IN THE SUPREME COURT OF FLORIDA

JOHN F. MOSLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-2108

RESPONSE TO PETITION FOR HABEAS CORPUS

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RESPONSE TO PETITION FOR HABEAS CORPUS

Mosley filed a petition for habeas corpus in this Court raising one claim of ineffective assistance of appellate counsel. For the reasons discussed below, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief.

Mosley was represented in the direct appeal by Ryan Thomas Truskoski. *See Mosley v. State*, 46 So.3d 510 (Fla. 2009) (No. SC06-1408). Attorney Truskoski was admitted to the Florida Bar in 1998.

Attorney Truskoski wrote a one hundred page initial brief raising thirteen issues. He then filed a six page reply brief addressing four of the original thirteen issues raised. Finally, he participated in oral argument on March 12, 2009.

STANDARD OF REVIEW

The standard of review of an ineffectiveness claim is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. State*, 209 F.3d 1243, 1247 (11th Cir. 2000).

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court has explained that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *Wickham v. State*, 124 So.3d 841, 863 (Fla. 2013) (citing *Valle v. Moore*, 837 So.2d 905, 907 (Fla. 2002)); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000); *Thompson v. State*, 759 So.2d 650, 660 (Fla. 2000). "Claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus addressed to the appellate court that heard the direct appeal." *Connor v. State*, 979 So.2d 852, 868-69 (Fla. 2007).

This Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000); *State v. Riechmann*, 777 So.2d 342, 364 (Fla. 2000); *Wickham v. State*, 124 So.3d 841, 863 (Fla. 2013) (stating that the standard for ineffective appellate counsel claims mirrors the *Strickland* standard for ineffective assistance of trial counsel). To grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must come to two conclusions: (1) the omissions were of such a magnitude as to constitute a serious error or substantial deficiency falling measurably

outside the range of professionally acceptable performance; and (2) the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Bradley v. State*, 33 So.3d 664, 684 (Fla. 2010).

Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. *Wyatt v. State*, 71 So.3d 86, 112-13 (Fla. 2011) (explaining that the failure of appellate counsel to raise a meritless issue will not render appellate counsel's performance ineffective (citing *Walls v. State*, 926 So.2d 1156, 1175-76 (Fla. 2006) (quoting *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000))); *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003) (observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success). Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000) (citing *Cave v. State*, 476 So.2d 180, 183, n.1) (Fla. 1985)). Appellate counsel is not required to raise every claim that might have had some possibility of success; effective appellate counsel need not raise *every conceivable nonfrivolous* issue. *Zack v. State*, 911 So.2d 1190, 1204 (Fla. 2005) (emphasis in original).

Additionally, there is a "strong presumption" that counsel's performance was not deficient. *Johnston v. State*, 63 So.3d 730, 737 (Fla. 2011). And the presumption that counsel's performance was reasonable "is even stronger when counsel is particularly experienced." *See Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1244 (11th Cir. 2010) (citing *Chandler v. United States*, 218 F.3d 1305, 1316, n.18 (11th Cir. 2000) (en banc)). Here, appellate counsel in the direct appeal, had vast experience.

The prejudice prong of *Strickland*, in the appellate context, requires a showing of a reasonable probability that the appellate court would have afforded relief on appeal. Petitioner must show that he would have won a reversal from this Court had the issue been raised. This Court has explained that to show prejudice, petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643.

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON DIRECT APPEAL THAT A *FARETTA* HEARING SHOULD HAVE BEEN CONDUCTED BY THE TRIAL COURT (RESTATED)

Mosley contends that his appellate counsel was deficient for failing to raise a claim on direct appeal that a *Faretta* hearing should have been conducted by the trial court, which would have resulted in an automatic reversal of his convictions and death sentence.

Appellate counsel was not ineffective because Mosley had waived his right to self-representation. There being no legal basis on which to appeal, appellate counsel was not ineffective for failing to raise this claim. Furthermore, since there was no basis on which to appeal, it cannot be argued that Mosley suffered any prejudice as a result of the issue not being appealed.

