.S. at 833-34.

See Tennis v. State, 997 So.2d 375,377-78 (Fla. 2008); Hernandez-Alberto v. State, 889 So.2d 721,729 (Fla. 2004); Potts v. State, 718 So.2d 757,759 (Fla. 1998); State v. Bowen, 698 So.2d 248,250 (Fla. 1997).

"The Founders believed that self-representation was a basic

right of a free people." Faretta, 422 U.S. at 830, n.39. See also Johnstone v. Kelly, 808 F.2d 214,218 (2nd Cir. 1986) ("The Sixth Amendment's right to self-representation reflects values of individual integrity, autonomy, and self-expression"); Chapman v. United States, 553 F.2d 886,891 (5th Cir. 1977) ("...[E]ach person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action").

United States v. Tucker, 451 F.3d 1176,1180 (10th Cir. 2006) summarizes the requirements which a defendant must satisfy to properly invoke his constitutional right to represent himself: (1) his request must be clear and unequivocal; (2) the request must be timely and not for purposes of delay; and (3) he must be willing and able to abide by rules of procedure and courtroom protocol. The fourth requirement is placed upon the trial judge, who must then conduct a thorough inquiry to ensure that the defendant's waiver of the right to counsel is knowingly and intelligently made.

Florida law recognizes that when these requirements are met, a trial court's denial of a literate, competent, and understanding defendant's right to voluntary self-representation requires a new trial. State v. Bowen, 698 So.2d at 250-52; Kearse v. State, 858 So.2d 348,349 (Fla. 1st DCA 2003).

"Only an unequivocal assertion of the right to self-representation will trigger the need for a Faretta inquiry."

Tennis v. State, 997 So.2d at 378, quoting State v. Craft, 685 So.2d 1292,1295 (Fla. 1996). "Such request must be made prior to the commencement of trial." Parker v. State, 423 So.2d 553,555 (Fla. 1st DCA 1982); quoting Cappetta v. State, 204 So.2d 913,918 (Fla. 4th DCA 1967), rev'd on other grounds, 216 So.2d 749 (Fla. 1968). Within the meaning of the double jeopardy clause, a jury trial commences when the jury which will hear the case has been selected and sworn. Brannan v. State, 383 So.2d 234 (Fla. 1st DCA 1979); Perkins v. Graziano, 608 So.2d 532 (Fla. 5th DCA 1992). Accordingly, in Lyons v. State, 437 So.2d 711 (Fla. 1st DCA 1983), a defendant's request for self-representation was found to be untimely where it was "made...after the jury had been selected and sworn and as counsel were about to make their opening statements"; the appellate court distinguished the timely requests for self-representation made in Kimble v. State, 429 So.2d 1369 (Fla. 3d DCA 1983)(defendant made his request "toward the close of the jury selection process") and Martin v. State, 434 So.2d 979 (Fla. 1st DCA 1983)(defendant's request was made on the morning of trial and after the jury had been selected but not yet sworn).

See also Fleck v. State, 956 So.2d 548 (Fla. 2d DCA 2007)(reversing convictions for new trial due to trial court's erroneous denial of self-representation, where request was made after the jury had been selected but before the jury was sworn), and compare Thomas v. State, 958 So.2d 995 (Fla. 5th DCA 2007) (citing Lyons, and finding defendant's request for self-representation untimely where it was made during the trial, after

the state had rested its case and after defendant had testified); Chapman v. United States, 553 F.2d 886,893-95 (5th Cir. 1977) (holding that a request for self-representation is timely if made before the jury which will try the case has been selected and sworn; a defendant must have a "last clear chance to assert his constitutional right" and "[i]f there must be a point beyond which [he] forfeits the unqualified right to defend pro se, that point should not come before meaningful trial proceedings have been commenced").

In determining whether the defendant has met the requirement of unequivocally asserting his intention to waive counsel and represent himself, it is not necessary that he assert on principle that he would rather be his own lawyer than be represented by any lawyer in the world. Many, if not most, self-representation requests are precipitated by the client's extreme dissatisfaction with the particular appointed lawyer he has, coupled with the knowledge (imparted by the trial judge) that absent a showing of ineffective assistance he has no legal right to a different lawyer. As recognized in Buhl v. Cooksey, 233 F.3d 783,794 (3rd Cir. 2000):

> Buhl's motivation for waiving counsel was not the issue. Common sense suggests (and experience confirms) that nearly every request to proceed pro se will be based upon a defendant's dissatisfaction with counsel. It is the rare defendant who will ask to proceed pro se even though he/she is thoroughly delighted with counsel's representation, ability, and preparation. Therefore, it should come as no surprise that Buhl's request was motivated by his dissatisfaction with defense counsel. However, a defendant's constitutional right of self-representation is not automatically negated by his/her motivation for asserting it. [Footnote omitted].

In Florida, as elsewhere, defendants often seek self-representation as an alternative, in conjunction with (or after the denial of) a motion to discharge appointed counsel. Faretta hearings frequently follow on the heels of Nelson[3] hearings. See, e.g., Tennis, 997 So.2d at 377; Hernandez-Alberto, 889 So.2d at 728; Aguirre-Jarquin v. State, ____ So.2d ____ (Fla. 2009)[2009 WL 775388]; Weaver v. State, 894 So.2d 178,190-93 (Fla. 2004); Potts v. State, 718 So.2d 757,758 (Fla. 1998); McKinney v. State, 850 So.2d 680 (Fla. 4th DCA 2003).

Where a defendant has unsuccessfully asserted that his appointed lawyer is rendering ineffective assistance - - and/or where the defendant has expressed dislike, mistrust, or loss of confidence in that lawyer - - and the trial judge has made it clear that the defendant is not entitled to a different lawyer, the defendant's insistence that given only those alternatives [a choice which has been termed "the Nelson ultimatum"][4] he wishes to represent himself is an unequivocal assertion of his right to self-representation. See Tennis; McKinney; Adams v. Carroll, 875 F.2d 1441,1444-45 (9th Cir. 1989); United States v. Allen, 153 F.3d 1037,1042 (9th Cir. 1998); Johnstone v. Kelly, 808 F.2d 214,216 n.2 (2nd Cir. 1986); State v. DeWeese, 816 P.2d 1,5-6

[3] Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), approved in Hardwick v. State, 521 So.2d 1071,1074-75 (Fla. 1988).
[4] Foster v. State, 704 So.2d 169,172 (Fla. 4th DCA 1997).

(Wash. 1991); State v. Modica, 149 P.3d 446,450 (Wash. App. 2006); State v. Richards, 456 N.W.2d 260,264 (Minn. 1990); Gallego v. State, 23 P.3d 227,235 (Nev. 2001).

A trial court's erroneous denial of a defendant's right to self-representation is not amenable to "harmless error" review, because the denial impacts much more than the outcome of the trial. McKaskle v. Wiggins, 465 U.S. 168,177 n.8 (1984); Tennis v. State, 997 So.2d at 379; Goldsmith v. State, 937 So.2d 1253,1257 (Fla. 2d DCA 2006); Eggleston v. State, 812 So.2d 524,525 (Fla. 2d DCA 2002); United States v. Tucker, 451 F.3d at 1180; Johnstone v. Kelly, 808 F.2d at 218. As stated in Chapman v. United States, 553 F.2d at 891:

> ...we recognize the defendant's right to defend pro se not primarily out of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and the embrace the consequences of that course of action. [Citation and footnote omitted]. ...[E]ven a defendant doomed to lose has the right to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.
>
> ...Accordingly, it is wholly irrelevant whether the result of [the defendant's] trial might have been different had the court deferred to his wish to represent himself. ...If the denial of self-representation as untimely asserted was error we must reverse.

C. Pretrial Proceedings

In the pre-trial proceedings in this capital case, appellant was initially represented by the Public Defender's Office; then by private attorneys Gonzalez and Hernandez; and beginning in August 2004, after a Faretta hearing (SR4/156;18/130-154), he represented himself for two years. During that period, appellant actively participated in the discovery process, and he filed and argued numerous motions pertaining to the case, as well as motions challenging various aspects of Florida's capital sentencing scheme. The record shows appellant to be intelligent, articulate, and moderately well-educated, although somewhat rigid in his thinking; he consistently conducted himself in a respectful and dignified manner (see 18/143;SR10/298;SR11/334;29/463-64;34/1120) even when the legal matters being discussed - - such as a request that the trial judge recuse himself - - could easily have become contentious. (See 17/2-13,24,33-34;SR4/151-56,159-60,165; 18/143, 155-60;19/164-75;20/180-81,184-85;SR5/181-82;SR6/187-92;SR7/199-216;22/199-200,204-08;SR8/222-25,229-30,235-46;23/212-28;235-39; SR9/250-52,256-69;SR10/289-96,302-04,313-31;24/242-48;SR11/335-50,354-57).

At the beginning of each pre-trial hearing, the trial judge (Judge Tharpe, then Judge Timmerman) renewed the offer of counsel, and each time appellant declined (19/164-65;20/178-80;SR5/173-75;SR6/186-87;SR7/197-98;21/189-90;22/197-98;SR8/220-21;23/211-12). However, as time went on appellant was becoming increasingly frustrated by the jail's restrictions (which he saw as arbitrary

and selectively enforced) on his access to his trial preparation materials (SR7/203-04;21/190;SR8/222-30,243-45;SR9/250-69; SR10/289-99,302-03,313-17,325-31;24/242-48;SR11/356). The judge, on the other hand, saw it as a security issue and stated that he would not presume to tell the Sheriff how to run his jail (SR7/206-07;SR8/222,244-45;SR9/254-57,264-66;SR10/280,291,293,299-301,328-31). Instead, the judge repeatedly emphasized to appellant that, as he had been warned from the outset, the problems he was experiencing in access to materials was due to his insistence on representing himself (SR7/206-07;SR8/244-45;SR9/264-65;SR10/299-300,329-30).

Then, at a pre-trial hearing on November 29, 2006, during a discussion of photographic evidence (and specifically a question of whether a particular photograph may have been lost or destroyed) (SR11/349-57), appellant proposed that he and his standby counsel and the prosecutor meet “and we can look through the negatives in their presence. I don’t have to have a copy of them in my person. Mr. Gonzalez [standby counsel] can be there and we can go through them. I don’t need the copies” (SR11/357). The judge asked appellant how he expected to see the negatives; “What are you going to do [,] hold them up to a light?” Appellant said there is a machine that you put the negatives through, and the judge replied, “But you don’t have one.” The judge said, “You have an opportunity to have a professional lawyer who can get one of those machines and you don’t want a lawyer”, and it was at that point when appellant finally relented and requested that a lawyer

be appointed (SR11/357-60). Appellant wanted to clarify his position, but Judge Timmerman demanded a yes or no answer, and in response appellant said, “Yes, I want an attorney” (SR11/360). However, he explained:

> I am not going to accept no counsel if I feel a person is not working that hard I don’t care if it is Moses I don’t want him if he doesn’t have my interest at heart. Like I say I have been working with politics and lawyers since I was 16. Not as a victim but working with them in their duties. Counsel is smart people. They know a lot. I seen them put forth an effort to work and those who don’t. 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.

