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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This reply brief is directed to Issue I on appeal. Appellant will rely on his initial brief with regard to Issue II.

The state's answer brief will be referred to herein as "SB".

ARGUMENT

ISSUE I

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

The state's argument is premised on the inaccurate assumption - - unsupported by the record - - that appellant, by manipulation, "successfully delayed his trial for years" (SB39; see SB45,48,50, 60-61,63-64). The state claims that appellant's "machinations" were "entirely responsible" for delaying his trial until October 2007 (SB50), and asserts that appellant had a record of changing his mind about counsel on the "eve" of his prior trial dates (SB45). The record, however, indicates only one time prior to October 2007 when a trial was imminent (see SB 10-12), and the record clearly shows that appellant was not responsible for the fact that the trial did not take place at that time.

The practice in Hillsborough County capital cases was that the pretrial motions would be heard by one judge (or division of the Circuit Court), and when the case was ready to be tried it would be transferred to a different judge who would preside over the trial. (See SR15/413,419;SR17/423-28). Accordingly, the

pretrial proceedings in this case were held before Judges Tharpe and Timmerman, but when the case was set for trial in late August, 2006 it was to be before Judge Padgett. On Monday, August 21, appellant asserted (as he had done in earlier hearings) his position that he was being unfairly hampered by what he saw as arbitrary and selectively enforced jail restrictions on his access to his boxes of trial preparation materials (SR13/374-96). Judge Padgett, like his predecessor judges, made it clear that he was not going to interfere with the jail's rules, and informed appellant that his "second biggest problem" - - i.e., aside from being charged with capital murder - - was the consequence of his unwise decision to represent himself (SR13/383-84,see 380-96). Judge Padgett, after initially mulling over the possibility of a 60-day continuance (SR13/386-93), told appellant "it's not going to get any better so we're going to start the trial today" (SR13/396). After telling appellant that the trial was about to begin, Judge Padgett, at the prosecutor's suggestion, asked him:

> Mr. Pasha, are you sure you want to represent yourself?
>
> APPELLANT: Yes, sir.
>
> THE COURT: You understand you're at a tremendous disadvantage doing that? Your circumstances are such that you're going to have a hard time doing it, but that's what you want to do, right?
>
> There is a variety of circumstances that affect a person representing themself, Mr. Pasha. Listen to me. Confinement in the county jail is one of them. Intellect is another one. Experience is another one. Command of the English language is another one, and there's probably several more, and I've seen them all in the 32 years I've been a judge, more or less, in each case. So that's all I want to make sure that you

understand is that you are at a disadvantage in representing yourself, and you can have a lawyer. You could have a lawyer any time you want one.

Do you understand those things? Just say “yes” or “no”, please.

APPELLANT: Yes, sir.

THE COURT: And you still want to represent yourself?

APPELLANT: Yes, sir.

THE COURT: Okay, Court will be in recess.

(SR13/397-98)

At that point, appellant, acting pro se, pointed out that there were several pending motions upon which Judge Tharpe had deferred ruling. Appellant said he would like to get a ruling on those motions “before we start the trial because the outcome of those motions would have some effect in regard to the trial.” Judge Padgett replied, “Yeah, you’re right”, and continued the trial until the following Monday morning (August 28)(SR13/399-400). He told appellant, “We might bring you over some day this week. We’ll give you about 24 hours notice so that you can - - when you find your motions and get your feet on the ground, we’ll bring you back and we’ll hear those motions, okay?” (SR13/400).

However, by the time the parties returned to the courtroom on Friday morning, August 25, an unexpected development had occurred:

JUDGE PADGETT: ...[T]he State has come up with some additional evidence in the form of a surveillance tape, which they intend to use as evidence, and I understand Mr. Pasha hasn’t seen it and hasn’t had time to do whatever it is that he wants to do with it or about it; is that right?

MR. HARB [prosecutor]: Judge, that’s correct. I haven’t seen it myself either. The only thing I’ve seen is a

letter was sent by a detective or agent from Orange County telling us that he looked at portions of the tape, but they were the wrong times, the period immediately about six to ten hours preceding to the homicide, but last night Corporal McCullough, who is present in the courtroom, last night he and Corporal Losat, the two detectives on the case at the time, took the tape back to Orange County or FDLE, spent a few hours on it, into the wee hours of this morning, and there's still some more work to be done.

