IN THE SUPREME COURT OF FLORIDA

FRANK MONTE Petitioner,	)	
vs.	)	Case No. SC11-259
	)	L.T. Case Nos. 4D08-1461
STATE OF FLORIDA, Respondent.	)	4D08-1437

PETITIONER'S BRIEF ON THE MERITS

On Appeal from the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

The Petitioner, Frank Monte, was the Appellant/Defendant and the Respondent, State of Florida, was the Appellee/prosecution in the proceedings below. In this brief, the parties will be referred to as they stood in the lower courts, by proper name, or as Petitioner and Respondent. The symbol "R" will denote the Record on Appeal; the symbol "SR" will denote the Supplemental Record on Appeal; the symbol "T" will denote the Transcript on Appeal and the symbol "ST" will denote the Supplemental Transcript on Appeal.

STATEMENT OF THE CASE AND THE FACTS

Petitioner, Frank Monte, was charged by amended information, with two counts of aggravated stalking and one count of violation of a protective injunction (R3-4). The State nolle prossed one count of aggravated stalking. The named victim was Ray Anthony.

A.Pretrial– Dr. Block-Garfield, appointed at the request of defense counsel Resnick, found Petitioner competent to stand trial (SR1). After Petitioner's motion to discharge counsel was granted, Resnick informed the court that Petitioner was the least competent client he had ever represented and indicated that he had been discharged for questioning his competency (ST/2,P21-22).

The court ordered additional competency examinations. Dr. Brannon found Petitioner incompetent and Dr. Dann-Namer found him competent (SR4,10,13). No evidentiary hearing was held.

Petitioner was allowed to represent himself at trial with standby counsel R66, 68, 70; T9-10).

B. The State's Case – The state presented several witnesses who were employed by Ray Anthony. Bridgette Alfonso, Margaret Kline and Judy Scott each testified that Petitioner repeatedly called Anthony's businesses(T286-288,301). Alfonso stated that Petitioner referred to Anthony as a "sand n----r" and that he threatened the company's water system (T306, 320) Wordy Whidden, also an Anthony employee, testified that Petitioner had threatened to blow up their building (T399-400), 402-403). Jonathon Frink, another employee, confirmed that Petitioner had threatened Anthony, Anthony's family and Frink himself (T560). Petitioner threatened to kill someone named Sam. Anthony had a son and an employee named Sam (T562-563).

Ray Anthony, who was of Syrian descent, had been born and raised in Pennsylvania (T444). He met Petitioner in 1999 at one of his businesses. Petitioner was being considered for a job, but Anthony did not remember if he was hired(448-449). Petitioner came to Anthony's office with a loaded firearm in November of 2004. Anthony obtained preliminary and final injunctions for protection (T451-452). Anthony denied having

done anything to Petitioner and did not know why he was being harassed (T451).

Petitioner continued to contact Anthony at work and at home (T465). He threatened to rape or kill his daughter and repeatedly threatened to kill Anthony (T476, 501-502). Anthony moved after Petitioner left a note on the door of his house (T477-478).

Keith Schiller, director of security at the Trump Organization, received 10 or 12 calls from Petitioner (T374-375). Petitioner was very angry with Anthony and blamed him for destroying his life. Petitioner said Anthony had ties to terrorists and he threatened to harm or kill him (T375, 393). Schiller sent their recorded conversations to Detective Kessling (T376-377).

The State introduced phone records indicating that Petitioner made over 1000 calls to Anthony between June 20 and September 20, 2007 (T624). After being advised of his ***Miranda*** rights, Petitioner acknowledged the restraining order, agreed that he had violated it and stated that he would continue to do so (T680).

C. Petitioner's Actions at Trial -- During voir dire, prospective juror Bush said that he had heard that Anthony engaged in unfair business practices and referred to Petitioner

and Anthony as David and Goliath. The court told Petitioner to sit down and stop applauding (T211).

During Keith Schilling's cross examination, Petitioner said he believed that Anthony had terrorist ties based on comments made to him prior to September 11 (T394). He asked Schilling about an FBI terrorist report which allegedly came to the same conclusion and which Petitioner said had been delivered to his home(T392, 394).

While cross examining Anthony, Petitioner indicated that assaults and threats he had suffered at the hands of Anthony's associates justified his phone calls (T482-484).

Over Petitioner's cumulative evidence and authenticity objections, recordings of phone calls made to several witnesses were introduced (T530-531, 537). When more tapes were played, Petitioner objected, stating, "I think we all know I refer to Ray as a sand nigger, a.k.a. terrorist." (T539). He then insisted that the tapes be played in their entirety (T539, 541) and that he be allowed to subpoena the FBI, FDLE, and personal character witnesses (T539).

During cross examination of Detective Kessling, Petitioner made repeated references to Anthony's involvement with terrorists and the September 11 attacks. He repeatedly asserted that the FBI and FDLE approached him to help in their investigations (T681, 682, 683, 687, 727, 736, 737).

Also during Kessling's cross-examination, Petitioner said that he had referred to Anthony as a "sand nigger" because he affiliated with terrorists and those who wanted this country under martial law and laughed at the FBI (T685).

When the court asked Petitioner if he had any witnesses to present, he turned to the attorneys in the audience and asked if they wanted to testify, explaining "These are all people I paid in the past." (T804).

Appellant was convicted as charged on both counts (R123-124, T892-893).

Petitioner began his allocution by apologizing to Donald Trump and the Trump Organization (T911-912). He then stated that, even with his 139 IQ, he had trouble keeping up with the lies against him, including those in the presentence investigation (T912-913).

Petitioner denied that he had any psychiatric issues. He dismissed Dr. Brannon's report (T914) and stated "I didn't make it to where I'm at by having some mood disorder or psychological problem. I made it by superior intellect, and if there is anybody here that's a victim, it is truly me." (T915). He said "And the reason why I'm telling you this, is so the next time you people see me in business, you know you're in the presence of greatness and you will govern yourselves accordingly." (T917).

Petitioner concluded his allocution by stating that he had been surrounded by people in the car business and he knew what he had heard "And in my own house, FDLE told me they tried to recruit me, and they had him [Anthony]under investigation. Now, maybe I was pushing a little too hard to prove that point, so be it, but that statement remains." (T918-919). Petitioner said that FDLE had come to his house and listened to him:

> And what they said, I can't say I'm shocked, it just confirmed what I kind of pieced together on my own being around all of these people pre 911. They, point blank, said and I don't want to list their names, but I will at the Fourth DCA, that these people tried to --recruiting (sic) me, and I asked them, point blank, I said, is Mr. Anthony under investigation, and they said, yes, he is.

(T927-928).

Petitioner adamantly asserted that he was not delusional. He stated the certain local police officers did not want him around because he had learned too much and could piece things together (T927-928). Petitioner concluded by asking the court to tell Anthony that "they missed the white house, and this country didn't fall on marshal (sic) law." (T933).

Petitioner was sentenced to five years in prison for aggravated stalking and a consecutive 365 days in the county jail for violating a protective order (R154-155, T934).

