IN THE SUPREME COURT OF FLORIDA

PEDRO HERNANDEZ-ALBERTO,

Petitioner,

v. **CASE NO. SC11-1608**
L.T. No. 99-00117 CFAWS

KENNETH S. TUCKER, ETC.,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COME NOW, Respondents, KENNETH S. TUCKER[1], Secretary, Florida Department of Corrections, etc., by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondents respectfully submit that the petition should be denied, and state as grounds:

FACTS AND PROCEDURAL HISTORY

The facts of this case are summarized in this Court's opinion on direct appeal, *Hernandez-Alberto v. State*, 889 So. 2d 721, 724 (Fla. 2004):

> Pedro Hernandez-Alberto and Maria Gonzalez were married in 1996 after a courtship of several years. Maria had an adult son, Salvatore Gonzalez, an adult daughter, Isela Gonzalez, and a minor daughter, Donna Berezovsky. Hernandez-Alberto and Maria had one child together, Gabriella, who was an infant at the time of the homicides. Prior to and during their marriage, Maria lived with her children in her home in Apollo Beach, Florida, and she owned and operated a family business known as the Apollo Beach Family Restaurant.

[1] Kenneth S. Tucker has replaced Edwin G. Buss as the Secretary of the Florida Department of Corrections.

On the morning of January 3, 1999, Hernandez-Alberto and Maria continued an ongoing argument about ownership of the home and business. Previously, Hernandez-Alberto insisted that Maria place his name on the title to the home and the business, which she had solely owned prior to their marriage. After continuing to deny his demands, Maria left the home to go to work at the restaurant. Upon her departure, Hernandez-Alberto put Gabriella in a back bedroom and then confronted his eleven-year-old stepdaughter, Donna, in the family room. He told Donna to pick up a toy. When she refused, he struck her on the head near the right ear, knocking her to the floor. He then removed a gun from his fanny pack and shot her as she lay face down. Donna died from the gunshot wound.

The medical examiner's testimony confirmed there was a contusion on Donna's face consistent with being struck with a hand. In addition, the autopsy indicated that the gunshot entered Donna's back, traveled through her spinal cord, aorta, lung, chest, and arm. The injuries were consistent with being shot while face down on the floor.

After shooting Donna, Hernandez-Alberto drove to the Apollo Beach Family Restaurant where Maria and Isela were working. Upon entering the back of the restaurant, Hernandez-Alberto went directly to the restroom where he remained for approximately eight to ten minutes. Upon exiting the rest-room, he walked up behind Isela and shot her twice in the back. After she fell to the floor, he then shot her once in the head.

The medical testimony indicates that a gunshot to Isela's lower back passed through her hip and intestines before exiting the front of her body. A gunshot higher on her back penetrated her lung, diaphragm, spleen, pituitary gland, kidney, pancreas and stomach before exiting her body. The third gunshot to her neck hit her spine, then went through her carotid artery and jugular vein.

After the shooting, Hernandez-Alberto left the restaurant with a gun in his hand, got into his car, and fled toward Mexico. He was arrested in Brookshire, Texas, a small town near Houston. He was interviewed by the Brookshire police chief, Joe Garcia, and he confessed to shooting and killing both Donna and Isela. At the time of his arrest, Hernandez-Alberto had a gun, which was later determined to be the murder weapon, in his possession. A fanny pack was also found in his possession.

Hernandez-Alberto, 889 So. 2d at 724.

Direct Appeal:

This Court resolved the following issues raised on direct appeal in *Hernandez-Alberto v. State*, 889 So. 2d 721 (Fla. 2004):

Issue 1: Competency

> Hernandez-Alberto asserts that he was incompetent to stand trial and that the trial court erred in this case by failing to hold competency hearings throughout the trial. We have outlined a trial court's role in the area of competency to stand trial as follows:
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> > In determining whether a defendant is competent to stand trial, the trial court must decide whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - - and whether he has a rational as well as a factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); see also § 916.12(1), Fla. Stat. (1993); Fla. R. Crim. P. 3.211(a)(1). In situations where there is conflicting expert testimony regarding the defendant's competency, it is the trial court's responsibility to consider all the evidence relevant to competency and resolve the factual dispute. *Hunter v. State*, 660 So. 2d 244, 247 (Fla. 1995), *cert. denied*, 516 U.S. 1128, 116 S. Ct. 946, 133 L. Ed. 2d 871 (1996); *Watts v. State*, 593 So. 2d 198, 202 (Fla. 1992). The trial court's competency decision will be upheld absent a showing of an abuse of discretion. *Hunter*, 660 So. 2d at 247; Watts, 593 So. 2d at 202.
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> *Hardy v. State*, 716 So. 2d 761, 763-64 (Fla. 1998).
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> On April 19, 1999, the trial court ordered a competency and sanity evaluation and psychiatric evaluation return to determine if Hernandez-Alberto was competent to stand trial. Both Dr. Michael S. Maher and Dr. Alfonso H. Saa determined that Hernandez-Alberto was incompetent to stand trial. On May 18, 1999, the trial court adjudged Hernandez-Alberto incompetent to stand trial and committed him to the Florida Department of Children and Families. While Hernandez-Alberto was committed to the South Florida Evaluation and Treatment