Pre-trial proceedings

Mosley was arrested on May 6, 2004, and charged with two counts of murder. (R/I 1-4) He was appointed the services of the Public Defender the following day. (R/I 5) By November 8, 2004, Mosley had filed the first of several *pro se* pleadings, that one being a Notice of Expiration of Speedy Trial Time. (R/I 24) From November 17, 2004 to June 28, 2006, Mosley filed approximately thirty-three *pro se* pleadings and letters to the Court, despite being represented. Most of those consisted of demands for

discharge and release from custody based on alleged violations of his right to speedy trial, as well as motions for a new trial. It was clear from the record and specifically Mosley's numerous *pro se* filings and statements on the record that he was dissatisfied with remaining in custody prior to trial.

On December 15, 2004, the trial judge, the Honorable Michael R. Weatherby, held a hearing on one of Mosley's *pro se* demands for speedy trial. (R/VI 1078-88) Judge Weatherby referred to a similar hearing he had on another one of Mosley's *pro se* filings a few weeks before.[1] (R/VI 1081)

The trial court began with a discussion as to whether Mosley had authority to file *pro se* pleadings in light of his representation by the Office of the Public Defender, specifically Assistant Public Defender, McGuiness. (R/VI 1082) McGuinness stated that the case law was clear that Mosley's *pro*

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[1] The hearing referred to by Judge Weatherby was conducted on November 23, 2004 and addressed Mosley's *pro se* Notice of Expiration of Speedy Trial. At the time, he was represented by Assistant Public Defender Patrick T. McGuinness, who was also present at the hearing. Mosley addressed the court and again argued that he should be released from custody based on the expiration of speedy trial, or, in the alternative tried within ninety days. McGuinness point blank informed the court that he was not ready for trial and was not adopting Mosley's *pro se* motion or notice. The trial court told Mosley he would not be going to trial until his attorney was ready and his trial would not occur with ninety days. The court set a pre-trial hearing for December 16, 2004. (R/VI 1070-77)

se pleadings should be treated by the trial court as a nullity because he was represented at the time of the filings. (R/VI 1082) The State moved to strike Mosley's demand because McGuinness had previously told the court he was not prepared for trial and further, the parties were still engaged in discovery, consisting of numerous depositions. (R/XI 1082-83) McGuiness again confirmed that he was not ready to proceed to trial. (R/XI 1083) The trial court questioned Mosley as to his understanding of the fact that his attorney was not prepared to proceed to trial in a case that allowed for a recommendation of death. Mosley responded with the following:

> MOSLEY: Yes, sir, I fully understand what he is saying, but I am innocent, so whatever happens, happens. I am ready to go to trial. If I have to represent myself, I will do that. And I am ready to go to trial. I have a family.
>
> There is no evidence against me unless they planted evidence. I am ready to go to trial, and I have that right.
>
> COURT: Well, in general that is true. But it is not an absolute right. And if your lawyer is not ready to determine whether or not he can support your claim that the evidence has been planted, then don't you at least want him to talk to the witnesses to determine whether or not he can answer the questions you are putting to him about all this? That doesn't make any sense, does it?
>
> MOSLEY: Well, yes, sir, I fully understand what you are saying, but I mean, I have been sitting in jail for over eight months and nothing was done for my trial in September, October, November, three dead months, they could have done depositions then. And you know, I have nothing to fear. So I am ready to go to trial. I an innocent and whatever they have, let them

bring it.

COURT: Well, that may be, Mr. Mosley, but I have something to fear, and that's your 3850 motion in case you ever get convicted of this.

I am going to grant the state's motion to strike the demand. I don't think Mr. Mosley has any authority at this stage in the proceedings to file such a motion.

And I am aware from looking at the file that there are multiple witnesses that have been disclosed by the state that have not been deposed yet.

And for record purposes, frankly, the eight months that this has been going on, I have been quite impressed as counsel has been moving along as quickly as they can given what minimal knowledge I have about the facts of this case and the defense that may be necessary to launch to –

...

MOSLEY: Your Honor, can I address the Court again?

COURT: Sure, just be careful about talking about the case, the facts of the case, Mr. Mosley.

MOSLEY: Yes sir. Well, I want to petition the Court to go *pro se*.

COURT: Well, when you have filed the appropriate motions setting forth the appropriate grounds, I will consider it.

In the meantime, the matter is set to January the 19th for further pretrial.