Appeal – On direct appeal, Petitioner argued that the trial court erred: in failing to renew an offer of counsel prior to

trial and prior to sentencing; in failing to conduct a competency hearing prior to trial and during trial when it became obvious such a hearing was needed; and, in allowing Petitioner to represent himself in light of the decision in ***Indiana v. Edwards,*** 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008),.

The Fourth District found that the trial court erred in failing to renew the offer of counsel prior to sentencing. ***Monte v. State***, 51 So.3d 1196, 1202 (Fla. 4th DCA 2011). The District Court also held that the circuit court erred in failing to conduct the statutorily required competency hearing prior to trial. However, the Court remanded the case for a retroactive determinative of competency if the experts and their reports were available and the determination could be made. If not, a new trial was required. ***Id***. at 1203. The Court also held that the decision in ***Edwards***, did not grant substantive rights to defendants and declined to apply the 2009 amendment to Florida Rule of Criminal Procedure 3.111(d) (3) retroactively to Petitioner's case. ***Id.***

Petitioner sought review in this Court based on express and direct conflict with decisions of this Court and other district courts which have held that retroactive determinations of competency are improper. This Court accepted jurisdiction on August 29, 2011.

SUMMARY OF THE ARGUMENT

POINT I The Fourth District reversibly erred when it held that this Court's opinions in ***Tingle*** and ***Tennis*** allow retroactive determinations of competency. Retroactive determinations of competency violate a defendant's state and federal due process protections.

POINT II Even if this Court determines that retroactive competency hearings are permissible under certain limited circumstances, such a hearing was not appropriate in the instant case. In Florida, *nunc pro tunc* determinations of competency have only been permitted on remand in motions for post conviction relief. Such hearings are civil in nature and the defendant's Fifth and Sixth Amendment rights are much more limited. However, the instant case is a direct appeal. A retroactive determination of competency would violate Petitioner's due process protections. The District Court's decision failed to instruct the trial court on protections to be afforded Petitioner in such a hearing, particularly in light of his *pro se* status.

POINT III It is evident from the record that Petitioner was not competent to represent himself and the trial court erred in allowing him to do so. The District Court erred in failing to review the case under the standard announced in ***Indiana v. Edwards.*** Petitioner's conviction was not final when ***Edwards*** was

decided and when Rule 3.111 was amended. Petitioner's conviction and sentence should be reversed. In the alternative, the trial court should also have been instructed to consider the ***Edwards*** standard before allowing Petitioner to represent himself at any retroactive competency hearing or at the new sentencing hearing.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT THIS COURT'S DECISIONS ALLOW RETROACTIVE DETERMINATIONS OF COMPETENCY.

The standard of review for pure questions of law is *de novo.* ***Armstrong v. Harris***, 773 So. 2d 7, 11 (Fla. 2000).

A. The Decision of the Fourth District Court

The Fourth District remanded for a competency hearing, relying on the holdings in ***Mason v. State***, 489 So.2d 734 (Fla. 1986) and ***Brown v. State***, 449 So.2d 417, 417 (Fla. 3d DCA 1984), which state that there is no *per se* rule forbidding *nunc pro tunc* competency hearings in Florida. ***Monte***, 51 So.2d at 1203. The court held such a hearing would be possible if the experts who evaluated Petitioner and their records were still available. ***Id***.

The Fourth District's opinion acknowledges the First District's decision in ***Rogers v. State***, 16 So.3d 928 (Fla. 1st DCA 2009) which questioned the continued viability of ***Mason*** in light of this Court's decision in ***Tennis v. State***, 997 So.2d 375

(Fla.2008). ***Id***. at 1204, n. 5. In ***Tennis***, Justice Pariente had noted a competency hearing held prior to sentencing "was not relevant in establishing if the defendant had been competent to stand trial 'because a determination of competency cannot be retroactive.'" ***Id***. 381 n.7. However, in the opinion below, the Fourth District held that Justice Pariente was only referring to the 'general' rule as applied to the defendant in ***Tennis*** and acknowledging that there were exceptions to that rule. ***Id***.

B. Federal and Florida Law Regarding Retroactive Determinations Prior to *Tingle.*

The United State Supreme Court reversed the decision of the district court and rejected retroactive competency hearings in ***Pate v. Robinson***, 383 U.S. 375, 377, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966):

> But we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). The jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties.

Id. 383 U.S. at 387.

Although this Court has allowed such hearings in the past, it has done so only under very limited circumstances. In ***Fowler v. State***, 255 So.2d 513, 515 (Fla. 1971), the trial court failed to conduct an evidentiary hearing as to competency. The case was

temporarily remanded to the circuit court for a full evidentiary hearing with transcripts of that hearing to be included in the record to be returned to the Supreme Court if the defendant was found sane. ***Id***. at 515-516.

However, in ***Scott v. State***, 420 So.2d 595 (Fla. 1982), a 3.850 proceedings, this Court vacated the defendant's murder conviction and remanded for a new competency hearing, not a retroactive determination. ***Id***. at 596. In doing so, it stated:

> It is well-settled that there is substantial difficulty in retrospectively determining an accused's competence to stand trial. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). "In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining ... competency," *Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960), this Court believes that a new hearing is required to ascertain appellant's present competency to stand trial.

Id.

The First District's decision in ***Williams v. State,*** 447 So.2d 356, 357 (Fla. 1st DCA 1984), has been relied upon by most courts which have held that retroactive determinations may be ordered in 3.850 proceedings. ***Williams*** held that neither the decision in ***Drope v. Missouri***, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) nor various Florida rulings support "a *per se* rule requiring a new trial for failure to hold a competency hearing, regardless of the circumstances." ***Id***. at 358. Relying

in part on the fact that this Court had not yet disavowed its opinion in ***Fowler***, the court stated that its opinion was narrow and could be applied only to reject the trial court's conclusion that a determination of competency to stand trial could ***never*** be made retrospectively when the issue was ***raised in a 3.850 motion***. ***Id***. at 359.

Relying on ***Williams***, the First District again remanded for a retroactive competency hearing in ***Brown v. State***, 449 So.2d 417 (Fla. 1st DCA 1984). However, ***Brown*** contains no facts or procedural history. The Court simply stated that it had learned at oral argument that the doctors who examined the defendant were available to testify. The decision directed that those doctors should testify at any hearing and the court should consider "other evidence the state or the defense may offer." ***Id***. ***Brown*** also held that a new trial must be granted should the trial court "determine that the defendant's competency in May, 1983, cannot be sufficiently established to protect his due process rights." ***Id***. As the court relied on the narrow ruling in ***Williams***, it must be assumed that ***Brown*** was also before the court on a motion for post conviction relief.

In ***Mason v. State***, 489 So.2d 734, 735 (Fla. 1986), the other decision cited as authority by the Fourth District below, the defendant's murder conviction was challenged in a motion for post conviction relief. This Court emphasized that ***Mason***

differed from other cases[1] because there was nothing in the record to indicate a pre-trial competency hearing was necessary. ***Id***. Mason's 3.850 claim was remanded for an evidentiary hearing to determine if the evaluating psychiatrists would have reached a different conclusion if they had the information uncovered after trial ***Id***. at 736.