Center in Miami, Dr. Fred J. Balzer, Dr. Andres L. Jimenez, Dr. Francisco A. Campos, and Hospital Administrator Cheryl Y. Brantley all determined that Hernandez-Alberto was malingering and competent to proceed. On July 13, 1999, the trial court ordered a second competency and sanity evaluation and psychiatric evaluation return to determine if Hernandez-Alberto was competent to stand trial. Dr. Maher and Dr. Saa again evaluated Hernandez-Alberto. On July 22, 1999, Dr. Saa concluded that Hernandez-Alberto was incompetent but stated, "However, I suspect that his clinical presentation, likely compatible with malingering, is coloring my conclusions." On August 6, 1999, Dr. Maher concluded that Hernandez-Alberto was competent to stand trial. On August 9, 2001, the trial court ordered a third competency and sanity evaluation and psychiatric evaluation return to determine if Hernandez-Alberto was competent to stand trial. On August 15, 2001, Dr. Maher again concluded that Hernandez-Alberto was competent to stand trial. On August 16, 2001, Dr. Robert M. Berland concluded that he might have "a genuine psychotic disturbance." The trial court concluded that Hernandez-Alberto was competent to stand trial at this time, and the trial commenced on August 20, 2001. On August 24, 2001, the jury found Hernandez-Alberto guilty on both counts of first-degree murder.

On November 16, 2001, defense counsel filed a motion for reconsideration of competency, alleging that Dr. Berland had done additional work on the issue and was prepared to state definitively that the defendant had a mental illness and was incompetent. Prior to the penalty phase on November 19, 2001, the trial court revisited the issue of competency. Dr. Berland was allowed to elaborate on his findings concerning Hernandez-Alberto's competency. The new information which formed the basis of Dr. Berland's "definitive" opinion was a conversation with the defendant's ex-wife. At the conclusion of that hearing, the trial court stated:

> THE COURT: Initially in this case, I found that he was incompetent to proceed and had him transferred to the state hospital. While at the state hospital, they made extensive observations of Mr. Hernandez Alberto, and their final conclusion was that he was malingering. He was sent back to Hillsborough County, where he has just totally refused to cooperate with his attorneys, with all of the doctors that the Court has appointed, and to

> this day he continues to be uncooperative. I have previously found that Mr. Hernandez Alberto was competent to proceed, and I believe that presumption remains with Mr. Hernandez Alberto today. I'll make a few other observations. **One was that Dr. Maher had the opportunity to make some observations of Mr. Hernandez Alberto, and, based upon his observations, felt that he was competent to proceed, that he had conducted himself appropriately in the courtroom. Also when Mr. Hernandez Alberto represented himself throughout the trial, I made a particular note that he conducted himself appropriately in the courtroom and was able to ask what I felt were some competent questions in his defense. Therefore, I'm going to find that Mr. Hernandez Alberto remains competent to proceed to the penalty phase of this proceeding**.

The penalty phase was conducted on November 28 and 29, 2001. At the conclusion of the penalty phase, the jury recommended by a vote of 10-2 that Hernandez-Alberto receive the death penalty as to both counts of first-degree murder. Prior to the *Spencer* hearing on April 30, 2002, the trial court granted Hernandez-Alberto's motion for a PET scan. [n2] However, Hernandez-Alberto refused to cooperate and did not allow a PET scan to be performed on him.

> [n2] Positron emission tomography (or PET scan) is a medical test often used to detect tumors and monitor a patient's brain function.

The record supports the trial court's resolution of the factual disputes on the issue of competency. Five medical experts, after having observed and examined Hernandez-Alberto, informed the trial court that he was malingering and competent to proceed. Yet another expert opined that Hernandez-Alberto's presentation was compatible with malingering. Dr. Berland initially opined that Hernandez-Alberto might have a genuine psychosis. After talking with Hernandez-Alberto's ex-wife, Dr. Berland stated the defendant was not competent. Even though there is conflicting evidence on the issue, the trial court's determination is supported by competent, substantial evidence and will not be disturbed on this appeal. See *Evans v. State*, 800 So. 2d 182, 188 (Fla. 2001) ("Even when the experts' reports conflict, it

is the function of the trial court to resolve such factual disputes, and the trial court's determination should be upheld absent an abuse of discretion."). As there was evidentiary support in the record for the trial court's decision, we will not disturb the trial court's competency determination. See *Mora v. State*, 814 So. 2d 322, 327 (Fla.) ("In situations where there is conflicting expert testimony regarding the defendant's competency, it is the trial court's responsibility to consider all the evidence relevant to competency and resolve the factual dispute."), *cert. denied*, 537 U.S. 1050, 154 L. Ed. 2d 526, 123 S. Ct. 603 (2002).

The trial judge held hearings on Hernandez-Alberto's competency at various stages of the trial proceedings and did not err in finding him competent to stand trial.

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:

> Where 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, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (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. [n3] 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.

> [n3] 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.

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*:

> Once 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 v. State*, 677 So. 2d 863 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. [n4] **The trial court did not err in allowing the defendant to exercise his right to represent himself in this case.**

> [n4] 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.").