(R/VI 1084-87)

The two comments made by Mosley, while represented by McGuinness, on December 15, 2004, reflecting his desire to proceed *pro se* in an effort to get to trial more quickly, were his only requests during the pendency of his case.

Notably, on January 5, 2005, Mosley filed a *pro se* Motion for Additional Counsel, in which he asked the trial court to allow him to participate as co-counsel alongside the attorneys at the Office of the Public Defender, in determining which witnesses to present at trial and to be able to cross-examine state witnesses. (R/I 30) He concluded his motion with, "I am the added counsel requested." The motion bears his signature. (R/I 30)

Thereafter, on January 14, 2005, Assistant Public Defender McGuinness filed a Certificate of Conflict and Motion to Withdraw (R/I 32), which was heard on that day. (R/VI 1089-99) Mosley was present, along with McGuinness, attorney Richard R. Kuritz, attorney, W. Charles Fletcher, and the State. During the hearing, Mosley was asked whether he objected to McGuinness withdrawing, to which he responded, "No, sir." (R/VI 1092) Kuritz informed the court that he had already spoken with Mosley and the possibility of delaying trial further, until late March, and that Mosley indicated a preference that trial occur by May. (R/VI 1095) The State inquired of the status of Mosley's *pro se* filings, to which the court replied and the following exchange occurred:

> COURT: Might I suggest that we let Mr. Kuritz and Mr. Mosley discuss those *pro se* pleadings, I mean, I am – one of them was a request for – the most recent one I saw was a request that Mr. Mosley be – what was it, Mr. Mosley be appointed as co-counsel or something like that?

> DEFENDANT: Yes, sir.
>
> COURT: I don't remember the – I am not aware of any provisions – well, there are limited provisions for that, and I would not be inclined to grant them, particularly since I have already appointed Mr. Fletcher to act as co-counsel in the matter.
>
> But with regard to the previous one, which I think was – I don't remember how I thought I characterized it, it wasn't exactly a demand for speedy trial, it was a notice to discharge if I remember correctly.
>
> But in any event, I would like Mr. Kuritz to have an opportunity to discuss that with Mr. Mosley. I know Mr. McGuinness has also, but perhaps a different professional view of it, which may move to some accommodation to the situation.

(R/VI 1097-98)

McGuinness' motion to withdraw was granted on January 18, 2005, with entry of two Orders Allowing Public Defender to Withdraw and Appointing Attorney. The trial court, through those orders, appointed Richard R. Kuritz, as counsel, and W. Charles Fletcher, as co-counsel, effective January 14, 2005. (R/I 33-36)

On September 21, 2005, Richard R. Kuritz and Quentin T. Till executed and filed a Notice of Substitution of Counsel for Penalty Phase, relieving Charles Fletcher of his representation of Mosley and replacing him with Quentin T. Till. (R/II 369) On September 28, 2005, the trial court entered its order approving and granting this notice. (R/II 368) From this point until the direct appeal was commenced, both Richard R. Kuritz and Quentin T. Till represented Mosley.

Analysis

Waiver of Invocation of Right to Self-Representation

While it is undisputed that the Sixth and Fourteenth Amendments guarantee defendants the right of self-representation at trial,[2] that right of self-representation may be waived, after initially invoked. *See Raulerson v. Wainwright*, 732 F.2d 803, 808 (11th Cir. 1984).

In *Raulerson*, the defendant sought to act as co-counsel with his attorney during a status hearing prior to a second sentencing hearing on July 15, 1980. *Id.* The court denied the request. Subsequently, Raulerson sent a letter to the judge seeking permission to appear *pro se*. The court did not immediately act on this second request. At the resentencing hearing on August 11-12, 1980, however, the court reversed its original position and granted Raulerson permission to act as co-counsel, relying on the Florida appeals court's decision in *Tait v. State,* 362 So.2d 292 (Fla. 4th DCA 1978). During the course of the hearing, the Florida Supreme Court overruled *Tait,* thereby striking down such "hybrid" representation. *See State v. Tait*, 387 So.2d 338 (Fla. 1980). The trial court then withdrew its earlier grant of permission to act as co-counsel. *Raulerson*, 732 F.2d at 808.

