IN THE SUPREME COURT OF FLORIDA

CASE NO._____

PEDRO HERNANDEZ-ALBERTO,

Petitioner,

CAPITAL POSTCONVICTION CASE

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

The following format will be used when citing to the record. References to the record of the direct appeal of the trial, judgment, and sentence in this case shall be referred to as "ROA" followed by the appropriate volume and page numbers. References to the postconviction record on appeal shall be referred to as "PC-R." followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr.Hernandez-Alberto respectfully requests oral argument.

JURISDICTIONAL STATEMENT

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See, Art. l, Sec. 13, Florida Constitution. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Hernandez-Alberto's death sentence.

This Court heard and denied Mr. Hernandez' direct appeal. *Hernandez-Alberto v. State*, 889 So. 2d 721 (Fla. 2004). A petition for a writ of

habeas corpus is the proper means for Mr. Hernandez to raise the claims presented herein. See, e.g., *Way v. Dugg*er, 568 So. 2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987); *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985).

STATEMENT OF THE CASE

Despite the almost constant obstructive behavior by the defendant, two *Nelson* hearings, numerous motions to withdraw[1] or discharge counsel, and defense counsels' reports of non-cooperation, the lawyers were ordered to represent Mr. Hernandez through jury selection.

The judge repeatedly expressed misgivings about allowing the defendant to represent himself. As soon as the jury was selected the following exchange took place:

> THE COURT: We are back on the record. Because of his outbursts again, I don't believe, and I will make a decision by tomorrow morning. I don't know that I'm going to do a *Farreta* hearing.
>
> I can't conduct a trial, not of this magnitude, without someone representing the defendant, either himself or counsel. And by his actions, it appears that he is not going to conduct himself appropriately.

[1]ROA Vol. II, 270-72 ("Motion to Withdraw or Act in an Advisory Capacity" filed by defense counsel – hearing on that and various requests to fire his attorneys by the defendant at ROA Vol. IV, 128-36).

> That being the case, I don't believe that I am going to allow him to discharge you. But I will make that decision tomorrow morning.

ROA Vol. VI 482-83.

Despite that, the next morning after the jury was sworn, the court conducted a *Faretta* inquiry (reproduced below), discharged counsel (who remained on standby), and ordered the Defendant to represent himself. ROA Vol. VII 488-515. The judge made it clear, though, that the only reason he was doing it was because he thought the case law at the time did not give him any other choice:

> THE COURT: The Court's going to make the following finding that the defendant is competent to waive counsel. And that his waiver of counsel is one that is both knowing and intelligent according to the applicable case law. I have a serious concern, however, with him being able to capably conduct an effective defense.
>
> However, this is not a basis in which to not allow him to represent himself. And that's pursuant to *State vs. Bowen*. 698 So.2d 248, which is a Florida Supreme Court case decided in 1997.

ROA Vol. VII 515-16. After both sides rested defense counsel were re-appointed and remained on the case through the penalty phase and thereafter.

Hernandez claimed on direct appeal that the court erred by ordering him to proceed *pro se*. His argument, from his initial brief, so far as it goes, is reasserted here:

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO PROCEED PRO SE AT TRIAL WITHOUT A PROPER FINDING OF COMPETENCE AND WITHOUT A KNOWING AND INTELLIGENT WAIVER OF COUNSEL, AND IN FAILING TO HOLD COMPETENCY HEARINGS ON OCCASIONS THROUGHOUT THE PROCEEDINGS.

The trial court erred in allowing Hernandez to proceed without a proper determination of competence, and him to proceed pro se without a proper determination of competence or a proper showing his waiver of counsel was knowing and intelligent. . .

Hernandez was initially found incompetent a few months after the incident and his arrest, based upon the evaluations Dr. Maher and Dr. Saa . . . After a short commitment to a State Mental Hospital, Dr. Saa believed he remained incompetent, but Dr. Maher reversed his opinion . . . Based on the testimony and report of Dr. Maher, documents from the State Hospital, and the testimony of a State Hospital Psychologist, Dr. Balzer, the court found he was competent to proceed. . . .

After this hearing and until trial, Hernandez was disruptive and disrespectful in court; demanded care for injuries, contact with family, and help with abuse in jail; sought and was granted discharge of his original counsel; sought and was denied replacement of the second defense team; and refused to communicate with the new defense team

. . . On November 1, 2000, Dr. Martinez filed a report stating she found Hernandez was very paranoid and psychotic, probably suffering from chronic paranoid schizophrenia, and he should be treated with an antipsychotic medication . . . .

Two weeks before trial, the court reappointed Dr. Saa and Dr. Maher to examine Hernandez and ordered a competency hearing upon motions of the State and the defense [ROA Supp. Vol. II,188-98; ROA Vol. I 123-27; *Id.* Vol. II 322-25). At the competency hearing held on the day before trial (ROA Vol. IV, 26-146), Dr. Maher said Hernandez was competent and knew he was charged with murder and faced the death penalty despite failing to respond to being told of such . . . Dr. Saa testified Hernandez would not discuss the criteria of competence, and it was improper to find competence without a discussion of the criteria . . . Dr. Berland could not form an opinion to a medical certainty about Hernandez's competence because he had not participated in an evaluation, but he believed he was mentally ill and brain damaged . . . .

The trial court found Hernandez was competent to proceed on the day before trial . . . On the second day of trial, after jury selection, the trial court conducted a Faretta inquiry

[The Appellant's Initial Brief then contains a discussion of, *inter alia*, *Godinez v. Moran*. 509 U.S. 389 (1993) and *Bowen*.]

The trial court conducted a *Faretta* inquiry. . . That colloquy establishes a lack of competence and the lack of a voluntary waiver:

> THE COURT: Mr. Hernandez-Alberto.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Yesterday you indicated your desire to discharge your court-appointed attorneys and that you wanted to represent yourself. He can stand right now that we are talking.

THE DEFENDANT: Yes, sir.

THE COURT: Sir, I need to ask you some questions with regard to your representation of yourself. Do you still desire to discharge your attorneys and to represent yourself?

THE DEFENDANT: Yes.

THE COURT: Okay. Mr. Hernandez-Alberto, you understand, sir, that you do have the right to a lawyer and that I have appointed attorneys for you. You do have the constitutional right to discharge them.

THE DEFENDANT: I want them to withdraw because they are not helping me in any way.

THE COURT: Okay. You understand that there are advantages to having lawyers represent you. Do you understand that?

THE DEFENDANT: I know that there are certain advantages, but the attorneys are violating my rights. I don't see any advantage.

THE COURT: Okay.