In allowing such a determination under those unusual circumstances, the Court stated that it agreed with the First District in ***Williams*** that there is no *per se* prohibition against retroactive competency determination regardless of the circumstances. ***Id***. at 737. The Court noted that there may be enough expert and lay witnesses to offer pertinent evidence at a retrospective hearing and that "experts here will not have to rely upon a cold record or recent examination of the appellant, and the chances are therefore decreased that such a *nunc pro tunc* evaluation will be unduly speculative." ***Id***.

Unlike the cases involving post conviction relief, ***Pridgen v. State***, 531 So.2d 951 (Fla. 1988) was a direct appeal. This Court held that the trial court erred in failing to stay sentencing, have the defendant reexamined by experts and conduct a new competency hearing when he exhibited signs of mental

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[1] In particular the court mentioned ***Hill v. State***, 473 So.2d 1253 (Fla.1985)

deterioration. ***Id***. at 955. Citing to ***Hill***, ***Pridgen*** held "[a] retroactive determination of competency cannot now be made" and remanded the case for a new competency hearing. ***Id***.

The District Court's opinion below creates an additional problem. In ***Pate***, 383 U.S. at 387, the Supreme Court emphasized the fact that the defendant's present competence must be established before any proceedings may be conducted. In simply remanding for a retroactive competency hearing without further instruction, the District Court allowed that hearing to be conducted without a determination of Petitioner's current competence to either represent himself or to proceed with the hearing at all. *See also* ***Drope v. Missouri***, 420 U.S. 162, 183, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)("Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, we cannot conclude that such a procedure would be adequate here". (Internal citations omitted).

C. Tingle and progeny – In the decision under review, the Fourth District incorrectly interpreted this Court's opinion in ***Tingle v. State***, 536 So.2d 202 (Fla. 1988), and allowed retroactive competency hearings in any type of proceeding. In ***Tingle***, the defendant's motion for appointment of counsel was denied and his motion for determination of competency was never ruled on by the trial court. ***Id***. at 203. In reversing, this Court held the competency determination could not be made retroactively:

> As we have previously noted in *Scott* and *Hill,* a hearing to determine whether a defendant was competent at the time he was tried generally cannot be held retroactively. Therefore, because Tingle was entitled to a hearing on his competency to stand trial, we vacate the conviction and sentence and remand for retrial after it has been determined that he is competent to stand trial. (Internal citations omitted).

Id. at 204.

Almost without exception[2], every District Court decision interpreting ***Tingle*** and its predecessors has held that they prohibit retroactive determinations of competency. In ***Calloway v. State***, 651 So. 2d 752 (Fla. 1st DCA 1995), the First District relied on ***Tingle*** and ***Scott***, in holding that the trial court erred in sentencing the defendant without conducting a competency hearing. ***Id.*** at 754. *See also* ***Brockman v. State***, 852 So.2d 330, 334 (Fla. 2nd DCA 2003) ("competence may not be determined retroactively."); ***Culbreath v. State***, 903 So. 2d 338,340 (Fla. 2nd DCA 2005) (remanded for new competency hearing after defense counsel raised new grounds to question the defendant's competency.).

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[2] In ***Holland v. State***, 634 So.2d 813, 815 (Fla. 1st DCA 1994), the First District referenced the holdings in ***Tingle***, ***Hill***, ***Mason*** and ***Williams*** but found none of the cases were applicable because the defendant had previously been adjudicated incompetent to stand trial. The case was remanded for a full evidentiary hearing on competency. As with ***Brown*** and ***Williams***, the continuing viability of ***Holland*** is in question based on ***Rogers***.

In ***Finkelstein v. State***, 574 So.2d 1164, 1169 (Fla. 4th DCA 1991), defense counsel refused to proceed until competency was determined. He was removed and a special public defender was appointed. ***Id***. at 1166. The Fourth District cited ***Tingle*** in reversing. ***Id***. at 1169. The decision continued "The court reiterated that a retroactive determination of competency cannot be made." ***Id.***, *quoting* ***Pridgen***, 531 So.2d at 955, *citing* ***Hill v. State***, 473 So.2d 1253 (Fla.1985).

In ***Elwell v. State***, 61 So.3d 1292 (Fla. 4th DCA 2011), the Fourth District relied on ***Tingle*** in reversing the defendant's conviction for direct criminal contempt while his competency hearing was still pending. ***Id.*** at 1293.

The Fifth District held it was error to allow the defendant to proceed to trial without a competency hearing in ***Mairena v. State***, 6 So.3d 80, 85 (Fla. 5th DCA 2009). Relying on ***Tingle***, ***Scott*** and ***Hill,*** the case was remanded for a new trial "[B]ecause a hearing to determine whether a criminal defendant was competent at the time of trial cannot be held retroactively" ***Id***. at 86. *See also* ***Maxwell v. State***, 974 So.2d 505, 511 (Fla. 5th DCA 2008)(based on ***Tingle*** and ***Scott***, competency hearing cannot be held retroactively).

Appellate counsel was found ineffective for failing to raise the lack of a competency determination in ***Cochrane v. State***, 925 So.2d 370, 373 (Fla. 5th DCA 2006). The court referred

to both ***Tingle*** and ***Scott*** in explaining why such a hearing could not be held retroactively. ***Id***. at 372. *See also* ***Carrion v. State***, 859 So.2d 563, 565 (Fla. 5th DCA 2003)("The supreme court has concluded on a number of occasions, however, that a hearing to determine whether a criminal defendant was competent at the time of trial cannot be held retroactively. *See, e.g., Tingle v. State*, 536 So.2d 202, 204 (Fla.1988); *Scott v. State*, 420 So.2d 595, 598 (Fla.1982).").

In the opinion below, the Fourth District ordered a retroactive competency hearing after determining that the ***Tingle*** decision held such hearings were only "generally" prohibited. With the exception of ***Holland***, this appears to be the only decision on direct appeal which interprets the ***Tingle*** decision in this manner. It is important to recognize that most district court cases prohibiting *nunc pro tunc* hearings do not rely on ***Tingle*** alone. Many of the decisions also cite ***Scott*** and ***Hill***, neither of which contain any qualifier such as "generally". Both cases unreservedly hold that competency cannot be determined retroactively.

D. The Decisions in *Tennis* and *Rogers*.

The defendant's first degree murder conviction and death sentence were reversed for failure to conduct a ***Faretta*** inquiry in ***Tennis v. State***, 997 So.2d 375 (Fla. 2008). Justice Pariente authored a concurring opinion joined by three other members of

the Court. Because this opinion received the concurrence of three other members of this Court, it is a majority and controlling opinion as to this issue. *See* ***Miami-Dade County v. Associated Aviation Underwriters***, 983 So.2d 618, 620 (Fla. 3rd DCA 2008). Noting that a hearing on competency was held prior to sentencing, Justice Pariente wrote

> In this case, a post-guilt phase competency hearing was held, at which Tennis was found to be competent. However, this hearing is not relevant to the present issue because a **determination of competency cannot be retroactive.** *See Tingle v. State*, 536 So.2d 202, 204 (Fla.1988); *Hill v. State*, 473 So.2d 1253, 1259 (Fla.1985). (*Emphasis added*).

Id.

