IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC11-259

FRANK MONTE,

Petitioner,

- versus -

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

Statement Of The Case And Facts

Respondent accepts Petitioner's Statement of the Case and Facts subject to the additions and clarifications set forth below and in the argument portion of this Brief which are necessary to resolve the legal issues presented upon appeal. In addition, Respondent relies upon those facts set forth in the opinion of the Fourth District Court of Appeal in the instant case, Monte v. State, 51 So. 3d 1196 (Fla. 4th DCA 2011).

1. Written Competency Reports.

Based on defense counsel's request at a prior hearing, the trial court appointed Trudy Block-Garfield, Ph.D., to examine Petitioner (R. 6-7). Dr. Block-Garfield conducted a clinical interview and forensic testing of Petitioner (SR.). Dr. Block-Garfield diagnosed Petitioner with bipolar disorder, but noted that it was in remission (SR.). She authored a three (3) page report analyzing in detail the six (6) elements legally required for a competency evaluation:

(1) capacity to appreciate charges against him;
(2) capacity to appreciate the range and nature of possible penalties;
(3) capacity to understand the adversary nature of the legal process;
(4) capacity to disclose pertinent facts;
(5) courtroom behavior; and
(6) capacity to testify relevantly.

(SR.).

Dr. Block-Garfield stated that Petitioner was competent to proceed to trial based on her formal competency testing (SR.). She noted that Petitioner "has his own notions as to how his case should be handled but this appears related to personality factors rather than the symptoms of a mental disorder" (SR.).

Psychologist Michael D. Brannon, Psy.D., also evaluated Petitioner as to competency to stand trial (SR.). As did Dr. Block-Garfield, Dr. Brannon conducted a clinical interview and forensic testing of Petitioner (SR.). He diagnosed Petitioner with a delusional disorder (SR.). Dr. Brannon authored a three (3) page report analyzing in detail the six (6) elements legally required for a competency evaluation (SR.). Dr. Brannon found Petitioner incompetent to proceed based on criteria (4) (Petitioner could not assist in his own defense) and (6) (Petitioner could not testify relevantly) (SR.). However, Dr. Brannon conceded that Petitioner was able to provide specific facts concerning the alleged offenses (SR.).

Finally, Psychologist Karen Dann-Namer, Ph.D., was appointed to evaluate Petitioner to determine competency to proceed to trial (SR). Although all of the examinations were performed within a two week period, Dr. Dann-Namer's evaluation was performed closest to Petitioner's trial. Dr. Dann-Namer was the only expert to include a review of Petitioner's jail records and transcripts of two of

Petitioner's court appearances, along with a clinical interview and diagnostic testing (SR.). In Dr. Dann-Namer's opinion, Petitioner was competent to proceed to trial (SR.). Dr. Dann-Namer noted that Petitioner had "distinct and ingrained personality features that require diagnostic mention," she concluded these personality traits did not hinder Petitioner's competency (SR.). Dr. Dann-Namer noted that although Petitioner was hyper-verbal and periodically interrupted, "redirection is effective in addressing such issues" (SR.).

2. The Faretta Hearing.

On February 22, 2008, the trial court conducted a thorough Faretta[1] inquiry. The trial judge inquired of Petitioner's age, education, physical and mental health, his experience representing himself, his understanding of the charges and the consequences of conviction, and his familiarity with the rules of evidence and case law (ST. 38-51). The judge specifically asked Petitioner if he had been treated for any mental illness, to which Petitioner responded, "no" (ST. 40). Petitioner denied ever being treated by a psychiatrist or a psychologist and denied ever having been prescribed psychotropic medication (ST. 41). The trial court also warned dangers of self-representation (ST. 39-51). Petitioner confirmed that he had represented himself in at least one other case through jury selection (ST. 42-43). Petitioner

[1]Faretta v. California, 422 U.S. 806 (1975).

confirmed that he understood the charges against him and the possible penalties (ST. 48-49). After the trial court's inquiries, Petitioner knowingly and voluntarily waived his right to counsel for his trial that was scheduled for March 10, 2008 (ST. 51).

3. Direct Appeal.

Petitioner filed a direct appeal of his conviction and sentence. Monte v. State, 51 So. 3d 1196 (Fla. 4th DCA 2011). On appeal, Petitioner claimed, inter alia, that the trial court erred in failing to conduct a competency hearing both before trial and sua sponte during trial, when, Petitioner claimed, it should have become apparent to the trial court that such a hearing was necessary. Id. at 1202-03. The Fourth District found the trial court erred in not conducting a competency hearing because "sufficient grounds existed to question Monte's competency to stand trial . . . However . . . the mandatory subsequent competency hearing never occurred." Id. at 1202. Relying on this Court's opinion in Mason v. State, 489 So. 2d 734, 737 (Fla. 1986), the Fourth District remanded for a retroactive competency hearing: ". . . a retroactive determination of competency may be possible and legally permissible because three pre-trial psychological examinations have in fact already been performed and the records associated with those evaluations may remain available for review and consideration." Id. at 1203.

Petitioner also claimed that the trial court reversibly erred in allowing him to represent himself without first determining whether he was competent to make the decision to waive counsel and thereafter competent to represent himself. Id. at 1203-04. The Fourth District held that if the trial court was able to make a retroactive competency determination, that determination would be sufficient to support the trial court's earlier presumption of competence during the Faretta hearing. Id. at 1204. The Fourth District declined Petitioner's request to apply the Supreme Court's decision in Edwards v. Indiana, 128 S. Ct. 2379 (2008), and the amendment to Fla. R. Crim. P. 3.111(d)(3) retroactively. Monte, 51 So. 3d at 1204.

Petitioner sought, and was granted, discretionary review in this Court based on conflict jurisdiction.