(SR11/363)

Judge Timmerman - - who in the previous hearings had been chastising appellant for “continu[ing] to insist” on representing himself (SR9/264-65;SR10/299-300,329-30) - - now chastised him for changing his mind, and said there would be no more “game playing” (SR11/361-65). “Mr. Pasha, I am not going to permit the lawyers that practice before this Court to be painted with a brush by somebody saying these people don’t have my interest at heart” (SR11/363). He was not going to pick somebody off the street; any lawyer he would appoint would met the qualifying criteria for lawyers handling death penalty cases (SR11/364).

Accordingly, a week later the judge appointed attorneys Nick Sinardi as lead counsel and Robert Fraser as penalty phase counsel (SR12/368;6/1176-84). During the following ten months leading up to trial, Mr. Sinardi met personally with appellant on three occasions (28/322,342). It was during the third and last visit when a simmering rift between client and counsel opened wide

(28/321-22,342-43), as a result of Mr. Sinardi's strongly held opinion that the only course of action which had any chance of success was to concede appellant's guilt of the two murders and argue second degree based on insufficient proof of premeditation (28/321-22,369;29/442-45,447-50,475-76,478-79), coupled with appellant's equally vehement position that he was innocent and that the only satisfactory result (for him) would be an acquittal (28/342-43,369;29/442-43,447-49,479).

D. The Denial of Appellant's Requests to Represent Himself at Trial.

The case was reassigned to Circuit Judge William Fuente. A week before trial, on October 17, 2007, a Nelson hearing was held on appellant's motion to discharge Mr. Sinardi, and - - when that was unsuccessful - - a Faretta hearing was held on October 22, 2007.

At the outset of the Nelson hearing, and on several occasions thereafter, Judge Fuente noted that appellant was not requesting a continuance or seeking a delay of the trial; he simply did not feel safe with Mr. Sinardi as his attorney (28/303-04,321,378;see 29/461). Mr. Sinardi said, "Judge, I think the problems, candidly, occurred at the last meeting I had with Mr. Pasha when I explained to him a possible defense of - - a lesser included [offense]. That, I believe, offended him and caused the problem." (28/322). Mr. Sinardi told appellant at the time that he was duty-bound to explain possible defenses and "it was obviously his choice as to

how to proceed or not to proceed in that manner" (28/322). Appellant agreed that this was one of the reasons he sought to discharge Mr. Sinardi (28/342-43):

> I guess it was something I just don't want to hear. It upset me I guess to hear him say that.
>
> THE COURT: You know, lawyers don't always tell their clients what they want to hear.
>
> APPELLANT: I know.
>
> THE COURT: In fact, if you're representing yourself you know sometimes you have to tell yourself some things you don't want to hear.
>
> APPELLANT: Yes, sir, that's correct.
>
> THE COURT: That's the way it goes.

(R28/344).

Appellant expressed the view that Mr. Sinardi had had insufficient communication with him to be able to adequately present his defense (28/366), and - - when Judge Fuente asked if there was anything else he'd want him to consider - - appellant replied:

> Just - - I would...like for you to consider the fact that to force him to - - to - - to continue as my counsel would be forcing a master - -
>
> THE COURT: Be forcing a what?
>
> APPELLANT: A master, as to protect me against. And because I'd be forced to go to trial with somebody that don't have no - - don't have no - - that can't - - that don't have the ability to defend me, to speak to my side of the issues.

(28/368).

The judge reminded appellant that he had the right to testify or to choose not to testify (28/368-69).

Mr. Sinardi reiterated that he had discussed possible defenses with appellant, and "[h]e was not in agreement with those. I'm understanding his position that he's not guilty and he wants to proceed to trial and we've discussed that" (28/369). Mr. Sinardi also expressed the concern that if appellant were to testify, the state might introduce certain inconsistent (through not necessarily directly incriminating) statements against him as impeachment (28/370-73, see 411-17).

Judge Fuente concluded that Mr. Sinardi was competent, capable, and effective, and that his actions were those reasonably expected of any competent lawyer (28/374-75). Accordingly, he denied appellant's motion to discharge him (28/377). In response, appellant began to assert his desire to represent himself at trial:

> ...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.

(28/384).

The judge replied, "That's not before me right now"; if appellant had another request that he wanted him to consider, he should put it in writing "and I promise you I will hear it before trial" (28/384).

Appellant, following the court's instruction, filed a written motion to proceed pro se (8/1590-91), which was, as promised, heard before trial on October 22, 2007. Prior to the Faretta inquiry, however, there was extensive discussion of the dilemma which Mr. Sinardi still felt he was on the horns of (29/442-50,

see 475-79). Appellant heard his appointed lawyer make the following comments to the judge:

> MR. SINARDI: There is - - myself and I believe Mr. Fraser also have discussed with Mr. Pasha the theory of second degree murder as a defense to the - -
>
> THE COURT: You mean a tactic at trial conceding it was a second-degree murder, not a first degree murder?
>
> MR. SINARDI: Correct.
>
> THE COURT: That would require the defendant's specific consent.
>
> MR. SINARDI: Well, that would by my initial reaction. There is some case law. And so the record is clear that is that Mr. Pasha has never given me that consent. And he has vehemently denied his participation in any of these acts. However, in reviewing all of the evidence, I think there is a likelihood that the jury could believe that Mr. Pasha is, in fact, guilty of murder in the first degree.
>
> And obviously then that would open Mr. Pasha up to a second phase proceeding and the State has, as I understand it, continues to seek death.

(29/442-43)

Mr. Sinardi represented, and the prosecutor acknowledged, that the state had never offered a plea to first degree murder to avoid the death penalty (29/443). Mr. Sinardi stated that he'd discussed with appellant the fact that the state was continuing to seek a death sentence, and:

> We've had lengthy discussions concerning [appellant's] theories or his position concerning what occurred and reviewing that in light of the evidence that I am aware of that will be presented by the State, I'm obviously concerned that the jury could find that the State's evidence is sufficient to constitute first degree murder.
>
> And I think under the evidence as I know it, I think that the best posture and presentation of a defense is

> to attempt to preclude the possibility of a death sentence and argue second degree murder as a defense.
>
> THE COURT: When you started to speak my first comment was in order for any lawyer to pursue that approach at trial obviously it requires the defendant's specific consent because in essence would be - - he would be acknowledging through you his guilt to the jury. And you suggest that the law provides otherwise that you can do it without his consent.

(29/444)

Mr. Sinardi responded by saying "I just want to attempt to establish that Mr. Pasha is guilty of only second degree murder" (29/445), and citing Harvey v. State, 946 So.2d 937 (Fla. 2006) and Florida v. Nixon, 543 U.S. 175 (2004) for the proposition that defense counsel will not necessarily be held ineffective on a postconviction motion for conceding guilt (of the charged crime or a lesser included crime) without obtaining the client's express consent (29/444-47). Instead, counsel's effectiveness must be evaluated under the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984)(29/446). Mr. Sinardi continued:

> Obviously it's my position that the best defense for Mr. Pasha is an argument of second degree murder to avoid the death penalty.
>
> Mr. Pasha...unequivocally does not want me to make that argument however, I think I'm forced to make a decision based on the facts as I know them, based on my interviews with Mr. Pasha as to what a jury would do when they heard those facts and it's my opinion that the best course of action would be an argument of second degree murder.

(29/447)

In response to the judge's query, appellant acknowledged that he emphatically did not want Mr. Sinardi to do that; he wanted to maintain his innocence (29/448-49). The judge replied:

> Okay, as is your right. And Mr. Sinardi, I guess my question to you, sir, would be based upon your assessment of the case, the things that you've just stated are you able to proceed forward with representing and defending Mr. Pasha the way he insists?

(29/449)

Mr. Sinardi reiterated that in his professional opinion a claim of innocence would surely be unsuccessful, and "I think the only realistic hope is that the jury would accept a concession to second degree murder and avoid the death penalty" (29/449). Appellant then heard Mr. Sinardi state in open court:

> So the answer to the Court's question, could I proceed in defending Mr. Pasha that he is not guilty of these offenses, I don't think anyone could to be honest with you. I think the facts are going to be overwhelming to establish his participation. <u>So I could not effectively represent him in that manner</u>.

(29/449-50)

Mr. Sinardi believed he could offer some information to the jury from which he could argue second degree murder (29/450). But as far an arguing the case on reasonable doubt, "Physically, I can do it, yes. But in my opinion is it the correct strategy. No it's not" (29/450).

> THE COURT: Your best advice to him would be contrary. And I guess that puts you in a position of arguing the case on a reasonable doubt.
>
> MR. SINARDI: Correct. Pretty much that would be it.
>
> THE COURT: And many times that's the case as we all know.
>
> All right, Mr. Pasha, Mr. Sinardi's indicated he's going to represent you under the theory that you want that is that you were not - - I won't get into the facts but you did not commit this crime and not argue that you're

> guilty of some lesser offense even though that's against his professional better judgment.

(29/450-51)

The judge asked appellant if he had any comment about what had been discussed; appellant replied by stating his desire to proceed pro se from this point on (29/451). In accordance with the judge's directions at the conclusion of the Nelson hearing five days earlier, appellant now filed the written motion which he'd prepared (29/451-52;8/1590-91;see 28/384). The judge read the motion aloud, and then said:

> 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. So are you telling this Court that you want to proceed on your own without a lawyer?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You're absolutely certain of that?
>
> THE DEFENDANT: Yes, sir.

(29/452-53)

The judge then commenced a thorough Faretta inquiry, which he prefaced with the following admonition:

> And I'll say this to you right now and I'll repeat this to you again at the end. I believe in this Court's opinion that you're making a terrible mistake by doing this, a terrible mistake.
>
> I know Mr. Sinardi will tell you that. I know Mr. Fraser will tell you that. I think your investigator will tell you that and I will tell you that but it is your constitutional right if this is what you want to do.