Issue 3: Motion for Continuance

Hernandez-Alberto further claims the trial court erred in denying his motion for a continuance after the trial court permitted him to proceed *pro se*. We have repeatedly held that "the denial of a motion for continuance is committed to the sound discretion of the trial judge." *Lebron v. State*, 799 So. 2d 997, 1018 (Fla. 2001), *cert. denied*, 535 U.S. 1036, 152 L. Ed. 2d 652, 122 S. Ct. 1794 (2002). A "court's ruling on a motion for continuance will only be reversed when an abuse of discretion is shown. An abuse of discretion is generally not found unless the court's ruling on the continuance results in undue prejudice to [the] defendant. This general rule is true even in death penalty cases." *Israel v. State*, 837 So. 2d 381, 388 (Fla. 2002) (quoting *Kearse v. State*, 770 So. 2d 1119, 1127 (Fla. 2000), *cert. denied*, 539 U.S. 931, 156 L. Ed. 2d 611, 123 S. Ct. 2582 (2003)). "While death penalty cases command our closest

scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance." *Cooper v. State*, 336 So. 2d 1133, 1138 (Fla. 1976).

Hernandez-Alberto offered three reasons for his request for a continuance: (1) so that he could go to the library and familiarize himself with the law because he knew "almost nothing"; (2) so that he could obtain a copy of the indictment and read it over; and (3) so that he could have someone go to the library with him and translate from English to Spanish all of the related discovery documents in the case for him so that he could understand the State's case. The trial court addressed all three of Hernandez-Alberto's concerns, so a continuance was unnecessary. The trial court repeatedly warned Hernandez-Alberto that his unfamiliarity with the law was the main reason why it would be advantageous to remain represented by his counsel. Furthermore, the trial court appointed standby counsel to assist Hernandez-Alberto with the legal aspects of his case. The trial court recessed the guilt phase proceedings, gave Hernandez-Alberto a copy of the indictment, and allowed him to read the indictment in his cell. Leann Goudie, one of the attorneys initially assigned to represent Hernandez-Alberto, testified that she had traveled to the jail on two occasions to visit Hernandez-Alberto and translated the discovery documents into Spanish so that he could understand the charges and evidence against him. Furthermore, Caroline Fulgueira, a mitigation specialist hired by the Office of the Public Defender, testified that she played to Hernandez-Alberto the taped confession he made to the Brookshire police chief. This tape was a major piece of evidence against him in the State's case. Hernandez-Alberto even admitted that Fulgueira had in fact played the tape for him. The trial court thoroughly considered and addressed the reasons proffered for a continuance. Therefore, the trial court did not abuse its discretion in denying Hernandez-Alberto's pro se motion for a continuance.

Issue 4: PET Scan

Hernandez-Alberto also asserts the trial court erred in initially denying his motion for a PET scan. Because he was given an opportunity to have a PET scan but refused to cooperate, we deny relief on this issue. In *Rogers v. State*, 783 So. 2d 980 (Fla. 2001), we stated

the criteria to be applied by trial courts in making a determination regarding the necessity for a PET scan. We said:

> A trial court's decision to deny a defendant's motion for a PET-Scan will not be disturbed absent an abuse of discretion. In evaluating whether the trial court abused its discretion, this Court generally looks at two factors. First, before the trial court will provide a defendant with the necessary funds for a PET-Scan, the defendant must establish a particularized need for the test, that is, that the test is necessary for experts to make a more definitive determination as to whether the defendant's brain is functioning properly and to provide their opinions about the extent of the defendant's brain damage. Second, this Court must consider whether the defendant was prejudiced by the trial court's denial of the motion requesting a PET-Scan.

Id. at 998-99 (citations omitted).

On March 21, 2001, Hernandez-Alberto filed a motion for a PET scan to help in preparation for the sentencing phase. In the motion Hernandez-Alberto pointed to Dr. Berland's March 8, 2001, affidavit which recommended that the defendant receive a PET scan in order to "contribute critical and otherwise unavailable information about the presence of injured brain tissue which which [sic] may have been caused by the auto accident described above [Hernandez-Alberto's accident with a Hillsborough County sheriff], or in other, unknown incidents in the defendant's history." Although the trial court initially denied the motion for a PET scan on January 7, 2002, the trial court reversed itself and ordered that $ 2500 be allotted for a PET scan. This order was entered three months prior to the April 30 *Spencer* hearing. Had the test been done, the results of the PET scan would have been available for argument as mitigation at the *Spencer* hearing. However, Hernandez-Alberto refused to allow a PET scan to be performed on him. He now claims that, although he refused to cooperate with a PET scan prior to the *Spencer* hearing, he might have cooperated with a PET scan prior to the guilt and penalty phase hearings, and he may cooperate with PET scan testing on remand. He concedes that when given the opportunity he did not allow the PET scan.

It is clear that the trial court afforded Hernandez-Alberto the opportunity for a PET scan, and he refused to take advantage of it. As a result, he has failed to demonstrate that he was prejudiced by the trial court's initial decision to deny the PET scan. Therefore, error has not been demonstrated.

Issue 5: Premeditation

Hernandez-Alberto next asserts that there was insufficient evidence of premeditation as to count one, the murder of Donna Berezovsky. In *Johnston v. State*, 863 So. 2d 271 (Fla. 2003), *cert. denied*, 541 U.S. 946, 158 L. Ed. 2d 372, 124 S. Ct. 1676 (2004), we reiterated our definition of premeditation, and said:

> Premeditation is defined as "a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." *Blackwood v. State*, 777 So. 2d 399, 406 (Fla. 2000) (quoting *Sireci v. State*, 399 So. 2d 964, 967 (Fla. 1981)). Premeditation may be "formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.'" *Blackwood*, 777 So. 2d at 406 (quoting *DeAngelo v. State*, 616 So. 2d 440, 441 (Fla. 1993)).