That is correct, Judge. It is new evidence from a tape that we've had all along but we were under the assumption that the tape was worthless. Apparently it is not.

As best described to me last night at eleven o'clock and this morning by the detectives, the corporals, that you could see motions. You can see things consistent with what we believe to be the evidence.

It's a new development. There's no question that it adds a lot to the case and obviously the defendant hasn't seen it, and we will be providing that as soon as it becomes available in discovery.

JUDGE PADGETT: Okay, so we obviously can't go to trial on Monday. You know, what I think I'll do is I think I'll send this case back to Judge Timmerman until it's ready for trial again, put it on his docket for Monday, we'll say, and then from that - - from Monday - - he can set it for a disposition date, and you guys can do whatever you have to do, and Mr. Pasha can do whatever he has to do in way of filings and requests and everything, and we'll consider all that pretrial stuff that the judge of that division should be doing.

Is that okay with everybody?

(SR15/411-13;see SR17/423-24)

There was some discussion of the technical logistics of appellant viewing the surveillance footage at the jail; appellant and Judge Padgett agreed that that might be an issue which Judge Timmerman would have to deal with (SR15/414-17). Judge Padgett closed the hearing by saying, "[C]ome back Tuesday and Judge Timmerman will then give you another disposition date or whatever

he gives over there for whatever it is that needs to be done, and when it's ready for trial again some day, you guys can send it back here, okay? (SR15/419).

At the next hearing, on Tuesday, August 29 before Judge Timmerman, the prosecutor explained "[t]he matter is not set for trial. It was stricken off the trial calendar and then gave us today's date so we can restart" (SR17/426; see case progress at 1/23).

So it can be seen, contrary to the state's contentions, that appellant did not have a record of changing his mind on the eve of his prior trial dates, and his so-called machinations were not "entirely responsible for delaying his trial until October of 2007" (see SB45,50). Indeed, the one time when a trial was actually imminent - - and the judge made it clear that it was going to begin the following Monday - - appellant was invited to change his mind and request counsel, but instead he reaffirmed his decision to represent himself. The fact that the trial did not occur as scheduled was in no way attributable to appellant, much less a product of his "machinations". It was the prosecution's eleventh-hour discovery that an item of its own evidence - - a videotape it had previously thought had no significance - - might in fact prove useful and "add a lot to the case" which resulted in the trial being removed from the calendar and transferred back to a pretrial division.

Appellant's decision to request counsel, which led to the appointment of Mr. Sinardi, occurred in a hearing concerning

discovery issues before Judge Timmerman on November 29, 2006. During a discussion of photographs, 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).

Clearly, appellant was not manipulating the system for purposes of delay. He was in his 60s and he was spending years in jail awaiting trial (and the record shows that he was much more concerned about the guilt/innocence determination than the possibility of a death sentence). For nearly two years, three different judges (Tharpe and Timmerman in the pretrial proceedings, Padgett in the aborted trial) were repeatedly chastising him that his difficulties in access to materials was solely the result of his boneheaded insistence on representing himself (SR7/206-07;SR8/244-45;SR9/264-65;SR10/299-300,329-30;SR13/380-85,388-96). The fact that appellant eventually relented and did what every judge was telling him he needed to do

in order to gain full and unimpeded access to discovery materials is not an indication of bad faith or manipulation or disruption or dilatory motives.

As outlined in the initial brief, as the trial approached an impasse developed between appellant and his new attorney Mr. Sinardi. Undersigned counsel is not claiming that appellant is an easygoing or malleable personality (Faretta[1] defendants never are); but every accused citizen has a right to assert his innocence before a jury and to put the state to its burden of proof. Mr. Sinardi, at least in appellant's case, evidently didn't think so.

It is important to note here that it is not merely that Mr. Sinardi told appellant that his case was weak, or that the jury would certainly or almost certainly convict him. Nor is it merely that Mr. Sinardi advised or even strongly advised appellant that his only realistic chance to avoid a death sentence was to concede his guilt of second-degree murder. Mr. Sinardi went much further than that; he made it clear during the Faretta hearing (both before and after the inquiry) that it was his intention to concede appellant's guilt of second-degree murder notwithstanding appellant's express, timely, and vehement objection to that course of action (29/442-47,475-76). [Mr. Sinardi, taking a stance adverse to that of his client, cited Harvey v. State, 946 So.2d 937 (Fla. 2006) and Florida v. Nixon, 543 U.S. 175 (2004) in

[1] Faretta v. California, 422 U.S. 806 (1975).

support of his position. Those cases, however, simply hold that on a postconviction motion a trial attorney will not necessarily be found ineffective for conceding guilt (of the charged crime or a lesser included crime) without first obtaining the defendant's express consent. (Instead, the issue of ineffective assistance must be evaluated under the standards of Strickland v. Washington, 466 U.S. 668 (1984)). Harvey and Nixon do not authorize an attorney to, in effect, plead his client guilty to a murder which his client denies having committed, over the client's strong objection made to the attorney (and judge) before trial, and without any of the assurances of voluntariness which are routinely afforded to defendants who actually plead guilty].