(29/452-53)

Appellant was placed under oath (29/453). The judge reviewed the charges in the indictment, and briefly outlined the history of

the case, including the fact that appellant had proceeded on his own for some period of time; "[t]hen later on I don't know the circumstances it came to pass that you again were appointed counsel" (29/454). Subsequently the case was transferred to another trial division and Judge Fuente became the presiding judge (29/454-55). "You've indicated to me that you want to represent yourself so I have to go through this inquiry" (29/455).

During the Faretta inquiry, appellant stated that he understood that he had an absolute right to a lawyer (29/455). The judge explained to him that Mr. Sinardi could obtain information through discovery, uncover potential violations of constitutional rights, identify and secure favorable evidence, and present "the best legal argument for the defense"; appellant acknowledged that those are things a lawyer can do (29/456-57).

> THE COURT: Mr. Sinardi has just given his professional opinion and believe me he's been down this road many, many times. He has assessed the evidence and he has told you on certain, on a one to one basis and has announced to this Court on the record that his assessment is that the best approach to this case knowing the facts as he understands them to be would be to proceed arguing for a lesser included offense but you have specifically rejected that; do you understand that?
>
> APPELLANT: Yes, sir.

(29/457-58)

The judge continued to itemize numerous ways in which an attorney - - because of his knowledge and experience - - can protect his client's rights and present his defense at trial (29/458-60). Appellant stated that he understood (29/458-60). The judge explained in detail the dangers and disadvantages of self-

representation, and again appellant stated that he understood (29/460-66).

The judge advised appellant that his decision to represent himself would not necessarily result in a continuance; appellant said he understood that, and he was prepared to proceed, although he would need to get his materials back from Mr. Sinardi's investigator (29/461-62).[5]

The judge cautioned appellant that because he was in custody he would be limited in his access to legal materials and to the law library; appellant said he understood (29/462-63). The judge said:

> Do you understand that if you do not abide by the rules of court and procedure in this court that is if you act up and I must say that you've been a gentleman every time you've been in front of me to date but if you don't for whatever reason you act otherwise I would have the authority to either discontinue your self representation or remove you from the courtroom and require you to be, hear the trial from outside the courtroom; do you understand?
>
> APPELLANT: Yes, sir.

(29/464)

The judge told appellant that even though he was not a trained lawyer, the prosecutor was going to treat him as an adversary, and would not take it easy on him simply because he was representing himself (29/465).

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[5] The judge - - referring to a paragraph in appellant's written motion stating that during the past week Mr. Sinardi had fought his effort to proceed pro se and impaired his ability to prepare for trial - - asked him what he meant by that (29/462;8/1590-91). Appellant explained that Mr. Sinardi and his investigator still had all of his materials; "that's the hindrance that I was concerned about" (29/462)

> And finally should this case end up badly for you that is should this jury find you guilty and should we go to a second phase regardless of what sentence you receive, whether it be life in prison, whether it be the death penalty or something less than that under any circumstances, you understand that on appeal you cannot claim that you were denied the effective assistance of counsel because you're giving up the right to counsel; do you understand that, sir?
>
> APPELLANT: Yes, sir.

(29/465-66)

The judge ascertained that appellant is, and was born, a United States citizen; he is 64 years old; he reads and writes English and also Arabic; and he has completed high school and has some college (though he did not graduate from college)(29/468-69). He has never been diagnosed or treated for any mental illness or condition; he is not on any medications (and was not under the influence of any medication at the time of the Faretta inquiry); and he has no physical problems other than wearing eyeglasses (29/469-70). More than twenty years earlier, appellant represented himself in a trial on charges of bank robbery and escape; he was found guilty on the former charge and the latter charge was dismissed (29/471-72).

The judge then asked appellant:

> Do you have any questions of me with respect to your right to have counsel appointed to represent you? I guess what I'm getting at is do you want a lawyer to represent you?
>
> APPELLANT: It is wiser to have a lawyer. My contention is that I'm against having an attorney. I don't think Sinardi put forth the effort in my situation.
>
> THE COURT: So are you telling me that you want a lawyer but you do not want Mr. Sinardi; is that correct?

> THE DEFENDANT: 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.

(29/473)

Based on those answers, the trial judge found that appellant’s request to represent himself was equivocal (29/473). He asked appellant if he was absolutely certain that he didn’t want to continue with an appointed lawyer (29/473). Appellant reiterated his previously stated position: “As I stated I would love to have a lawyer [.D]efinitely I would rather have a lawyer. ...But apparently I don’t have that choice” (29/473).

The trial judge, referring to the earlier Nelson hearing, said he’d heard appellant’s concerns and complaints about Mr. Sinardi, and he’d found that Sinardi was providing effective representation (29/474). In order to now allow appellant to represent himself:

> I have to make a finding that you [are] 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.

(29/474-75)

At this point, Mr. Sinardi returned the discussion full circle to the subject which had antagonized appellant in the first

place: “So the record is clear it is my intention in light of Harvey and Nixon that I believe Mr. Pasha’s best strategy [is] to proceed on a theory of second degree murder even though he is vehemently opposed to that position” (29/475-76). The judge empathized:

> I know, Mr. Sinardi, you’re on the horns of the dilemma. You feel that the best approach would be one thing. And you know, I guess and again I don’t mean to suggest that your client has told you something or not told you something but we’ve all been in a position where we have a client that says - - admits to us in a privileged way that he committed the crime and yet wants you to argue that he didn’t commit the crime that’s ethical and that’s permitted.
>
> The only thing we cannot do is have the client testify perjuriously. My understanding of the law is and you may have a different assessment but I know that as a Judge we’re told that if we reach that stage of the trial where counsel is going to make an argument conceding a crime on the part of the client I’m required to stop the proceedings and make certain that the client concedes to that.
>
> I mean I guess if your client tells you not to do something I presume you have to abide by that request. I can’t advise you how to proceed.
>
> MR. SINARDI: I understand that, Judge. I want the Court to be aware and Mr. Pasha to be aware that my opinion is based on Harvey and based on United States Supreme Court case in Nixon where the attorney there elected to concede guilt to first degree murder in an attempt to avoid the death penalty.
>
> In one of the cases I believe it was in Nixon I forget which one it was the client did not acquiesce one way or the other just stood mute but the record is clear is that Mr. Pasha maintains his complete innocence and does not want me to proceed in that manner.
>
> THE COURT: Again, just thinking out loud I can - -
>
> MR. SINARDI: Again at the horns of a dilemma I’ve had a conversation with Mr. Pasha concerning my position and representing him and it would be my intention, my opinion that the best strategy for second degree murder

> and he absolutely does not want me to do that. He's indicated he would prefer to represent himself as opposed to me advocating that position. And my position is that is his best position - - that is in the best interest of Mr. Pasha.
>
> THE COURT: Well, he indicated to me that he would prefer to have a lawyer to represent himself so - - under oath.

(29/477-79).

Appellant started to speak: "My position is that - - is the Court asking me a question?" (29/479). The judge (with reference to an upcoming suppression hearing) said to the prosecutor, "Mr. Harb, how do you stand with your witnesses? Are they on their way? (29/479). Mr. Sinardi asked the judge, "If they're not here and we're waiting on them can we take a brief recess and let me talk to Mr. Pasha?" (29/479).

After the recess, Mr. Sinardi reported no progress. It was still his opinion that the best strategy would be second degree murder. "And then we were talking about if I were to go ahead and just offer a reasonable doubt argument and request second degree murder instruction which I obviously believe we would be entitled to but I don't have a response to that" (30/484). The judge stood by his prior rulings; Mr. Sinardi would continue as counsel, and he would "leave it to the devices of Mr. Pasha and Mr. Sinardi to work out their differences" (30/484).

Two days later, during voir dire examination (and before the members of the jury were chosen or sworn), Mr. Sinardi said, "I'm getting fired again" (34/1021). The judge, via the bailiff, had received a note from appellant which stated, "May I please have an in camera hearing. I can not in good faith put [my] life in the

hand of someone who's simply working for money (which I am not paying) and not for justice. It is my firm and final [decision]. I want to proceed pro se" (10/1852;34/1021). The judge stated that he had denied appellant's request after the Faretta inquiry because "you were equivocal at that time" (34/1023), and now:

> 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 the 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.

(34/1023)

Appellant stated that he had no intention of delaying the trial (34/1023). The judge replied that that was his ruling and if he was wrong some appellate court would tell him so (34/1024). Appellant asked, "Then may I be excused for the duration of the trial?", and the judge answered that he could not (34/1024).

[The trial judge signed appellant's renewed written request to proceed pro se, and wrote on it "10/24/07 1:25pm Denied Trial Commenced" (10/1852;see34/1021). This occurred before the lawyers began the process of exercising peremptory and cause challenges and choosing the jurors who would try the case (34/1030,1035-36,1042-63). The jury trial data sheet indicates that the jury was selected at 2:48 p.m. and was sworn at 2:54 p.m. (10/1833, see 34/1067-68)].

Later the same afternoon (but this time after the jury was sworn and after opening statements) appellant again renewed his request for self-representation (34/1114-16). The judge, responding to both of the renewed requests (34/1116), referred to the Nelson hearing the week before trial in which he denied appellant's request to discharge Mr. Sinardi, and said "Now, at that time, that's all you asked me to do. You did not ask me to let you proceed pro se" (34/1118,see also similar comment at 1116).

[In fact, appellant unmistakably started to invoke his right to self-representation at the end of the Nelson hearing, and Judge Fuente told him "[t]hat's not before me right now." The judge told him to put it in writing and he'd hear it before trial (28/384), and that is what happened].

The judge continued:

> But be that as it may, you did bring it up Monday. We addressed it Monday. I went through an entire [Faretta v.] 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.

(34/1116-17)

Appellant readily agreed that that was an accurate summary of his position (34/1117).

The judge restated his viewpoint that appellant had equivocated (34/1117).

> You did not tell me with absolute certainty that you wanted to represent yourself under

> [Faretta] versus California and its [progeny] 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.

(34/1117)

The judge expressed the opinion that Mr. Sinardi had done a very thorough and competent job in his voir dire of prospective jurors (34/1118-19).

Referring to appellant's second written request to represent himself (10/1852) (which was filed and denied before the jury was chosen and sworn), Judge Fuente said that it was his understanding that once a trial has commenced he is not required to allow self-representation (34/1119-20). He cited Parker v. State, 423 So.2d 553 (Fla. 1st DCA 1982)(34/1119;10/1833). The judge expressed the opinion that the trial commenced when the prospective jurors were sworn for their initial questioning (34/1119). "And again, I may be correct. I may be incorrect." (34/1120). He hoped and thought his rulings were right, and if not an appellate court would tell him so (34/1120) "And I appreciate your concern. I'll reiterate, Mr. Pasha, as far as your appearance before me, you've never been anything more than a gentleman. You've never caused me any problems and I appreciate that. And I hope it continues to be that way" (34/1120).