Summary Of The Argument

I. It is true that **generally**, a hearing to determine whether a defendant was competent to stand trial cannot be held retroactively. Tingle v. State, 536 So. 2d 202 (Fla. 1988). However, this Court has stated that there is no per se rule in Florida forbidding a nunc pro tunc competency determination under any circumstances. Mason v. State, 489 So. 2d 734, 737 (Fla. 1986) (citing State v. Williams, 447 So. 2d 356 (Fla. 1st DCA 1984)). Although this Court has acknowledged the inherent problems in conducting a retroactive competency evaluation in earlier cases such as Hill v. State, 473 So. 2d 1253 (Fla. 1985), it has also observed that a "'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.'" Mason, 489 So. 2d at 737 (quoting Martin v. Estelle, 583 F.2d 1373, 1375 (5th Cir. 1978); see also Williams, 447 So. 2d at 359. This Court's opinion in Tennis v. State, 997 So. 2d 375 (Fla. 2008), which omits a key word from the analysis, does not change this Court's prior precedent.

II. Retroactive competency determinations have never been limited to postconviction proceedings and there is nothing in the language of any case limiting the consideration of this issue to postconviction proceedings. Doing so

would be contrary to one of the considerations involved in determining whether a retroactive competency evaluation is appropriate in a particular case: the passage of time.

III. The trial court did not err in granting Petitioner's request to represent himself. While the United States Supreme Court's decision in Edwards v. Indiana, 128 S. Ct. 2379 (2008), makes clear that states may set a higher or different competence standard for self-representation than for trial with counsel, Florida had already done so at the time of Petitioner's trial. However, should this Court determine that the record does not support a showing that the trial court properly applied a heightened standard of competency, the Fourth District properly remanded for a competency hearing in light of Edwards, not for a new trial, as Petitioner suggests.

Argument

I. THE FOURTH DISTRICT DID NOT ERR IN ORDERING REMAND TO THE TRIAL COURT FOR A RETROACTIVE COMPETENCY DETERMINATION.

The Fourth District found the trial court erred in not conducting a competency hearing because "sufficient grounds existed to question Monte's competency to stand trial . . . However . . . the mandatory subsequent competency hearing never occurred." Monte v. State, 51 So. 2d at 1202. Relying on this Court's opinion in Mason v. State, 489 So. 2d 734, 737 (Fla. 1986), the Fourth District remanded for a retroactive competency hearing: ". . . a retroactive determination of competency may be possible and legally permissible because three pre-trial psychological examinations have in fact already been performed and the records associated with those evaluations may remain available for review and consideration." Monte, 51 So. 2d at 1203. Petitioner claims the Fourth District's opinion remanding this case to the trial court for a retroactive determination of competency is erroneous and contrary to precedent from this Court and other District Courts.

A. Florida Supreme Court Precedent.

1. Tennis v. State.

Petitioner places the most reliance on this Court's opinion in Tennis v. State,

997 So. 2d 375 (Fla. 2008). Tennis raised multiple issues in the direct appeal of his conviction and sentence of death. However, this Court chose to address only one issue in the majority opinion: whether the trial court erred in failing to conduct a Faretta hearing after Tennis made multiple requests to represent himself. Id. at 376. Determining that the trial court committed error, this Court reversed and remanded for a new trial solely based upon its resolution of the Faretta issue:

> In sum, we conclude that the trial court had no proper basis for failing to conduct a Faretta inquiry and that a Faretta inquiry was mandated after Tennis's unequivocal request for self-representation. Accordingly, we reverse Tennis's conviction for first-degree felony murder and vacate his sentence of death and remand for further proceedings consistent with this opinion.

Id. at 380. Importantly, this Court noted that competency was never an issue during Tennis's trial or sentencing proceeding. Id. at 380, n.5. "The trial court here did not indicate that its reason for not considering Tennis's request for self-representation was as a result of doubts as to his mental competency." Id. at 379.

In a concurring opinion, Justice Pariente, joined by a majority of the Court, agreed with the majority opinion "reversing because of the trial court's failure to hold a hearing on Tennis's request for self-representation," but wrote to address her concerns regarding "why the trial judge did not allow Tennis to accept the State's offer . . . or, alternatively, to explain her reasons for rejecting the plea. Id. at 381.

Justice Pariente noted that if Tennis was not competent to accept the plea, then he was not competent to proceed to trial. Justice Pariente noted that the competency hearing held in Tennis's case after the guilt phase of trial was not relevant in establishing if Tennis had been competent to stand trial "**because a determination of competency cannot be retroactive**," citing to this Court's prior opinions in Tingle v. State, 536 So. 2d 202, 204 (Fla. 1988), and Hill v. State, 473 So. 2d 1253, 1259 (Fla. 1985). Id. at 382, n.7.

Petitioner sought and was granted conflict jurisdiction based on this language in Tennis, which was subsequently cited with approval in the First District's opinion in Rogers v. State, 16 So. 3d 928 (Fla. 1st DCA 2009).

2. Tingle v. State.

In Tingle v. State, 536 So. 2d 202 (Fla. 1988), this Court held that the trial court erred in denying a motion to determine competency where there were reasonable grounds to believe that the defendant may have been incompetent. This Court specifically stated that "a hearing to determine whether a defendant was competent at the time he was tried **generally** cannot be held retroactively." Id. at 204.

This Court's language in Tingle is clearly distinguishable from the broad statement contained in Justice Pariente's later concurring opinion in Tennis. The

omission of the word "generally" from Justice Pariente's reference to Tingle completely changes the meaning of this Court's holding. As noted by the Fourth District, when making the statement in Tingle regarding the "general" rule, this Court implied there were exceptions. Monte, 51 So. 3d at 1203 n.5. In Tingle, when this Court made its observations regarding the general rule, it specifically cited to its prior opinions in Hill v. State, 473 So. 2d 1253, 1256 (Fla. 1985), and Scott v. State, 420 So. 2d 595 (Fla. 1982).[2]

3. Mason v. State.

Importantly, in Mason v. State, 489 So. 2d 734, 737 (Fla. 1986), this Court stated that there is no per se rule in Florida forbidding a nunc pro tunc competency determination under any circumstances:

> In spite of the problems involved in conducting a nunc pro tunc competency evaluation so well enunciated in Hill, we find that under these circumstances the "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." Martin v. Estelle, 583 F.2d 1373, 1375 (5th Cir. 1979). The 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. United States v. Makris, 398 F. Supp. 507 (S.D. Tex. 1975), aff'd 535 F.2d 899 (1976), cert. denied, 430 U.S. 954, 97 S. Ct. 1598, 51 L. Ed. 2d 803 (1977).