Id. at 285. The facts and circumstances of Donna Berezovsky's death indicate that the defendant had sufficient time to form the state of mind necessary for premeditated murder.

During direct examination, the former chief of police for Brookshire, Texas, Joe Garcia, recounted Hernandez-Alberto's taped confession, in which Hernandez-Alberto admitted that he took his own daughter, Gabriella, and placed her in a bedroom before he confronted Donna in the family room. He asked Donna to pick up a toy, and when she refused, he hit her in the head. Donna fell on the floor. Hernandez-Alberto then removed a gun from his fanny pack and fired a shot into her back as she lay face down. These actions demonstrate there was sufficient time for Hernandez-Alberto to be conscious of and reflect on his actions. Therefore, this issue is without merit.

Issue 6: Proportionality

On the issue of sentencing, Hernandez-Alberto argues that the death penalty is not appropriate because it is not proportional and is premised on inapplicable aggravating factors and the improper disregard of critical mitigating factors. "In deciding whether death is a proportionate penalty, we must consider the totality of the circumstances of the case and compare the case with other capital cases. We also must remain mindful that the death penalty is reserved for the most aggravated and least mitigated of first-degree murders." *Johnson v. State*, 720 So. 2d 232, 238 (Fla. 1998) (citations omitted).

The trial court found three aggravating circumstances applicable to the murder of Donna Berezovsky: (1) previous violent felony conviction; (2) victim less than twelve years old; and (3) vulnerable victim. The trial court found two aggravating circumstances applicable to the murder of Isela Gonzalez: (1) previous violent felony conviction and (2) CCP. [n5] All of the aggravating factors were given great weight.

> [n5] As we stated in *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999), the CCP aggravator is one of the "most serious aggravators set out in the statutory sentencing scheme."

The trial court considered and analyzed the following mitigating circumstances: (1) no significant criminal history (some weight); (2) extreme mental or emotional disturbance (no weight); (3) substantial impairment (no weight); (4) age of the defendant (no weight); and (5) the defendant's background (some weight) and a number of nonstatutory circumstances.

A comparison of this case to other capital cases with similar aggravating and mitigating circumstances demonstrates that Hernandez-Alberto's sentence of death is proportional. See *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003) (finding death sentence proportional in case where defendant murdered his wife and two young children with three aggravating circumstances of previous conviction of another capital offense, HAC, and CCP; statutory mitigating circumstances of no significant prior criminal history and that the murders were committed while the defendant was under the influence of an extreme mental or emotional disturbance; and a number

of nonstatutory mitigating circumstances); *Lynch v. State*, 841 So. 2d 362 (Fla.) (finding death sentence proportional in case where defendant murdered his mistress and her thirteen-year-old daughter with three aggravating circumstances as to the murder of the mistress: CCP, prior violent felony conviction, and the murder was committed while defendant was engaged in one or more other felonies; three aggravating circumstances as to the murder of the daughter: HAC, prior violent felony conviction, and the murder was committed while defendant was engaged in one or more other felonies; statutory mitigating circumstance of no significant history of prior criminal activity; and a number of nonstatutory mitigating circumstances, including mental or emotional disturbance and substantial impairment), *cert. denied*, 540 U.S. 867, 157 L. Ed. 2d 123, 124 S. Ct. 189 (2003); *Rimmer v. State*, 825 So. 2d 304 (Fla.) (finding death sentence proportional in case where defendant murdered two people during a robbery with aggravating circumstances that the murders were committed by a person convicted of a felony and under a sentence of imprisonment, the defendant was previously convicted of another capital felony and a felony involving use or threat of violence to the person, the murders were committed while the defendant was engaged in a robbery and kidnapping, the murders were committed for the purpose of avoiding or preventing lawful arrest, HAC, and CCP; no statutory mitigating circumstances; and a number of nonstatutory mitigating circumstances, including a troubled family background and diagnosis of a schizoaffective disorder), *cert. denied*, 537 U.S. 1034, 154 L. Ed. 2d 453, 123 S. Ct. 567 (2002). Therefore, we conclude that death is a proportionate penalty in this case.

Issue 7: *Ring* [n6] Claim

[n6] *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002).

Lastly, Hernandez-Alberto asserts that Florida's capital sentencing statute is unconstitutional. We have repeatedly rejected such challenges. See, e.g., *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002). Hernandez-Alberto specifically argues that Florida's capital sentencing scheme is unconstitutional because (1) the State is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any

> specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the State is not required to prove the appropriateness of the death penalty. We have rejected each of these assertions. See, e.g., *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003) (rejecting argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla.) ("While *Ring* makes *Apprendi* [n7] applicable to death penalty cases, *Ring* does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."), *cert. denied*, 540 U.S. 950, 157 L. Ed. 2d 283, 124 S. Ct. 392 (2003). Additionally, the assertion that the State does not have to prove the appropriateness of the death penalty is simply without merit. In a criminal prosecution the State always has the burden of proof, and in the sentencing context the State bears that burden by proving the existence of each aggravating circumstance beyond a reasonable doubt. See *Clark v. State*, 443 So. 2d 973, 976 (Fla. 1983) ("The burden is upon the state in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt."). Therefore, this claim is without merit.
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> [n7] *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Hernandez-Alberto, 889 So. 2d at 726-734 (e.s.).