The First District Court of Appeal discussed the continued viability of post-***Tennis*** retroactive competency hearings in ***Rogers***, 16 So.3d at 928. In ***Rogers***, the defendant's murder conviction had previously been reversed for failure to hold a competency hearing. ***Id***. at 930.[3] On remand, the trial court conducted a retroactive competency hearing and found that the defendant had been competent at the time of trial. ***Id***. at 931. The district court again reversed and remanded for a new trial should the defendant be determined competent. ***Id***. at 929. n1.

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[3] *See* ***Rogers v. State***, 954 So.2d 64, 65 (Fla. 1st DCA 2007).

The First District held that it did not have to decide whether a retroactive determination of competency would **ever** be possible after this Court's opinion in ***Tennis***. ***Id***. at 931, n5.(*Emphasis added*). ***Rogers*** recognized that courts have rarely, and only with explicit directions, remanded for a retroactive determination of competency. ***Id***. at 931, n6. The court went on to cite Justice Pariente's opinion and it's holding that "a determination of competency cannot be retroactive." ***Id***., *citing Tennis*, 997 So.2d 381-382, n.7. It then noted that ***Mason***, the last opinion from this Court authorizing a retroactive determination, was issued prior to ***Tennis.***

E. The Fourth District Erred In Holding That *Tingle* and *Tennis* Allow Retroactive Competency Hearings.

As explained above, the Fourth District's opinion in this case interpreted ***Tennis*** as affirming the existence of an exception that had been recognized in ***Mason***. ***Monte,*** 51 So.3d at 1204, n. 5.

The Fourth District misinterpreted not only the decision in ***Tennis,*** but misinterpreted or ignored numerous other opinions from this Court and from district courts throughout the state. In ***Tennis***, Justice Pariente specifically wrote "[H]owever, this hearing is not relevant to the present issue because a **determination of competency cannot be retroactive." *Tennis v. State***, 997 So.2d at 375 (Fla. 2008)(E*mphasis added*).

While citing to ***Tingle***, the opinion in ***Tennis*** did not state that hearings "generally" cannot be held retroactively. It stated that they **cannot be held retroactively**. The Fourth District opinion under review also failed to recognize that ***Tennis*** did not rely solely on ***Tingle***. ***Tennis*** also cited to ***Hill v. State***, 473 So.2d 1253 (Fla.1985) which referred to the principles set forth by the United States Supreme Court in ***Dusky***, ***Pate*** and ***Drope***. ***Id.*** at 1258-1259. In particular, ***Hill*** quoted from ***Drope***, stating ***"***Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, we cannot conclude that such a procedure would be adequate here. (Internal citations omitted). ***Id***., *quoting* ***Drope,*** 420 U.S. at 183, 95 S.Ct. at 909 (citations omitted). This Court went on to state

> As was determined in ***Drope*** and ***Robinson***, this type of competency hearing to determine whether Hill was competent at the time he was tried cannot be held retroactively because, as was stated in ***Drope***, "a defendant's due process rights would not be adequately protected" under that type of procedure. 420 U.S. at 183, 95 S.Ct. at 909. Such a hearing should be conducted contemporaneously with the trial.

Id. at 1259.

Similarly, in ***Scott***, 420 So.2d at 598, this Court remanded for a new hearing after cited to the "well settled" and "substantial difficulty" in retrospective determinations of competency.

Many of the district court opinions finding retroactive competency hearings violate due process also cite to ***Hill*** and/or ***Scott*** in addition to ***Tingle***. In the opinion below, the Fourth District erred in concentrating on a single word in a single opinion. This mistake was not made by the other district courts. Indeed, it was not made by the Fourth District in other cases. *See* ***Finkelstein v. State***, 574 So.2d 1164 (Fla. 4th DCA 1991) and ***Elwell v. State***, 61 So.3d 1292 (Fla. 4th DCA 2011).

In its decision below, although the Fourth District conceded that retroactive competency hearings are still "generally" impermissible, the Court failed to explain why the instant case, involving a direct appeal and a *pro se* defendant who insisted that he was competent and had no mental health issues, posed a appropriate exception to the "general" rule prohibiting retroactive hearings.

The only district court which seemed to sanction retroactive hearings, post-***Tingle,*** was the First District. However, in ***Rogers***, that court suggested that ***Mason*** was no longer good law. The First District was correct.

The Fourth District erred in holding that this Court's decisions in ***Tingle*** and ***Tennis*** permit retroactive competency hearings. In light of this court's decisions in ***Hill***, ***Scott*** and ***Tennis***, such hearings clearly violate a defendant's due process protections. The decision of the Fourth District below should

be reversed. Petitioner's convictions and sentences should be reversed and the case remanded for a new trial if it is determined that Petitioner is competent to stand trial and to represent himself in accord with ***Edwards***, 554 U.S. at 164,and Rule 3.111.

POINT II

IF RETROACTIVE COMPETENCY HEARINGS ARE PERMISSIBLE, THEY ARE LIMITED TO POST CONVICTION PROCEEDINGS WHERE A DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS ARE SEVERLY LIMITED, THEREFORE THE FOURTH DISTRICT ERRED IN REMANDING PETITIONER'S CASE FOR A POSSIBLE *NUNC PRO TUNC* DETERMINATION.

The facts and circumstances presented in this case do not permit a retroactive competency hearing even if this Court were to determine such hearings are permissibly under limited circumstances.

A. The Instant Case Is Distinguishable From Those Rare Florida Cases In Which Pre-Tingle Retroactive Hearings Have Been Permitted.

It is important to note that Petitioner was a *pro se* defendant who firmly believed that was competent and resented any and all implications that he was not.[4] It does not appear that any of the other cases dealing with this issue involve a

[4] Petitioner's comments regarding Dr. Brannon, his report and his own competency are in the record on appeal (T914-915).

pro se defendant who resisted any suggestion that he was incompetent and would undoubtedly do so on any remand.

The cases in which such hearings have been allowed are otherwise distinguishable. ***Fowler,*** 255 So.2d at 513 was decided prior to ***Drope***, ***Scott***, ***Hill*** and ***Tingle***. That decision is unique in that this Court remanded the case to the circuit court for a hearing to determine the defendant's sanity during the pendency of the appeal. ***Id***. at 515.

The constitutionality of retroactive hearings was discussed in ***Jones v. State***, 740 So.2d 520 (Fla. 1999). Citing to ***Mason***, it was suggested that retroactive determinations may be possible in appeals from **motions for post conviction relief**. ***Id***. at 523. (*Emphasis added*). This Court went on to state that "[T]he United States Supreme Court has cautioned that determining competency to stand trial retrospectively is inherently difficult, even under the most favorable circumstances." ***Id***. The opinion noted that Court had reversed convictions after finding that retroactive findings of competency violated due process solely because of the amount of time that had passed between the trial and the decision or hearing; for example, six years. ***Id***. Again, citing to ***Mason***, the court emphasized the difficulty that ensues when the experts must rely on a cold record. ***Id***.