[2]Both of these cases are discussed more fully in Section I.A.4., supra.

> We agree with the First District Court of Appeal's observation in State v. Williams, 447 So. 2d 356 (Fla. 1st DCA 1984), that no per se rule exists in Florida forbidding a nunc pro tunc competency determination regardless of the surrounding circumstances. See also Brown v. State, 449 So. 2d 417 (Fla. 3d DCA 1984) (remanding for nunc pro tunc evaluation when original experts available to testify). Should the trial court find, for whatever reason, that an evaluation of Mason's competency at the time of the original trial cannot be conducted in such a manner as to assure Mason due process of law, the court must so rule and grant a new trial.

Thus, in Mason, this Court clearly and consistently evaluated the factors involved in conducting a retroactive competency determination, but nonetheless determined that remand for a determination as to whether such a retroactive determination could be conducted would be appropriate in Mason's case.

In the case at bar, the Fourth District, consistent with this Court's holding in Mason, remanded for a determination of whether a retroactive competency determination could be made. Importantly, the record in the case at bar contains three competency evaluations performed in the few weeks immediately prior to trial.

4. Hill v. State and Scott v. State.

In Hill v. State, this Court determined that Hill's due process rights would not be adequately protected by a retroactive competency hearing performed sixteen years after the trial. While recognizing that such a determination would not be

appropriate in Hill's case, this Court recognized the concept that such retroactive determinations are not strictly forbidden:

> The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, see Pate v. Robinson, 383 U.S., at 386-87 [86 S. Ct. at 842-43]; Dusky v. United States, 362 U.S., at 403 [80 S. Ct. at 789], we cannot conclude that such a procedure would be adequate here.

473 So. 2d at 1258-59. Clearly, this Court's decision in Hill did not completely foreclose the possibility of conducting a retroactive competency determination. This Court merely determined that such was not a reasonable possibility in Hill's case and remanded for a new trial if it was determined that Hill would be competent for his retrial. Id. at 1260.

Similarly, in Scott v. State, this Court determined that the trial court erred in failing to conduct a competency hearing prior to trial. 420 So. 2d at 597. This Court then moved on to determine whether a retroactive competency determination would be appropriate in Scott's case. Because no competency evaluations were conducted at the time of trial and it was not possible to make a retroactive competency determination, this Court reversed Scott's conviction and remanded for a new trial once it was determined Scott was competent. Id. Again, this Court

refused to foreclose the possibility of conducting a retroactive competency determination.

B. First District Court of Appeal.

Petitioner places heavy reliance, and argued in support of conflict jurisdiction, based on the opinion of the First District in Rogers v. State, 16 So. 3d 928 (Fla. 1st DCA 2009). In Rogers, the First District had already reversed the murder conviction in a prior appeal. Id. at 930; Rogers v. State, 954 So. 2d 64, 65 (Fla. 1st DCA 2007). The issue presented to the First District after remand was whether the trial court exceeded its authority on remand when it conducted a competency determination to determine whether Rogers was competent at the time of her original trial and concluded that she was. Id. at 931. Thus, the issue was the scope of authority granted to the trial court on remand, not whether a retroactive determination of competency could ever be made: "the prior panel's decision reversing in the present case did not order a retrospective determination and laid down no conditions under which a post hoc competency hearing might be possible." Id. at 932.

The portion of the opinion relied upon by Petitioner for conflict jurisdiction recognizes that the First District was not reaching the question of whether a retroactive competency determination could ever be made: "We need not reach the

question, therefore, whether on general principles a retroactive determination would ever - since the decision in Tennis v. State, 997 So. 2d 375, 382 (Fla. 2008) - be permissible." Id. at 931, n.5. The Court further recognized that "[w]hile the Florida Supreme Court has, even on direct appeal, remanded for a retrospective determination of a defendant's competence at the time of trial, it has only done so explicitly and only in unmistakable language." Id. at 931-32.

C. Other Jurisdictions.

1. Federal Court Precedent.

The general rule is that retrospective determinations of a defendant's competency are disfavored under United States Supreme Court precedent because of "the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances." Drope v. Missouri, 420 U.S. 162, 183 (1975). See also Pate v. Robinson, 383 U.S. 375, 386–87 (1966) (stating "we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. 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 [defendant's] hearing would be held six years after the fact aggravates these difficulties."); Dusky v. United States, 362 U.S. 402, 403 (1960) (remanding the case to the District Court for a new competency hearing in light of

the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago[.]").

Nonetheless, federal circuit courts have concluded that a "meaningful" determination is possible "where the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings." Reynolds v. Norris, 86 F.3d 796, 803 (8th Cir. 1996) (finding that a four year lapse of time between the initial competency hearing and proposed retrospective hearing would not prevent an accurate assessment in light of the "the unusual amount of contemporaneous evidence specifically relating to [defendant's] competency."). Additionally, "[w]hen determining whether a meaningful hearing may be held, we look to the existence of contemporaneous medical evidence, the recollections of non-experts who had the opportunity to interact with the defendant during the relevant period, statements by the defendant in the trial transcript, and the existence of medical records. The passage of time is not an insurmountable obstacle if sufficient contemporaneous information is available." Reynolds, 86 F.3d at 803 (citations omitted). See also United States v. Giron-Reyes, 234 F.3d 78, 83 (1st Cir. 2000) (remanding for potential retrospective competency determination); United States v. Auen, 846 F.2d 872, 878 (2d Cir. 1988) (same);