On September 23, 2004, this Court affirmed Hernandez-Alberto's convictions and death sentences. Rehearing was denied on December 10, 2004. *Hernandez-Alberto*, 889 So. 2d 721. Hernandez-Alberto's counsel filed an application in the U. S. Supreme Court on March 4, 2005 asking for an extension of time to file a petition for writ of certiorari, which was granted until May 9, 2005. A petition for writ of certiorari was never filed.

Post-Conviction Proceedings

On August 17, 2010, the trial court issued an order dismissing Hernandez-Alberto's second amended motion to vacate without prejudice to file a verified motion within sixty (60) days. (PCR V5/919-924). This order set forth the following procedural history:

> Procedural History
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> In May of 1999, Alphonso A. Saa, M.D. ("Dr. Saa") and Michael S. Maher, M.D. ("Dr. Maher") were appointed to examine Defendant and evaluate his competency to stand trial. Each expert found him disorganized in his train of thoughts, noted that his perception of reality did not appear intact and concluded that he was incompetent to proceed.
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> Defendant was committed to the South Florida Evaluation and Treatment Center. Within ten days of his commitment the center's treatment team began developing the opinion that his conduct was willful. Defendant was transferred back to the Hillsborough County Jail and in July and August of 1999 he was reexamined by Dr. Saa and Dr. Maher. After their examinations, Dr. Saa found that although his clinical presentation was compatible with malingering, it was his opinion that Defendant was still not competent to proceed; however, Dr. Maher found that he was malingering and was competent to proceed.
>
> In August 2001, just prior to Defendant's trial, Dr. Saa and Dr. Maher each evaluated Defendant for a third time. Dr. Saa stated that because Defendant was uncooperative, he was unable to give an opinion at that time regarding Defendant's competence. Dr. Maher noted that Defendant was initially uncooperative, but he eventually responded appropriately to his questions. After the examination, Dr. Maher formed the opinion that Defendant was competent to proceed. The Court concluded that Defendant was competent to stand trial. *See Hernandez-Alberto v. State*, 889 So.2d 721, 726-727 (Fla. 2004).

On August 22, 2001, prior to opening statements, Defendant requested that his counsel be discharged. The trial court warned Defendant that substitute counsel would not be appointed and asked if he still wished to discharge counsel and represent himself. Defendant indicated that he would and after the Court conducted a Faretta inquiry, it discharged counsel and appointed standby counsel. *See Hernandez-Alberto*, 889 So.2d at 728-729. (*See* Case Progress, attached.) Defendant proceeded to represent himself during the majority of the guilt portion of his trial; although prior to closing argument he moved for standby counsel to be reappointed, which the Court granted. *Id.* (*See* Case Progress, attached.) On August 24, 2001, the jury found Defendant guilty of two counts of First Degree Murder. (*See* Case Progress, attached.) On November 29, 2001, a jury recommended the death penalty, and on May 28, 2002, the Court sentenced Defendant to death on each count. (*See* Case Progress, Judgment and Sentence, attached.) The Supreme Court of Florida subsequently affirmed Defendant's judgment and sentence. *See Hernandez-Alberto*, 889 So.2d at 721 (Fla. 2004).

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). [fn 2] The Court held a competency hearing on February 14, 2008, and on June 3, 2008, the Court found Defendant competent to proceed. [fn 3] (*See* Case Progress, attached.)

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. (*See* Case Progress, attached.) 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. (*See* Case Progress, attached.) 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 se postconviction motion. (*See* Case Progress, attached.)

On December 17, 2008, the Court extended by sixty (60) days the time which Defendant had to file his motion. (*See* Case Progress, attached.) 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. [fn 4] (*See* Case Progress, attached.)

On March 18, 2009, defense counsel filed their amended motion. (*See* Second Amended Motion, attached.) 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. (*See* Case Progress, attached.)

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

A status hearing was then scheduled for July 29, 2010. At that hearing, defense counsel stated that Defendant still refused to verify the truth of the instant Motion. (See Case Progress, attached.)

(PCR V5/919-922) (footnotes omitted).

On November 2, 2010, the court issued its final order dismissing, with prejudice, the second amended motion to vacate. (PCR V6/1198-1199).

PRELIMINARY LEGAL PRINCIPLES AND STANDARDS OF REVIEW

Habeas petitions may not serve as a second or substitute appeal and may not be used as a variant to an issue already raised. See *Brown v. State*, 894 So. 2d 137, 159 (Fla. 2004), citing *Fotopoulos v. State*, 838 So. 2d 1122, 1134 (Fla. 2002).

This Court has repeatedly held that "an extraordinary writ petition cannot be used to litigate or relitigate issues that were or could have been raised on direct appeal or in prior postconviction proceedings." *Denson v. State*, 775 So. 2d 288, 289 (Fla. 2000); *Mills v. Dugger*, 574 So. 2d 63, 65 (Fla. 1990) ("[H]abeas corpus is not to be used for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in prior postconviction filings.") (internal quotation marks omitted); *White v. Dugger*, 511 So. 2d 554, 555 (Fla. 1987) ("[H]abeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in [prior postconviction] proceedings.")

