IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S REPLY BRIEF ON THE MERITS

On Appeal from the Fourth District Court

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POINT I

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

In arguing that Petitioner places undue reliance on this Court's decision in ***Tennis v. State***, 997 So.2d 375(Fla. 2008)(AB at 8-9)," Respondent fails to recognize the numerous decisions from this Court and every district court in the state which Petitioner discussed and relied upon in his brief. IB at 9-19.

While Petitioner believes that the decision of the Fourth District in ***Monte v. State***, 51 So.3d 1196 (Fla. 4th DCA 2011) directly conflicts with both ***Tennis*** and ***Rogers***[1], it also conflicts, as discussed in Petitioner's jurisdictional brief, with numerous other opinions from this Court and other district court including the Fourth District.

This Court has held that "a hearing to determine whether a defendant was competent at the time he was tried "generally"

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[1] Respondent argues that the portion of ***Rogers v. State***, 16 So.3d 928 (Fla. 1st DCA 2009) referenced in Petitioner's merits brief was dicta. AB at 14-15. Petitioner acknowledged that 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***." IB at 19.

cannot be held retroactively." ***Tingle v. State***, 536 So. 2d 202, 204 (Fla. 1988). Respondent asserts that the omission of the word "generally" from the opinion in ***Tennis*** completely changed the Court's holding. *See* ***Tennis***, 997 So.2d at 381, n. 7. AB at 10-11. However, the ***Tennis*** opinion did not cite only to ***Tingle***, but also to ***Hill v. State***, 473 So. 2d 1253 (Fla. 1985). In neither ***Hill***, nor ***Scott v. State***, 420 So.2d 595 (Fla. 1982), did this Court allow for the possibility of retroactive competency hearings on direct appeal from criminal convictions. The word "generally" is not found in either opinion.

Respondent cites to a number of federal court decisions which allow "meaningful" retroactive competency determinations. AB at 16-18. Each of the cases cited is factually and procedural distinguishable from the case at bar. In ***Wheat v. Thigpen***, 793 F.2d. 621, 630 (5th Cir. 1986), the court allowed the hearing after determining that numerous witnesses would be available to testify and experts stated a "meaningful hearing" could be held. *See also* ***Reynolds v. Norris***, 86 F.3d 796 (8th Cir. 1996) and ***United States v. Giron-Reyes***, 234 F.3d 78 (1st Cir. 2000) in which each defendant was represented by counsel and hospitalized prior to trial.

In ***Cremeans v. Chapleau***, 62 F.3d 167 (6th Cir. 1995), *abrogated other grounds Thompson v. Keohane*, 516 U.S. 99 (1995),

a nine year delay in conducting the competency hearing was held to be, on its face, a fatal due process defect. ***Id.*** at 170. The court also considered testimony from the presiding judge and defense counsel and reviewed medical records and trial transcripts. ***Id.*** *But see* ***McMurtrey v. Ryan***, 539 F.3d 1112, 1131 (9th Cir. 2008)(Testimony of attorneys, guards, newspaper reporters, psychologists, substance abuse experts, detectives and jail progress notes all presented at hearing, but given passage of time and lack of medical records, it was not possible to make a "meaningful" assessment of competency at time of trial)[2].

Respondent cites to a number of cases from other states which allow such hearings. AB at 18-19. These cases are also distinguishable. In ***Evans v. State***, 300 N.E. 2d 882 (Ind. 1973), the defendant sought the hearing after filing a motion alleging newly discovered evidence of insanity at the time of the offense. ***Id*** at 885. The Court found it necessary to determine

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[2] Many of the Federal cases cited by Respondent involve an appeal from the trial courts findings after a retroactive competency hearing. Respondent objected to Petitioner's motion to supplement the record on appeal with a transcript of the hearing on remand in this case and this Court denied the motion. It does not appear that a notice of appeal was filed after that hearing below.

the defendant's competency at the time of trial so it could be determined whether he had waived his right to assert an insanity defense. ***Id.*** at 889. In ***Schuman v. State***, 357 N.E. 895, 899 (Ind. 1976), the court noted that competency was not explicitly raised prior to the entry of the defendant's plea. Additionally, the opinion contained an in-depth recitation of the evidence presented at the hearing. ***Id.*** at 898-899.