United States v. Jones, 336 F.3d 245, 260 (3d Cir. 2003) (same); United States v. Mason, 52 F.3d 1286, 1293 (4th Cir. 1995) (same); Wheat v. Thigpen, 793 F.2d 621, 630-32 (5th Cir. 1986) (affirming retrospective competency determination); Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) ("The Sixth Circuit recognizes that a retrospective [competency] determination may satisfy the requirements of due process provided it is based on evidence related to observations made or knowledge possessed at the time of trial."), abrogated on other grounds by, Thompson v. Keohane, 516 U.S. 99 (1995); United States v. Savage, 505 F.3d 754, 758 (7th Cir. 2007) (recognizing viability of retrospective competency determinations); U.S. ex rel. Bilyew v. Franzen, 842 F.2d 189, 193 (7th Cir. 1988) (finding that a meaningful hearing "can be [conducted] if the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings."); Reynolds v. Norris, 86 F.3d 796, 802-03 (8th Cir. 1996) (remanding for retrospective competency hearing); McMurtrey v. Ryan, 539 F.3d 1112, 1131–32 (9th Cir. 2008) (describing framework for analyzing feasibility of retrospective competency determinations); Maynard v. Boone, 468 F.3d 665, 674-75 (10th Cir. 2006) (finding that an eight year lapse of time was not a bar to a retrospective competency hearing because the prior competency hearing

records was substantial and the medical records were complete); Watts v. Singletary, 87 F.3d 1282, 1286-87 n.6 (11th Cir. 1996) (recognizing viability of retrospective competency determinations).

2. Other States.

In Thompson v. Commonwealth, 56 S.W.3d 406, 409 (Ky. 2001), the Kentucky Supreme Court concluded that, while the better practice is to conduct the competency hearing before the trial, a retrospective competency hearing is permissible if the hearing is adequate to arrive at an assessment that is not mere speculation as to the defendant's competency at the time of trial (citing Martin v. Estelle, 583 F.2d 1373, 1374 (5th Cir. 1978)). The Thompson Court remanded the matter to the trial court "for the limited purpose of determining whether a retrospective competency hearing is permissible in this case, and, if so, to conduct such an evidentiary hearing . . ." 56 S.W.3d at 410.

In Louisiana, under certain limited circumstances, a retroactive determination of competency may be permissible if it is proven that the trial court ignored reasonable grounds for doubting a defendant's competency. State v. Snyder, 750 So.2d 832, 854-55 (La. 1999); State v. Nomey, 613 So.2d 157, 161 n. 8 (La. 1993).

In Smith v. State, 443 N.E.2d 1187, 1191 (Ind. 1983), the Indiana Supreme

Court remanded a for retrospective competency determination. See also Mato v. State, 429 N.E.2d 945, 947 (Ind. 1982) ("Unquestionably, there are difficulties with retrospective determinations of competency such as fading memories, and changing conditions. . . . Nevertheless, depending upon the data that is available, trustworthy determinations can be made retrospectively."); Schuman v. State, 357 N.E.2d 895, 898-99 (Ind. 1976) (affirming a "retroactive determination of competency"); Evans v. State, 300 N.E.2d 882, 889 (Ind. 1973) (remanding case "for a hearing to determine whether appellant was competent to stand trial at the time of his trial" and instructing trial court "to certify its determination following the hearing to this Court for final disposition" of the appeal).

Based on the foregoing, it is clear that this Court has never prohibited retroactive competency determinations.[3] The record in the present case contains three evaluations of Petitioner's competency performed only weeks prior to the beginning of his trial. All three evaluations extensively discussed Petitioner's mental competency for trial. The reports contain supportive findings and

[3]Petitioner's argument, taken to its logical conclusion, would by necessity mean that a competency determination, including sanity at the time of the crime, could never be performed retroactively, regardless of the circumstances. It should be remembered, however, that in cases where a defendant's sanity at the time of the crime is called into question, all competency determinations, are, by necessity, performed retroactively.

explanations for the ultimate conclusion of competency or incompetency. Based on these reports, a retrospective reviewer is able to determine the standard of competency against which the experts measured.

II. RETROACTIVE COMPETENCY HEARINGS HAVE NEVER BEEN LIMITED TO POSTCONVICTION PROCEEDINGS.

Next, Petitioner argues that retroactive competency proceedings, if allowed, have been limited by this Court's prior decisions to postconviction proceedings. however, limiting such a determination solely to postconviction proceedings would ignore the due process concerns inherent in such proceedings.

One of the primary issues recognized by the United State Supreme Court with regard to whether a retroactive competency hearing is appropriate is the passage of time. For example, in Drope, the Supreme Court found that a retrospective competency hearing six years after the initial competency hearing would not be adequate. Drope, 420 U.S. at 183. In Pate, the Supreme Court expressed concerns over a retrospective competency hearing six years after the initial hearing. Pate, 383 U.S. at 386–87. In Dusky, the Supreme Court expressed concern over a retrospective competency hearing more than one year after the initial hearing. Dusky, 362 U.S. at 403.

The passage of time was a special consideration in this Court's opinion in Jones v. State, 740 So. 2d 520, 521 (Fla. 1999), a postconviction case. In Jones, the defendant brought a postconviction claim that he was incompetent at the time of his trial, and his competency to stand trial had never been tested. Id. at 521.

The postconviction court summarily denied the claim, and this Court reversed and remanded for an evidentiary hearing. After delaying a hearing for twelve years, the court below finally held the required hearing and then denied relief without elaboration. Id. This Court vacated the conviction and sentence, concluding that "the twelve-year delay undisputedly not due to appellant, the lack of psychological testing contemporaneous to trial, and the State's own evidence that a retroactive competency determination is not possible establish the inability to provide appellant a meaningful retrospective competency determination that complies with due process." Id. at 524.

While Petitioner may be able to cite numerous cases where this issue was presented to courts in a postconviction proceeding, there is nothing in the language of any of those cases limiting the consideration of this issue to postconviction proceedings. And such a holding would be contrary to one of the considerations expressed in Jones: the passage of time. Additionally, in the federal circuits, to determine whether a "meaningful hearing" can be conducted, courts look at four factors, one of which is the passage of time. See, e.g., Maxwell v. Roe, 606 F.3d 561 (9th Cir. 2010) ("A meaningful retrospective competency determination, given the twelve-year delay and sparse medical record, is not possible.").