In ***Williams***, 447 So.2d at 357, the First District held that "neither ***Drope v. Missouri*** nor decisions from the Florida courts support a *per se* rule requiring a new trial for failure to hold a competency hearing, regardless of the circumstances." ***Id***. at 358. The ***Williams*** court also explained that there was "no evidence of conduct by appellant contemporaneously with the time of trial, nor any other evidence, suggesting incompetency at the time of trial" and that this helped distinguish it from cases in which retroactive hearings had been prohibited. ***Id***. at 359.

The ***Williams*** Court emphasized that its holding only applied to competency issues raised in a Rule 3.850 motion for post conviction relief:

> Our holding is a narrow one. **We simply reject the trial court's conclusion that a determination of competency to stand trial can never be made retrospectively when the issue is raised in a 3.850 motion.** Whether appellant's pre-conviction competency can be determined retrospectively in this case has not been determined. (*Emphasis added*).

Id.

The Third District relied on ***Williams*** in remanding for a retroactive competency hearing in ***Brown***, 449 So.2d at 417. Very little can be gleaned from the opinion in ***Brown,*** but it must be assumed that ***Brown*** was before the trial court on a motion for post conviction relief since the holding in ***Williams*** was so limited. ***Id***. Petitioner's case is clearly distinguishable. The Fourth District agreed that there was evidence of incompetency

at the time of trial and the remand was from a direct appeal and not a post conviction proceeding.

In addition to ***Brown***, the Fourth District relied on this Court's opinion in ***Mason***. That case is also clearly distinguishable. In ***Mason***, 489 So.2d at 735, the defendant was before the Court on a motion for post conviction relief after a stay of execution had been granted. No pretrial competency hearing had been requested and it was determined that trial counsel had no reason to make such a request. ***Id***. at 736.

After trial and sentencing, it was discovered that the defendant had an extensive history of mental retardation, drug abuse and psychotic behavior. The case was remanded "for a hearing on whether or not the examining psychiatrists would have reached the same conclusion as to competency had they been fully aware of Mason's history." ***Id***.[5] In remanding for the hearing, this Court agreed with ***Williams*** that there was no *per se* rule forbidding *nunc pro tunc* hearings regardless of the

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[5] The Court wrote that one crucial issue would be the source of the information used in determining competency. "Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved." ***Id***. at 737. At least one of the doctors who evaluated Petitioner, Dr. Block-Garfield, testified that her diagnosis finding him competent was tentative and should not be considered definitive as it was based upon self-reporting and a competency interview (SR1).

circumstances. ***Id***. at 737. This Court went on to explain that the trial "court may find that there are a sufficient number of expert and lay witnesses who have examined or observed the defendant contemporaneous with trial available to offer pertinent evidence at a retrospective hearing." ***Id***, *quoting* ***Martin v. Estelle***, 583 F.2d 1373, 1375 (5th Cir.1979). It was determined that chances of the retroactive hearing being unduly speculative were lessened because the experts did not have to rely on a "cold record or recent exam of the defendant. ***Id***. However, the Court held that the defendant must be granted a new trial if a retroactive determination could not be made without violating his due process guarantees. ***Id.***

As with ***Jones*** and ***Williams,*** the hearing in ***Mason*** was ordered on appeal from a motion for post conviction relief. In ***Mason***, as in other Florida cases which have allowed such hearings, this Court considered the defendant's due process protections and stated such a hearing could not be held if the defendant's due process rights could not be protected.

The instant case is as clearly distinguishable from ***Mason*** as it is from ***Brown***. Here, the Fourth District did not specifically mention Petitioner's due process guarantees when discussing the proper remedy. ***Monte***, 51 So.3d at 1203. The purpose of the remand in ***Mason*** was completely different from the remand here. In addition to the obvious procedural differences,

Mason was remanded for defense counsel to present expert and lay witnesses along with evidence relevant to the defendant's competency at the time of trial. ***Mason***, 489 So.2d at 737. It is unlikely that such evidence would be presented by a *pro se* defendant who resented any suggestion that he was not competent.

Many of the constitutional protections which a criminal defendant would enjoy at trial do not adhere at a post conviction proceeding. The Fifth and Sixth Amendment do not apply in post conviction proceedings. ***Jones v. State***, 69 So.3d 329, 333 (Fla. 4th DCA 2011). *See also* ***Arbelaez v. State***, 898 So.2d 25, 42 (Fla. 2005) (rejecting Fifth and Sixth Amendment claims on the merits on post conviction claim).

A criminal defendant in a post conviction hearing has no absolute constitutional or statutory right to appointed counsel in a noncapital case. ***Arbelaez***, 898 So.2d at 42. Because the right of self representation derives from the Sixth Amendment, a criminal defendant has no right to self representation in post conviction proceedings. ***Jones***, 69 So.3d at 335. A post conviction court is not required to comply with the dictates of ***Nelson***[6] or ***Faretta***[7]. ***Id.***

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

[7] ***Faretta v. California***, 422 U.S. 806, 95 S.Ct. 2525 45 L.Ed.2d 562 (1974).

By extension, a post-conviction court would not be required to comply with the requirements of Florida Rule of Criminal Procedure 3.111, dealing with the appointment of counsel to, and self-representation by, indigent criminal defendants. This is because a motion for post conviction relief brought under Rule 3.850 "is a civil proceeding challenging a conviction and sentence." ***Id***. at 333. As such, the defendant does not have the same constitutional rights he would be afforded in a criminal prosecution. ***Id***.

The defendant requested a competency hearing in ***Jackson v. State***, 452 So.2d 533 (Fla. 1984). This Court affirmed the denial of the defendant's request for a competency hearing explaining:

> Appellant relies on section 916.11 and 916.12, Florida Statutes (1983), and Rule 3.210, Florida Rules of Criminal Procedure to support his argument. This reliance is misplaced, however, because the statutes and the rule both address the issue of a judicial determination of competency related to criminal trial proceedings. These do not apply to a 3.850 motion because the designation of the criminal procedure rule is a misnomer in that the proceeding is civil in nature, rather than criminal, and is likened to a combination of the common-law writ of habeas corpus and a motion for writ of error coram nobis. *Dykes v. State*, 162 So.2d 675 (Fla. 1st DCA 1964). Therefore, we hold that appellant is not entitled to a judicial determination of his competency to assist counsel either in preparing a 3.850 motion or a petition for writ of habeas corpus.

Id. at 536-537. *See also* ***Luckey v. State***, 979 So.2d 353, 355 (Fla. 5th DCA 2008)(Post conviction proceedings brought under

Rule 3.850 are civil in nature and the rules of criminal procedure dealing with competency do not apply.).

B. A Retroactive Competency Hearing Would Violate Petitioners Due Process Protections.

Even those jurisdictions which permit retroactive determinations of competency recognize their inherent difficulties. ***Maxwell v. Roe***, 606 F.3d 561, 577 (9th Cir. 2010)(noting that it ”disfavor(s) retroactive determinations of incompetence” the court disallowed a retroactive determination based on short form medical records after a 12 year delay). *See also* ***McMurtrey v. Ryan***, 539 F.3d 1112, 1132 (9th Cir. 2008)(due to thirteen year delay, lack of medical records and contemporaneous medical opinions, retroactive hearing violated due process. Additionally, trial judge admitted that he did not remember a lot of things that had occurred).