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

THE PETITIONER'S PREVIOUS CHALLENGE TO THE TRIAL COURT'S RULING – ALLOWING THE DEFENDANT TO EXERCISE HIS RIGHT TO REPRESENT HIMSELF AT THE GUILT PHASE - WAS AFFIRMED BY THIS COURT ON DIRECT APPEAL AND IS PROCEDURALLY BARRED IN THIS HABEAS PROCEEDING.

CCRC IS NOT ENTITLED TO RELITIGATE THIS IDENTICAL CLAIM BASED ON THE U. S. SUPREME COURT'S DECISION IN *INDIANA v EDWARDS.*

In the instant petition, CCRC repeats the claim that was previously raised by Hernandez-Alberto on direct appeal (Petition at 4-24, quoting Appellant's Initial Brief, 50-72) and seeks to relitigate the same *pro se* representation claim that was previously raised, and rejected, on direct appeal. *Hernandez-Alberto*, 889 So. 2d at 728-730.

The defendant's renewed *pro se* representation claim is procedurally barred in this habeas proceeding. See, *Everett v. State*, 54 So. 3d 464, 486 (Fla. 2010); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992) ("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been, should have been, or were raised on direct appeal.").

On direct appeal, this Court held that "the trial court did not err in allowing the defendant to exercise his right to represent himself in this case." *Hernandez-Alberto*, 889 So. 2d at 730 n. 4. It is an improper attempt to relitigate an issue that this Court has already rejected. See, *Rodriguez v. State*, 39 So.

3d 275, 295 (Fla. 2010); *Jones v. Moore*, 794 So. 2d 579, 586 (Fla. 2001) ("This Court previously has made clear that habeas is not proper to argue a variant to an already decided issue.") CCRC's attempt to relitigate the previously-rejected challenge to Hernandez-Alberto's *pro se* representation at trial is procedurally barred and precluded by the law of the case doctrine and *res judicata*. See, *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits); *State v. McBride*, 848 So. 2d 287, 289-90 (Fla. 2003) (law of the case doctrine precludes relitigation of claim denied by trial court and affirmed on appeal).

In *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379 (2008), the Supreme Court granted Indiana's petition for writ of certiorari to address "whether the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation at trial - on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." *Id.* at 174; 2385-86. The U. S. Supreme Court determined that states have that right. *Id.* at 177-78; 2387-88. In *Edwards*, the United States Supreme Court recognized a narrow exception to the *Faretta*[2] right of self-representation in a

[2] In *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975), the U. S. Supreme Court announced that the Sixth Amendment provides a right to self-representation. *Faretta* noted, however, that the right to self-representation is not a license for a defendant to fail to comply with "relevant rules of procedural and substantive

situation when a mentally ill defendant is so limited by his mental infirmity as to be incompetent to represent himself at trial.[3] The question in *Edwards* was whether "the Constitution forbids a State from insisting that the defendant proceed to trial with counsel . . . thereby denying the defendant the right to represent himself." In other words, "whether the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial — on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." In *Edwards*, the United States Supreme Court held that the Constitution does not forbid a State from doing so and stated:

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law." *Faretta*, 422 U.S. at 834 n. 46, 95 S. Ct. at 2541 n. 46. Under *Faretta*, "the trial judge may terminate self-representation by a defendant who deliberately engages in serious obstructionist misconduct. *Faretta*, 422 U.S. at 834 n. 46, 95 S. Ct. at 2541 n. 46.

[3] *Edwards* also left undisturbed the Court's holding in *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680 (1993). The *Edwards* Court explained that *Godinez* addressed only the level of competency required to waive the right to counsel when the defendant intends to enter a guilty plea and, accordingly, a different standard may be used when the defendant asserts his right to self-representation to defend himself at trial. *Id.* at 173-74; 2385. The Court also emphasized that *Godinez* involved a state trial court that had permitted the defendant to represent himself, whereas *Edwards* involved a state trial court that had denied the defendant that right. Thus, the Court reiterated that under *Godinez*, it is constitutional for a state to allow a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial. On the other hand, the state may insist on counsel and deny the right of self-representation for defendants who are "competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, at 178; 2388.

> . . .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.
>
> *Id.* at 177-78; 2387–88.

Thus, in *Edwards*, the Court ruled that a state may preclude a defendant's self-representation upon a finding by the trial judge that the defendant's mental illness renders him insufficiently competent to represent himself at trial.

In 2009, this Court amended Florida Rule of Criminal Procedure 3.111(d)(3) to implement the narrow limitation upon the right to self-representation recognized in *Edwards*. See*, In re Amendments to Florida Rule of Criminal Procedure 3.111*, 17 So. 3d 272, 274 (Fla. 2009). On August 27, 2009, this Court announced,

> . . . 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**.
>
> *In re Amendments to Florida Rule of Criminal Procedure 3.111*, 17 So. 3d 272, 274 (Fla. 2009) (e.s.)