Again, in ***Mato v. State***, 429 N.E. 2d 945 (Ind. 1982), competency was not questioned before or during trial. ***Id.*** at 947. The court, *sua sponte*, ordered the defendant hospitalized prior to sentencing. When he was released, six months later, a new judge found him competent and sentenced him. ***Id.*** at 947. That decision was found to be supported by competent evidence. ***Id.*** at 948.

The defendant was evaluated and conceded competency before entering his plea to murder in ***Thompson v. Commonwealth***, 56 S.W. 406 (Ky. 2001). He did so to avoid jury sentencing. ***Id.*** at 407-408. On appeal, it was held that the state was entitled to jury sentencing. ***Id.*** Kentucky law held that a defendant cannot waive competency hearings, so the case was remanded to decide whether a competency determination was possible based on a consideration of all appropriate factors. ***Id.*** at 409-410.

In ***Thompson***, the Kentucky Supreme Court reversed, holding that a criminal defendant cannot waive his competency hearing. While that finding was based on a state statute, the same principle should have been followed in below. Based on the pre-trial and trial transcripts, as well as *pro se* pleadings, it is evident that Petitioner believes he is competent and resents any implication that he is not. He continues to show every intention to represent himself. A retroactive hearing at which a defendant represents himself, at which no witnesses are called and no evidence is presented, and at which the defendant makes the same argument as the state amounts to little more than a waiver. Such a proceeding cannot be considered the "meaningful" determination of competency called for in the cases cited by Respondent. *See also* ***State v. Snyder***, 750 So.2d 832, 855 (La. 1999) (any hearing most be a "meaningful" hearing)[3].

As Respondent points out, the record contains three evaluations performed a few weeks prior to trial. AB at 19. Respondent mistakenly asserts that the three evaluations would enable a reviewer to make a retroactive competency determination. AB at 19-20. This assertion is wrong for several

[3] In ***Snyder*** and ***State v. Nomey***, 613 So.2d 157 (La. 1993) (AB18), the Louisiana Court indicates that retroactive hearings are never appropriate when the issue of competency was raised at trial or had been recognized by the trial court.

reasons. First, Dr. Block-Garfield's report was entitled "Provisional Diagnostic Impressions." She specifically stated that her evaluation contained a tentative diagnosis and "should under no circumstances be considered definitive." (SR1). Secondly, basing the entire hearing on three reports, one of which was tentative, cannot fulfill the criteria set forth for a "meaningful" retroactive determination of competency. This is particularly true, if as anticipated, there will be no other evidence presented and no argument that Petitioner was not competent.

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.

Respondent argues that retroactive competency hearings cannot be limited to post conviction proceedings because doing so "would ignore the due process concerns inherent in such proceedings." AB at 21-22. Respondent fails to state exactly which due process concerns would be ignored, but mentions the length of time between trial and such hearings. In doing so, Respondent cites to ***Dusky v. United States***, 362 U.S. 402, 403 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960) in which the Court

expressed concern over a time lapse of over one year. In the instant case, the lapse was more than three years.

Respondent notes that the passage of time was of special concern in ***Jones v. State***, 740 So.2d 520 (Fla. 1999), a postconviction case. AB at 21-22. Respondent misinterprets this Court's ruling in ***Jones***. The defendant was convicted on three counts of first degree murder, among other offenses, in 1981. ***Id***. at 521. After his death warrant was signed in 1985, he filed his first motion for post conviction relief alleging his incompetency at the time of trial. ***Id***. at 522. The motion was summarily denied. This Court reversed and remanded for an evidentiary hearing. An amended 3.850 motion was filed in April 1995 and an evidentiary hearing was held in February 1997. ***Id***. The trial court denied relief, without attachments or explanation. ***Id***.