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[2] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

After his removal as co-counsel, Raulerson did not immediately renew his request to appear *pro se*. Later, however, at a hearing on February 6, 1981, he made a request in open court to represent himself. At that point, the judge began a *Faretta* inquiry into Raulerson's understanding of the potential danger inherent in his action, but subsequently terminated the hearing when Raulerson abruptly walked out of the courtroom. *Id.*

Consequently, the Eleventh Circuit concluded that Raulerson failed to make an "unequivocal" assertion of his right to relinquish counsel until February 6, 1981. *Id*. at 809. On that date, he did make known his desire to appear *pro se* but then waived it by voluntarily leaving the courtroom during the *Faretta* inquiry. Initially, Raulerson wrote a letter to the judge requesting to appear *pro se* but did not pursue the matter. Although a defendant need not "continually renew his request to represent himself even after it is conclusively denied by the trial judge," he must pursue the matter diligently. *Raulerson*, 732 F.2d at 809, quoting *Brown v. Wainwright,* 665 F.2d 607, 612 (5th Cir. 1982).

The court took no immediate action upon receipt of Raulerson's letter. Thus, it did not conclusively deny the request at that time. When Raulerson subsequently requested and was granted the right to serve as co-counsel, he acquiesced without objection. Later, when this right was taken away, he

failed, at that time, to notify the court of his desire to represent himself.

A defendant may waive his right of self-representation by electing to act as co-counsel. *See Brown v. Wainwright,* 665 F.2d 607, 611 (5th Cir. 1982); *Chapman v. United States,* 553 F.2d 886, 893 n. 12 (5th Cir. 1977). Assuming Raulerson's letter of July 18, 1980 constituted a clear and unequivocal demand to represent himself, his agreement to proceed with the assistance of an attorney waived that original request until he reasserted it on February 6, 1981. At that time he made a valid assertion of his right and the court responded by initiating its required *Faretta* hearing. At this time he again waived his right to appear *pro se* when he voluntarily left the courtroom. The Eleventh Circuit found Raulerson's behavior during the *Faretta* hearing demonstrated that he was not deprived of his constitutional right to appear *pro se*.

Mosley's case is not unlike Raulerson's. In the instant case, while apparently frustrated with his state of incarceration and inability to be released, Mosley, on December 15, 2004 and in again seeking discharge under the speedy trial rule, made two statements to the trial court that he wanted to proceed *pro se*. A few weeks later, on January 5, 2005, Mosley submitted a written request for permission to proceed as co-counsel with "the public defender office attorneys." Following that, the

attorney he wanted to co-counsel with, McGuinness with the Office of the Public Defender, withdrew and both Richard Kuritz and Quentin Till were appointed to represent Mosley. Mosley's handwritten and signed election to be appointed as co-counsel constitutes a waiver of his right of self-representation. Further, Mosley failed to ever seek self-representation again after Kuritz and Till were appointed. Mosley waived his right to self-representation and never reasserted it.

Once the right to self-representation is asserted, that right may be waived through conduct indicating that one is vacillating on the issue or has abandoned one's request altogether. *Wilson v. Walker*, 204 F.3d 33 (2d Cir. 2000); *Williams v. Bartlett,* 44 F.3d 95, 100 (2d Cir. 1994) (citing *Brown v. Wainwright,* 665 F.2d 607, 611 (5th Cir. 1982) (en banc)). Thus, "[a] waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." *Brown,* 665 F.2d at 611.

In *Wilson*, the defendant clearly and unequivocally asserted his right to represent himself seven times at an April 29, 1994 hearing. *Wilson*, 204 F.3d at 38. Whether or not the trial judge's ruling at the April 29, 1994 hearing could be construed as a "clear denial" of Wilson's request to proceed *pro se,* it was apparent to the Second Circuit that both Wilson and the trial judge considered the matter still open for discussion on

May 13, 1994. On that date, another attorney was appointed to replace Wilson's initial counsel, and Judge Marks granted the successor attorney one week "to review [Wilson's] request with regard to the *pro se* application." *Id.*

The Second Circuit found that in light of the fact that there were two subsequent changes in the attorney appointed to represent Wilson and the question of self-representation was left open for possible further discussion, Wilson's failure to reassert his desire to proceed *pro se* constituted a waiver of his previously asserted Sixth Amendment right. *Id.*