But the issue here is not whether Mr. Sinardi was right or wrong, or even whether he was effective or ineffective. [As in Adams v. Carroll, 875 F.2d 1441,1445 n.6 (9th Cir. 1989), appellant is challenging only the denial of his right to self-representation, not the trial court's ruling in the earlier Nelson[2] hearing]. While a defendant who wishes to exercise his right to self-representation is ordinarily not required to state persuasive reasons for the request (he need only show that he is competent to make an understanding waiver of his right to counsel), in the instant case - - in light of the state's unsupported contention on appeal that appellant's assertion of his right to self-representation was insincere, manipulative, and a mere delaying tactic - - it becomes important to show that he had

[2] Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

a good-faith reason for wanting to represent himself at trial if (as the trial judge made clear) the only alternative was Mr. Sinardi.

This is why the state's argument that appellant's request for self-representation was manipulative and made for purposes of delay is a red herring. The state completely ignores the reason why appellant lost confidence in his appointed attorney, which is summed up in Mr. Sinardi's answer to the court in the pretrial Faretta hearing:

> ...[c]ould I proceed in defending Mr. Pasha that he is not guilty of these offense, I don't think anyone could to be honest with you. I think the facts are going to be overwhelming to establish his participation. So I could not effectively represent him in that manner.

(29/449-50)

That statement alone provided a good-faith basis for appellant to choose to represent himself at trial rather than have Mr. Sinardi "represent" him. See Faretta v. California, 422 U.S. 806,821 (1975)("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"). For purposes of determining whether appellant's request was made in good faith - - or whether as the state urges it was merely an effort to game the system - - it does not matter at all whether Mr. Sinardi's assessment of the strength of the state's case was accurate or inaccurate. When an accused's appointed counsel announces in his

presence in open court that he cannot contest his guilt, the accused has a constitutionally guaranteed right to dispense with that attorney's services and present his defense pro se.

Appellant had made it clear, and Judge Fuente was aware, that he was not requesting a continuance of the trial; he simply did not feel safe with Mr. Sinardi as his attorney (28/303-04,321, 378). Conversely, Judge Fuente made it equally clear during the Faretta hearing that he was under no obligation to grant a continuance if appellant chose to represent himself, and appellant said he understood that (29/461). See 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); see also Commonwealth v. Chapman, 392 N.E.2d 1213,1218 n.8 (Mass. App. 1979). It is sheer speculation on the part of the state to assume that these representations were meaningless; to assume that if appellant's right to self-representation had been respected he would have immediately reneged and asked for a continuance, and (had he done so) the trial court's hands would have been tied.

The record simply does not support the state's contention that appellant's request for self-representation was insincere and done for purposes of delay, especially since the record vividly shows a good-faith basis for appellant's total loss of confidence in Mr. Sinardi. See United State 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").

Contrary to the state's contention (SB39,44-59), and unlike the cases cited in the state's brief, appellant clearly and unequivocally asserted his right to self-representation, and he never vacillated even in the slightest on the critical point that he absolutely preferred to represent himself than be "represented" by his unwanted appointed lawyer, Sinardi. Appellant (as he had been directed to do by Judge Fuente, when he tried to raise the Faretta issue at the close of the earlier Nelson hearing) had filed a written motion, which Judge Fuente now read aloud:

> 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)

Obviously no equivocation there. Judge Fuente then conducted a thorough Faretta inquiry regarding appellant's capacity to knowingly and voluntarily waive his right to counsel, which appellant passed with flying colors (29/453-72). The question is whether appellant's honest answers to the judge's questions at the end of the Faretta inquiry amounted to "equivocation" or