THE DEFENDANT: For some time now I have been requesting the documents, the discovery documents, the accusation documents. And I have not received anything. I have wanted to go to the library and I have never been allowed to go to the library.

THE COURT: Okay. Throughout the proceedings, Mr. Hernandez-Alberto, you have not given your attorneys the opportunity to speak with you.

THE DEFENDANT: I don't count on their help. I want them to withdraw. I don't need them.

THE COURT: That's why we are at this --

THE DEFENDANT: Because they are not helping me. They are not helping me. That's the motive. That's the reason. They are not helping me.

THE COURT: That's why, sir, we are at this stage of the proceedings. And I'm going to ask you some questions with regard to you representing yourself.

Do you understand, Mr. Hernandez-Alberto, that your attorneys have the experience and knowledge of the entire legal process and that they will argue for your side during the entire trial and that they will present the best legal argument for your defense?

THE DEFENDANT: Why should I have them if there's no trust and there's no communication?

THE COURT: Well, I am just asking you, sir, if you understand the advantages of experienced attorneys representing you.

Do you understand, sir, that your attorneys can call witnesses for you, that they can question the witnesses against you and they can present evidence on your behalf?

THE DEFENDANT: Do I have a right to make those questions? Yes or no?

THE COURT: You have the right to assist your attorneys, sir, in formulating the questions.

THE DEFENDANT: The attorneys, I don't want to

communicate with them because they haven't done anything for me. I want to communicate with my family and they have not helped me.

THE COURT: Well, in fact, Mr. Hernandez-Alberto, we have gone over these exact issues. And your family, at least your sister, has been brought to Hillsborough County and taken to the jail and you have refused, in fact, to see her.

Do you understand, sir, that your attorneys can advise you on whether you should testify?

THE DEFENDANT: Whom?

THE COURT: The consequences of that decision and what you have a right not to say?

THE DEFENDANT: Speaking about my sister, I saw her. She spoke with me. She left me some telephone numbers to her home. And now at the jail they don't let me talk with her.

MR. TRAINA: Judge, just for the record, he did speak with his sister. I don't know if you have got the impression from something that we had said earlier that he had did not speak to his sister.

There have been many people that he did not speak to, but he has, indeed, had visits with his sister.

THE COURT: Okay. Do you understand, sir, that your attorneys can discuss with you your right to testify and whether you should or should not testify and what you have a right not to say?

THE DEFENDANT: I don't want the attorneys. I want them to withdraw.

THE COURT: You further understand, sir, that your attorneys have studied the rules of evidence and they know what evidence can or cannot come into your trial?

THE DEFENDANT: They haven't shown it to me. They have not explained it to me. They haven't -- that's what I would like to find out, in fact. But they have not communicated any of this to me.

THE COURT: Mr. Hernandez-Alberto, that's because you have refused to talk with your attorneys.

Do you understand, sir, that your attorneys may provide assistance in assuring that the jury is given complete and accurate jury instructions by the Court? And that they may make an effective closing argument on your behalf?

THE DEFENDANT: This gentlemen Daniel, he went to the jail. I spoke to him three or four times. We talked about the situation, about the accusation. I told him about how I was treated. So it is not that I have not spoken with the attorneys.

THE COURT: Do you understand, Mr. Hernandez-Alberto, that your attorneys, in assisting in this trial and representing you in this trial, that they may prevent an improper argument by the prosecutor if that were to happen?

THE DEFENDANT: But I am not in agreement that they are representing me. I am not in agreement with that. I don't have any trust in either one of the two.

THE COURT: Do you understand, Mr. Hernandez-Alberto, that your attorneys could insure that any errors committed during the trial are properly preserved for appellate review by a higher court?

THE DEFENDANT: I don't know about law. I know almost nothing. But I need to learn. If I could go to the library then I would study and I would possibly find some things that would be of benefit to me.

THE COURT: That's why, sir, that I'm going to ask you a series of questions that would outline some of the damages and disadvantages of you discharging your attorneys and asking the Court that you represent yourself.

Do you understand, sir, that you will not get any special treatment from the Court just because you're representing yourself?

THE DEFENDANT: What do you mean by special treatment?

THE COURT: I am not going to treat you any differently than I would treat the attorneys.

THE DEFENDANT: Are you saying then that you would not or that I would not be allowed the opportunity to find the documents or to go to the library?

THE COURT: I am telling you that I am not going to allow you or you will not be entitled to a continuance simply because you have chosen to represent yourself.

THE DEFENDANT: I want to represent myself because the attorneys have done nothing toward my defense. Nothing in my defense. That's why I want to represent myself. But I would like for you to give me the opportunity to familiarize myself, to take certain steps so that I can find out what is going on.

Also, it would be to my advantage to find out through

these documents what is against me.

THE COURT: Mr. Hernandez-Alberto, if you choose to represent yourself, I am not going to continue the trial. We are going to proceed this morning.

We have picked this jury yesterday. The jury is here. You obviously have a right to represent yourself. But I am not going to prolong the trial.

You are not required to possess the legal knowledge or the skills of an attorney in order to represent yourself. However, you will be required to abide by the rules of criminal law and the rules of courtroom procedure.

These laws took the lawyers years to learn and abide by. If you demonstrate an unwillingness to abide by these rules, I may terminate your self-representation. Do you understand that, sir?

THE DEFENDANT: I don't understand very well. But is it allowed what I am asking from you?

THE COURT: Is what allowed?

THE DEFENDANT: That you let me go to the library and you let me have the discovery. If it is in English, someone can translate it for me so I know what is going on so I can find out what is written there. Because the attorneys that you have sent to help me have not helped me with that.

THE COURT: Mr. Hernandez-Alberto, we have already gone through these issues. I have found that your attorneys have been representing you effectively and that they have done everything that they possibly could have done in light of the fact that you have not cooperated with anyone.

Now that you are requesting to represent yourself, and you have the constitutional right to do so, I will give you that opportunity. But I am not going to continue the trial. Do you understand that, sir?

THE DEFENDANT: What do you mean to continue the trial?

THE COURT: I am not going to delay the trial. The jury is here and we are going to proceed with the trial this morning. Do you understand?

THE DEFENDANT: If this is the case then I would like all the news media to be present and spread the news that I am not being given the opportunity to go to the library to obtain the self discovery or to discuss any matters with my family.

THE COURT: Okay. Do you still want to represent yourself, Mr. Hernandez-Alberto?

THE DEFENDANT: I don't want the attorneys. I want to represent myself. I want to communicate with my family.

THE COURT: Do you understand that if you're disruptive in the courtroom that the Court can terminate your self-representation and remove you from the courtroom? In which case the trial would continue without your presence?

THE DEFENDANT: I do not understand that. But if I'm going to be judged, it has to be done in front of the people and that I be given an opportunity to present those cases to those people.