Notably, following the trial judge's initial denial of Wilson's request, there were two separate hearings concerning Wilson's representation. The Second Circuit gave considerable weight to:

> On both of these occasions - and during the remainder of pre-trial proceedings and during trial - Wilson remained silent with respect to the issue of his representation, voicing no dissatisfaction with the attorneys appointed to represent him and choosing not to reassert his desire to proceed *pro se.* Moreover, this silence stands in stark contrast to Wilson's willingness to assert his perceived rights at other points during the proceedings. Indeed, he initiated the request to proceed *pro se* by writing himself to Judge Marks; and in subsequent proceedings, he pointedly questioned Judge Marks's impartiality, and ultimately invoked his right not to attend the trial.
>
> In short, from Wilson's apparent cooperation with

> Hanlon and Barr, his failure at any point after Bennett's withdrawal from the case to voice any dissatisfaction with his representation, and his decision not to reassert his previously asserted right to represent himself, it 'reasonably appears' that Wilson 'abandoned his initial request to represent himself.' *Brown,* 665 F.2d at 611. Accordingly, the judgment of the District Court is affirmed.

Wilson, 204 F.3d at 38-39.

Similarly, Mosley never raised the issue of self-representation again after the December 15, 2004 hearing, at which it appears that Mosley's previously-filed pleadings were tabled for further discussion. He appeared satisfied with the representation provided by Kuritz and Till. He certainly never voiced any concerns or objections about their performance. Throughout the trial, Mosley voiced concerns and opinions about witnesses, testimony and evidence to the trial court; he participated fully in the proceedings (R/XII 508; R/XIX 1876-77); he personally opted out of attending standard pre-trial hearings (R/VI 1126-28, 1137-38); however he never voiced any concern about his representation or desire to proceed *pro se*. And in fact, when questioned, during the guilt phase of trial on November 16, 2005, as to whether he was satisfied with everything that had transpired up to that point, Mosley responded, "Yes, sir." (R/XIX 1876-77) This was reiterated by Kuritz the following day, when he said, "Well, when the Court was inquiring of [Mosley] yesterday at the end of the day

regarding witnesses and whether or not he was satisfied with his representation he indicated he was very satisfied." (R/XIX 1940) The record is devoid any of comments, by Mosley, that this declaration by Kuritz was incorrect.

Further, Kuritz testified, at the postconviction evidentiary hearing on September 4, 2013, as to comments Mosley made about his representation after he had an opportunity to review the trial transcripts. Mosley gave Kuritz a "huge compliment;" thanked him for doing everything he had requested; told Kuritz that he had proved that he couldn't have done it; and thanked him for all the time and effort he put into his defense. (PCR/9 1651)

The facts of *Brathwaite v. Phelps*, 418 Fed.Appx. 142 (3d Cir. 2011), nearly mirror the facts of the instant case. In *Brathwaite*, the defendant filed a written motion requesting permission to exercise his constitutional right to proceed *pro se*. He stated that he thought "he would be more effective than his present counsel," David Facciolo, and that Facciolo refused to consider "many motions that he had requested be filed that would have been very instrumental to his release from custody." He also claimed that he was "being conspired against by the Attorney General's office and by the attorney's [sic] in the State of Delaware." *Id*. at 143. The trial court sent Brathwaite's motion to Facciolo and informed him that the court

was referring the matter to him because it would "not consider *pro se* applications by defendants who are represented by counsel unless the defendant has been granted permission to participate with counsel in the defense." In turn, Brathwaite quickly filed a "Motion to participate with counsel in the defense," in which he stated that he "strongly feels that if he participates with counsel in the defense, [h]is defense would be more effective." *Id*. In a subsequent letter to the trial court, Brathwaite expressed frustration regarding continuances of his trial and "request[ed] that something be done about the tactics being used by the prosecutor and the public defender in [his] cases." *Id*. at 144. The trial court never ruled on Brathwaite's motion to proceed *pro se* or his motion to participate with counsel. *Id*.