To the extent Petitioner complains about the remand instructions in the

Fourth District opinion in this case, his complaint is not well-founded. The Fourth District's opinion contains specific instructions to the trial court on remand, not only for the competency issue, but also for the Faretta issue:

> We, therefore, reverse and remand for the trial court 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.
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> * * *
>
> [I]f the trial court is able to retroactively determine the Monte was competent to stand trial, this determination would also suffice to support the trial court's earlier presumption of competence during its Faretta inquiry that occurred only a few weeks before trial.

Monte v. State, 51 So. 3d at 1203, 1204. These instructions are explicit, recognizing the principle clarified in the First District's opinion in Rogers: that a remand for a retroactive competency determination contain explicit and unmistakable language.

Petitioner's counsel is concerned that the Fourth District's language fails to advise the trial court that Petitioner should not be permitted to proceed pro se at the competency hearing. However, Fla. R. Crim. P. 3.120 does not contemplate that a criminal defendant's competency will be determined while the defendant is proceeding pro se. There are numerous references to "counsel for the defendant"

in the rule. See Fla. R. Crim. P. 3.210. Furthermore, prior to making a determination that a defendant is able to proceed pro se, the trial court must make a determination that the defendant is competent to make a knowing and intelligent waiver of his right to counsel (see Issue III, supra).

Thus, based on Petitioner's concerns, his competency was properly raised and considered on direct appeal. The Fourth District's language instructing the trial court on remand was explicit and not deficient.

III. WHEN CONSIDERING PETITIONER'S COMPETENCE TO REPRESENT HIMSELF, THE TRIAL COURT WAS NOT REQUIRED TO APPLY A HIGHER STANDARD THAT THE STANDARD FOR COMPETENCE TO STAND TRIAL.

Next, Petitioner contends that the trial court erred in permitting him to represent himself at trial. Petitioner further contends that the Fourth District compounded the error by refusing to order the trial court to apply a higher standard of competency on remand.

A. Standard Of Mental Competence For Self-Representation: Federal Cases.

In its decision in Indiana v. Edwards, 128 S. Ct. 2379 (2008), the United States Supreme Court held the federal constitution does not prohibit state courts from denying self representation to defendants who are competent to stand trial with an attorney, i.e., trial competent, but who lack the mental health or capacity to conduct their own defense at trial. Relying principally on this decision, Petitioner contends he was incompetent to represent himself and the trial court erred in failing to exercise its discretion to deny self-representation on grounds of mental incompetence.

In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court recognized a federal constitutional right to represent oneself. However, the court failed to address the standard of mental competence needed to claim the

right. The court made clear, on the one hand, that the defendant's waiver of counsel must be undertaken voluntarily and "with eyes open" to the disadvantages of self-representation and, on the other, that the defendant's "technical legal knowledge" was irrelevant to the exercise of the right. Id. at 835, 836. Except for noting that Faretta himself was "literate, competent, and understanding," id. at 835, the Court did not explore how a defendant's mental health and capacity related to the newly recognized Sixth Amendment right.

In 1993, the United States Supreme Court issued its decision in Godinez v. Moran, 509 U.S. 389 (1993), which denied the existence of a separate competence standard for self-representation as a matter of federal law. Moran, who had tried to kill himself after fatally shooting his former wife and two others, was evaluated by two psychologists and found competent to stand trial. He sought to dismiss his attorneys and plead guilty in order to avoid the presentation of mitigating evidence at his sentencing hearing. Despite Moran's attempted suicide and the fact he was taking prescribed antiseizure medications, the state trial court accepted his waiver of counsel and allowed him to plead guilty; he received a death sentence. Id. at 391-393. On petition for a writ of habeas corpus, the federal court of appeals held that even though Moran had been found competent to stand trial, the record showed he was not competent to waive counsel and plead guilty, steps the court of

appeals believed required higher levels of mental functioning than standing trial with the assistance of counsel. Id. at 394.

The Supreme Court reversed, "reject[ing] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the Dusky standard." Id. at 398. In response to the argument that representing oneself requires greater intellectual powers than standing trial with an attorney, the court answered: "But this argument has a flawed premise; the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." Id. at 399 (footnote omitted). While most defendants undeniably would be better defended with counsel than without, "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation." Id. at 400 (footnote omitted). The court acknowledged that in addition to trial competence, the defendant seeking to waive counsel must be found to do so knowingly and voluntarily. The court stressed, however, that this is not a competence standard; while the competence inquiry focuses on the defendant's ability to understand the proceedings, the "knowing and voluntary" inquiry is intended to ensure the defendant actually does understand the consequences of his or her decision, and that the decision is uncoerced. Id. at 400-401 and n.12.

Finally, the court observed that "psychiatrists and scholars" might find subclassifications of competence useful, and that "while States are free to adopt competency standards that are more elaborate than the Dusky formulation, the Due Process Clause does not impose these additional requirements." Id. at 402.

B. Standard Of Mental Competence For Self-Representation: Florida Cases.

Prior to the issuance of Faretta, this Court recognized that a criminal defendant's right to self-representation was embodied in the Florida Constitution. State v. Cappetta, 216 So.2d 749, 750 (Fla. 1968) ("[I]n the absence of unusual circumstances an accused who is mentally competent and sui juris has the right to conduct his own defense without counsel by virtue of Section 11, Declaration of Rights, Florida Constitution."), cert. denied, 394 U.S. 1008 (1969).

Additionally, in 1972, when adopted, Rule 3.111(d)(3) of the Florida Rules of Criminal Procedure provided as follows: "No waiver shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his **mental condition**, age, education, experience, the nature or complexity of the case, or other factors" (emphasis added). See In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 79-80 (Fla. 1972).

