IN THE SUPREME COURT OF FLORIDA
CASE NO. SC11-1608

PEDRO HERNANDEZ-ALBERTO,

Petitioner,

v. **CAPITAL POSTCONVICTION CASE**

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA, et al.,

Respondents.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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The Petitioner, PEDRO HERNANDEZ-ALBERTO, by counsel, files this Reply to the Response to his Petition for Writ of Habeas Corpus and states:

The Petition urges that this Court 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*, 554 U.S. 164, 128 S.Ct. 2379 (2008) who may be competent under *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 789 4 L.Ed.2d 824 (1960) 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, because the Defendant was denied his right to counsel under the Sixth Amendment and because he was incompetent to stand trial.

The Respondents argue that the issue of self-representation was addressed on direct appeal and is therefore procedurally barred. They argue that *Indiana v. Edwards* should not be given retroactive application, and that the claim is without merit.

In reply, Petitioner submits that the self-representation conducted by Mr. Hernandez at trial is a perfect portrayal of what the Supreme Court sought to avoid in *Indiana v. Edwards*. In its discussion of how the right to self-representation was originally meant to "affirm the dignity" of the defendant, the Court observed how that goal was turned on its head where a competent, but mentally ill defendant

conducted the trial. "To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." 554 U.S. at 176-77. The Court also observed the "proceedings must not only be fair, they must 'appear fair to all who observe them.'" *Id*. citing *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

There is no indication from trial that Mr. Hernandez was feigning mental illness as a clever disguise; rather there is every indication to the contrary. Mr. Hernandez essentially admitted to commission of the crime but tried to raise mental and physical health issues, lack of memory, police conspiracy, and mistreatment as a defense. In opening statements, Hernandez told the jury he had been in a car accident with the Florida Highway Patrol which made him "bad" mentally, and it could be because of this accident that he was even charged. Essentially he tried to offer an insanity defense. He said he was not treated at the hospital after the accident. He complained he had been beaten by police, had not able to call his relatives, and had wanted to call his wife, a religious person, and his

sister. He told the jury he could not contradict the prosecutor because what the prosecutor said may or may not be true, and he was not well mentally when he was arrested. ROA Vol. VII, 536-44. The court repeatedly had to admonish him to stop rambling. E.g. ROA Vol. VII, 541-42, 744. Finally, when the defendant started to say something about the Jehovah's Witness Church, the court cut him off and told him to sit down. *Id*. at 544.

Maria Carmen Gonzalez, Mr. Hernandez's wife and the mother of the victims, was the first prosecution witness. *Id*. at 547. Mr. Hernandez's entire cross consisted of asking her if the two ever visited a psychologist for his problems. She answered, "No." Hernandez said, "Yes." Hernandez then asked her if she had been at the hospital when the police did not help him, or words to that effect. She denied it. Hernandez said, "Yes, you were." This was the sum total of the cross examination of the victims' mother. *Id*. at 573.

Mr. Hernandez conducted little or no cross examination of the day's remaining state witnesses. He made a few objections, based on whether he was "aware" of something, such as photos of his home or whether he "remembered" it, such as a shell casing. ROA Vol. VII, 639, 644, 649, 650.

The next day began with the testimony of the medical examiner. When it came time to introduce the death certificates, and the cause and manner of death of

the two decedents, Mr. Hernandez said he was not aware they were deceased, and questioned whether the medical examiner could really tell they were. The state sought to introduce the death certificates; when the Court asked Mr. Hernandez if he had objections, Mr. Hernandez said he was "not aware" the two decedents were dead:

> THE DEFENDANT: I didn't understand very well this.
>
> THE COURT: They are the death certificates prepared by the Medical Examiner's Office for Isela Gonzalez and Donna Berezovsky. Do you have any legal objections to them being entered into evidence, sir?
>
> THE DEFENDANT: But I am not aware that, like you're saying, that Isela Gonzalez and Donna Berezovsky, they are dead. I am not aware of that. They are saying that they are dead, but somebody killed them. But I am not aware that I should say, yes, yes, it's okay.
>
> THE COURT: State's Exhibits 21 and 22 will be received into evidence over the Defense's objection.

Vol. VIII, 684-85.

The cross examination of the Medical Examiner reads as follows:

> Q The question is how sure is the test of a doctor?
>
> A How sure is the --
>
> Q Test of a doctor?
>
> A I don't understand the question.