A few months later, the trial court allowed Facciolo to withdraw and appointed Thomas Foley, who represented Brathwaite at trial and on direct appeal. After Foley was appointed, Brathwaite stopped filing *pro se* motions with the trial court, and he did not raise his request to represent himself again until after his conviction. During Foley's representation and through the conclusion of trial, Brathwaite directly addressed the trial court numerous times. During these interactions, he did not mention any dissatisfaction with Foley or ask to represent himself, and on several occasions he stated that he

was satisfied with Foley's representation as to certain specific issues. *Id.*

The Supreme Court of Delaware affirmed Brathwaite's conviction and sentence on direct appeal, and denied him post-conviction relief. Although Delaware's highest court found that the trial court erred when it suggested that Brathwaite was required to file a motion to participate with counsel in his defense when he clearly requested permission to represent himself, it nonetheless held that Brathwaite waived his right to self-representation because, as the trial court found: (1) Foley thought Brathwaite was satisfied with Foley's representation; (2) Brathwaite never told Foley that he wanted to represent himself; (3) Brathwaite told the trial court that "he was satisfied with Foley's representation;" and (4) Brathwaite had the opportunity to renew his request to proceed *pro se*, yet he never did so. The Court concluded that "the only plausible explanation for Brathwaite's conduct is that he waived the right to proceed *pro se* in favor of exercising his constitutional right to counsel." *Id.*

The Federal District Court held, among other things, that "Brathwaite's silence during ... [the] appointment of new counsel and colloquies with [the] trial judge ... supports the Delaware Supreme Court's conclusion that Brathwaite abandoned his previously asserted right to self-representation; once

Facciolo withdrew as his counsel, Brathwaite changed his mind about representing himself and decided to exercise his right to counsel." *Id.* at 144-45.

The Third Circuit denied Brathwaite's habeas petition, in finding that the Supreme Court of Delaware's decision was a reasonable application of Supreme Court precedent under § 2254(d). *Id.* at 148.

Just like Brathwaite, after making statements about a desire to proceed *pro se*, Mosley's then trial counsel, Assistant Public Defender, McGuinness was replaced with Kuritz and Till. Furthermore, Mosley's trial counsel, Kuritz, believed Mosley was satisfied with his representation; the record is devoid of any evidence reflecting that Mosley ever told Kuritz that he wanted to represent himself; Mosley told the trial court that he was satisfied with Kuritz and Till's representation; and (4) Mosley had ample opportunity to renew his request to proceed *pro se,* yet never did so.

The cases on which Mosley relies are easily distinguishable. First, Mosley cites *Tennis v. State*, 997 So.2d 375 (Fla. 2008). Tennis first, and unsuccessfully, sought to discharge his attorney on two separate occasions. *Id.* at 376-77. After hearings on each request, they were denied. Tennis then filed two separate motions seeking to represent himself and asking that standby counsel be appointed. *Id.* at 377. The trial court

did not hold a *Faretta* hearing on either motion. Tennis proceeded to trial with the same attorney, was convicted and sentenced to death. *Id.* Tennis clearly and unequivocally sought to represent himself numerous times both in written motions and during argument before the court. Despite allegations that he and his attorney did not get along, he was not freed of his attorney and forced to proceed to trial with the very attorney he had been complaining of.

Mosley also relies on *Pasha v. State*, 39 So.3d 1259 (Fla. 2010). Pasha also sought, unsuccessfully, to have his trial counsel discharged. One week later, on the morning of jury selection, he filed a motion seeking to proceed to trial *pro se* and also argued his position to the trial court. *Id.* at 1260. The trial court then conducted a *Faretta* hearing and determined that Pasha was being equivocal (particularly in a statement that he would prefer an attorney, but not the one he currently had) in his request and denied it. Jury selection and trial followed; Pasha was convicted of two counts of first degree murder and sentenced to death. *Id.* at 1259. This Court later overturned his conviction, finding that the trial court erroneously determined that Pasha's statement that he preferred to have an attorney, but not Sinardi, in effect negated his request to proceed *pro se* because Pasha continued to maintain, both in a written motion and orally before and during the *Faretta* inquiry, that he

preferred proceeding *pro se* to being represented by Sinardi. This Court determined that at that point the trial court should have presumed that Pasha was unequivocally invoking his right to represent himself. *Id*. at 1262.