In vacating the defendant's convictions and sentences, this Court held that procedural due process requires adequate notice and an opportunity to be heard in a meaningful time and manner. ***Id***. at 523. ***Jones*** went on to hold that the defendant was deprived of a timely hearing as he sat on death row for 12 years, waiting for a competency hearing that was delayed without explanation. ***Id***. at 524. The Court also noted that the lack of a contemporaneous examination, combined with testimony from a

state witness that a retroactive determination was not possible, established that the defendant could not be provided with a "meaningful" retroactive hearing. ***Id.*** It was also held that the failure to hold a timely hearing and to make findings of fact and conclusions of law violated Fla. R. Crim. P. 3.850(d). ***Id.*** This Court concluded "[f]ailure to act promptly deprives defendants of due process under the law and reflects poorly on our justice system." ***Id.*** at 525.

It is apparent that the decision in ***Jones*** was not based on whether retroactive determinations of competency are limited to post-conviction proceedings. Respondent argues that none of the cases contained in Petitioners brief on the merits contain any language limiting retroactive competency hearings to postconviction proceedings. AB at 22. While the exact words might not be used, the implication is clear.

Although Florida courts have not specifically stated that retroactive competency hearings are limited to postconviction hearings, at least one has stated "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." ***State v. Williams***, 447 So. 2d 356,359 (Fla. 1st DCA 1984). And, as explained in the merits brief, virtually

every case allowing a retroactive determination has done so in a post conviction context. IB at 22-29.

Respondent asserts that the remand instructions in the ***Monte*** opinion are "specific," "explicit" and made in "unmistakable language." Respondent makes short shrift of concerns that the trial court, on remand, will allow Petitioner to represent himself at the competency hearing without a proper competency determination. AB at 23-24.

The trial court was instructed to "conduct a nunc pro tunc competency hearing if the experts who evaluated Monte and their reports are available. If not available or if Monte's competency to stand trial cannot be retroactively determined – the trial court shall afford Monte a new trial." ***Monte***, 51 So.3d at 1203. The ***Monte*** Court also stated that a retroactive determination regarding competency to stand trial, "would also suffice to support the earlier presumption of competency during its *Faretta* inquiry that occurred only a few weeks before trial."[4] ***Id.***

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[4] The language used by the District Court is particularly troubling. It implied that the trial court may, on remand, use the same standard to determine competency to stand trial as used to determine competency to represent oneself. The Fourth District held that ***Edwards*** did not apply to this case and that amended Rule 3.111 was not retroactive. This ruling is addressed in Point Three. However, ***Edwards*** and the revised Rule 3.111, would clearly apply to self representation on remand. As

These "instructions" are problematic for several reasons. As noted by Respondent, Fla. R. Crim. P. 3.210 "does not contemplate that a criminal defendant's competency will be determined while the defendant is proceeding pro se." AB at 23. This is true, but it does not mean it will not occur. The rule does not contemplate that the trial court will ignore the required competency hearing, but it did so in this case. *See* Fla. R. Crim. P. 3.210 (b).

Competency determinations should be made on a factual case by case basis. When presented with the facts available in this case, particularly as ordered on remand, it is clear that a retroactive determination of competency deprives Petitioner of his due process protections. IB at 31-32.

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.

Respondent and Petitioner agree that Florida courts have traditionally recognized that a defendant may represent himself only if he is able to "knowingly and intelligently" waive his

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written, the opinion is far from "specific" and "explicit" in regard to this issue.

right to counsel. IB at 40; AB at 28-35. Despite the many cases cited by both parties, the ***Monte*** court held "that the standard for determining competency to waive the right to an attorney is the same as the standard for determining competency to stand trial." ***Monte***, 51 So.3d at 1204, *quoting Muhammad v. Sec'y, Dep't of Corr.*, 554 F.3d 949, 956 (11th Cir.2009). While Respondent asserts that ***Edwards***[5] should not be applied to the instant case, it is not because of retroactivity.