> Q The experience that you have, up to what point is sure the work that you do as a doctor?
>
> A Well, let me answer that question as best I can. I still don't quite understand it, but I can say that there is no doubt as to the cause and manner of death of these two individuals. They were both shot to death by somebody else or some other persons in the way I have described to the jury.
>
> Q That's all.

ROA Vol. VIII, 685-86.

The cross of the next witness Detective Chancey consisted of asking whether there was a chance she could make a mistake. ROA Vol. VIII, 689-90.

The cross of one of the arresting officers in Texas consisted of trying to raise issues about the traffic accident Mr. Hernandez was in, involving the Florida Highway Patrol, in Florida, years before. Here is Mr. Hernandez's cross of Officer Darrel Branch:

> Q I want to ask you how many years of experience do you have in your job?
>
> A Approximately nine years.
>
> Q The other question is when you, as a policeman, do you make a mistake, do you make a mistake during your work, do you report that? And what is the percentage of the civil cases that you report? And I would like to know if you report that to the newspaper or the media?
>
> THE INTERPRETER: Correction. Media for the

interpreter.

THE WITNESS: Can I have the first question again, please? Just the first question.

BY THE DEFENDANT:

Q How many years of experience do you have in your job?

THE COURT: No, that question was already answered. The second question was a compound question. Ask him the first question of the compound.

THE DEFENDANT: There are two.

THE COURT: I believe it dealt with if he makes any mistakes.

BY THE DEFENDANT:

Q About the mistakes that the police make. How much is the percentage that is reported to the media?

A I have no idea.

Q I had a similar experience with a policeman, that he crashed with me. And I don't have a paper and he left me unconscious.

THE COURT: That's not a question. You have to ask a question, sir.

THE DEFENDANT: That's not a question? Okay. Nothing else. I would only like to say the only thing was that I was hit by a policeman with a car and that's why I was asking you is that report to the media or not?

> THE WITNESS: In my department?
>
> BY THE DEFENDANT:
>
> Q Well, in your department it was not where I had the accident. But it was here in Hillsborough County. The question is based on your experience. How do you see the response that you could give?
>
> A I don't understand what you are saying.
>
> Q Nothing else.

ROA Vol. VIII, 703-04.

Mr. Hernandez signed a form consent to search his vehicle when he was apprehended en route to Mexico. When the State sought to introduce the consent to search form, Mr. Hernandez again talked about the fact he had not felt good in the head when this took place, because of the automobile accident:

> THE COURT: Mr. Hernandez-Alberto, do you have any objection to State's Number 42 being entered into evidence?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: State your legal objection, please.
>
> THE DEFENDANT: In general, when he was asking me to sign this piece of paper, on several times I told him that I was not feeling good up here. A cause of that was that an automobile had left me ill here, a police automobile here. There were some things that I understood and some that I did not understand. But he was telling me that I do it. He was demanding that I do

> this.
>
> THE COURT: I will give you an opportunity to question the witness in that regard. Any other legal objections?
>
> THE DEFENDANT: That I do not permit that. That that's not true. That that's going against me. I do not permit that.

ROA Vol. VIII, 733-34.

Mr. Hernandez was later provided the opportunity to cross examine the officer, and he apparently tried to follow up on his defense theory developed during the cross of the medical examiner that he did not know the condition of the decedents:

> Q The second one is do you remember when you were taking me in the car that I asked you in what condition was Donna and in what condition was Isela? That you were asking me and telling me that I had shot them. And what was the answer? What was your answer?
>
> A I don't recall that question and I don't recall that conversation.

Id. at 737.

When the State rested its case, Mr. Hernandez said he had no witnesses, they were all against him. ROA Vol. VIII, 769-70. He did testify. He talked about the statement in Texas, his car accident and mental health; how when he gave a statement in Texas he was not right mentally; he rambled on about Jehovah's

witnesses; how the jail would not help and grievances and medical issues in the jail. The judge let him go for a while, but eventually admonished him to stick to the defense. Mr. Hernandez responded by saying that he wanted to ask questions of the investigator of his case and that his wife and others would testify he was peaceful. He reiterated he was prevented from seeing and speaking with his sister; that the Mexican Consulate was not helping him, and so on. He again said that "he can't say he did or didn't do it" . . . he could not be sure, and was "not well up here." *Id*. at 786-94.

> THE COURT: Mr. Hernandez-Alberto, please testify only about matters that are relevant to your case and to your defense.
>
> THE DEFENDANT: Yes. As I have mentioned to you already, I am being accused of something that they are saying, "You did it." They are pointing the finger at me. I cannot be sure either if it was like that or if it isn't like that. I was not well up here. (Indicating.)