THE COURT: Mr. Hernandez-Alberto, in virtually every

court appearance that you have made, with the exception of this morning so far, you have created a disturbance. You have interrupted the court proceedings, you have used profanity. You have been vulgar.

And I am telling you, [sir, that if you want to represent yourself, that you have the constitutional right to do so. And I will allow to you do so.

However, if you are disruptive, as you have been through- out all of the Court proceedings up until today, that I can terminate your self-representation and remove you from the courtroom. In which case the trial will continue without your presence. Do you understand that, sir?

THE DEFENDANT: Are you not violating the laws in that way?

THE COURT: Mr. Hernandez-Alberto, I'm going to ask you, sir, please answer the question.

THE DEFENDANT: Yes or no?

THE COURT: I'm going to ask you to please answer the question. If you're disruptive, I will remove you from the courtroom and we'll proceed with the trial without your presence.

THE DEFENDANT: No, because the law -- not exactly the law of what I think, but I believe that when one is tried, one has to be tried before the people.

So that the people must find out if one is guilty or not guilty. Whereas, if everybody turns against one, then that would not be very fair.

THE COURT: Mr. Hernandez-Alberto, this is an open

courtroom. You will have a jury of your peers determine whether you're guilty or innocent. There is not going to be anyone that will be denied access to the court.

There are certain rules and procedures, however, that you will be required to follow just as a lawyer is required to follow them. If you do not follow those rules and procedures, if you are otherwise disruptive, I'm going to remove you from the courtroom and I will continue the trial without your presence. Do you understand, sir?
THE DEFENDANT: Yes, I understand what you are saying. But that doesn't mean that I agree with what you are saying. What I am asking for you is, again, to let me speak with my family and give me the opportunity to have the discovery.

THE COURT: Do you understand, Mr. Hernandez-Alberto, that the State will not go any easier on you or give you any special treatment because you're representing yourself? That the State will present its case against you as an experienced lawyer?

THE DEFENDANT: As I was saying, I want to know what is going on. I want the report of the information. The report of the charges that are against me.

THE COURT: All of these items in which you complain, Mr. Hernandez-Alberto, could have and would have been provided to you long ago had you only been cooperative with your attorneys and their investigators. You chose not to be cooperative, sir. That's why you're in the position that you're in today.

Finally, Mr. Hernandez-Alberto, do you understand that if you're convicted, you cannot claim on appeal that your own lack of legal knowledge or skill constitutes a basis for a new trial.

In other words, you cannot claim that you received ineffective assistance of counsel. Do you understand that, sir?

THE DEFENDANT: Why I cannot complain if you yourself know that the lawyers are not helping me? I had mentioned to you a few times the same thing.

THE COURT: Do you understand these damages and disadvantages of representing yourself, sir?

THE DEFENDANT: I need time to come back later on.

THE COURT: I am not going to continue the trial, sir. Do you have any questions about these damages and disadvantages?

THE DEFENDANT: Do you understand that when you hire somebody to do a job for you and you pay that person some amount of money, if that person could not do the job, he is not being fair to you because he is not complying with the money that you had already paid him?

These persons, that they already have been paid money for my case to represent me. But as I repeated to you, they had done nothing, nothing, to help me. And then what happened was that the one who paid the money to the person to do the job, he doesn't trust that person and will not hire that person again to do another job for him.

THE COURT: If you're discussing the facts of discharging your attorneys, I'm going to give you that opportunity. You will be allowed to represent yourself.

THE DEFENDANT: Then I am not going to obtain the discovery?

THE COURT: Have you received and read a copy of the charges against you?

THE DEFENDANT: Who gave it to me, the lawyer?

THE COURT: My question to you is it have you received and read a copy of the charges against you?

THE DEFENDANT: No.

THE COURT: Okay. Make a copy of the indictment, take him to the holding cell and give him an opportunity to read it.

THE DEFENDANT: No, I need, please, to give me the discovery.

THE COURT: Take him back to the holding cell and let him read the indictment. I will be in recess for a few moments.

* * *

THE COURT: Okay. Thank you. The Court is satisfied that Mr. Hernandez-Alberto was been afforded the opportunity to review the evidence and discovery in preparation of his defense. Do you still wish to represent yourself, Mr. Hernandez-Alberto?

THE DEFENDANT: I told you a while ago that I wanted -- not to exchange -- but the discovery, the documentation, that I can prepare myself and present my case.

THE COURT: Mr. Hernandez-Alberto, I am not going to continue this matter. I am asking you a specific question. And I'm going to ask you to respond specifically to my question. Do you still want to represent yourself?

THE DEFENDANT: Yes.

THE COURT: Do you understand the charges against you?

THE DEFENDANT: That's what I want to make sure of.

THE COURT: You're charged with two counts --

THE DEFENDANT: I need the opportunity.

THE COURT: --of first degree murder. Do you understand that, sir?

THE DEFENDANT: I am being accused of two counts of murder?

THE COURT: Yes. You understand that?

THE DEFENDANT: I am hearing and I understand the information that is against me, but I need the papers, the discovery, in order to be able to talk --

THE COURT: Do you understand that the maximum penalty, if you're found guilty of the charges, is either death by electrocution or by lethal injection or life imprisonment without the possibility of parole. Do you understand that, sir?

THE DEFENDANT: Well, I am not going to say yes, but if you're going to base yourself on the information that the police gave you and the information is incorrect, you're going to base yourself on that information.

THE COURT: Do you understand that if you are not a citizen of the United States and if you're found guilty, you could be deported from this country, excluded from

entering this country in the future and denied the opportunity to become a naturalized citizen?

THE DEFENDANT: I am not guilty, sir, of the accusation that's being made against me.

THE COURT: My question to you -- I would ask that you please respond to the question, sir.

THE DEFENDANT: Could you tell me that question again, please?

THE COURT: Do you understand if you are not a citizen of the United States and you're found guilty, you could be deported from the country, excluded from entering the country in the future and denied the opportunity to become a naturalized citizen?

THE DEFENDANT: From something that I am guilty? As I told you, I am not guilty of such an action.

THE COURT: Do you have; any questions about the charges or the possible consequences and penalties if you're found guilty as I have explained them to you?

THE DEFENDANT: What did you say?

THE COURT: Do you have any questions about the charges or the possible consequences and penalties if you're found guilty as I have explained them to you?

THE DEFENDANT: I don't understand that question very well.

THE COURT: Let me ask you some other questions to determine whether you're competent to make a knowing and competent waiver of counsel. How old are you?

THE DEFENDANT: Twenty-eight years old.

THE COURT: Can you read or write the English language?