E. Trial and Post-Trial Occurrences

Although after his first renewed request for self-

representation was denied appellant declined to participate in the exercise of peremptory and cause challenges (34/1043;11/2024), at the end of the first full day of testimony, the prosecutor put on the record that he'd observed appellant throughout the proceeding and he did appear to be "actively participat[ing] in looking at photographs and what have you" (36/1375). Mr. Sinardi confirmed that that was correct, and that appellant had communicated with him (36/1375-76). Judge Fuente once again noted for the record that "every time Mr. Pasha has been before me, he's been nothing but cooperative and respectful and a gentleman" (36/1376).

The defense did not present any witnesses and appellant did not testify at trial (41/1960-61,1971). In his closing statement to the jury, Mr. Sinardi primarily argued reasonable doubt (41/1994-2058). However, while he did not concede appellant's guilt of second degree murder, he did tell the jury that it could convict him of that offense if it found that the evidence supported it (..."[W]hat I think again is not important. What's important is what you think")(41/2056). Near the end of his argument, Mr. Sinardi told the jury:

> The judge will instruct you as to what those elements are of second degree murder. Again, I'm not going to insult your intelligence and tell you that Mr. Pasha is not - - it's not possible that he did this or is it likely that he did this, maybe that he did it.
>
> And all those are possible, yes. It's a maybe, yes. Could have, yes. But that is not your burden that you're - - the judge is going to instruct you on and, that is, beyond and to the exclusion of every reasonable doubt.

(41/2056-57)(see also 41/2045-46)

In his pro se amendment to Mr. Sinardi's motion for new trial

(adopted by Mr. Sinardi so it could be considered by the trial court), appellant objected to what he perceived as the attorney's attempt to argue second degree murder (11/2022-25;45/2388-92).

F. Standard of Review

The right of self-representation is personal, is guaranteed by the Sixth Amendment, and is not discretionary with the trial court. Faretta; State v. Bowen; Hutchens v. State, 730 So.2d 825,826 (Fla. 2d DCA 1999). The erroneous denial of a literate, competent, and understanding defendant's right to voluntary self-representation requires reversal for a new trial [Kearse v. State, 858 So.2d at 349, citing Bowen, 698 So.2d at 251], and is not subject to "harmless error" analysis [McKaskle v. Wiggins; Tennis; Goldsmith; Chapman v. United States].

When a defendant's request for self-representation is unequivocal and timely made, when the defendant has not been disruptive or contumacious, and when the required Faretta inquiry does not establish that the defendant is mentally incapable of voluntarily waiving his right to counsel, the trial judge must grant him his Sixth Amendment right to determine his own fate and present his own defense. Stated conversely, the trial judge cannot constitutionally force a lawyer on a defendant who has made it clear that he dislikes, mistrusts, or has lost all confidence in that lawyer, and would rather do it himself. See Tennis v. State, 997 So.2d at 378.

[On the other hand, when the defendant's request for self-

representation is untimely (i.e., made after the trial jury has been chosen and sworn, see Lyons, 437 So.2d at 711-12; Fleck, 956 So.2d at 549-50; Chapman, 553 F.2d at 893-95)], then the trial court's discretion may come into play. See Lambert v. State, 864 So.2d 17 (Fla. 2d DCA 2003); [Derrick] Thomas v. State, 867 So.2d 1235,1238 (Fla. 5th DCA 2004); [Donald] Thomas v. State, 958 So.2d 995 (Fla. 5th DCA 2007); Chapman v. United States, 553 F.2d 886,893 (5th Cir. 1977); United States v. Wesley, 798 F.2d 1155 (8th Cir. 1986); United States v. Kosmel, 272 F.3d 501 (7th Cir. 2001); but see United States v. Young, 287 F.3d 1352 (11th Cir. 2002). If the defendant's request is "made at a time in the trial when there [is] a clear potential for disruption of the proceedings", then under the "abuse of discretion rule" (but not under the "per se" rule) the court should balance the right of the defendant to represent himself against the potential disruption of the trial. Lambert, 864 So.2d at 18; [Derrick] Thomas, 867 So.2d at 1238].

G. Appellant's Request to Represent Himself at Trial, Made Orally and in Writing after the Trial Court Denied his Motion to Discharge Mr. Sinardi, was Timely and Unequivocal.

Immediately after his motion to discharge Mr. Sinardi was denied, appellant started to orally invoke his right to self-representation; the judge told him to put in it written form and "I promise you I will hear it before trial" (28/384). Accordingly, appellant filed a written motion to proceed pro se (8/1590-91), and the judge conducted a Faretta inquiry before trial (29/451-75). Appellant's initial request was timely, and nobody below

contended otherwise.

Ironically, it was not equivocation which cost appellant his right of self-representation, it was his candor. (See 29/475).

Just before the Faretta inquiry began, appellant's appointed attorney, Mr. Sinardi, stated to the court in appellant's presence not only that a concession to second degree murder was appellant's only viable "defense", but also that in light of what he considered to be overwhelming evidence he could not effectively represent appellant in any other manner (29/449-50). Nor did Mr. Sinardi think that anyone could (29/449).

Then, at the outset of the Faretta inquiry, the judge read appellant's motion aloud, including his assertion that Mr. Sinardi did not have his best interests at heart (29/452).

> THE COURT: 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. So are you telling this Court that you want to proceed on your own without a lawyer?
>
> APPELLANT: Yes, sir.
>
> THE COURT: You're absolutely certain of that?
>
> APPELLANT: Yes, sir.

(29/452-53).

Since that statement is about as unequivocal as you can get, the only question is whether appellant subsequently backtracked from his stated position that he was absolutely certain that he wanted to represent himself rather than have Mr. Sinardi do it.

The trial court's thorough Faretta colloquy established, inter alia, that appellant is literate (in English and Arabic), fairly well-educated (high school graduate and some college), free

of mental or physical infirmities, and not on medication. At the end of the inquiry, in response to the judge's questions, appellant candidly acknowledged that it is wiser to have a lawyer and he would love to have one (29/472-73). But he made it abundantly clear that given the reality of his situation - - that the only alternatives were to represent himself or be represented by Mr. Sinardi - - he chose to proceed pro se (29/472-73).

There is no requirement that, in order to be afforded his constitutional right of self-representation, a defendant must be so foolish or megalomaniacal as to assert that he is so in love with the idea of handling his own case that he would prefer that option over any hypothetical lawyer in the English-speaking world. See State v. Modica, 149 P.3d 446,450 (Wash. App. 2006)(a clear request to proceed pro se "is not rendered equivocal by the fact that a defendant is motivated by something other than a singular desire to conduct his or her own defense"). This isn't about whether appellant would have rather had Roy Black, or a live Johnnie Cochran, or a non-fictional Perry Mason. Appellant made it as clear as he possibly could that he wanted to represent himself because the only alternative was Mr. Nick Sinardi, a man who had just stated in open court that he could not effectively represent appellant without conceding that he murdered his wife and stepdaughter. See Buhl v. Cooksey, 233 F.3d 783,794 (3rd Cir. 2000)(common sense suggests and experience confirms that nearly every request to proceed pro se will be based on the defendant's dissatisfaction with counsel; it is a rare defendant who will ask

to proceed pro se even though he is delighted with counsel's representation, ability, and preparation).

Many - - perhaps most - - Faretta hearings in Florida take place after Nelson hearings; when the defendant is informed that the specific attorney to whom he objects will not be replaced, he asserts his right to self-representation as the only available alternative. See, e.g., Tennis; Aguirre-Jarquin; Weaver; Hernandez-Alberto; Potts; McKinney. [In fact, this Court has gone so far as to hold that "[a] defendant who persists in discharging competent counsel after being informed that he is not entitled to substitute counsel is presumed to be unequivocally exercising his right of self-representation", and therefore the trial court, in that situation, may in his discretion discharge counsel and require the defendant to proceed pro se. Weaver v. State, 894 So.2d 178,191,193 (Fla. 2004)].

Where, after a Nelson hearing, the lawyer is found to be providing adequate representation, the trial judge does not violate the defendant's Sixth and Fourteenth Amendment rights by presenting him with the "Nelson ultimatum" - - either keep his court-appointed lawyer or represent himself. Weaver, 894 So.2d at 188; Foster v. State, 704 So.2d 169,172 (Fla. 4th DCA 1997). The constitution does not, on the other hand, permit the trial court to force the lawyer on the defendant when he's made it clear that the lawyer is unacceptable to him and given that alternative he'd prefer to proceed pro se. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction.

Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution for in a very real sense it is not his defense" Faretta, 422 U.S. at 820-21 (emphasis in opinion); see McKaskle v. Wiggins, 465 U.S. at 173-74. [Note that in Weaver, as in the instant case, a primary reason for the client's choice to proceed pro se rather than accept an unwanted lawyer was the lawyer's announced strategy, over the defendant's strenuous objection, to concede his guilt of second degree murder. 894 So.2d at 191-92].

Another recent example of a defendant unequivocally expressing his desire to proceed pro se as a preferable alternative to a specific lawyer he mistrusted can be found in Tennis v. State, 997 So.2d at 377-78. There the defendant stated during the Nelson hearing, "I refuse to go to trial with him. I would like to go pro se instead of having two prosecutors against me, I'll do it myself. Even though I don't know what I'm doing, I will have a better fighting chance." 997 So.2d at 377-78. This Court held that this statement, coupled with two written motions for self-representation, was "an unequivocal and clear request for self-representation." 997 So.2d at 378.

"A request to proceed pro se is not equivocal merely because it is an alternative position, advanced as a fall-back to a primary request for different counsel." Johnstone v. Kelly, 808 F.2d 214,216 n.2 (2nd Cir. 1986), citing Faretta v. California, 422 U.S. at 810 n.5; Wilson v. Walker, 204 F.3d 33,38 n.3 (2nd Cir. 2000); State v. Richards, 456 N.W.2d 260,264 (Minn. 1990); Gallego

v. State, 23 P.3d 227,235 (Nev. 2001). Plainly, then, generalized statements like "It is wiser to have a lawyer" or "I would love to have a lawyer" - - given as an honest response to the judge's questions - - cannot negate a defendant's constitutional right to represent himself when, as here, he has made it clear that he is absolutely certain he would rather proceed pro se than be represented by this lawyer (29/452-53,472-73).