When he continued to ramble on about his medical problems, the court admonished him again:

> THE COURT: Mr. Hernandez-Alberto, I am not going to allow you, sir, to testify any further with regard to your medical condition. Testify only to matters that are relevant to your defense and to the case. Otherwise, I'm going to have to stop you, sir, from any further testimony and allow the prosecutor to begin his cross examination.
>
> THE DEFENDANT: If I had a list here where I would have my case here where I would be familiarized, then I

> would not, like, steer away from that which I would have written down. And that's why that's the case. That I do not know, well, if that happened or if it didn't happen.

Vol. VIII, 797. And again:

> THE COURT: Are you telling me, sir, that you don't have anything else to testify about?
>
> THE DEFENDANT: Well, you're demanding of me that I not speak about my alignment. Do you believe that if I were well, that I would do as they said? That I would have killed this person and this other person?
>
> THE COURT: You have already testified about your medical condition. I am not going to allow you to testify about that condition any further. If you have another subject that's relevant, you're welcome to testify about that, sir. But not your medical condition any further.

Id. at 797-98.

On cross examination the State focused on Mr. Hernandez's repeated statements that he could not say he was innocent, but that he not guilty either. He gave an incomprehensible answer when asked whether he denied Isela Gonzalez was dead, denying he had seen her dead. *Id*. at 801-02. When he was asked about being found in Texas heading to Mexico fifteen hours after the victims were killed, Mr. Hernandez gave a rambling account of how he could have gone anywhere, Miami or the beach. The cross examination concluded with this exchange:

> Q And in your opening statement to the jury you said that you may or may not have done this murder, these

> murders. Isn't that correct?
>
> A I am not referring that I may or may not. But how do you say that word, you know, I am not going to be telling the jury and the judge that I am like innocent. That I am innocent in this trial.

Vol. VIII, 810.

When the court gave him an opportunity to say anything else, Mr. Hernandez raised his not-innocent-but-not-guilty-because-he-didn't-know-what-happened defense again:

> THE COURT: Mr. Hernandez-Alberto, anything else you want to say to this jury before you have a seat, sir?
>
> THE DEFENDANT: Yes. What I would like to say to them is of the accusation that I am being accused of, I am not guilty of that. But you have the last say of this and the judge.
>
> But I am not guilty of this thing that they are saying against me. That's all I want to say to you. That I was not well mentally. And I don't know what happened.
>
> They caught me, arrested and they put me in this situation that they are accusing me of being here at this moment. But I do not feel guilty of this accusation that's being made against me.
>
> I don't know what may be the opinion of each one of you, but that's what I have to inform to all of you. That's all that I have to say.
>
> THE COURT: Thank you, sir. If you would have a seat

back at the counsel table.

Id., 811.

That evening there was some interaction between the defendant, defense counsel, and the Mexican Consulate,[1] counsel were re-appointed for the closing argument and the subsequent penalty phase. Nevertheless, in the words of *Indiana v. Edwards*, this example of self-representation was a humiliating spectacle that was anything but ennobling and would force any observer to question the fairness of the trial.

As addressed in the petition for habeas corpus, the trial court was constrained by *State v. Bowen*. 698 So.2d 248 (Fla. 1997). ROA Vol. VII, 515-16. This Court also expressly cited *Bowen* in denying petitioner's claim on direct appeal that the court erred by allowing him to represent himself. The position as articulated in *Bowen* and by the Respondents in this proceeding is that "[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.. . . The court may not inquire further into whether the defendant 'could provide

[1] Which goes unexamined to this day because the postconviction proceedings never made it beyond the pleading stage.

himself with a substantively qualitative defense.'" *Hernandez-Alberto v. State*, 889 So.2d 721 (Fla. 2004) citing *Bowen v. State* and Fla. R. Crim. P. 3.111. As noted in the petition, the trial judge did not believe the case law at the time gave him any other choice but to allow self-representation:

> 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.