In ***Odle v. Woodford***, 238 F.3d 1084, 1089 (9th Cir. 2000), the Ninth Circuit allowed a retroactive hearing. The court explained that it believed a fair hearing was possible because the experts who testified at trial and the experts who had examined the defendant since that time could testify; defense counsel and investigator could submit declarations as to the defendant’s behavior during trial; and medical, psychiatric and jail records submitted at trial were still available. ***Id***. at 1090.

While emphasizing that such hearing are disfavored, the 10th Circuit set forth certain factors to be used in considering when retroactive competency hearing would be feasible. The criteria included:

> (1) [T]he passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial, including the trial judge, counsel for both the government and defendant, and jail officials.

Maynard v. Boone, 468 F.3d 665, 675, 676 (10th Cir. 2006), *quoting* ***McGregor v. Gibson***, 248 F.3d 946, 962-963 (10th Cir. 2001). *See also* ***Dorris v. Commonwealth***, 305 S.W. 3d 438, 442-443 (Ky. App. 2010) *citing* ***United States v. Makris***, 535 F.2d 899, 904 (5th Cir.1976).

In ***Dusky v. State***, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), the Supreme Court vacated the defendant's convictions and remanded for a new competency hearing, explaining it did so "[i]n view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago." ***Id***., 362 U.S. at 403.

The opinion issued below did nothing to ensure that Petitioner's due process rights would be protected. The trial court was simply instructed to determine whether the experts and their reports were available. ***Monte***, 51 So.3d at 1203. The opinion mentions nothing about the length of time between the evaluations and any possible *nunc pro tunc* hearing. The evaluations were performed in January 2008 (SR1-15). Any retroactive competency hearing would be held, at the very earliest, after the opinion of the District Court was entered on January 5, 2011; a time span of at least three years. ***Dusky*** indicates that a span of more than a year causes difficulties. ***Dusky***, 363 U.S. at 403.

The trial court was not instructed to view medical evidence or any prior competency evaluations[8]. The court was not directed to review jail records, the trial transcripts or to consider statements made by the defendant before, during or after trial. There was no indication that testimony from prior defense counsel or standby counsel should be considered. Nor was it even specified that the same judge was to conduct the hearing. *See* ***Maynard v. Boone***, 468 F.3d at 676 (10th Cir. 2006); ***Dorris,*** 305 S.W. 3d at 442-443.

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[8] Dr. Block Garfield indicated that she had previously evaluated Petitioner (SR2).

Perhaps most importantly, those jurisdictions which allow retroactive determinations routinely instruct the trial court to consider the opinion of trial counsel. In this case, Petitioner himself was trial counsel. And, it is clear from all *pro se* pleadings and the record on appeal that he intended to remain trial counsel. It is also evident from the trial transcripts and the record on appeal that Petitioner took great umbrage with anyone who questioned his competency. Therefore, at any retroactive hearing on this case, the trial court would be presented with two parties arguing that the defendant was competent and no one presenting any evidence in opposition. It is difficult to envision this situation resulting in a meaningful hearing at which Petitioner's state and federal due process rights are protected.

The opinion under review also failed to address the issue of counsel at any *nunc pro tunc* hearing. Should Petitioner be allowed to represent himself before a decision is made as to his competency, either retroactive or otherwise? Again, it is difficult to imagine how Petitioner's Fifth and Sixth Amendment due process rights would be protected in such a proceeding. The opinion of the Fourth District remanding the case for a retroactive determination of competency should be reversed.

POINT III

THE DISTRICT COURT ERRED IN FINDING THAT THE HOLDING IN *INDIANA V. EDWARDS* COULD NOT BE APPLIED TO THE INSTANT CASE. PETITIONER'S CONVICTION SHOULD BE REVERSED FOR A NEW TRIAL; IN THE ALTERNATIVE, ANY *NUNC PRO TUNC* HEARING SHOULD INCLUDE AN *EDWARDS* DETERMINATION.

A. Competency Under *Godinez* and *Edwards* – In ***Godinez v. Moran***, 509 U.S. 389, 391 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), the United States Supreme Court explained that "the competency standard for pleading guilty or waiving the right to counsel" was no higher than was the competency standard for standing trial.

The issue was revisited in ***Edwards***, 554 U.S. at 164. In ***Edwards***, the defendant appealed his convictions arguing he had been deprived of his right to self representation after the trial court determined he was competent to stand trial but not competent to represent himself. ***Id***. A new trial was order based on the ***Godinez*** and ***Faretta***. ***Id***., 554 U.S. at 168-169. The Supreme Court concluded that its decision in ***Godinez*** was not controlling because that case dealt with competency to enter a plea and ***Edwards*** involved competency to conduct a trial. ***Id***. Additionally, ***Godinez*** involved a state's request to allow the defendant to represent himself and, in ***Edwards***, the state sought to prohibit self representation. ***Id***.

In holding that a defendant who is deemed competent to stand trial can still be denied the right to represent himself based on a lack of competency, the ***Edwards*** Court noted that the traditional standard for competency includes the ability to consult with and assist counsel, and therefore, ***also assumes representation by counsel***. ***Id***., 554 U.S. at 174. The Court concluded that the individual states can insist that a defendant who is competent to proceed to trial must be represented by counsel if it is determined that he is not sufficiently competent to represent himself at that trial. ***Id***., 554 U.S. at 177-178.

B. The Issue Is Properly Before This Court – On direct appeal, Petitioner argued that the trial court erred in allowing him to represent himself without determining if he was competent to waive counsel and continue *pro se*. ***Monte***, 51 So.3d at 1203-1204. The Fourth District denied relief holding that ***Edwards*** allowed states to limit a defendant's right to self representation, but it "does not grant any substantive rights to defendants." ***Id***. at 1204. The District Court also stated that Rule 3.111(d)(3), requiring the trial court to deny self representation if the defendant suffered from severe mental illness to the point he was not competent to conduct the trial, was not amended until after Petitioner's trial and declined to apply the rule retroactively. ***Id***.

Although review was granted based on a direct and express conflict concerning retroactive competency hearings, this Court has jurisdiction to consider any issues which were properly before the District Court. As explained in ***Savoie v. State***, 422 So.2d 308 (Fla. 1982)

> We have jurisdiction, and, once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. This authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case.

Id. at 312. *See also* ***Price v. State***, 995 So.2d 401, 406 (Fla. 2008). Petitioner's competency to represent himself at trial was properly briefed and argued before the district court and the issue is dispositive of the case.

C. Because Petitioner's Conviction Was Not Final, *Edwards* and Rule 3.111 Apply To His Case.

In light of the ***Edwards*** opinion, Fla. R. Crim. P. 3.111(d)(3) was amended as follows:

> 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.*** [Emphasis added]

In Re Amendments to Florida Rule of Criminal Procedure 3.111, 17 So. 3d 272, 274 (Fla. 2009). The amendment was effective August 27, 2009. ***Edwards*** was decided on June 29, 2008. *See* ***Indiana v. Edwards***, 554 U.S. at 164.