Subsequently, in the wake of the strong constitutional statements in Faretta

and Godinez, Florida courts discussed a criminal defendant's right to self-representation and the mental competence needed to exercise that right. A close examination of these cases, however, shows that Florida courts do not tend to view the federal right to self-representation as absolute, assuming a valid waiver of counsel. To the contrary, Florida courts have consistently held that, although every defendant in a criminal case has the constitutional right to represent himself if he so desires, before his waiver of counsel may be accepted the trial court is duty-bound to determine a defendant's competency to represent himself. See Reilly v. State Dep't of Corr., 847 F. Supp. 951, 960 (M.D. Fla. 1994) (recognizing that, in Florida, a defendant may be found incompetent to proceed without counsel even though he is found legally competent to stand trial).

In Muhammad v. State, 494 So. 2d 969, 970-972 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987), a case similar to the case at bar, defense counsel was concerned about the defendant's mental condition from the beginning of the case. Counsel had the defendant evaluated for competency to stand trial, as well as insanity at the time of the offense. Although two doctors were unable to determine whether the defendant was competent because the defendant refused to meet with them, a third doctor was able to meet with the defendant, and found him competent. The court declared the defendant competent, and the case proceeded to

trial. After the case was mistried, the case was immediately transferred to a new judge, and the judge entertained the defendant's motion to discharge his attorney. After a Faretta hearing, the court allowed the defendant to proceed pro se. The jury found the defendant guilty as charged.

On appeal, Muhammad raised two issues, similar to the issues raised by Petitioner in the instant case: (1) that the defendant was not competent to stand trial; and, (2) that the trial ". . . judge failed to question whether Muhammad was competent to make the decision to waive counsel and to conduct his own defense." Muhammad, 494 So. 2d at 972, 974. As to the issue of competency to stand trial, this Court quickly disposed of the issue, reasoning that three experts were appointed to evaluate the defendant, but that through his own doing, only one expert was able to complete the evaluation. Id. at 973. This Court deferred to the findings of the trial court, noting that the trial judge had the chance to observe the defendant's behavior, as well as various pleadings and letters written by the defendant, and took testimony from an expert regarding the issue. In short, this Court noted that nothing in the record dispositively showed that the defendant was **not** competent to stand trial, and that the standard for determining competence had been met.

Next, as to the allegation that the trial court erred in allowing the defendant

to waive the right to counsel, this Court stated that the defendant "urges that the judge failed to question whether Muhammad was competent to make the decision to waive counsel, and to conduct his own defense." Muhammad, 494 So. 2d at 974. Although the defendant conceded that the court properly determined that the waiver was knowing and voluntary, the defendant also argued that the judge should have determined that the defendant was in fact competent to do so. See id. This Court noted, that for purposes of the defendant's argument, the alleged primary indicators that the defendant was not competent were that he refused to raise the insanity defense, and failed to present evidence of his psychological problems in mitigation during the penalty phase. However, this Court also rejected this argument, reasoning that the appropriate standard to apply to the case was whether the defendant was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will." Id. (quoting Faretta v. California, 422 U.S. 806 (1975); and, citing Jones v. State, 449 So. 2d 253 (Fla. 1984), cert. denied 469 U.S. 893 (1984)). This Court further noted that the trial judge conducted a lengthy Faretta hearing, after which the court advised the defendant that it believed the defendant was making a mistake in representing himself. This Court also reasoned that Faretta does not require that the trial court make a determination that the defendant meets some special competency requirement to

represent himself, and that in Faretta, the Court noted that the question of whether the defendant even possessed the skills to represent himself was irrelevant to the waiver of counsel. Id. at 975. This Court stated:

> Inherent in appellant's argument is the assumption that the level of competence necessary to waive counsel is greater than the level required to simply stand trial. Competency to waive counsel is **at the very least** the same as competency to stand trial.

Id. (emphasis added).

In Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986), this Court found that the right to self-representation was not absolute. There, this Court stated that "[i]n determining whether a defendant has knowingly and intelligently waived his right to counsel, a trial court should inquire into, among other things: defendant's age, mental status, and lack of knowledge and experience in criminal proceedings." This Court concluded that "[t]he trial judge made the proper inquiry . . . and correctly concluded that the desired waiver of counsel was neither knowing nor intelligent, in part, because of Johnston's **mental condition**." Id. (emphasis added).

In Visage v. State, 664 So. 2d 1101 (Fla. 1st DCA 1995), the First District found that a trial court did not abuse its discretion in refusing to allow a competent defendant with bi-polar disorder and a psychiatric history to proceed pro se, but

certified the question of whether under Fla. R. Crim. P. 3.111(d)(3) a defendant may be competent to stand trial but incompetent to proceed pro se. Visage appealed his conviction claiming that no evidence justified denying him the right to represent himself. Prior to trial, Visage sought leave to represent himself. Id. at 1101. The First District found that Visage was incompetent based on the fact that he was taking anti-depressants, tranquilizers, and anti-manic medication for his bi-polar disorder, and previously had attempted suicide. Id. at 1102. The court held that although Visage may have been competent to stand trial, under Rule 3.111(d)(3), the record failed to show that Visage was able to make an "'intelligent and understanding choice' to proceed without counsel." Visage next sought to invoke the jurisdiction of the Florida Supreme Court. This Court, in Visage v. State, 679 So. 2d 735, 735-36 (Fla. 1996), discharged jurisdiction, stating the following:

> Both parties concede that it is well settled that a defendant may be competent to stand trial yet lack the ability to knowingly and intelligently waive counsel. See, e.g., Johnston v. State, 497 So. 2d 863 (Fla. 1986); Muhammad v. State, 494 So. 2d 969 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987); Goode v. State, 365 So. 2d 381 (Fla. 1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979). We agree and therefore discharge jurisdiction.

However, in 1998, Rule 3.111(d)(3) was amended and the language of the

rule completely changed. The amended rule stated 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 him 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." Amendment to Florida Rule of Criminal Procedure 3.111(d)(2)-(3), 719 So. 2d 873, 875 (Fla. 1998). As an aid to the application of the rule, this Court published a model colloquy designed to allow the trial judge to learn of the defendant's age, education and mental and physical abilities and conditions. Id. at 876-77.