THE DEFENDANT: No.

THE COURT: How many years of school have you completed?

THE DEFENDANT: Up until number six.

THE COURT: Are you currently under the influence of any drugs or alcohol?

THE DEFENDANT: What do you mean? What did he say?

THE COURT: Are you currently under the influence of any drugs or alcohol?

THE DEFENDANT: No.

THE COURT: Have you ever been diagnosed and treated for a mental illness?

THE DEFENDANT: Yes. In jail I was taking medicine for about five months.

THE COURT: Do you have any physical problem which would hinder your self-representation in this case such as a hearing problem, speech impediment, or poor eyesight? Do you have an answer?

THE DEFENDANT: No.

THE COURT: Do you have a hearing problem?

THE DEFENDANT: No.

THE COURT: Do you have a speech impediment?

THE DEFENDANT: No.

THE COURT: Do you have poor eyesight?

THE DEFENDANT: Sometimes my sight fails me, but it doesn't mean that it's permanent. It fails me possibly due to tiredness.

THE COURT: Has anyone told you not to use a lawyer?

THE DEFENDANT: From the ones that are here?

THE COURT: No, sir. Has anyone ever threatened you not to use a lawyer?

THE DEFENDANT: No.

THE COURT: Has anyone threatened you if you hire a lawyer or accept a lawyer appointed by the Court?

THE DEFENDANT: They have prohibited the use of an attorney over there in the jail because they never come in to see me.

THE COURT: Have you ever represented yourself in trial?

MR. HERNANDEZ: I have never been in jail before.

THE COURT: Okay. I take that as the answer is no. Is that correct?

THE DEFENDANT: One time I had to go in front of a judge, I don't remember when it was, for a ticket that had

been given to me.

THE COURT: But you have never represented yourself in a trial. Is that correct?

THE DEFENDANT: I was there speaking. I was there speaking with a translator, but I did not have an attorney.

THE COURT: Having been advised of your right to counsel, the advantages of having counsel, the disadvantages and damages with proceeding without counsel, the nature of the charges and the possible consequences in the event of a conviction, are you certain that you do not want me to appoint these lawyers to defend you?

THE DEFENDANT: I have been conscious of what you said about the attorneys that I had over here, that they have not helped me. If you appoint another attorney for me, yes, I want an attorney.

THE COURT: I am not going to appoint substitute counsel. Are you certain that you do not want me to keep these attorneys on your case and let them defend you, sir?

THE DEFENDANT: Yes, I don't want them.

THE COURT: I'm going to, on the Court's own motion, order that Mr. Hernandez and Mr. Traina act as standby counsel. That means, Mr. Hernandez-Alberto, that they will be available to you if you have any questions during the course of these proceedings. However, you will be responsible for the organization and content of presenting your case. You still have the entire responsibility for your own defense. Do you understand that?

THE DEFENDANT: Yes, I understand. I understand that. That's why I am asking you to let me go to the

> library and get acquainted with some things that I need to know, necessary for me to know.
>
> THE COURT: I have already discussed that matter with you, sir. I am not continuing the trial. Do you understand that you're going to have the entire responsibility for your own defense?
>
> THE DEFENDANT: Yes. But I also -- I agree that I need the opportunity to know about the discovery. Because if I did hear it, I don't know.
>
> THE COURT: The Court's going to make the following finding that the defendant is competent to waive counsel. And that his waiver of counsel is one that is both knowing and intelligent according to the applicable case law. I have a serious concern, however, with him being able to capably conduct an effective defense.
>
> However, this is not a basis in which to not allow him to represent himself. And that's pursuant to *State versus Bowen*, 698 So 2d, 248, which is a Florida Supreme Court case decided in 1997.

[ROA Vol. VII 488-518]. . . .

> The inquiry does not establish Hernandez understood the risks of self-representation, and there was no knowing, intelligent, and voluntary waiver of counsel. "[T]he knowingly and voluntary prong of the Godinez standard requires more than merely exposing a defendant to information -- it requires that the defendant actually does understand the significance and consequences of a particular decision.'" *Wilkins v. Delo*, 886 F.Supp. 1503 (W.D.Mo. 1995), quoting *Godinez*, 509 U.S at 401 fn 12. Every reasonable presumption against waiver should be indulged. *Brewer v. Williams*. 430 U.S. 387, 404 (1977). "The ultimate test is not the trial court's express advice, but

rather the defendant's understanding." *Rogers v. Singletary*, 698 So. 2d 1178 (Fla. 1996); *U.S. v. Balough*, 820 F.2d 1485, 1487-1488 (9th Cir. 1987) ("Throughout this inquiry, we must focus on what the defendant understood, rather than on what the court said or understood."), cert, denied 525 U.S. 1083 (1999). The trial court clearly erred in finding a literate, competent, understanding, and voluntary waiver of counsel.

After the trial, and prior to the guilt phase jury proceeding, Hernandez: asserted at a hearing he needed to contact his family . . . filed a pro se discovery demand and pro se motions for termination of counsel, reappointment of the public defender, disqualification of the judge, and to withdraw guilty plea [Supp. ROA Vol. I 6-9; ROA Vol. II 327]. He complained at a hearing that: relatives brought for the hearing were not the relatives requested; he was allowed only an hour to visit with the relatives; counsel did not arrange phone calls with other relatives as promised; counsel did not provide copies of X-rays as requested; he needed help with injuries; the jail failed to provide medication; the court had not ruled on his pro se motions; he wanted to discharge counsel, but he did not want to represent himself; he wanted to see a doctor for his broken back; a jail doctor prohibited him from receiving medication and an X-ray, and improperly diagnosed him well; counsel failed to help with his injuries, and failed to provided anything about the investigation; no one helped him during the trial and everything the police said was accepted; the arresting officer lied about a detail of the arrest . . . He again filed a pro se motion to disqualify the judge. . .

On November 19, 2001, before the penalty phase jury proceeding, the defense moved for reconsideration of competence, based on new more definitive testimony of Dr. Berland that Hernandez was mentally ill and incompetent. . . . Dr. Berland testified he originally believed Hernandez

> was not competent to proceed, but he lacked solid evidence of mental illness. . . Dr. Berland had now obtained clear evidence of mental illness through a conversation with his ex-wife Carmen . . . Dr. Berland asserted Hernandez's behavior during the marriage was consistent with delusional paranoid thinking, he is psychotic, and he is incompetent to proceed . . . .
>
> At the jury penalty phase hearing. Dr. Mussenden testified Hernandez suffered from a brain damage and a paranoid disorder and had so suffered for some time . . . . Dr. Berland testified Hernandez was psychotic and brain damaged at the time of the offenses, and continued to be mentally . . . Dr. Merin hypothesized that Hernandez had no mental illness but suffered from a paranoid personality disorder
>
> At a hearing held on March 19, 2002, prior to the *Spencer* hearing, counsel noted Hernandez refused to submit to a PET scan which was contrary to his interests, and questioned whether he was competent . . .
>
> The court stated he was competent, but refused to conform [Supp. ROA Vol. III 273]. . . .
>
> The judgment and sentence must be vacated and the cause reversed for a new trial. In the alternative, the sentence must be vacated and the cause reversed for a new sentencing proceeding.