CCRC argues that the exception recognized in *Edwards* should be applied retroactively and, if so, this Court's previous affirmance

of the trial court's ruling – allowing Hernandez-Alberto to proceed *pro se* at the guilt phase – should be relitigated anew and reversed. However, as the Court stated in *Monte v. State*, 51 So. 3d 1196, 1204 (Fla. 4th DCA 2011), "*Edwards*, however, only permits states to limit a defendant's right to self-representation. The decision does not grant any substantive rights to defendants." (e.s.). *Edwards* does not authorize CCRC to resurrect this previously-denied trial claim and litigate it once again in this habeas proceeding.[4] CCRC acknowledges that the Fourth District Court declined to apply *Edwards* retroactively in *Monte*, 51 So. 3d at 1204, review granted, Case No. SC11–259, *Monte v. State*, 68 So. 3d 235 (Fla. 2011) (Table).[5] In *Monte*, the Fourth District Court explained:

> Monte also argues that in light of *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008), the trial court should not have permitted him to waive his right to counsel because he was suffering from a mental illness to the point that he was not competent to conduct trial proceedings by himself. ***Edwards*, however, only permits states to limit a defendant's right to self-representation. The decision does not grant any substantive rights to defendants.**

[4] This Court has also rejected attempts to relitigate IAC claims based on more recently decided caselaw. In *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), this Court rejected the defense claim that his previously-denied IAC/penalty phase counsel claims had to be re-evaluated under *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456 (2005), *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000).

[5] According to this Court's online docket, as of November 14, 2011, the merits briefs have not yet been filed in *Monte v. State*, SC11-259.

> The Florida Supreme Court has amended the Florida Rules of Criminal Procedure to require that a trial court deny a defendant's request to represent himself or herself if the defendant suffers "from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by his or her self." Fla. R.Crim. P. 3.111(d)(3). **These changes, however, became effective on August 27, 2009, long after Monte's trial. In re Amendments to Florida Rule of Criminal Procedure 3.111, 17 So.3d 272 (Fla.2009). We decline to apply the 2009 amendment to rule 3.111(d)(3) retroactively**.
>
> *Monte,* 51 So. 3d at 1204 (e.s.)

Under *Edwards,* a state may deny a criminal defendant the right to represent himself when he suffers from a severe mental illness. But that situation is not present here. Furthermore, although CCRC reads *Edwards* as announcing a new rule, the Court in *Edwards* held only that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178, 128 S. Ct. at 2388. In short, the Constitution may have allowed the trial judge "to block [the defendant's] request to go it alone, but it certainly didn't require it." *U.S. v. Berry*, 565 F. 3d 385 (7th. Cir. 2009),[6]

[6] In *U.S. v. Berry*, 565 F.3d 385 (7th Cir. 2009), the Court noted that "*Edwards* does seem to cap a trial court's ability to foist counsel upon the unwilling." As the Court explained, "'[s]evere mental illness' appears to be a condition precedent. Certainly, the right to self-representation cannot be denied merely because a defendant lacks legal knowledge or otherwise makes for a poor advocate. *See Faretta*, 422 U.S. at 834 n. 46, 95 S.Ct. 2525 ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial

citing *United States v. DeShazer*, 554 F.3d 1281, 1290 (10th Cir. 2009) ("Thus, while the district court was not compelled to find Mr. DeShazer competent to waive his right to counsel simply because the court had found him competent to stand trial, it does not follow that the district court was absolutely prohibited from doing so."). Moreover, *Edwards* itself reaffirmed that a trial court may constitutionally permit a defendant to represent himself so long as he is competent to stand trial. See *Edwards* at 173; 2385.

Although CCRC asserts that *Edwards* established a new rule that should be applied retroactively on collateral review, both *State v. Jason*, 779 N.W.2d 66, 73-74 (Iowa Ct. App. 2009) and *State v. Wortman*, 2011 WL 181341 (N.J. Super. A.D. 2011) (unpublished) (noting that the Court was satisfied that *Edwards* did not announce a new rule) are direct appeal, or pipeline, cases.

Assuming, *arguendo*, that *Edwards* established a new rule, in deciding whether a new rule should apply retroactively in Florida, this Court balances two important considerations: (1) the finality

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of 'effective assistance of counsel.'"). And the *Edwards* Court repeatedly cabined its holding with phrases like 'mental derangement,' 128 S. Ct. at 2386, 'gray-area defendant,' *id.* at 2385, 'borderline-competent criminal defendant,' *id.* at 2384, and, of course, 'severe mental illness,' *id.* at 2388. *Edwards* himself, after all, suffered from schizophrenia and delusions, not just a personality disorder. So even if we were to read *Edwards* to require counsel in certain cases - a dubious reading - the rule would only apply when the defendant is suffering from a 'severe mental illness.' Nothing in the opinion suggests that a court can deny a request for self-representation in the absence of this. . ." *Berry*, 565 F.3d at 391.

of decisions and (2) the fairness and uniformity of the court system. *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). In *Witt*, this Court stated that a new rule of law will not apply retroactively unless the new rule "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id.* at 931. Thus, pursuant to *Witt*, retroactive application is only available where: (1) the change in law emanated from this Court or the United States Supreme Court; (2) was constitutional in nature; and (3) was of fundamental significance. *Witt*, 387 So. 2d at 929-30. To meet the third element of this test, the change in law must (1) place the power to regulate certain conduct or impose certain penalties beyond the authority of the state; or (2) be of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. Application of that three-prong test requires consideration of the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001).