"vaccilation" so as to negate his earlier unequivocal request for self-representation. They do not. Appellant never wavered from his position that if the only alternative was Mr. Sinardi - - and he understood that that was indeed the case after the judge's ruling in the Nelson hearing - - then he was absolutely certain he would rather represent himself. That is all Faretta requires; an unequivocal choice to proceed pro se rather than be "represented" by an unwanted lawyer appointed by the state. Faretta does not require an accused to say that he would rather proceed pro se than be represented by any hypothetical lawyer he might wish he had. If such a requirement existed, then only liars and lunatics would have Faretta rights. The fact is that the overwhelming majority of defendants who assert their right to self-representation do so because of their extreme dissatisfaction with the specific lawyer they have. See Buhl v. Cooksey, 233 F.3d 783,794 (3rd Cir. 2000), and appellant's initial brief, p. 39-44.

A defendant's request to represent himself if the only alternative is the specific appointed lawyer he does not want is not "equivocal" for Faretta purposes. 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).

Along the same lines, "[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 at 264; Gallego v. State, 23 P.3d at 235. Obviously, if the defendant's initial request was for different counsel, then he is not categorically opposed to the concept of being represented by an attorney in an absolute sense; he is simply asserting - - as appellant did in the instant case - - that he would rather represent himself than be represented by the unwanted lawyer he has.

The caselaw relied on by the state is thoroughly distinguishable. In Tyler v. State, 945 So.2d 662 (Fla. 4th DCA 2007)(SB47-48) the operative facts were as follows:

> After conducting a Nelson inquiry, the court found that Tyler's counsel was competent and refused to replace him. Although given the opportunity, Tyler did not make an unequivocal demand to represent himself. See Hardwick v. State, 521 So.2d 1071,1074 (Fla. 1988)(noting that "courts have long required that a request for self-representation be stated unequivocally"). On several occasions, the court asked Tyler if he wished to represent himself. Tyler responded, "I'm not a lawyer...how can I represent myself...I don't know nothing about none of that there." Even though the court informed Tyler that he did not need to be a lawyer to represent himself, Tyler maintained that he did not have the capacity for self-representation.

In Gibbs v. State, 623 So.2d 551,553-54 (Fla. 4th DCA 1993) (SB54) the appellate court emphasized that there was never any oral or written request for self-representation; only "an isolated, offhand statement". Moreover, Gibbs (like the defendant

in Jackson v. Ylst, 921 F.2d 882 (9th Cir. 1990)) "did not object to the presence of his appointed counsel at further proceedings, nor did he renew his request to proceed pro se".

In the instant case, in sharp contrast, appellant filed a written request for self-representation (as Judge Fuente instructed him to do when he tried to raise the issue at the end of the Nelson hearing), and he made a clear and unambiguous oral request at the outset of the Faretta hearing. Morever, he twice renewed his request for self-representation, and the earlier of these renewed requests was made before the jury was selected and sworn. [The state correctly points out (as did appellant in his initial brief, p. 50) that there is no uniform rule among state and federal jurisdictions as to the precise point in time when a proper request for self-representation is timely (and therefore must be granted unless a Faretta inquiry demonstrates that the defendant is incapable of voluntarily waiving his right to counsel), or when it is untimely (in which case it still cannot be automatically denied, but the judge's ruling is subject to the abuse of discretion standard). However, Florida appellate decisions strongly suggest that even an initial request for self-representation, made during voir dire but before the jury is selected and sworn, is timely[3], and the state has cited no Florida cases which conclude otherwise. More importantly, appellant's

[3] See Fleck v. State, 956 So.2d 548 (Fla. 2d DCA 2007); Lyons v. State, 437 So.2d 711 (Fla. 1st DCA 1983); Martin v. State, 434 So.2d 979,980 (Fla. 1st DCA 1983); Kimble v. State, 429 So.2d 1369,1370 (Fla. 1983).

request during voir dire was not an initial request, but a renewal of a pretrial motion which should have been granted in the first place. See Buhl v. Cooksey, 233 F.3d 783,795 (3d Cir. 2000) [footnote and citation omitted], in which the Court of Appeals 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. Buhl had already clearly asserted his right to proceed pro se in a timely manner.