A defendant's request to represent himself if the only alternative is the specific appointed lawyer he does not want - - while conditional - - is not equivocal. Adams v. Carroll, 875 F.2d 1441,1444-45 (9th Cir. 1989); United States v. Allen, 153 F.3d 1037,1042 (9th Cir. 1998); State v. DeWeese, 816 P.2d 1,5-6 (Wash. 1991); State v. Modica, 149 P.3d 446,450 (Wash. App. 2006); State v. Richards, 456 N.W.2d 260,264 (Minn. 1990); Gallego v. State, 23 P.3d 227,235 (Nev. 2001).

In Richards, for example, the defendant asserted his right to represent himself, but in answer to the trial court's questions (like appellant in the instant case) he acknowledged a theoretical preference for counsel. However, such counsel would have to be "competent, prepared, loyal, dedicated" and "with proper ancillary personnel and resources." Richards explained, "I do not see those things existing here" and "I think I can do a better job." The Minnesota Supreme Court held that "[t]he record leaves us with no doubt that [Richards] asserted his right to represent himself in a clear, unequivocal, and timely manner." 456 N.W.2d at 263-64. See also Wheeler v. State, 839 So.2d 770,772 (Fla. 4th DCA 2003)

("Wheeler would only be satisfied with an attorney of her choosing who would take her case immediately and...absent those conditions, she desired to represent herself. On these facts, we conclude that Wheeler's waiver of counsel was voluntary").

Even a defendant's expression that he feels "forced" to choose self-representation as the preferable alternative to the unwanted lawyer does not render his request "equivocal", nor does it negate his constitutional right to chart his own course. See United States v. Robinson, 913 F.2d 712,714 (9th Cir. 1990); United States v. Allen, 153 F.3d 1037,1042 (9th Cir. 1998); State v. DeWeese, 816 P.2d 1,5-6 (Wash. 1991). In Florida's terminology, the "Nelson ultimatum"[6] gives him precisely this Hobson's choice. And Faretta and the Sixth and Fourteenth Amendments guarantee that the accused - - not the trial court - - gets to make this choice which will likely determine the rest of his life. So when the judge asked:

> So are you telling me that you want a lawyer but you do not want Mr. Sinardi; is that correct?"

and appellant answered:

> 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.

there was no equivocation, only candor. The Faretta inquiry established that appellant is literate, competent, understanding, and capable of voluntarily waiving his right to counsel. His request for self-representation should have been granted in the

[6] Foster, 704 So.2d at 172; see Weaver, 894 So.2d at 188.

October 22, 2007 hearing, prior to the beginning of jury selection.

H. Appellant's Renewed Request to Represent Himself at Trial, Made in Writing and Orally During Voir Dire Before the Jury was Selected and Sworn, was Also Timely and Unequivocal.

"I'm getting fired again" was Mr. Sinardi's reaction to appellant's letter to the trial judge, delivered by the bailiff during voir dire (34/1021). The letter read "May I please have an in-camera hearing? I can not in good faith put [my] life in the hand of someone who's simply working for money (which I am not

paying) and not for justice. It is my firm and final [decision]. I want to proceed pro se." (10/1852;34/1023).

This time the judge denied appellant's request as untimely (34/1023); he subsequently cited Parker v. State, 423 So.2d 563 (Fla. 1st DCA 1982) as authority for that ruling (34/1119; 10/1833). The judge further stated that, since appellant had chosen to say no more than what he'd asserted in his renewed written motion, "it's my impression that you're simply trying to delay the proceedings" (34/1023). The judge opined that Mr. Sinardi was "doing a very admirable job", and he was simply going to deny appellant's request outright (34/1023).

Appellant's reply that he had no intention of delaying anything (34/1023) is supported by the record and consistent with everyone's understanding at the Nelson and Faretta hearings. Appellant made it clear from the outset that he was not seeking a delay and was not asking for a continuance (28/303-04,321,378). See United States v. Tucker, 451 F.3d 1176,1179,1182 (10th Cir. 2006); Chapman v. United States, 553 F.2d 886,895 (5th Cir. 1977); Birdwell v. State, 10 SW.3d 74,76-78 (Tex. App.-Houston 1999); State v. Artis, 146 SW.3d 460,461 (Mo. App. 2004); Thomas v. Commonwealth, 539 S.E.2d 79,82 n.3 (Va. 2000); Commonwealth v. Chapman, 392 N.E.2d 1213,1218 (Mass. App. 1979). Therefore, there is no basis to assume a dilatory motive [see Birdwell, 10 S.W.3d at 76-78], especially since appellant's written request during voir dire was simply a renewal of his earlier request for self-representation, which was precipitated by an obvious non-dilatory

motivation - - his total loss of confidence in Mr. Sinardi. See United States v. Hernandez, 203 F.3d 614,621 (9th Cir. 2000)("Nor is there any evidence that Hernandez' request was calculated to delay the proceedings: Hernandez simply wanted to proceed pro se because he did not trust his appointed counsel).

[Moreover, even if there had been some indication of a dilatory motive, "[a] dilatory motive on the part of the defendant is probably not now a sufficient basis on its own for denying a defendant's otherwise proper request to proceed pro se because the judge has it in his power...to require the defendant asserting his pro se right to go to trial immediately, whether represented by counsel or by himself". Commonwealth v. Chapman, 392 N.E.2d at 1218 n.8; see also State v. Lamar, 72 P.3d 831,836 (Ariz. 2003) (although a defendant enjoys a constitutional right to represent himself, the Constitution does not also require that the trial court grant him a continuance regardless of the circumstances). In the instant case, both the trial judge and appellant were well aware that allowing self-representation would not obligate the judge to grant a continuance (29/461)].

Like his initial request, appellant's renewed request for self-representation was both unequivocal and timely. Both requests were framed in terms of appellant's desire to represent himself rather than be represented by Mr. Sinardi (8/1590;10/1852;29/452-53,455,472-73;34/1021-22). In the Faretta hearing, he stated that he was absolutely certain of that (29/452-53); in the renewed request he stated that it was his firm and final decision

(10/1852;34/1021). Both requests were unequivocal, and appellant never backtracked from his position that he wanted to represent himself because the only alternative was Sinardi.

The trial court's error in forcing Mr. Sinardi on appellant, and denying him his properly asserted right of self-representation, was fully preserved for review at the conclusion of the Faretta hearing. (See 29/475; "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"). Appellant was under no obligation to renew or reassert his request [see Buhl v. Cooksey, 233 F.3d 783,795-96 (3d Cir. 2000); United States v. Hernandez, 203 F.3d 614,622-23 (9th Cir. 2000); Hutchens v. State, 730 So.2d 825,826 (Fla. 2d DCA 1999); State v. Black, 223 SW.3d 149,154 (Mo. 2007). However, appellant chose to renew his request because he very much desired to rid himself of the unwanted lawyer and proceed pro se. By doing so before the jury was chosen and sworn, he also gave the trial judge one last chance to correct his constitutional error and avoid reversal on appeal. See Carratelli v. State, 961 So.2d 312,319 (Fla. 2007). See also State v. Walters, 641 S.E.2d 758,762 (N.C.App. 2007)(defendant "timely asserted his right to self-representation when his case was called and stated his dissatisfaction with appointed counsel. [He] reasserted his right to represent himself prior to trial and jury selection and on numerous occasions thereafter").

Instead of availing himself of this opportunity, the judge in the instant case simply denied appellant's renewed request outright, concluding based on Parker that it was untimely.

The judge's summary ruling was wrong on several levels. Parker simply holds that a defendant's unequivocal request to act as his own lawyer must be made prior to the commencement of trial. 423 So.2d at 555. Parker does not discuss when the trial is deemed to have commenced for purposes of determining the timeliness of a request for self-representation, but subsequent Florida caselaw strongly suggests that a request made during voir dire examination, but before the jury which will hear the case has been chosen and sworn, is timely. See Lyons v. State, 437 So.2d 711 (Fla. 1st DCA 1983)(and cases discussed therein); Fleck v. State, 956 So.2d 548 (Fla. 2d DCA 2007). In any event, Parker, Lyons, and Fleck deal with the timeliness of a defendant's initial request for self-representation. The instant case is more like Buhl v. Cooksey, 233 F.3d at 795, where the appellate court recognized:

> Therefore, the second request (which is really nothing more than a reassertion of the prior written motion) is irrelevant to our timeliness inquiry because the Faretta violation had already occurred. [Footnote omitted]. Buhl had already clearly asserted his right to proceed pro se in a timely manner. [Citation omitted].

Moreover, even if appellant's invocation of his right of self-representation during voir dire had been the first time he asserted the right, it still would have been timely. In Lyons, 437 So.2d 711-12, the appellate court held that Lyons' request was properly denied as untimely because he made it "after the jury had been selected and sworn and as counsel were about to make their

opening statements". The court distinguished Kimble v. State, 429 So.2d 1369,1370 (Fla. 3d DCA 1983), where the defendant's request was made "toward the close of the jury selection process", and Martin v. State, 434 So.2d 979,980 (Fla. 1st DCA 1983), where the request was made after the jury had been selected but before it was sworn. More recently, in Fleck v. State, 956 So.2d 548 (Fla. 2d DCA 2007), a defendant's convictions were reversed for a new trial due to the trial court's erroneous denial of self-representation, where the request was made after the jury was selected but before the jury was sworn. Contrast Thomas v. State, 958 So.2d 995 (Fla. 5th DCA 2007)(citing Lyons, and finding defendant's request for self-representation untimely where it was made during the trial, after the state had rested its case and after the defendant had testified).

Jeopardy attaches and a jury trial commences when the jury which will hear the case has been chosen and sworn. See Illinois v. Somerville, 410 U.S. 458,466 (1973); Crist v. Bretz, 437 U.S. 28,35 (1978); Kee v. State, 727 So.2d 1094 (Fla. 2d DCA 1999); Brannan v. State, 383 So.2d 234 (Fla. 1st DCA 1980); see also Martin v. State, 434 So.2d at 980 (defendant successfully asserted his right to self-representation after the jury had been selected but not yet sworn; "[t]he jury was then sworn and trial commenced"). Black's Law Dictionary (8th Ed.) defines empanel (or impanel): "[t]o swear in (a jury) to try an issue or case". Accordingly, courts have held that empanelment of a jury is not complete until its members are selected and sworn; the trial

"commences" at the same point jeopardy attaches. See Hill v. State, 827 S.W.2d 860,864 (Tex.Cr.App. 1992); Nash v. State, 123 S.W.3d 534,537 n.1 (Tex.App.-Fort Worth 2003). [For speedy trial purposes, the rule is different; based on the specific language contained in Florida Rule of Criminal Procedure 3.191(c) trial is considered to have commenced when the panel is sworn for voir dire examination. See, e.g., Casimir v. McDonough, 932 So.2d at 471,473 (Fla.3d DCA 2006). Commencement of trial for speedy trial purposes and commencement of the actual jury trial are two distinct concepts. See, e.g. Johnson v. State, 660 So.2d 648,660-61 (Fla. 1995); Holmes v. State, 883 So.2d 350 (Fla. 3d DCA 2004). Sometimes there may be a gap of days or even weeks between the two events. See Casimir v. McDonough, 932 So.2d at 473, and cases cited therein].