Appellant's Initial Brief, 50-72

This Court disposed of the issue this way:

Issue 2: Pro Se Representation

> Hernandez-Alberto next asserts that the trial court erred in allowing him to proceed pro se at trial. From the time of his arrest until the third day of his trial,

Hernandez-Alberto had been represented at different times by two sets of attorneys. At some point he requested that both sets be discharged. Prior to discharging each set of attorneys, the trial court conducted a *Nelson* hearing. Such a hearing is required:

> [W]here a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute. See *Wilder v. State*, Fla.App.1963, 156 So.2d 395, 397. If the defendant continues to demand a dismissal of his court appointed counsel, the trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel.

Nelson v. State, 274 So.2d 256, 258-59 (Fla. 4th DCA 1973).

After both *Nelson* hearings, the trial court concluded

that Hernandez-Alberto had been zealously represented. However, at the conclusion of the first Nelson hearing, the trial court nonetheless discharged counsel and appointed substitute counsel. Prior to discharging the second set of attorneys and prior to opening statements, the trial court warned Hernandez-Alberto that substitute counsel would not be appointed and asked Hernandez-Alberto if he still wished to discharge his counsel and represent himself. When Hernandez-Alberto indicated that he wished to discharge his counsel, the trial court conducted a *Faretta* inquiry.

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self- representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and that his choice is made with his eyes open."

Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (citations omitted). During the *Faretta* inquiry, Hernandez-Alberto indicated that he understood the charges against him, that he wished to represent himself, and that he understood the consequences of representing himself. Hernandez-Alberto then represented himself for two days while his second set of counsel remained, as required by the trial court's order, as standby counsel. [FN3] During those two days, the trial court asked Hernandez-Alberto numerous times if he wished to have his counsel reappointed, and Hernandez-Alberto declined these

invitations. On the morning of the final day of the guilt phase, Hernandez-Alberto moved for standby counsel to be reappointed prior to closing arguments, and the trial court granted his request.

> FN3. The "State may--even over objection by the accused--appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta*, 422 U.S. at 835 n. 46, 95 S.Ct. 2525.

Based upon the foregoing, we find that the trial court did not err in allowing Hernandez-Alberto to proceed pro se. As we stated in *Bowen*:

> [O]nce a court determines that a competent defendant of his or her own free will has "knowingly and intelligently" waived the right to counsel, the dictates of Faretta are satisfied, the inquiry is over, and the defendant may proceed unrepresented. See Fla. R.Crim. P. 3.111. The court may not inquire further into whether the defendant "could provide himself with a substantively qualitative defense," *Bowen*, 677 So.2d at 864, for it is within the defendant's rights, if he or she so chooses, to sit mute and mount no defense at all.

State v. Bowen, 698 So.2d 248, 251 (Fla.1997). Although Hernandez-Alberto's self-representation did not result in a favorable outcome, the trial court committed no error in allowing Hernandez-Alberto to represent himself, because the record demonstrates that the trial court properly conducted a *Faretta* hearing. As explained by the United States Supreme Court in *Faretta*:

> 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."
>
> *Faretta*, 422 U.S. at 834, 95 S.Ct. 2525. [FN4] The trial court did not err in allowing the defendant to exercise his right to represent himself in this case.
>
> FN4. *Accord Bowen*, 698 So.2d at 250 ("The federal Court in *Faretta* made no provision for an additional layer of protection requiring courts to ascertain whether the defendant is intellectually capable of conducting an effective defense. Such a requirement would be difficult to apply and would constitute a substantial intrusion on the right of self-representation.").[2]

[2]This Court said, "Although Hernandez-Alberto's self-representation did not result in a favorable outcome, the trial court committed no error in allowing Hernandez-Alberto to represent himself, because the record demonstrates that the trial court properly conducted a *Faretta* hearing." *Indiana v. Edwards* carves out an exception to this safe harbor approach.

Hernandez-Alberto, supra, 889 So. 2d at 728-30.

The pattern of multiple competency evaluations and inappropriate courtroom behavior by the defendant continued in the postconviction proceedings. The court discharged postconviction counsel after a *Faretta* hearing at one point. On January 12, 2009, after another colloquy with the defendant, the court re-appointed CCRC, citing *Indiana v. Edwards*, *United States v. Garey*, 540 F.3d 1253 (11th Cir.2008) (en banc),[3] and *Tennis v. State*, 997 So.2d 375 (Fla.2008).[4] The course of the

[3] In *U.S. v. Posadas-Aguilera*, 336 Fed.Appx. 970, 976 n.5 (11th Cir. 2009), the court was considering a *Faretta* claim, but in a footnote stated that, "[i]n those cases in which a court finds a defendant to be suffering from a severe mental illness, *Edwards* appears to limit that defendant's right to self-representation and require counsel." In the same case, the court noted that *Faretta* had been complied with and that the trial court had not erred in allowing the defendant to proceed pro se, and concluded that, "[m]oreover, Posadas-Aguilera did not show, and has not shown, that he suffered from a significant mental illness to such an extent that his choice must not be considered intelligent." *Id*. at 976. Under this reasoning, the test in the Eleventh Circuit would be whether a defendant's mental illness renders his choice to waive his right to counsel "unintelligent," thereby precluding courts from granting the request to represent himself under *Faretta*'s "knowing and intelligent" waiver standard. *Accord United States v. Garey*, 540 F.3d 1253, 1268 n. 9 (11th Cir. 2008) ("If, when viewing all relevant circumstances, a court concludes a defendant's equivocal, irrational, or otherwise uncooperative conduct stems from serious mental illness, confusion, or any other condition indicative of a lack of understanding, the court should prohibit the defendant from proceeding *pro se*, even if the defendant has rejected counsel or made an affirmative request to proceed without counsel").