In Hardwick v. State, 521 So.2d 1071,1074 (Fla. 1988) (SB44,56) "the record...reflects that Hardwick repeatedly asked for new counsel, admitted his incompetence to conduct the trial, and stated that 'I'm not choosing to represent myself'". In the instant case, appellant (though he was not happy about it) understood that in light of Judge Fuente's prior ruling the only alternatives were Sinardi or himself. Sinardi, at that point, had not yet backed away from his intention to concede guilt of second degree murder over appellant's objection. Judge Fuente thought - - contrary to Mr. Sinardi's broad interpretation of the Nixon and Harvey cases - - that that course of action would require the defendant's specific consent (29/442-47,475-79), but he also told Sinardi "I can't advise you how to proceed" (29/478). Given the clear alternatives of Sinardi or himself, appellant never vacillated in the slightest from his strongly expressed invocation of his right to represent himself. [Moreover, unlike defendants

Hardwick and Tyler, appellant never claimed to be unable to conduct his own trial; and he actually had some experience, in an unrelated case many year earlier, representing himself in a trial (29/471-72)].

Unlike such cases as Haram v. State, 625 So.2d 875 (Fla. 5th DCA 1993); State v. Crosby, 6 So.3d 1281,1283-86 (La.App. 2 Cir. 2009), and United States v. Frazier-El, 204 F.3d 553,556-60 (4th Cir. 2000)(SB51-52,65), the record of the Faretta hearing and other related proceedings plainly establishes that appellant had a genuine reason for concern that his defense would not be presented - - or would not be presented effectively (see 29/449-50) - - to the jury by Mr. Sinardi. Therefore, based on Mr. Sinardi's statements in open court, appellant could and did reasonably believe that if he went to trial with this unwanted attorney, he would never get his day in court on the issue of guilt or innocence, and he would certainly spend the rest of his life in prison. Sinardi's strategy may have been sound in terms of avoiding a death sentence for this 64 year old appointed client, but that was not appellant's main concern. See Faretta, 422 U.S. at 820-21 and 833-34. As this Court recognized in Hojan v. State, 3 So.3d 1204,1211-12 (Fla. 2009), the defendant - - not the attorney - - is "captain of the ship", at least insofar as the objectives of representation. Sinardi, paternalistically, took it upon himself to decide what result (life imprisonment) appellant should want, or should settle for. Appellant, like any competent defendant, had the right under these circumstances to discharge

his counsel and proceed pro se. Hojan, at 1212. The existence of a powerful genuine motivation for appellant to exercise this right, coupled with appellant's statements that he was not requesting a continuance and the judge's statement that (even if he were to ask) he wasn't getting one, belie the state's main argument that appellant's request was insincere, manipulative, and calculated to delay the trial.[4]

The state also relies on the pre-Faretta case of Meeks v. Craven, 482 F.2d 465 (9th Cir. 1973)(SB54-55). Meeks was discussed in Admas v. Carroll, 875 F.2d 1441 (9th Cir. 1991)(see appellant's initial brief, p.14,42-43). The Court of Appeals in Adams wrote:

> Here, Adams made his preference clear from the start: He wanted to represent himself if the only alternative was representation by Carroll. [footnote omitted]. Although his two self-representation requests were sandwiched around a request for counsel, this was not evidence of vacillation. To the contrary, each of these requests stemmed from one consistent position: Adams first requested to represent himself when his relationship with Carroll broke down. He later requested counsel, but with the express qualification that he did not want Carroll. When Carroll was reappointed, Adams again asked to represent himself. Throughout the period before trial, Adams repeatedly indicated his desire to represent himself if the only alternative was the appointment of Carroll. While his requests no doubt were conditional, they were not equivocal.
>
> This conclusion is reinforced when tested against the purposes underlying the unequivocality requirement. Adams was not seeking to waive his right to counsel in a thoughtless manner; the trial court engaged him in extensive discussion regarding the difficulties of proceeding in pro per. Adams nevertheless persisted,

[4] Contrast United States v. Frazier-El, supra, where the Court of Appeals found Frazier-El's request to be a manipulative attempt to assert a legally invalid, frivolous defense; i.e., that as an "officer in the Moorish Science Temple" he was not subject to the jurisdiction of a United States district court.

> choosing to fend for himself rather then rely on counsel whom he mistrusted. Nor was his request a momentary caprice or the result of thinking out loud; he made the same request over and over again, at nearly every opportunity. Had the request been granted, an appeal based on the denial of the assistance of counsel would have been frivolous, in light of the earnestness and frequency of his requests to represent himself. None of the purposes served by the requirement would be furthered by treating a conditional request for self-representation as equivocal.