While there does not appear to be a uniform rule among state and federal jurisdictions regarding the precise point in time by which a defendant must assert his right of self-representation, a number of courts which have considered the question have concluded - - consistently with the line of Florida cases previously discussed - - that a request is timely if it is made before the jury has been selected and sworn to try the case. See Chapman v. United States, 553 F.2d 886,892-95 (5th Cir. 1977). The same conclusion has been reached in an evolving series of decisions by the Texas appellate courts, discussing what is meant by "empanelment".[7] Trial commences after voir dire examination is

[7] See Blankenship v. State, 673 S.W.2d 578,585 (Tex.Cr.App.

completed and the jury is selected and sworn; the same point when jeopardy attaches. Nash, 123 S.W.3d at 537 n.1. A request for self-representation made before that point is timely. Blankenship, 673 S.W.2d at 585 (citing Chapman v. United States, supra); Cain, 976 S.W.2d at 235; Birdwell, 10 S.W.3d at 77; Bansal, 169 S.W.3d at 377. A request made after that point is untimely. McDuff, 939 S.W.2d at 619; Leighton, 2002 WL 31265487. See also the Virginia case of Thomas v. Commonwealth, 539 S.E.2d 79,82 (Va. 2000)(citing Chapman v. United States and other federal cases for the proposition that a request for self-representation is timely if it precedes the seating of the jury). Thomas distinguishes United States v. Lawrence, 605 F.2d 1321,1325 (4th Cir. 1979), in which the defendant's initial request for self-representation (held untimely) came after voir dire examination had been completed, the trial jury had been selected, "the only remaining formality" was the swearing of the jury, and the delay in administering that oath was attributable to the defendant.

The Eleventh Circuit in United States v. Young, 287 F.3d 1352 (11th Cir. 2002) retreated somewhat from the Fifth Circuit's holding in Chapman, but even under the Eleventh Circuit's analysis a request made during voir dire examination but before the parties

(..continued)
1984); Johnson v. State, 676 S.W.2d 416 (Tex.Cr.App. 1984); Price v. State, 782 S.W.2d 266,269 (Tex.App.-Beaumont 1989); Hill v. State, 827 S.W.2d 860,864 (Tex.Cr.App. 1992); McDuff v. State, 939 S.W.2d 607,619 (Tex.Cr.App. 1997); Cain v. State, 976 S.W.2d 228,235 (Tex.App.-San Antonio 1998); Birdwell v. State, 10 S.W.3d 74,77 (Tex.App.-Houston 1999); Leighton v. State, 2002 WL 31265487 (Tex.App.-Houston 2002)(unpublished, but may be cited with the notation "not designation for publication"); Nash v. State, 123 S.W.3d 534,537 n.1 (Tex.App.-Fort Worth 2003); Bansal

have selected the jury is timely. The point of departure between Chapman and Young is when the request is made after the jurors have been chosen but before they are sworn.

> A defendant must have a last clear chance to assert his constitutional right. If there must be a point beyond which the defendant forfeits the unqualified right to defend pro se, that point should not come before meaningful trial proceedings have commenced.

Chapman, 553 F.2d at 895; see Young, 287 F.3d at 1354.

The bottom line is that appellant timely and unequivocally requested self-representation before trial, in a written motion as directed by the trial court. A Faretta hearing was held before trial, and the judge's erroneous ruling deprived appellant of his constitutional right, and forced an unwanted lawyer on him. When appellant reasserted his request during voir dire (but before the jury was chosen or sworn) the Faretta violation had already occurred, so the "timeliness" of the renewed request is beside the point. Buhl v. Cooksey. But the fact remains that even if that had been his initial request, the judge would have been wrong in ruling it untimely. By renewing his request, appellant gave the judge a last clear chance to cure the constitutional (and per se reversible) error which he'd committed two days earlier. By rejecting appellant's renewed request as untimely, the judge squandered the opportunity.

I. Appellant Did Not Forfeit his Right to Self-

(..continued)
v. State, 169 S.W.3d 371,377 (Tex.App.-Beaumont 2005).

Representation, Where the Record Does Not Establish Disruptive or Manipulative Misconduct, and Where Instead it Clearly Shows a Valid and Rational Reason for his Request.

As recognized in Faretta, 422 U.S. at 834-35, n.46, "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural or substantive law." Therefore, "the trial judge may terminate self-representation by a defendant who engages in serious and obstructionist misconduct." Faretta, 422 U.S. at 834-35,n.46; see Perry v. Mascara, 959 So.2d 771 (Fla. 4th DCA 2007); United States v. Brock, 159 F.3d 1077,1079 (7th Cir. 1998). When a defendant is "so disruptive, obstreperous, disobedient, disrespectful, or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation", he or she may forfeit that constitutional right. People v. Welch, 976 P.2d 754,776 (Cal. 1999); see, e.g., Thomas v. State, 867 So.2d 1235,1237 (Fla. 5th DCA 2004)(defendant "blew up in court", and after a number of attempts to calm him, judge threatened to bind and gag him because of his very disruptive behavior); State v. Jones, 916 A.2d 17,39 (Conn. 2007) (defendant forfeited his right to self-representation because of "his demonstrated proclivity to react violently" when court rulings did not go his way, and because he could not be relied on to refrain from such outbursts in the future).

In the instant case, appellant never displayed any disruptive or disrespectful misconduct. To the contrary, he was repeatedly

complimented for his demeanor and behavior: “extremely cordial and respectful”; “never caused me any problems”; “cooperative”; “a gentleman” (18/143;29/463-64;34/1120;36/1375-76). The record shows appellant to be intelligent, articulate, and reasonably well-educated; and while he does not have the training or experience of a lawyer, he does appear to have a lawyer’s temperament. Add to that his stubborn streak and his insistence on personal autonomy, and it can be seen that he is very much the kind of person whom the Faretta Court was envisioning when it held that an accused has a Sixth Amendment right to assume the responsibility for his own defense.

Nor, under the circumstances of this case, can it be said that appellant forfeited his right to self-representation by manipulating the proceedings to thwart the interests of justice. In Waterhouse v. State, 596 So.2d 1008,1014 (Fla. 1992), quoting Jones v. State, 449 So.2d 253,259 (Fla. 1984), this Court observed that:

> “[A] defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices [of self-representation and appointed counsel]”...We refuse to permit an intransigent defendant to completely thwart the orderly processes of justice.

See State v. Roberts, 677 So.2d 264,266 (Fla. 1996); see also Haram v. State, 625 So.2d 875 (Fla. 5th DCA 1993)(concluding based on record that defendant’s various conflicting requests were not made in good faith, but were designed solely for purpose of delay).

In the instant case, in contrast, there was no “willy-nilly”

ricocheting between positions, and the record clearly shows a good faith basis for appellant's decision in November 2006 to request appointment of counsel. While he was representing himself during the pretrial proceedings, and was experiencing restrictions in his access to materials, two trial judges on five separate occasions severely admonished him that this was due to his insistence on proceeding pro se; a lawyer would readily be able to obtain those things (SR7/206-07;SR8/244-45;SR9/264-65;SR10/299-300,329-30;SR11/357-58). When appellant finally requested counsel, it is not so much that he "changed his mind" as that he relented. That is when Mr. Sinardi was appointed.

The record even more clearly shows that appellant had a good-faith, legitimate and rational reason in October 2007 for his total loss of confidence in Mr. Sinardi and, therefore, for his request to represent himself at trial. Appellant made it clear that he was not requesting a continuance. See Tucker, 451 F.3d at 1179 and 1182; Chapman, 553 F.2d at 895; Birdwell, 10 S.W.3d at 76-78; Artis, 146 S.W.3d at 464; Thomas, 539 S.E.2d at 82 n.3; Chapman, 392 N.E. 2d at 1218. See also United States v. Hernandez, 203 F.3d at 621 (no evidence that request was calculated to delay the proceedings; Hernandez simply wanted to proceed pro se because he did not trust his appointed lawyer).

Nor was there any basis to conclude that appellant was trying to thwart the orderly processes of justice - - or that granting his request for self-representation would have caused such an outcome.

During the ten months that Mr. Sinardi represented appellant he met with him on three occasions; it was on the last visit when the rift between them came to a head, with the lawyer insisting the only viable "defense" was to concede guilt of second degree murder to try to avoid the death penalty, and appellant equally insistent on maintaining his innocence. During the Faretta hearing, Mr. Sinardi cited caselaw holding that an attorney will not necessarily be found ineffective (on postconviction motion) for conceding guilt of a lesser degree homicide where the record does not establish the defendant's express consent; Mr. Sinardi argued those cases in support of his intention (which he ultimately did not follow through on) to concede appellant's guilt of second-degree murder over his express and vehement objection. Mr. Sinardi also forthrightly stated to the trial court, in appellant's presence, that he could not effectively represent appellant by contending that he was not guilty of the homicides, nor did he think anyone could (29/449-50). "I think the facts are going to be overwhelming to establish his participation" (29/450).

The question on appeal of the denial of appellant's right of self-representation is not whether Mr. Sinardi's assessment of the case was right or wrong. As the Supreme Court made clear in Faretta, the Sixth Amendment respects the fundamental autonomy and dignity of the individual accused, regardless of the probable or actual outcome of the trial. "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction". 422 U.S. at 834. "To force a lawyer

on a defendant can only lead him to believe that the law contrives against him". 422 U.S. at 834. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction", 422 U.S. at 821, and for this reason "Faretta emphasizes that a defendant should not be bound to an attorney who represents his client in a manner in which defendant strongly disagrees". Chapman v. United States, 553 F.2d at 894 n.13.

While a defendant seeking to invoke his Sixth Amendment right is not ordinarily required to satisfy a trial or appellate court that his reasons are sound, where the state is asserting that the request for self-representation was made for purposes of delay or manipulation, it becomes important to show - - to the contrary - - that the defendant had a good-faith basis for his request. And the record in the instant case clearly establishes such a good-faith basis.