[4]In *Tennis v. State*, this Court held that courts must be satisfied of three things before allowing a defendant to proceed *pro se*:

subsequent postconviction proceedings were as set out in the lower court's orders dismissing the instant motion for postconviction relief first without and then with prejudice:

> On March 10, 2006, Capital Collateral Regional Counsel (CCRC) filed an unverified Motion to Vacate Judgment of Conviction and Sentence on Defendant's behalf, and on March 13, 2006, they filed a Motion for Competency Determination pursuant to Florida Rule of Criminal Procedure 3.851(g). The Court held a competency hearing on February 14, 2008, and on June 3, 2008, the Court found Defendant competent to proceed.
>
> On July 28, 2008, the Court extended the time by sixty (60) days for the defense to file a facially sufficient motion that included an oath signed by Defendant verifying the truth and accuracy of the claims made in his motion as required by rule 3.851. But on October 27, 2008, at a status hearing, Defendant not only refused to verify the motion, he also requested that CCRC be discharged as counsel and that he be allowed to represent himself. After conducting a *Faretta* inquiry, the Court granted Defendant's request, discharged CCRC as counsel and appointed them as standby counsel. The postconviction motion previously filed by CCRC on Defendant's behalf was dismissed and on October 30, 2008, Defendant was given sixty (60) days to file his *pro*

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1) The request for self-representation must be unequivocal;
2) A *Faretta* hearing must be held to determine whether the request is made knowingly and intelligently;
3) Under *Indiana v. Edwards*, 554 U.S. 164, a defendant may be denied the right to proceed *pro se* if, after the *Faretta* hearing, the judge has doubts as to the defendant's mental competency. *Tennis v. State*, 997 So.2d 375, 378-9 (Fla. 2008).

se postconviction motion.

On December 17, 2008, the Court extended by sixty (60) days the time which Defendant had to file his motion. However, on January 12, 2009, after interviewing Defendant, the Court concluded that although Defendant was competent to proceed, he was not competent to represent himself, and pursuant to *Indiana v. Edwards*, 128 S.Ct. 2379 (2008), the Court reappointed CCRC as defense counsel and gave them ninety (90) days to file an amended motion.

On March 18, 2009, defense counsel filed their amended motion. On April 7, 2009, they filed a motion to extend the time to file a signed verification, and on April 27, 2009, the Court granted defense counsel's request. On June 1, 2009, defense counsel conceded that not only had Defendant not signed the verification but they did not anticipate that they would ever be able to convince him to sign one. On that date they also requested that Defendant be reevaluated to determine if he was still competent to proceed.

In an abundance of caution the Court granted the defense's request and ordered that Defendant be reevaluated. A competency hearing was held on June 3, 2010, and after hearing testimony from two experts, the Court again found Defendant competent to proceed.

A status hearing was then scheduled for July 29, 2010, and at that hearing . . . Defendant still refused to verify the truth of the instant Motion. On August 17, 2010, the Court entered an Order dismissing Defendant's Motion without prejudice so that he may file a facially sufficient motion, which included a signed oath, within sixty (60) days.

Defendant did not file a facially sufficient motion within

> the sixty (60) day period; consequently, the Court now enters the instant order dismissing Defendant's Motion with prejudice. See *Christner v. State*, 984 So.2d 561 (Fla. 2d DCA 2008) (holding that an order dismissing a postconviction motion without prejudice to file an amended, facially sufficient motion is not an appealable order and the best practice would be for the trial court to enter a final order disposing of the motion if the defendant does not file an amended motion within the given time period.)
>
> It is therefore ORDERED AND ADJUDGED that Defendant's Second Amended Motion to Vacate Judgment and Sentence is hereby DISMISSED WITH PREJUDICE.

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GROUNDS FOR RELIEF

IN LIGHT OF *INDIANA V. EDWARDS*, THE CASE SHOULD BE REMANDED FOR THE TRIAL COURT TO DETERMINE WHETHER THE DEFENDANT SHOULD HAVE BEEN PERMITTED TO REPRESENT HIMSELF DURING THE TRIAL, AND IF SUCH A DETERMINATION CANNOT BE MADE, A NEW TRIAL SHOULD BE CONDUCTED

This case is in a similar posture to *United States v. Mckinney*, 373 Fed.Appx. 74, 2010 WL 1169786 (C.A.D.C. 2010) (not selected for publication). That case reads as follows:

> Appellant Duane McKinney challenges his conviction on four counts of mail fraud in violation of 18 U.S.C. §1341, two counts of wire fraud in violation of18 U.S.C. §1343, two counts of engaging in monetary transactions in

violation of 18 U.S.C. §1957 18 U.S.C. §1957, and three counts of first degree theft in violation of D.C.CODE §22-3212(a). During trial, McKinney represented himself, with appointed counsel on standby. On April 17, 2008, the jury returned its verdict against McKinney. On June 19, 2008, the Supreme Court handed down its decision in *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 2387-88, 171 L.Ed.2d 345 (2008) (holding that "the Constitution permits Judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so."). . . .

In *Indiana v. Edwards*, the Supreme Court held that the question of mental competence for self-representation "calls for a different standard" than the question of mental competence for assistance of counsel at trial. See *Edwards*, 128 S.Ct. at 2386. The Court declined to adopt a "specific standard" for mental competency to represent oneself at trial. *Id*. at 2388. Rather, the Court left it to the discretion of the trial judge, who "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." *Id*. at 2387. Under *Edwards*, when the issue of a defendant's mental competency to represent himself is raised, the District Court must first determine whether the defendant "suffer[s] from severe mental illness to the point where [he is] not competent to conduct trial proceedings by [himself]." *Id*. at 2388. Only then may it exercise discretion and decide whether to limit that defendant's right to self-representation. See id. In the instant case, it is unclear whether the District Court meant to hold that the defendant did not have a "severe mental illness" and therefore failed to satisfy the Edwards threshold. The District Court considered the opinion of an expert forensic psychologist at the Federal Correctional Institution in Butner, North Carolina, who concluded that McKinney did not suffer from a severe

mental disease or defect and that he was competent to conduct his own defense. However, it is unclear whether the District Court relied on the expert's opinion to support a conclusion that McKinney did not suffer from severe mental illness or whether the court merely meant to say that it could not determine whether that was so. Therefore, a remand is necessary.

The Government argues that retrospective challenges to the quality of self-representation are not permitted under *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, *Faretta* did not involve a question of mental competency. Moreover, the distinction between mental competency to represent oneself at trial and mental competency to stand trial did not arise until after McKinney's trial, see *Edwards*, 128 S.Ct. at 2386, and he promptly raised the issue in a post-trial motion. Nothing in Edwards suggests that retrospective review in these circumstances is impermissible.