The District Court mistakenly concluded that ***Edwards*** and Rule 3.111 would have to be applied retroactively. The ***Edwards*** opinion and the amended Rule were both in place while Petitioner's direct appeal was pending and, therefore, before his conviction was final. As Petitioner's conviction was not yet final, retroactivity was not a concern. *See* ***Smith v. State***, 598 So. 2d 1063, 1066 (Fla. 1992) ("Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.).

Even if it were necessary to apply the ***Edwards*** opinion retroactively, other state courts have done so. In ***State v. Connor***, 973 A.2d 627, 633 (Conn. 2009), it was acknowledged that the trial court had been bound by "controlling precedent" and that the decision in ***Edwards*** was contrary to established state case law, but the case was remanded for a determination of competency at the time of trial. ***Id.*** *See also* ***State v. Wray***, 698 S.E. 2d 137, 139 (N.C. Cir. 2010)("The holding of ***Edwards***

applies retroactively to the case *sub judice*, because this appeal is before us on direct review."); ***State v. Lane***, 707 S.E.2d 210 (N.C. 2011).

D. The Trial Court Erred In Finding That Petitioner Was Competent To Represent Himself and the District Court Erred in Affirming The Conviction, or in the Alternative, For Remanding Without Instructions To Determine Petitioner's Competency To Represent Himself.

The Fourth District erred in failing to analyze the case under the standard set forth in ***Edwards*** and amended Rule 3.111. That error was compounded when the court remanded the case without instructing the trial court to determine if Petitioner was competent to represent himself at the retroactive competency hearing and/or new sentencing hearing.

The issue of Petitioner's competency was first addressed at the request of counsel who argued that the trial court had failed to comply with Rule 3.210(ST2/P8-9, 12-14). The trial court granted Petitioner's motion to discharge counsel.[9] When the State moved to increase bond, Petitioner asked the court to contact the Trump Organization (ST2/P20). Attorney Resnick attempted to explain that Dr. Block-Garfield had not asked the right questions during her evaluation. Counsel explained that

[9] While ostensibly based on his failure to join in Petitioner's demand for speedy trial, Resnick explained that the underlying reason had more to do with his raising the competency issue against Petitioner's wishes (ST2/P6),

Petitioner had a serious mental issue, was not capable of understanding, and was unable to hear questions and answer correctly. He also explained that his ability to investigate the case had been limited by Petitioner's mental problems and Petitioner "cannot comprehend it on his own, nor can he admit to it because of the nature of the mental illness." (ST2/P21-23). The trial court dismissed counsel's concerns and suggested he should have retained more experts if he thought they were necessary (ST2/P21-23).

Before leaving court, Petitioner again asked someone to tell the Trump Organization that he was running late ST2/P24). When Petitioner refused to attend the next court hearing, the court ordered further evaluations (ST3).

Newly retained defense counsel informed the court that two evaluations had found that Petitioner was competent to stand trial and one found he was incompetent (ST9). None of the evaluations addressed Petitioner's competency to represent himself at trial.

A few days later, defense counsel's motion to withdraw, filed at Petitioner's insistence, was granted (ST20-21). During that hearing, Petitioner stated "I can't say I blame him for wanting to withdrawing (sic) from this hypocrisy. And those Trump tapes -- no, that was me on those Trump tapes, 100 percent unequivocally." And "I will say it again, I called Donald Trump.

Evoking (sic) on the Trump Enterprise to intervene in this hypocrisy on my behalf." (ST21) He also asked if someone was going to ask Dr. Phill (sic) to speak with him. (ST22). After stating that he had money and could act anyway that he pleased, Petitioner was removed from the courtroom (ST23). The court conducted a ***Faretta*** hearing and Petitioner was permitted to represent himself with an assistant public defender as standby counsel (T9-10).

In the decision below, the Fourth District held a defendant's right to self representation could be limited but ***Edwards*** did not "grant any substantive rights to defendants." ***Monte***, 51 So.3d at 1204. It appears that the District Court incorrectly held that a defendant can only appeal if representation is forced upon him.

This Court discussed the new competency standard for self representation in ***Muehleman v. State***, 3 So.3d 1149, 1153 (Fla. 2009). The defendant argued that the trial court failed to conduct a proper ***Faretta*** hearing. This Court affirmed, stating:

> *Edwards* makes clear, however, **that the constitution permits states to insist upon representation by counsel for those defendants 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." *Id*. at 2388. (*Emphasis added*).

Id. at 1159. This Court concluded that the trial court's findings met the standards set forth in Rule 3.111 and ***Edwards***,

especially in light of the fact that the defendant had never alleged that he was incompetent. ***Id***. at 1160.

Such was not the case below. Not only did the trial court err in failing to hold a pretrial and *sua sponte* competency hearing during trial[10], it erred in allowing Petitioner to represent himself. Florida has long recognized that ***Faretta*** allows self representation only when the defendant knowingly and intelligently waives his right to counsel. ***Reilly v. State, Dept. of Corrections***, 847 F. Supp. 951 (M.D. Fla. 1994). The defendant in ***Reilly*** alleged that the court erred in denying his right to represent himself. ***Id***. at 955. The Court explained that Florida recognized the right to self representation before ***Faretta***, but that right was never absolute. ***Id***. at 960. "No waiver will be accepted where the court finds that the defendant is unable to make an intelligent and voluntary choice because of his mental condition, age, education, experience, the nature of complexity of the case, and his knowledge and experience in criminal proceedings." ***Id.*** *citing* ***Johnston v. State***, 497 So.2d 863, 868 (Fla. 1986).

In ***Tennis,*** 997 So.2d at 378, this Court explained that ***Edwards*** could prevent some defendants from representing

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[10] In remanding for a competency hearing, the Fourth District recognized that "[h]ere sufficient grounds existed to question Monte's competency to stand trial." ***Monte***, 51 So.3d at 1202.

themselves even after a proper ***Faretta*** inquiry. However, the decision does not relieve the trial court from making the "appropriate determination of whether a defendant can represent himself". ***Id***.

It is evident from the record, both before and during trial, that Petitioner was not competent to represent himself.

> Proper assistance encompasses more than merely providing information but is "extended to comportment in the courtroom before a jury." *United States v. Hemsi*, 901 F.2d 293, 295 (2d Cir.1990). That defendant can recite the charges against her, list witnesses, and use legal terminology are insufficient "for proper assistance in the defense requires an understanding that is 'rational as well as factual.' " *Id*. (*quoting Dusky,* 362 U.S. at 402, 80 S.Ct. at 789).

United States v. Williams, 113 F.3d 1155, 1160 (10th Cir. 1997).

This is precisely what Attorney Resnick meant when he said that Dr. Block Garfield was asking the wrong questions. Just because a defendant can recite the names of the players does not mean that he can coach the team.

An examination of cases from several jurisdictions illustrates what factors the trial court should consider in determining a defendant's competency to represent himself. In ***State v. Baumruk***, 280 S.W.3d 600 (Mo. 2009), the finding that the defendant was not competent to represent himself was affirmed. ***Id***. at 605. Evidence supporting that finding included the defendant's outbursts in court, refusal to cooperate with

counsel, his determination to prove that he was justified in assaulting a nurse and insistence on calling witnesses who lacked any relevance to the trial. ***Id***. at 611-612. *See also* ***State v. Lewis***, 785 N.W.2d 834, 841 (Neb. 2010) (defendant's disruptive behavior, removal from courtroom, refusal to attend court along with testimony of experts supported denial of self representation); ***Chadwick v. State***, 309 S.W.3d 558, 562-563 (Tex. App. 2010) (Facts relied on to support the denial of right to proceed *pro se* included the defendant's refusal to attend court; personal attacks on the prosecutor, the judge, judges from other cases and his attorney; and incoherent written *pro se* motions).