Interestingly, even in spite of the change in language of Rule 3.111(d)(3), this Court continued to maintain that a trial court has discretion to deny self-representation when a defendant's mental instability prevents a knowing and intelligent waiver of the right to counsel. Holland v. State, 773 So. 2d 1065, 1069-70 (Fla. 2000) (citing Johnston, supra). Thus, this Court continued to apply a heightened level of competence to a defendant who sought to exercise his right to self-representation.

That this same rule has been applied by Florida courts, even in light of the amendment to Rule 3.1111(d)(3), is quite evident. Recently, in DaSilva v. State, 966 So. 2d 1013 (Fla. 4th DCA 2007), the Fourth District found that the trial court

did not abuse its discretion when it denied a murder defendant's request to represent himself. Reports of medical experts indicated that DaSilva suffered from schizophrenia, and therefore was not competent to make a competent decision regarding self-representation. In addition to the mental health diagnosis, the several trial judges who had presided over the lengthy case had many occasions of direct dealing with DaSilva himself in pre-trial proceedings. Thus, DaSilva was properly found incompetent to exercise his right to self-representation, even though he was competent to stand trial. The Fourth District's decision was in conformity with the long-standing principle in Florida that Florida courts apply a higher standard of competency to the decision to exercise one's right to self-representation.

C. Indiana v. Edwards, 128 S. Ct. 2379 (2008).

The Supreme Court next addressed Faretta competence standards, 15 years after Godinez, in Indiana v. Edwards, 128 S. Ct. 2379 (2008). Charged in Indiana state court with attempted murder and other crimes, Edwards was twice found incompetent to stand trial because of his schizophrenia and delusions. After his second hospitalization, he was returned to court as competent. The trial court denied his request for self-representation, however, and denied his renewed request when he was retried after a partially hung jury; the court noted his lengthy

psychiatric history and found he still suffered from schizophrenia and, while competent to stand trial, was not competent to defend himself. The Indiana appellate courts ordered a new trial on the ground that Faretta, supra, and Godinez, supra, required the state to permit Edwards to represent himself. Edwards, 128 S. Ct. at 2382-2383.

The Supreme Court reversed, holding "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Edwards, 128 S. Ct. at 2388. The court did not overrule Godinez, instead distinguishing it on two grounds. First, the defendant in Godinez "sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue." Id. at 2385. Second, "Godinez involved a State that sought to permit a gray-area defendant to represent himself. Godinez's constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may deny a gray-area defendant the right to represent himself -- the matter at issue here." Id.

On the merits of the question, the court observed that the Dusky standard for competence to stand trial assumes the defendant will be defending through

counsel. The competence case law thus suggests that defending oneself in the absence of an attorney "calls for a different standard." Id. at 2386. Moreover, "[m]ental illness itself is not a unitary concept. . . . In certain instances an individual may well be able to satisfy Dusky's mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." Id. When a defendant who lacks the necessary mental capacity attempts to represent himself, the resulting trial is likely neither to be, nor to appear, fair. "The application of Dusky's basic mental competence standard can help in part to avoid this result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that Dusky alone is sufficient." Id. at 2387.

The court in Edwards did not hold, contrary to Godinez, that due process mandates a higher standard of mental competence for self-representation than for trial with counsel. The Edwards court held only that states **may**, without running afoul of Faretta, impose a higher standard, a result at which Godinez had hinted by its reference to possibly "more elaborate" state standards. Godinez, 509 U.S. at 402. Connecticut has recently noted the following:

> In light of Edwards, it is clear . . . that we are free to adopt for mentally ill or mentally incapacitated defendants who wish to

> represent themselves at trial a competency standard that differs from the standard for determining whether such a defendant is competent to stand trial. It is equally clear, however, that Edwards does not mandate the application of such a dual standard of competency for mentally ill defendants. In other words, Edwards did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.

State v. Connor, 973 A.2d 627, 650 (Conn. 2009).[5]

Notably, the issuance of the Supreme Court's opinion in Edwards did not change a trial court's authority in Florida to deny a defendant's Faretta request if the court believed that a defendant was mentally ill and that his mental illness was so severe that he was not competent to represent himself at trial. As discussed extensively in section III.B., supra, for at least two decades prior to Edwards, Florida case law had already recognized that Florida courts apply a higher standard of competency to the decision to exercise one's right to self-representation than to competency to stand trial. However, based on the Edwards opinion, this Court amended Rule 3.111(d)(3) 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

[5]Thus, Edwards does not support a claim of federal constitutional error in a case like the present one, in which a defendant's request to represent himself was granted.

> 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; new language emphasized). In re Amendments to Florida Rule of Criminal Procedure 3.111, 17 So. 3d 272 (Fla. 2009).[6]

D. Post-Edwards Cases.

Petitioner contends that the Fourth District, in considering competence to represent himself, should have exercised its discretion, later recognized in Edwards, to apply a higher standard than mere competence to stand trial. Because he was incompetent under the higher standard, Petitioner argues, the trial court should have denied his Faretta motion. This claim must be rejected because, at the time of Petitioner's trial, Florida case law already provided the trial court with a higher test of mental competence to apply than the Dusky standard of competence to stand trial.

Petitioner cites to numerous post-Edwards cases for the proposition that, in light of the "new competency standard," several states direct that such cases

[6]Curiously, despite the long-standing case law from Florida courts to the contrary, this Court unequivocally stated that the 1998 version of Rule 3.111(d)(3) does not permit the trial court to take into consideration a defendant's mental capacity to represent himself. See Amendments, 17 So. 3d at 272.

involving competence to exercise the right of self-representation be remanded to the trial court for another competency determination in light of "the intermediate level of competency" enunciated in Edwards.