Mosley's reliance on *Pasha* is misplaced because the issue in his case is not whether his invocation of the right to self-representation was unequivocal; rather, the issue is whether he waived that right after asserting it.

Lastly, Mosley submits the case of *Harden v. State*, 152 So.3d 626 (3d DCA 2014) in support of his claim. Harden filed multiple motions for speedy trial, notice of expiration motions, and demands for discharge under the Florida Speedy Trial Rule, which were all denied, as well as numerous motions and pleadings with the trial court waiving his right to counsel and invoking his right to self-representation. *Id*. at 627. Harden's attorney also confirmed Harden's desire to represent himself several times during the proceedings. The trial court chose not conduct a *Faretta* hearing on Harden's requests, but instead postponed the *Faretta* hearing, for sixteen months, until after the discovery process was complete.

At the *Faretta* hearing, the trial court concluded that Harden was competent to represent himself. Harden represented himself at trial and was convicted on two counts of attempted robbery and one count of furnishing false information to a law

enforcement officer during an investigation. The *Harden* Court reversed and remanded for a new trial because the trial court committed *per se* reversible error when it failed to conduct a *Faretta* hearing after Harden made several unequivocal requests to represent himself. *Id.* at 627. The court noted that there were several crucial stages in the proceedings over that period of sixteen months; each crucial stage presented a missed opportunity for Harden to represent himself. *Id.* at 628.

Harden is distinguishable from the instant case. Mosley sought to represent himself on one occasion during one hearing. He did not file any motions to that end, nor did he continue to seek to assert that right after the December 15, 2004 hearing. He never told his attorneys, Kuritz and Till, of any desire to proceed *pro se*, and instead, informed both the trial court and Kuritz that he was satisfied with their representation.

Ineffectiveness of Appellate Counsel

Mosley bears the burden of proving ineffective assistance of his appellate counsel in this habeas proceeding.

Thus, he must show that counsel's performance was deficient. *Wickham v. State*, 124 So.3d 841, 863 (Fla. 2013). He must also show that the deficient performance prejudiced the defendant, ultimately depriving the defendant of a fair appeal with a reliable result. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Id. (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)

There was no basis on which to appeal the trial's court failure to conduct a *Faretta* hearing. Said issue would have been fruitless on appeal, in light of the case law cited in this Response. Appellate counsel researching this issue would have come to the same conclusion upon discovering this case law. It is clear that Mosley waived his right to self-representation after the December 15, 2004 hearing with: the filing of his Motion for Additional Counsel on January 5, 2005, in which he sought to participate as co-counsel in his trial; with the withdrawal of McGuinness, the attorney who represented him at December 15, 2004 hearing and replacement of that attorney with Richard Kuritz and Quentin Till; Mosley's assurances to the trial court that he was satisfied with his representation; Mosley's complimentary comments to Kuritz about his representation; and Mosley's failure to reassert his right to self-representation.

Since there was no basis on which to appeal this issue, appellate counsel's performance cannot be deemed deficient. *See Wyatt v. State*, 71 So.2d 86, 112-13 (Fla. 2011); *Walls v. State*, 926 So.2d 1156, 1175-76 (Fla. 2006); *Rutherford v. Moore*, 774 So.2d 647, 643 (Fla. 2000); *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003) (appellate counsel will not deemed ineffective for failing to raise issues that have little or no chance of

success).

While Mosley provided considerable factual background in his Petition regarding Mosley's appellate counsel, Mr. Truskoski, that background cannot be used to bolster his argument that Truskoski performed ineffectively, when appealing this issue would have been meritless.

If Mosley's allegations are insufficient to show a *Faretta* error, then it naturally follows that he was not prejudiced by the arguably deficient performance of counsel in failing to raise the issue on appeal.

CONCLUSION

The habeas petition has not demonstrated that Mosley's appellate counsel was constitutionally ineffective and that requisite prejudice was incurred. Based on the foregoing discussions, the State respectfully requests this Honorable Court deny the Petition for Habeas Corpus in all respects.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via email to Rick A. Sichta, Esquire, 301 W. Bay Street, Suite 14124, Jacksonville, FL 32202, rick@sichtalaw.com on the 2nd day of March, 2015.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,

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