Given the record in this case, including the expert's opinion that McKinney was competent and did not suffer from severe mental illness, and no expert opinion to the contrary, we believe that the District Court is in a position to make a "fine-tuned mental capacity decision[ ], tailored to the individualized circumstances of [this] particular defendant." *Edwards*, 128 S.Ct. at 2387. The District Court has before it the reports of two mental health professionals, the forensic psychologist at Butner and the psychiatrist who attempted to evaluate the defendant, as well as its own observations of defendant's behavior before and during trial. On remand, the District Court may-but is not required to-take additional evidence or allow briefing on the defendant's state of mind at the relevant time. See *United States v. Ferguson*, 560 F.3d 1060, 1070 (9th Cir.2009). If the court determines that the defendant had a severe mental illness at the time he

> represented himself at trial, the District Court should exercise its discretion to determine whether to grant appellant's motion for a new trial. See *Edwards*, 128 S.Ct. at 2388. If the court would not have altered its decision to grant McKinney's motion, the conviction and sentence will stand. See *Ferguson*, 560 F.3d at 1070. If the court rules that it would have altered its decision at trial, it should vacate the conviction and sentence and conduct a new trial, with appellant represented by counsel.

Mckinney, id. This Court should likewise should remand this case to the trial court to make a decision about whether the defendant would have fit within the narrow category of defendants identified in *Indiana v. Edwards* who may be competent under *Dusky* but who are not competent under Edwards to conduct their own defense at trial. If the court cannot make that determination then it should conduct a new trial.

The trial in this case took place in 2001 and 2002. This Court's affirmance is dated December 2004 and became final May 2005. *Indiana v. Edwards* is dated 2008 and this Court's implementation of it became effective Aug. 27, 2009. Because the trial court and this Court did not have the benefit of *Indiana v. Edwards* until the case was well into postconviction, and because the relief requested here can only be granted by way of an original petition in this Court, this

petition is timely.[5]

The Court's implementing rule is reprinted here:

> This matter is before the Court for consideration sua sponte of amendments to Florida Rule of Criminal Procedure 3.111(d) (Waiver of Counsel). We have jurisdiction. See art. V, '2(a), Fla. Const.
>
> **Background**
>
> In *Indiana v. Edwards*, --- U.S. ----, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008), the United States Supreme Court held that the Constitution permits a state to limit a defendant's right to self-representation under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), by insisting upon representation by counsel at trial on the ground that, though competent to stand trial, the defendant lacks the mental capacity to conduct his own trial defense due to severe mental illness. *Edwards*, 128 S.Ct. at 2387-88.

[5]A motion in the postconviction proceedings below would have entailed a request that the trial court overrule *Bowen*.

As previously adopted by this Court, see Amendment to Florida Rule of Criminal Procedure 3.111(d)(2)-(3), 719 So.2d 873, 875 (Fla.1998), rule 3.111(d)(3) does not permit the trial court to take into consideration a defendant's mental capacity to represent himself. Accordingly, in light of *Edwards*, we proposed amending rule 3.111(d)(3) on our own motion.

The Court's proposed change to rule 3.111(d)(3) appeared in the January 1, 2009, edition of The Florida Bar News:

Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by his or her self.

Comments were filed by the Criminal Procedure Rules Committee (Committee) and the Florida Public Defender Association (FPDA).1 The Committee filed a response to FPDA's comment. After reviewing the comments and response, and upon consideration of the oral arguments heard in this case, we now amend rule 3.111(d)(3) as proposed on our own motion, with minor modifications.

Discussion

In reaffirming the right to self-representation under *Faretta*, the Supreme Court in *Edwards* clarified that that right is not without limitation. Rather, states may properly insist upon representation for those defendants who, due to severe mental illness, are not competent to conduct trial proceedings by themselves, a determination distinct from competency to stand trial. *Edwards*, 128

S.Ct. at 2385-86. Florida Rule of Criminal Procedure 3.111(d)(3), however, currently recognizes a right to self-representation once a determination is made that the defendant's waiver of counsel is knowing and intelligent:

> Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

Fla. R.Crim. P. 3.111(d)(3).

> *Edwards* presented the Supreme Court with its first opportunity to decide whether a severely mentally ill defendant, competent to stand trial under the standard announced in *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), 2 had a right to self-representation upon meeting *Faretta*'s knowing and intelligent waiver standard. *Edwards*, 128 S.Ct. at 2385-86. Edwards suffered from a diagnosed "schizophrenic illness" and, following a period of more than three years and three competency hearings, was ultimately found competent to stand trial. *Id*. at 2382. Shortly before trial, Edwards sought to represent himself and requested a continuance in order to proceed pro se. *Id*. The trial court denied Edwards' requests and he went to trial represented by counsel. *Id*. Following a hung jury on two of four counts, Edwards requested to represent himself at his retrial on the attempted murder and battery counts. *Id*. Relying upon the lengthy record of psychiatric reports and Edwards' schizophrenia, the trial court concluded that, while competent to stand trial, he was not competent to represent himself. *Id*. at 2383. On appeal in state court, *Edwards'* convictions were vacated and his case remanded. Id. The Indiana Supreme Court, though

agreeing with the prosecution that the trial court's conclusion that *Edwards* was incapable of adequate self-representation was reasonable, held that competency to represent oneself is controlled by the same standard as competency to stand trial. *Edwards v. State*, 866 N.E.2d 252, 260 (Ind.2007). According to the state high court, therefore, *Faretta* compelled the State of Indiana to allow Edwards to represent himself.

In vacating that judgment and rejecting one competency standard for both standing trial and the right to self-representation, the Supreme Court created a narrow exception to *Faretta*. 128 S.Ct. at 2387. The Supreme Court took into account, among other factors, that mental illness is not a unitary concept-it varies in degree and can vary over time-and that it "interferes with an individual's functioning at different times in different ways." *Id*. at 2386. Thus, while a defendant may be competent to stand trial-i.e., may have the ability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the criminal proceedings-severe mental illness could, nonetheless, interfere with the defendant's ability to conduct his or her own defense without the assistance of counsel. Accordingly, the Supreme Court concluded that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Edwards, 128 S.Ct. at 2387-88.

Both the Committee and the FPDA argued against the Court's use of "severe mental illness" in the rule as not providing sufficient guidance to trial courts.3 The issue of whether a defendant suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without the assistance of counsel requires a fact-intensive inquiry to be made on a case-by-case basis.

Without deciding whether *Edwards* compels states to provide additional protection to severely mentally ill defendants, the Court amends rule 3.111(d)(3) to implement the narrow limitation upon the right to self-representation recognized in *Edwards*. The Court's amendment to rule 3.111(d)(3) tracks the language of *Edwards*. We decline at this time to further refine that limitation.

We hereby amend Florida Rule of Criminal Procedure 3.111(d)(3) as set forth in the appendix to this opinion. New language is indicated by underscoring. The amendment shall become effective immediately upon release of this opinion.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, and PERRY, JJ., concur.