It is important to keep in mind that this case is the obverse of Edwards. The court allowed Petitioner to represent himself and ordered standby counsel. In Edwards, the trial court refused to allow Edwards to exercise his right to self-representation. Notwithstanding the twist of facts, other courts have concluded:

> [W]hen a trial court is presented with a mentally ill or mentally incapacitated defendant who, having been found competent to stand trial, elects to represent himself, the trial court also must ascertain whether the defendant is, in fact, competent to conduct the trial proceedings without the assistance of counsel.

State v. Conner, 973 A.2d at 655. See United States v. Ferguson, 560 F.3d 1060, 1068 (9th Cir. 2009) ("The standard for defendant's mental competence to stand trial is now different from the standard for a defendant's mental competence to represent himself or herself at trial.").

In reaching these conclusions, other courts have remanded the proceedings to the trial court to conduct a hearing to determine the defendant's competency to represent himself or herself post-trial. See United States v. Ferguson, 560 F.3d at 1070; State v. Conner, 973 A.2d at 658-59; State v. Lane, 669 S.E.2d 321, 322 (N.C. 2008). These courts rely ostensibly upon this passage in Edwards:

> We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Edwards, 128 S.Ct. at 2387-88. The premise underlying the passage is the fairness of the trial. Id. at 2387 (citing Massy v. Moore, 348 U.S. 105, 108 (1954) ("No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.")); State v. Connor, 973 A.2d at 655 ("[W]hen a mentally ill or incapacitated defendant is permitted to represent himself at trial despite his lack of competence to do so, the reliability of the adversarial process, and thus the fairness of the trial itself, inevitably is cast in doubt.").

However, as noted above, Florida courts had already employed a heightened standard prior to the issuance of Edwards (and concomitantly, prior to the most recent revision of Rule 3.111). See Holland v. State, 773 So.2d at 1069-70 (a trial court has discretion to deny self-representation when a defendant's mental instability prevents a knowing and intelligent waiver of the right to counsel); DaSilva v. State, 966 So. 2d 1013 (Fla. 4th DCA 2007) (DaSilva was properly

found incompetent to exercise his right to self-representation, even though he was competent to stand trial).

In the case at bar, the judge inquired of Petitioner's age, education, physical and mental health, his experience representing himself, his understanding of the charges and the consequences of conviction, and his familiarity with the rules of evidence and case law (ST. 38-51). The judge specifically asked Petitioner if he had been treated for any mental illness, to which Petitioner responded, "no" (ST. 40). Petitioner denied ever being treated by a psychiatrist or a psychologist and denied ever having been prescribed psychotropic medication (ST. 41). The trial court also warned dangers of self-representation (ST. 39-51). Petitioner confirmed that he had represented himself in at least one other case through jury selection (ST. 42-43). Petitioner confirmed that he understood the charges against him and the possible penalties (ST. 48-49). After the trial court's inquiries, Petitioner knowingly and voluntarily waived his right to counsel for his trial that was scheduled for March 10, 2008 (ST. 51). See Slawson v. State, 796 So. 2d 491, 502-503 (Fla. 2001) (holding that the trial court did not abuse its discretion in finding the defendant competent to waive collateral counsel and collateral proceedings, because (1) the court extensively questioned the defendant regarding his knowledge of his pending proceedings, the rights he would be waiving, and the

consequences of making such a waiver; and (2) the defendant's responses to the questions posed by the trial court show that he understood his legal options and the consequences of such a waiver), cert. denied, 512 U.S. 1246 (1994).

Thus, there is nothing in this record that would indicate the trial court combined the standards for assessing Petitioner's competency to stand trial and his competency to represent himself at trial. Rather, the trial court noted several times that the Faretta hearings concerned Petitioner's competency to represent himself. The trial court's statements indicate that it thoroughly considered the issue of Petitioner's competency to represent himself at trial. This standard was obviously not the same as the standard a trial court would use to determine competency. In addition to competency, the trial court made a determination as to whether Petitioner knowingly and voluntarily waived his right to representation and wished to proceed with standby counsel. The record provides ample support for those findings.

Counsel for Petitioner asks that this Court consider Petitioner's uncooperative behavior during trial. Certainly the record demonstrates Petitioner was difficult. But as noted by the court in Edwards, "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." Edwards, 128 S. Ct.

at 2386. Moreover, Petitioner's behavior throughout the proceedings was not decidedly bizarre. Rather, he engaged in lengthy colloquies with the trial court in which he seemed acutely aware of what was occurring. Furthermore, it is telling that standby counsel never raised the issue of competency during the trial. Petitioner participated extensively throughout his trial, giving an opening statement, conducting effective cross-examination, and giving a closing statement.

The record indicates that Petitioner actually understood the significance of his decision to waive counsel. The trial court's inquiries at the hearings to determine whether Petitioner should be permitted to proceed without counsel provide ample support to find that Petitioner voluntarily waived his right to counsel with a full understanding of his rights, the pitfalls of self-representation, and the consequences of his decision to forgo attorney representation. The record indicates that this conclusion was also based, in part, on the trial court's own observation of Petitioner's demeanor and behavior.

Thus, should this Court determine that the trial court's competency finding was insufficient, the appropriate remedy is to do as the Fourth District instructed: remand to the trial court for a hearing to determine whether Petitioner was competent at the time of trial. If the trial court determines that Petitioner was competent at the time of trial, combined with its prior determination that Petitioner

knowingly and voluntarily waived his right to counsel, then the standard enunciated in Edwards will have been met.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court affirm the decision of the Fourth District Court of Appeal in Monte v. State, 51 So. 3d 1196 (Fla. 4th DCA 2011).

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Ellen Griffin, Esquire, Assistant Public Defender, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida, 33401, this ____ day of April, 2012.

_____
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Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Respondent hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

_____
HEIDI L. BETTENDORF
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Certificate Of E-mail Transmission

In accordance with Administrative Order 2011-1 of the Fourth District Court of Appeal, Appellee hereby certifies that a .Microsoft Word copy of the foregoing has been e-mailed to e-file@flcourts.org.

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