After raising a nonsensical defense, the defendant was found competent to stand trial, but incompetent to represent himself in ***Falcone v. State***, 227 P.3d 469, 470 (Ala. App. 2010). The appellate court affirmed, stating

> Falcone presented pleadings and courtroom objections that were neither rational nor coherent. His personality disorder and obstreperous courtroom conduct suggested that his trial presentation would be similarly unintelligible. Based on these factors, Judge Pallenberg could reasonably conclude that Falcone could not present his defense in a rational and coherent manner.

Id. at 473. The Court explained "[T]he question is not whether the defendant correctly understands the law and is capable of distinguishing a good defense from a poor one. Rather, the

question is whether the defendant is capable of presenting his or her case in an understandable way." ***Id***. at 474.

Like these cases, the facts before the trial court clearly established that Petitioner was not competent to represent himself. The court simply relied on the written evaluations. A close examination shows those evaluations did not reveal a clear finding of competency, particularly competency to represent oneself. Dr. Block-Garfield found Petitioner competent to stand trial. However, any consideration of her findings must include the fact that she titled her findings "Provisional Diagnostic Impressions" and noted:

> This competency evaluation is based upon the **defendant's self-report and a competency interview.** An extensive clinical interview and psychological testing were not performed **nor are records available** to address psychiatric issues. Therefore, the **diagnostic impressions represent a tentative diagnosis and should under no circumstances be considered definitive**. (*Emphasis added*).

(SR1)[11] Dr. Dann-Namer found Petitioner competent to proceed to trial, but her findings should also be considered carefully. When asked why he was being evaluated, Petitioner referenced his desire to represent himself (SR12). Dr. Dann-Namer indicated

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[11] The supplemental record containing the competency evaluations is not indexed or numbered. For citations purposes, Petitioner will refer to each document in sequential order. Dr. Block-Garfield also pointed out that she had previously evaluated Petitioner for competency (SR2).

that Petitioner was compliant and attentive and his demeanor was consistent even when presented with conflicting information. (SR13). Dr. Dann-Namer concluded "Please note that Mr. Monte would benefit from instruction and guidance from his Attorney prior to the day of testimony, particularly since he is at times zealous about getting his point across." (SR13).

Dr. Brannon found Petitioner incompetent to stand trial. Of particular note, Dr. Brannon found that Petitioner would not be able to testify relevantly or **to assist in his own defense**. (SR4). Even those evaluations which indicate that Petitioner may have been competent to stand trial cast doubt on his ability to do so without the aid of counsel.

Clearly, psychological evaluations are not the only basis upon which such a determination should be made. Courts have considered disruptive behavior, both pretrial and during the trial itself. *See* ***Baumruck***, 280 S.W.3d at 611-612; ***Lewis*** 785 N.W.2d at 841 (Neb. 2010). They have also considered the fact that a defendant had to be removed from the courtroom and/or that a defendant refused to come to court. ***Id.*** Courts have looked at the fact that defendants have refused to cooperate with their own attorney and have launched personal attacks against either the prosecutor or the judge. ***Chadwick v. State***, 309 S.W.3d at 562; ***Baumruck***, 280 S.W.3d at 611-612. They have considered the defendant's determination to prove he was

justified in assaulting someone and presenting irrelevant testimony. ***Id***. Finally, courts have considered irrational and incoherent *pro se* pleadings and motions. ***Chadwick v. State***, 309 S.W.3d at 611-612; ***Falcone v. State***, 227 P.3d at 470.

As stated in ***Isreal v. State***, 258 P.3d 893, 894 (Ala. App. 2011), state and federal constitutions allow rejection of "self representation if the defendant is not capable of presenting their case in a rational and coherent manner, or if the defendant is not capable of conducting their defense without being unusually disruptive." ***Id***.

Petitioner exhibited each and every one of the behaviors described above. Yet the trial court allowed him to represent himself at trial, albeit from within a taped-off box and under threat of a stun belt (T57-58, 779). It is evident that, at best, Petitioner fell into the group of "gray defendants[12]" described in ***Edwards***. ***Edwards***, 554 U.S. at 172. As discussed above, the competency reports were, and continue to be, of little value. (SR 1,14).

A review of the trial transcripts reveal the futility of simply relying on the evaluations. It is painfully evident that

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[12] Petitioner is not conceding that he was competent to stand trial. That determination should have been made prior to trial and the courts failure to do so requires that his convictions be reversed.

Petitioner was "not capable of presenting his or her case in an understandable way." ***Falcone***, 227 P.3d at 470. And, when it is remembered that his defense was that (1) Mr. Anthony was involved in planning the September 11 attacks; (2) Petitioner was aware of this involvement; (3) FDLE was recruiting Petitioner because of his knowledge; and (4) the charges were concocted by Anthony and certain members of law enforcement in an attempt to keep Petitioner silent, it is evident that it was not possible to present the theory of defense in any "understandable way."

A review of the trial transcripts leaves little doubt that the proceedings were neither fair nor did they "appear fair to all who observe them." ***Edwards***, 554 U.S. at 177, *quoting* ***Wheat v. United States***, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). While the trial court seemed to believe that Petitioner was simply being obstreperous, the transcripts prove otherwise.

Petitioner's convictions and sentences should be reversed and remanded for a new trial if it is determined that he is currently competent to stand trial. Should Petitioner seek to represent himself, the court must determine his competency to do so under the standard set forth in ***Edwards*** and Rule 3.111(d)(3). If this Court holds that a retroactive determination of competency is appropriate, the trial court should be ordered to

first determine whether Petitioner is competent to represent himself at such a hearing and at sentencing under the standard in ***Edwards*** and Rule 3.111.

CONCLUSION

Based upon the foregoing argument and the authorities cited, Petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and remand this case for a new trial upon a finding that Petitioner is competent; or, in the alternative, modify the opinion of the District Court to ensure that the trial court determines that Petitioner is competent to represent himself prior to any further proceedings.

Additionally, Petitioner respectfully requests this Court reverse the finding of the District Court that *Edwards* and Rule 3.111(d)(3) cannot be applied to his case and further find that the trial court reversibly erred in allowing Petitioner to represent himself at trial without determining whether he was competent to do so; or in the alternative; modify the opinion of the district court to provide that any further proceedings before the trial court must comply with ***Edwards*** and Rule 3.111 (d)(3).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant's Initial Brief has been furnished to HEIDI BETTENDORF, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this 19th day of December, 2011. I also certify that an electronic copy of this Brief was transmitted to the Supreme Court and to opposing counsel.

_____
ELLEN GRIFFIN
Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, in compliance with a R. App. P. 9.210(a)(2).

_____

ELLEN GRIFFIN
Assistant Public Defender