APPENDIX

RULE 3.111. PROVIDING COUNSEL TO INDIGENTS
(a)-(c) [No Change]
(d) Waiver of Counsel.
(1)-(2) [No Change]
(3) Regardless of the defendant's legal skills or the

> complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by himself or herself.
> (4)-(5) [No Change]
> (e) [No Change]

In re Amendments to Florida Rule of Criminal Procedure 3.111, 17 So.3d 272 (Fla.2009).

Retroactive Application

One Florida court has declined to apply *Edwards* retroactively. *Monte v. State*, 51 So.3d 1196, 1201 (Fla. 4th DCA 2011) (We decline to apply the 2009 amendment to rule 3.111(d)(3) retroactively). The court in *Mckinney* thought otherwise. There appears to be a split of authority on the issue of retroactive application:

> We note that Jason [the defendant] asked to represent himself on December 10, 2007, some months before the United States Supreme Court issued its *Edwards* decision. Thus, the district court was without the benefit of the *Edwards* decision. The State argues that *Edwards* should not be applied retroactively. However, there is no reason not to apply *Edwards* under the criteria noted in *Everett v. Brewer*, 215 N.W.2d 244, 247 (Iowa 1974) (stating that retroactivity is a "function of three considerations[:] (a) the purpose to be served by the new standards, (b) the extent of the reliance by law

> enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards"). Retroactive application here assures the defendant of a fair trial; can easily be administered by remand to the trial court; and law enforcement has not relied upon the old standard. *Id*.

State v. Jason, 779 N.W.2d 66, 76 (Iowa Ct.App.2009).

> *Edwards* was decided two years after defendant's trial, and the judge obviously did not have the benefit of having this case before him. Edwards has been applied retroactively in a few cases. See *United States v. Carradine*, 621 F.3d 575, 578-79 (6th Cir.2010); *State v. Jason*, 779 N.W.2d 66, 73 (Iowa Ct.App.2009); *State v. McNeil*, 405 N.J. Super. 39, 52-54 (App. Div.), certif. denied, 199 N.J. 130 (2009).

State v. Wortman, Superior Court of New Jersey, Appellate Division. January 21, 2011 (not reported in A.3d 2011) WL 181341 A-3403-06T4 The *Wortman* court, in a direct appeal, concluded that *Edwards* did not announce a new rule of law and that retroactivity inquiries were "unnecessary."

To determine whether a decision should be retroactively applied, "the fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases." *State v. Callaway*, 658 So.2d 983, 986 (Fla.1995) (citing *Witt v. State*, 387 So.2d 922 (Fla.1980)) reaffirmed in *Callaway*. According to *Witt*, in order to retroactively apply a decision to post-conviction proceedings, the change in the law must (1)

originate in the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. *Callaway*, 658 So.2d at 986; *Witt*, 387 So.2d 922.

Indiana v. Edwards meets the three criteria for retroactive application set forth in *Witt v. State*, 387 So.2d 922 (Fla. 1980). First, the case issued from the United States Supreme Court. *Witt*, 387 So.2d at 930. Second, its Sixth Amendment rule unquestionably "is constitutional in nature." *Witt*, 387 So.2d. at 931. Third, *Indiana v. Edwards* "constitutes a development of fundamental significance."

This Court explained in *Callaway* that decisions having fundamental significance fall into two broad categories: (a) those decisions that "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (b) those that are "of sufficient magnitude to necessitate retroactive application under the threefold test of *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)." *Callaway*, 658 So.2d at 986 (citations omitted). *Stovall* requires that the court consider: (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application will have on the administration of justice.

This case presents the second category identified in *Calloway*, namely that

Edwards is of sufficient magnitude to necessitate retroactive application. Its purpose is to ensure a fair trial. The extent of reliance on the "old" rule is not implicated because it affects only a small group of defendants who fall into the gray area between incompetency to stand trial and those who are competent for all purposes. On the other hand it also carves out a small exception to the *Dusky/Godinez* up or down standard that courts and forensic mental health experts have been using all along, so it is important. This is an unusual case in that the defendant's competency has been challenged all along, the judge expressed reluctance about applying *Faretta*, the trial court's decision to permit self-representation and this Court's affirmance of that decision all occurred pre-*Edwards*, *Edwards* made a (small) exception to the universal up or down decision required by *Godinez*, and the postconviction court actually used *Indiana v. Edwards* to re-appoint postconviction counsel after they had been discharged pursuant to *Faretta*. Moreover retroactive application can be effected by – at most – granting a new trial. It will have no effect on law enforcement.

Its application to this case is all the more appropriate for a number of other reasons. The trial judge expressly said he did not want to discharge counsel and permit self-representation; he felt constrained to do so because of *Bowen*. Moreover the defendant's request for self-representation was not unequivocal. See

State v. Craft, 685 So.2d 1292, 1295 (Fla.1996) ("[O]nly an unequivocal assertion of the right to self-representation will trigger the need for a *Faretta* inquiry."). Beyond that, despite this Court's denial of relief, it is doubtful that the defendant should have been permitted to represent himself regardless of his mental competency. He had already poisoned the jury by his behavior. He had demonstrated a history of noncompliance with the requirements of courtroom decorum. That alone would have been reason enough for the judge to have declined to conduct a *Faretta* inquiry. While this Court did not find error, it did not have the benefit of *Indiana v. Edwards* either.

CONCLUSION AND RELIEF SOUGHT

This Court should likewise should remand this case to the trial court to make a decision about whether the defendant would have fit within the narrow category of defendants identified in *Indiana v. Edwards* who may be competent under *Dusky* but who are not competent under Edwards to conduct their own defense at trial. If the defendant did fit into that category, or if the court cannot make such a determination due to the passage of time, then it should conduct a new trial. Cf. *State v. Connor*, 292 Conn. 483, 973 A.2d 627 (2009), citing *United States v. Ferguson*, 560 F.3d 1060, 1068 (9th Cir.2009) ("The standard for defendant's mental competence to stand trial is now different from the standard for a defendant's mental competence to represent himself or herself at trial.")). "[O]ther courts have remanded the proceedings to the trial court to conduct a hearing to determine the defendant's competency to represent himself or herself post-trial." *Ferguson*, 560 F.3d at 1070; *Connor*, 973 A.2d at 658-59; *State v. Lane*, 362 N.C. 667, 669 S.E.2d 321, 322 (2008); cf. *State v. Klessig*, 211 Wis.2d 194, 564 N.W.2d 716, 724-25 (1997) (pre-*Edwards*, but remanding for hearing on defendant's competence to proceed pro se)).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, or by overnight courier, to all counsel of record and the Defendant on this ___ day of August, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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