This up-or-down approach cannot be sustained after *Indiana v. Edwards*, in which 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. *Edwards*, 128 S.Ct. at 2386. In *Godinez v. Moran*, 509 U.S. 389 (1993), the Supreme Court held no mental competence beyond that necessary to stand trial was required for the defendant to discharge his attorneys. The Court emphatically rejected any consideration of a specialized functional competence standard, holding "the competence that is required of a defendant seeking to waive his right to counsel is the competence to

waive the right, not the competence to represent himself." *Godinez*, 509 U.S. at 399. Given this unqualified statement, *Godinez* could be read as broadly equating competence to stand trial and competence to represent oneself. However *Indiana v. Edwards* held that *Godinez* was distinguishable in part because the defendant in that case wanted to plead guilty. The Court observed, that the *Dusky* standard does not completely predict whether the defendant will be able "to carry out the basic tasks needed to present his own defense without the help of counsel." *Id*. at 2386. These basic tasks, the Court noted, include "organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury." *Id*. at 2387. The *Edwards* Court also acknowledged that a trial in which a mentally incompetent defendant represents himself is unlikely to be or to appear fair. "The application of *Dusky*'s basic mental competence standard can help in part to avoid this result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient." *Id*. at 2387.

As the Respondents argue, the *Edwards* decision, on its face, is purely permissive: it holds only that state courts do not necessarily violate *Faretta* by imposing a higher standard of mental competence for self-representation than for trial with counsel. Nevertheless, there are three aspects of the decision that support

its applicability here:

First, *Edwards* embraces a concept of functional competence expressly rejected in *Godinez*. In contrast to the *Godinez* majority's unqualified assertion that "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation," *Godinez v. Moran*, 509 U.S. 389, 400 (1993) the *Edwards* Court expressly authorizes trial courts to "take realistic account of the particular defendant's mental capacities" and to deny the defendant the choice of representing himself when he is not "mentally competent to do so." Edwards, 128 S. Ct. at 2387-88. In giving weight to the very different capacities needed to assist defense counsel and to act as one's own counsel, the *Edwards* Court echoes the *Godinez* dissent's critique of equating competence to stand trial with competence to represent oneself: "A person who is 'competent' to play basketball is not thereby 'competent' to play the violin." *Godinez*, 509 U.S. at 413 (Blackmun, J., dissenting).

Second, as the Connecticut Supreme Court has observed, "the permissive nature of Edwards apparently creates an anomalous situation in which state courts can determine the level of competency necessary for the exercise of federal constitutional rights such that an individual's right to self-representation under the federal Constitution may vary from state to state." *State v. Connor*, 973 A.2d 627,

650 n.22 (Conn. 2009). It is hard to believe such a doctrinal arrangement, in which states may set their own standards for when one federal constitutional right (the right to counsel) may be waived and another (the right to represent oneself) exercised, can be permanent.

Finally, *Edwards* reasoned in part that allowing an incompetent defendant to represent himself "undercuts the most basic of the Constitution's criminal law objectives," the guarantee of a fair trial, and that "given the different capacities needed to proceed to trial without counsel" *Dusky*'s trial competence standard is inadequate to ensure a fair trial. *Edwards*, 128 S. Ct. at 2387. These statements raise a troubling question: how can the use of an inappropriate competence standard for self-representation be consistent with due process and the Sixth Amendment right to counsel? The logic of *Edwards*, if followed further, could eventually lead the court to hold that competence to represent oneself at trial must constitutionally be determined on a standard better tailored to that determination than is the trial competence standard enunciated in *Dusky*. See Jason R. Marks, STATE COMPETENCE STANDARDS FOR SELF–REPRESENTATION IN A CRIMINAL TRIAL: OPPORTUNITY AND DANGER FOR STATE COURTS AFTER *INDIANA V. EDWARDS*, 44 U.S.F. L.Rev. 825, 833-34 (2010).

The Respondents also oppose retroactive application of *Indiana v. Edwards*.

For the reasons stated above and in the petition, Petitioner argues that it should be given retroactive application here. *Indiana v. Edwards* was decided on June 19, 2008. The trial proceedings took place over 2001 to 2002, and the judgment and sentence in this case were affirmed on appeal in *Hernandez-Alberto v. State*, 889 So.2d 721 (Fla. 2004). Both the trial judge and this Court relied on *Bowen*. The distinction between mental competency to represent oneself at trial and mental competency to stand trial did not arise until after the trial and appeal in this case. In view of *Bowen*, Hernandez has, by this petition, raised the issue at his first opportunity. *See U.S. v. McKinney*, 373 Fed.Appx. 7 (USCA, District of Columbia, 2010) cited in the petition. 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)). Petitioner contends that, borrowing from *Edwards*, the "proceedings must not only be fair, they must 'appear fair to all who observe them.'" The "concern for fairness" should outweigh the concern for finality in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to 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 17th day of January, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply to Response to Petition for Writ of Habeas Corpus was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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