875 F.2d at 1144-45 (emphasis in opinion).

The Court of Appeals distinguished Meeks as involving markedly different facts; there "we found a request equivocal where the defendant indicated only once, and after trial had commenced, "I think I will [represent myself]", where that statement evidenced a desire to proceed in pro per only for the purpose of presenting one motion, and the defendant did not object to representation by counsel at any other time." Adams v. Carroll, 875 F.2d at 1445.

A diversionary argument raised by the state needs to be briefly addressed. Contrary to the state's suggestion (SB60 and n.13), appellant never requested "hybrid" representation, and there is no indication that the trial court believed he was requesting hybrid representation. Unlike the right of self-representation (which is not subject to the trial court's discretion when properly invoked), when a defendant requests that he be allowed to act as co-counsel there is no constitutional right involved; the granting or denial of such a request is discretionary with the trial court, and his ruling is reviewed

under an abuse of discretion standard. Mora v. State, 814 So.2d 322 (Fla. 2002); Madison v. State, 948 So.2d 975 (Fla. 1st DCA 2007); Brooks v. State, 703 So.2d 504 (Fla. 1st DCA 1997). In the instant case, the trial judge understandably made no ruling on a request to act as co-counsel, because appellant never made such a request.

Robert Fraser was specifically appointed as penalty phase counsel (6/1183-84;SR12/368), and appellant's complaint had nothing to do with the penalty phase. Appellant was seeking an acquittal of murder, in which case there would have been no penalty phase. The guilt phase of a capital trial and the penalty phase are separate and distinct proceedings. Barber v. State, 4 So.3d 9,12-13 (Fla. 5th DCA 2009); see Fla. Stat. §921.141(1). Each is a critical stage of the trial, so even if appellant had invoked his right to self-representation as to both phases, and had fired both Sinardi and Fraser, the trial court would have been obligated to renew the offer of counsel at the beginning of the penalty phase. See, e.g., Travis v. State, 969 So.2d 532 (Fla. 1st DCA 2007). The state claims that appellant "clearly express[ed] his desire to retain attorney Fraser" (SB60). Actually his comments are more indicative of indifference to Fraser and to the penalty phase in general (see 29/456;34/1022). But in any event, it is clear that Judge Fuente had no difficulty understanding that appellant was asking to represent himself in the guilt phase of the trial, and was not asking to act as co-counsel with Mr. Fraser, as evidenced by the following exchange during the Faretta

hearing:

> THE COURT: Do you understand that if you proceed pro se that is on your own that this Court will not and cannot give you any special treatment in representing yourself; you understand that?
>
> APPELLANT: Yes, sir.
>
> THE COURT: I know you have Mr. Fraser. I know you have investigators but with respect to the first phase of this trial they are not your lawyers. They cannot stand up and object. They cannot call witnesses. They cannot call witnesses, you would be doing that on your own; do you understand that?
>
> APPELLANT: Yes, sir.
>
> THE COURT: You understand that this Court will not necessarily grant you a continuance of this trial. In other words we're here on Monday morning ready to select a jury.
>
> Mr. Sinardi's prepared to do everything he needs to do on your behalf and simply because you choose to represent yourself that will not necessarily result in this case being continued; do you understand that?
>
> APPELLANT: Yes, sir.
>
> THE COURT: Are you prepared to proceed today?
>
> APPELLANT: Yes, sir.

(29/461-62)(emphasis supplied)

[Of course, if appellant's Sixth Amendment right to self-representation had been respected, the trial judge would have had the discretion, if he chose, to appoint Fraser as standby counsel. For that matter, he could even have appointed Sinardi to be standby counsel; doing so does not amount to a violation of a defendant's constitutional rights unless the standby attorney interferes with the defendant's ability to conduct his own case and to make all significant tactical decisions. See McKaskle v.

Wiggins, 465 U.S. 168 (1984)].

In Weaver v. State, 894 So.2d 178,190-91 (Fla. 2004), shortly before trial, Weaver moved to discharge his court-appointed guilt-phase attorney Salantrie over a disagreement about defense strategy. After an adverse ruling in the Nelson hearing, and after a Faretta inquiry, Weaver was allowed to dispense with Salantrie's services and proceed pro se in the guilt phase, while retaining his appointed penalty-phase counsel, Singhal, in the event of a first-degree murder verdict. That is what appellant was requesting to do in the instant case, as Judge Fuente well understood.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, 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 A. Browne, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of December, 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).

Respectfully submitted,

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