Citing to ***State v. Connor***, 973 A.2d 627, 650 (Conn. 2009), Respondent argues that the decision in ***Edwards*** "did not hold, contrary to ***Godinez***[6], that due process mandates a higher standard of mental competency for self representation than trial with counsel." AB at 37-38. However, the ***Edwards*** Court held "the nature of the problem before us cautions against the use of a single mental competency stand standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself." ***Edwards***, 554 U.S. at 175, 128 S.Ct. at 2386. The Court also held that states may insist on

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[5] ***Indiana v. Edwards***, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008)

[6] ***Godinez v. Moran***, 509 U.S. 389, 391 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)

representation for those who suffer from mental illness "to the point where they are not competent to conduct trial proceedings by themselves." ***Id.***, 554 U.S. at 178, 128 S. Ct. at 2388. Of course, the trial court below failed to determine either: whether Petitioner was competent to stand trial or whether he was competent to represent himself.

Respondent argues that Florida has always had a heightened competency standard and, therefore, Petitioner's argument that the trial court erred in not employing the "new" ***Edwards*** standard must be rejected. AB at 38-39[7]. Whether reviewed under the old standard or the new, the trial court failed to make any determination whatsoever as to Petitioner's **mental** competency to represent himself at trial.

Respondent insists that it is important to remember that the instant case is the obverse of ***Edwards***, but fails to explain why that fact is so critical. AB at 40. Neither ***Edwards***, nor any Florida case interpreting it have relied on this distinction. IB at 41-45; AB at 40-41.

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[7] Respondent acknowledges the amendment to Rule 3.111(d)(3), but continues to argue that there is longstanding case law establishing that the previous version of the Rule allowed the trial court to consider the defendant's mental capacity to represent himself. AB at 39, n. 6.

Respondent also asserts that the record on appeal supports a finding that Petitioner was competent to represent himself at trial and there is no indication that the trial court "combined" the standards for self representation and the standard to proceed to trial. AB at 42-43. Petitioner agrees that the trial court did not combine the standards. Rather, the trial court failed to utilize the proper standard to make either determination because the court failed to make either determination.

Respondent claims that Petitioner's counsel asks this Court to consider his "uncooperative" behavior as evidence of incompetence and asserts that there is nothing in the record to show that Petitioner's behavior was "bizarre." Respondent further contends that Petitioner must have been competent to represent himself because he gave an opening statement, a closing argument and extensively cross examined witnesses; and, that "it is telling that standby counsel never raised the issue of competency during trial." AB at 43-44.

Petitioner's behavior before, during, and after trial, considered along with his pro se pleadings, clearly establishes that he was not competent to proceed pro se. Respondent mentions the quantity of Petitioner's trial participation, but fails to discuss the quality of that participation.

Petitioner's trial behavior is not bizarre only if Donald Trump was actually interested in the outcome of the case; the victim was actually involved in the 9/11 attacks; and, Petitioner was actually recruited by FDLE and the FBI to prove that involvement. It is unknown how standby counsel viewed his role in the proceedings, but perhaps he learned from Mr. Resnick and did not question Petitioner's competency in open court.[8]

When Petitioner's conduct of the trial is viewed in light of established case law, it is evident that the trial court erred in allowing him to represent himself. IB at 41-46. Despite Respondent's arguments to the contrary, the trial court's observations of Petitioner did not and could not support a finding that he was simply being difficult. There is no doubt that the proceedings were neither fair nor did they give the appearance of fairness. ***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).

CONCLUSION

Based upon the foregoing argument and the authorities cited, Petitioner respectfully requests this Honorable Court to

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[8] Standby counsel was not even present at sentencing. Attorney Resnick stated that he was actually discharged for questioning Petitioner's competency (ST2/P6).

reverse the decision of the District Court and remand 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 find that the trial court 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 Reply Brief on the Merits 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 10th day of May, 2012. 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 Courier New 12 point type, in compliance with a R. App. P. 9.210(a)(2).

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Assistant Public Defender