The Sixth Amendment speaks of the "assistance" of counsel, and an unwanted lawyer "is not an assistant, but a master". Faretta, 422 U.S. at 820 (see 28/368); see Wallace v. Davis, 362 F.3d 914,920 (7th Cir. 2004); United States v. Wellington, 417 F.3d 284,289 (2nd Cir. 2005)("lawyers are agents, after all") (emphasis in opinions). Florida Rule of Professional Conduct 4-1.2(a) recognizes that a lawyer shall abide by his or her client's decisions regarding the objectives of representation (and shall consult with the client as to the means by which those objectives are to be pursued). See Florida Bar v. Glant, 645 So.2d 962 (Fla. 1994); Florida Bar v. Vining, 721 So.2d 1164,1168 (Fla. 1998).

In the instant case, Mr. Sinardi quite reasonably saw avoidance of the death penalty as a worthy objective, and he obviously thought that by conceding appellant's guilt of second degree murder it was the only objective he could realistically achieve. Appellant saw it differently, and from his perspective his insistence on maintaining his innocence was not only within his rights - - it was entirely rational. First of all, he may actually be innocent. Aside from that possibility, appellant was looking at at least four factors which pretty much guaranteed that any guilty verdict would result in his spending the rest of his life in prison: (1) he was 64 years old; (2) he was charged with two homicides; (3) he had two prior convictions for bank robbery; and (4) he was on parole at the time of the charged crimes. Regardless of whether he was convicted of first or second degree murder, he was not going to outlive his prison sentence. Moreover, because of his age, the many years it takes to complete direct appeal and exhaust all state and federal postconviction remedies, and the large backlog of death row inmates and the few executions which occur each year, appellant could reasonably have concluded that even in the event of a jury death recommendation and judicial death sentence, he was very unlikely to ever be executed. [The record in this case suggests that appellant simply had little or no interest in the penalty phase (42/2124-27,2132,2138-41,2173-75)].

Thus, to Mr. Sinardi, a jury verdict finding appellant guilty of two counts of second degree murder would have been a victory of

sorts. As a litigator, he cannot be faulted for this perspective. But neither should appellant be faulted for perceiving two convictions of second degree murder as a catastrophic loss.

Mr. Sinardi made numerous statements at the Nelson hearing and especially in the Faretta hearing which could only have exacerbated appellant's mistrust; he indicated based on Harvey and Nixon that he planned to concede appellant's guilt of second degree murder even over his objection, and he stated that he could not effectively represent him in any other way. To appellant's ears, this could only have been taken as confirmation of his belief that Sinardi would do a poor job ("this thing is going to turn into a debacle", 34/1114) and did not have his best interests at heart. Therefore, if the state argues on appeal that when (under the trial court's prodding) Sinardi ultimately did not concede guilt and instead advanced a reasonable doubt defense appellant somehow "acquiesced" to Sinardi's representation, the state will be wrong.

After the brief recess following the Faretta hearing, Mr. Sinardi indicated that he would go ahead and just offer a reasonable doubt argument, and request an instruction on second degree murder (30/484). The judge reaffirmed his prior rulings; Mr. Sinardi would continue as counsel, and he would "leave it to the devices of Mr. Pasha and Mr. Sinardi to work out their differences" (30/484). It was after this occurred that appellant made his first renewed request to proceed pro se, during voir dire before the jury was chosen and sworn.

Then, during his opening statement, Mr. Sinardi advanced a theory of reasonable doubt (34/1090-99). Afterwards, appellant made his second renewed request to proceed pro se.

In light of the renewed requests [see State v. Walters, 641 S.E.2d 758,761-62 (N.C.App. 2007)], it is clear that appellant never waived his previously asserted right of self-representation, nor did he acquiesce to being represented by Mr. Sinardi after the latter backed off his stated intention of conceding guilt, and instead offered a defense which he'd just said he couldn't effectively present. Under Faretta, appellant had the Sixth Amendment right to present his defense; whether he could have done so as well or better than Mr. Sinardi is beside the point. If it was a Hail Mary pass, appellant had the right to come in off the bench and throw it, rather than leave his fate in the hands of a starting quarterback who'd announced in the huddle that it was hopeless.

J. Conclusion

As the erroneous denial of a literate, competent, and understanding defendant's constitutional right to voluntary self-representation is per se reversible error, appellant's convictions and death sentences must be reversed for a new trial.

ISSUE II

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.

A. Ring

Ring v. Arizona, 536 U.S. 584 (2002) declared unconstitutional the capital sentencing schemes then used in Arizona, Colorado, Idaho, Montana, and Nebraska, in which the judge, rather than a jury, was responsible for (1) the factfinding of an aggravating circumstance necessary for imposition of the death penalty, as well as (2) the ultimate decision whether to impose a death sentence. Four states - - Alabama, Delaware, Florida, and Indiana - - were considered to have "hybrid" capital sentencing schemes, the constitutionality of which were called into question, but not necessarily resolved, by Ring. See 536 U.S. at 621 (O'Connor, J., dissenting).

Appellant submits that for all practical purposes Florida is a "judge sentencing" state within the meaning and constitutional analysis of Ring, and therefore its entire capital sentencing scheme violates the Sixth Amendment.[8] As this Court recognized in

[8] Undersigned counsel recognizes that this Court has repeatedly rejected Ring claims [see, e.g. Aguirre-Jarquin v. State, 2009 WL 775388, footnote 8; Franklin v. State, 965 So.2d 79,101 (Fla. 2007)]. However, the undersigned believes his arguments are right as a matter of federal constitutional law, and he urges reconsideration.

State v. Steele, 921 So.2d 538,548 (Fla. 2006), Florida is now the only state in the country that does not require a unanimous jury verdict in order to decide that aggravators exist and to recommend a sentence of death. Even more tellingly, this Court has forthrightly reaffirmed, post-Ring, that Florida's procedure "emphasizes the role of the circuit judge over the trial jury in the decision to impose a sentence of death". Troy v. State, 948 So.2d 635,648 (Fla. 2006). The Court also quoted and highlighted the following statement from Spencer v. State, 615 So.2d 688,690-91 (Fla. 1993): "It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed." Troy, 948 So.2d at 648. [See also the post-Ring opinion in Williams v. State, 967 So.2d 735,751 (Fla. 2007), quoting pre-Ring decisions for the proposition that the trial judge "is not limited in sentencing to only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence"].

The jury's advisory role, coupled with the lack of a unanimity requirement for either the finding of aggravating factors or for a death recommendation, is insufficient to comply with the minimum Sixth Amendment requirements of Ring. Moreover, since Florida is a weighing state in which each aggravating factor is critically important to the life-or-death determination, and in which the existence of a single aggravator is rarely sufficient to

sustain a death sentence[9], former Chief Justice Anstead was right - - as a matter of constitutional law - - in concluding that the requirements of Ring apply to all aggravating factors relied on by the state to justify a death sentence. See Duest v. State, 855 So.2d 33, 52-57 (Fla. 2003)(Anstead, C.J., concurring in part and dissenting in part); Conde v. State, 860 So.2d 930,959-60 (Anstead, C.J., concurring in part and dissenting in part). As he wrote in the latter opinion:

> It would be a cruel joke, indeed, if the important aggravators actually relied upon by the trial court were not subject to Ring's holding that [f]acts used to impose a death sentence cannot be determined by the trial court alone. The Ring opinion, however, focused on substance, not form, in its analysis and holding, issuing a strong message that facts used to aggravate any sentence, and especially a death sentence, must be found by a jury.

(emphasis in opinion)

In the instant case, the Ring issues were thoroughly preserved below (see 3/534-36,594-600;4/601-19;7/1312-41;1360-62;8/1465,1593;23/220,223-24;26/273-77;41/1968-70). In addition, the trial judge initially granted a defense motion for an interrogatory penalty verdict, but then - - very reluctantly - - changed his mind based on State v. Steele, 921 So.2d at 544-48. (See 7/1308-11;1392-94;10/1966-69;11/2128-29;26/278-85;42/2156-57,2164,2167;SR2/40-41;45/2411-12). The jury ultimately split 7-5 in its decision to recommend the death penalty, and - - as a

[9] See Jones v. State, 705 So.2d 1364,1366 (Fla. 1998)("while this Court has on occasion affirmed a single-aggravator death sentence, it has done so only where there was little or nothing in mitigation"; to rule otherwise "would put Florida's entire capital sentencing scheme at risk").

result of the general verdict - - the trial judge (as he recognized) had no way of knowing which aggravating factors the jurors found, or by what vote. (See 42/2167;11/2128-29). “A juror may consider a particular aggravating circumstance proved beyond a reasonable doubt and hence weigh it in his or her death recommendation, and another juror may not consider it established beyond a reasonable doubt and not weigh it in his or her death recommendation...” (11/2128-29). Such an “every man for himself” determination of aggravating factors is incompatible with Ring and the Sixth Amendment, and the constitutional deficiency is not cured by the fact that the judge independently makes the findings of aggravating circumstances and imposes the ultimate sentence. The fact that the judge is the ultimate sentencer, who “has the principle responsibility for determining whether a death sentence should be imposed”, and whose role is emphasized over that of the jury [Troy] just goes to show that Florida is fundamentally a judge-sentencing state, not meaningfully different from the five western states whose capital sentencing schemes were disapproved in Ring. See Chief Justice Anstead’s opinion, concurring in result only, in Bottoson v. Moore, 833 So.2d 694,710 (Fla. 2002) in which he concludes:

> In sum, in Florida, the responsibility for determining whether and which aggravating circumstances apply to a particular defendant falls squarely upon the trial judge, and it is those findings by the judge that are actually utilized to decide whether the death sentence is imposed, and that are reviewed by this Court on appeal. Like Arizona, Florida permits a judge to determine the existence of the aggravating factors which must be found to

> subject a defendant to a sentence of death, and it is the judge's factual findings that are then considered and reviewed by this Court in determining whether a particular defendant's death sentence is appropriate. Thus, we appear to be left with a judicial fact-finding process that is directly contrary to the U.S. Supreme Court's holding in Ring.

Florida's capital sentencing scheme, the jury's 7-5 death verdict, and the death sentence imposed upon appellant by judge Fuente are all constitutionally invalid.

B. Non-Unanimous Death Verdict

Even apart from Ring, the fact that Florida's capital sentencing scheme allows a jury death verdict to be reached by a bare majority (7-5 vote) compromises the deliberative process, impairs the reliability of the life-or-death decision, and therefore violates the Sixth, Eighth, and Fourteenth Amendments.[10] Appellant preserved this claim below (see 3/534-36;4/602 n.3,609-10;23/223-24;26/274-76), and since the jury's death recommendation (given, as required by Florida law, great weight by the trial judge) was reached by a 7-5 vote, appellant's death sentences cannot constitutionally be sustained or carried out.