In addition to the recognition in *Monte* that *Edwards* "only permits states to limit a defendant's right to self-representation," and the "decision does not grant any substantive rights" to the defendant, Hernandez-Alberto is not entitled to

relief based on an alleged change in law, where the change would not affect the disposition of the claim. See, *Witt*, 387 So. 2d at 930-31. Here, the alleged "change in law," based on *Edwards*, does not satisfy the requirements of *Witt* and would not affect the disposition of the defendant's claim.

In this case, the trial court's *Faretta* inquiry was aided by the numerous mental health evaluations conducted by the various professionals who examined the Defendant. The majority of the mental health doctors testified that Hernandez-Alberto was malingering in order to avoid legal consequences. As such, any analysis of the knowing and intelligent nature of his waiver of counsel, must take into account his repeated attempts to manipulate the system to avoid prosecution.

Additionally, the trial court inquired of Hernandez-Alberto's former and current trial counsel regarding their pretrial preparation and Hernandez-Alberto's involvement. Attorneys Traina and Hernandez were present through the guilt phase as stand-by counsel. These attorneys conducted jury selection, and following the guilt phase evidence, were reappointed to represent Hernandez-Alberto in closing arguments in the guilt phase, as well as throughout the penalty phase, *Spencer* hearing and sentencing hearing.

Although the defense argued that the trial court lacked evidence that the defendant had knowledge of the charges and

potential penalties, the ability to communicate with counsel and a rational understanding of the proceedings, Dr. Maher testified regarding these legal criteria for competency. According to Dr. Maher, Hernandez-Alberto understood the nature of the charges against him, the possible penalties facing him, the adversary nature of the process and the roles of the defense, the prosecution and the trial court, and had the ability to communicate with his attorneys and to testify relevantly. (DAR V4/47-48, 55-56, 61, 69, 71-72). Furthermore,

> The court made a specific observation that Hernandez-Alberto conducted himself appropriately throughout the trial while representing himself, that he asked relevant questions of the witnesses, and that he attempted to make valid points in the presence of the jury.

Hernandez-Alberto, 889 So. 2d at 724.

In affirming the trial court's ruling, allowing Hernandez-Alberto to proceed *pro se*, this Court explained:

> **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:
>
> > Where 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, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (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. [n3] 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.**

> [n3] 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.

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*:

> Once 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 v. State*, 677 So. 2d 863 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. [n4] **The trial court did not err in allowing the defendant to exercise his right to represent himself in this case.**

> [n4] 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.").

Hernandez-Alberto, 889 So. 2d at 728-30 (e.s.).

CCRC also alleges that Hernandez-Alberto "demonstrated a history of noncompliance with the requirements of courtroom decorum" and, thus, he should not have been allowed to proceed *pro se*. However, long before *Edwards*, the *Faretta* decision itself emphasized that a defendant can forfeit his right to self-representation by "deliberately engag[ing] in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n. 46, 95 S. Ct. 2525. CCRC's attempt to reverse the trial court's ruling on collateral review -- years after trial and the affirmance of this same claim on direct appeal -- based on an unfavorable outcome and *post hoc* review would create an unworkable standard, potentially allowing every convicted *pro se* defendant to argue in post-conviction that he should not have been permitted to represent himself at trial. See also, *State v. Lane*, 365 N.C. 7, 707 S.E.2d 210 (2011) (ruling that *Edwards* is only applicable when the trial court denies a defendant the right to proceed *pro se* because the defendant falls within the "gray area" of competence in which he is competent to stand trial, but not competent to represent himself. In other words, as noted in *Lane*, since the trial court granted the defendant's motion to represent himself, *Edwards* is not applicable.)

Even if, *arguendo*, *Edwards* established a "new rule," the alleged "new rule" does not present a more compelling objective that outweighs the importance of finality. See, *State v. Glenn*,

558 So. 2d 4, 7 (Fla. 1990); *Chandler v. Crosby*, 916 So. 2d 728, 729-731 (Fla. 2005); See also, *Wells v. LeFavre,* 2010 WL 2771877 (S.D.N.Y. 2010) (unreported) (finding that *Edwards* did not represent an intervening change in the law that would justify Wells' motion to vacate under Rule 60(b) and the reasonableness of the appellate court's decision remained governed by *Faretta*. As the Court in *Wells* further explained, even if *Edwards* were on point, "the *Edwards* Court gave no indication that *Edwards* is to be applied retroactively." Under *Teague v. Lane*, new constitutional rules of criminal procedure are generally not retroactively applicable to cases that became final before such rules were announced. *Edwards* does not fall within either of the *Teague* exceptions. "The holding in *Edwards* — that the Constitution permits States to insist upon representation by counsel for those defendants sufficiently competent to stand trial but not sufficiently competent to represent themselves at trial — does not involve individual conduct that is beyond the power of the criminal law to proscribe, nor does it represent a watershed rule of criminal procedure.)

The defendant's renewed *pro se* representation claim is both procedurally barred and also without merit. Hernandez-Alberto is not entitled to re-litigation of this claim under the guise of *Indiana v. Edwards*.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court deny Hernandez-Alberto's Petition for Writ of Habeas Corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Mark S. Gruber, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 15th day of November, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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