Under Florida's statutory procedure, the penalty phase jury is a co-sentencer. Snelgrove v. State, 921 So.2d 560,571 (Fla.

[10] Again, undersigned counsel recognizes that this Court has previously rejected challenges to the provision allowing non-unanimous jury death recommendations [e.g. Aguirre-Jarquin, 2009 WL 775388, at n.8; Franklin, 965 So.2d at 101; Perez v. State, 919 So.2d 347,367 (Fla. 2005)]; he urges this Court to reconsider

2005); Kormondy v. State, 845 So.2d 41,54 (Fla. 2003); see Espinosa v. Florida, 505 U.S. 1079 (1992). The jury's recommendation is "an integral part of the death sentencing process", and "[i]f the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So.2d 656,657 and 659 (Fla. 1987). The jury's recommendation, whether it be for death or life imprisonment, must be given great weight. Grossman v. State, 525 So.2d 833,839 n.1 and 845 (Fla. 1988). A Florida penalty phase is comparable to a trial for double jeopardy purposes, and when the jury reasonably chooses not to recommend a death sentence, it amounts to an acquittal of the death penalty within the meaning of the state's double jeopardy clause. Wright v. State, 586 So.2d 1024,1032 (Fla. 1991). In the overwhelming majority of capital trials in this state, the jury's recommendation determines the sentence which is ultimately imposed. See Sochor v. Florida, 504 U.S. 527,551 (1992)(Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

The United States Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586,604 (1978); Zant v. Stephens, 462 U.S. 862,884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320,329-330 (1985); Sumner v. Shuman, 483 U.S. 66,72 (1987). [See State v. Daniels,

(..continued)
based on the constitutional arguments herein.

542 A.2d 306,314-15 (Conn. 1988); People v. Durre, 690 P.2d 165,172-73 (Colo. 1984); and State v. Hochstein, 632 N.W. 2d 273,281-83 (Neb. 2001), discussing the principle of heightened reliability in the context of jury unanimity in capital sentencing]. Florida's procedure, by permitting bare majority death recommendations, works in the opposite direction. The importance of unanimity as a safeguard of reliability was recognized by the Supreme Court of Connecticut in Daniels, 542 A.2d at 314-15, which held that jury verdicts in the penalty phase of a capital case must comport with the guidelines that govern the validity of jury verdicts generally, including the requirement of unanimity. Rejecting the state's argument to the contrary, the court wrote:

> Two principal reasons compel us to disagree with the state. We first are persuaded that the functions performed by guilt and penalty phase juries are sufficiently similar so as to warrant the application of the unanimous verdict rule to the latter. Each jury receives evidence at an adversarial hearing where the chief engine of truth-seeking, the power to cross-examine witnesses, is fully present. At the close of the evidence, each jury is instructed on the law by the court. Finally, in returning a verdict, each jury has the power to "acquit": in the guilt phase, of criminal liability, and in the penalty phase, of the death sentence.
>
> Second, we perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. A. Spinella, Connecticut Criminal Procedure (1985) pp. 690-92. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate"; Sumner v. Shuman, 483 U.S. 66,107 S.Ct. 2716,2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-

> 1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. Beck v. Alabama, 447 U.S. 625,637-39, 100 S.Ct. 2382,2388-90, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586,604-05, 98 S.Ct. 2954,2964-65, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 349,359-60, 97 S.Ct. 1197,1205, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, supra, 428 So.2d at 304-306, 96 S.Ct. at 2990-91. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

This Court in State v. Steele, 921 So.2d at 549, stated that "[m]any courts and scholars have recognized the value of unanimous verdicts", and quoted the Connecticut Supreme Court's opinion in Daniels. This Court, aware that the constitutionality of Florida's scheme is not a foregone conclusion, said:

> The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

921 So.2d at 550 (emphasis in opinion).

[In the seven years since Ring, and in the four years since Steele, the Legislature has done nothing to address the constitutional deficiencies in the Florida capital sentencing scheme; therefore this state remains the "outlier". See Burch v. Louisiana, 441 U.S. 130,138 (1979)("We think that the near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally

permissible and those that are not"].

See also former Chief Justice Anstead's opinion, concurring in result only, in Bottoson v. Moore, 833 So.2d 693,710 (Fla. 2002), in which he wrote:

> Of course, Florida has long required unanimous verdicts in all criminal cases including capital cases. Florida Rule of Criminal Procedure 3.440 states that no jury verdict may be rendered unless all jurors agree. Furthermore, in Jones v. State, 92 So.2d 261 (Fla. 1956), this Court held that any interference with the right to a unanimous verdict denies the defendant a fair trial. However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote. The jury's advisory recommendation may be by mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in Apprendi and Ring.

Unlike the historical accident of jury size, the requirement of unanimity "relates directly [to] the deliberative function of the jury". United States v. Scalzitti, 578 F.2d 507,512 (3d Cir. 1978); see McKoy v. North Carolina, 494 U.S. 433,452 (1990) (Kennedy, J., concurring)(jury unanimity "is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community"); State v. McCarver, 462 S.E.2d 25,39 (N.C. 1995) ("[t]houghtful and full deliberation in an effort to achieve unanimity has only a salutary effect on our judicial system: [i]t tends to prevent arbitrary and capricious sentence recommendations"); State v. Anthony, 555 S.E.2d 557,604 (N.C. 2001); People v. Durre, 690 P.2d 165,173 (Colo. 1984).

C. Bare Majority Death Verdict

Finally, even assuming arguendo that a state could constitutionally provide for a non-unanimous "supermajority" jury death penalty verdict without violating the Sixth, Eighth, and Fourteenth Amendments, a bare majority 7-5 death verdict is simply too tenuous and arbitrary to withstand constitutional scrutiny, or to meaningfully reflect the conscience of the community. A brief review of United States Supreme Court decisions strongly suggests as much. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court (in holding that the Fourteenth Amendment guarantees a state criminal defendant the right to a jury trial in any case which, if tried in a federal court, would require a jury trial under the Sixth Amendment) observed that the penalty authorized for a particular crime may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. 391 U.S. at 159. The Court noted that only two states, Oregon and Louisiana, permitted a less-than-unanimous jury to convict for an offense with a maximum penalty greater than one year. 391 U.S. at 158 n. 30.

In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court held that a state statute providing for a jury of fewer than twelve persons in non-capital cases is not violative of the Sixth and Fourteenth Amendments. The Court noted that no state provided for fewer than twelve jurors in capital cases – "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death

penalty." 399 U.S. at 103.

The Supreme Court next decided the companion cases of Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972). In Johnson, the Court concluded that a Louisiana statute which allowed a less-than-unanimous verdict (9-3) in non-capital cases [406 U.S. at 357, n.1] did not violate the due process clause for failure to satisfy the reasonable doubt standard. Justice White, writing for the Court, noted that the Louisiana statute required that nine jurors - - "a substantial majority of the jury" - - be convinced by the evidence. 406 U.S. at 362. In Apodaca, the Court decided that an Oregon statute allowing a less-than unanimous verdict (10-2) in non-capital cases [406 U.S. at 406, n.1] did not violate the right to jury trial secured by the Sixth and Fourteenth Amendments. Johnson and Apodaca were 5-4 decisions. Justices Blackmun and Powell were the swing votes, and each wrote a concurring opinion emphasizing the narrow scope of the Court's holdings. Justice Blackmun wrote:

> I do not hesitate to say...that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As Mr. Justice White points out,..."a substantial majority of the jury" are to be convinced. That is all that is before us in these cases.

406 U.S. at 366 (opinion in Johnson, also applying to Apodaca).

Similarly, Justice Powell recognized that the Court's approval of the Oregon statute permitting 10-2 verdicts in non-capital cases "does not compel acceptance of all other majority-verdict alternatives. Due process and its mandate of basic fairness often require the drawing of difficult lines." 406 U.S.

at 377, n.21 (opinion in Johnson, also applying to Apodaca).

Some of those lines were drawn in Ballew v. Georgia, 435 U.S. 223 (1978) and Burch v. Louisiana, 441 U.S. 130 (1979). In Ballew, the Supreme Court held that conviction of a non-petty offense by a five person jury, impaneled pursuant to Georgia statute, violated the defendant's right to jury trial guaranteed by the Sixth and Fourteenth Amendments. In Burch, the Court determined that conviction of non-petty offense by a non-unanimous six-person jury, as authorized by Louisiana law, abridged the defendant's federal constitutional rights. The Burch Court wrote:

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two [Louisiana and Oklahoma] also allow nonunanimous verdicts [footnote omitted]. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Nothing in the development of this case law remotely suggests that a bare majority 7-5 verdict would be permissible in either the guilt phase or penalty phase of a capital trial. See State v. Daniels, supra, 542 A.2d at 314-15 ("the functions performed by guilt and penalty phase juries are sufficiently similar so as to warrant the application of the unanimous verdict rule to the latter").

Arguably, allowing a jury to return a death penalty verdict by a 10-2 or 11-1 vote might serve a legitimate purpose by preventing a rogue juror or "nullifier" from hanging the jury or blocking a death sentence based on his or her inability to follow

the law. [Note, however, that the state already has the ability to exclude such jurors for cause, assuming they honestly express their beliefs in voir dire. See, e.g. Wainwright v. Witt, 469 U.S. 412 (1985); Rodgers v. State, 948 So.2d 655,662 (Fla. 2006)]. Holdout jurors can happen in noncapital trials and capital guilt phases as well. This possibility in no way justifies a bare majority 7-5 death verdict, or an 8-4 death verdict, in which not even a substantial majority of the jury needs to be convinced that death is the appropriate sentence. See Johnson v. Louisiana, 406 U.S. at 362, and Justice Blackmun's concurring opinion at 366.

D. Conclusion

Appellant's death sentences, predicated upon 7-5 jury votes, are constitutionally invalid under Ring, and under the Sixth, Eighth, and Fourteenth Amendment principles regarding the need for heightened reliability in capital sentencing, and the importance of unanimity to the deliberative function of the jury. Reversal for a life sentence or a new jury penalty trial is required.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his convictions and death sentences, and remand for a new trial [Issue I]. In the alternative, appellant requests that this Court reverse his death sentences, and remand for a new jury penalty trial or for imposition of a sentence of life imprisonment [Issue II].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Scott Browne, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of June, 2009.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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