

IN THE SUPREME COURT OF FLORIDA

RONALD KNIGHT

Appellant,

vs.

CASE NO. 93,473

STATE OF FLORIDA,

Appellee.

_____ /

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Appellant's Motions To Discharge His Attorneys And Related Proceedings

1) First Chair Counsel Ann Perry

On October 31, 1997, a hearing was held on appellant's motion to discharge his court-appointed attorney before the Honorable Edward A. Garrison. Appellant was sworn in and given an opportunity to explain any problems he had with his court appointed attorney, Ann Perry. (Supp. Vol. I, TR. 8). Appellant told the trial court that he was dissatisfied with her services and would like her taken off his case and another lawyer appointed. In the alternative, appellant wanted the opportunity to hire a private attorney to represent him. (Supp. Vol. I, TR. 8). When pressed by the trial court for a reason, the appellant stated:

There are a few reasons. I have spoken to her already; she doesn't feel that there is any kind of problem or she doesn't see a problem. I, myself, see a problem whereas the way my case is being handled the way it's being prepared as to the things that I should know or don't know, you know, prior to me being at the county jail.

So far, I mean, I don't know anything since the day one, you know, on a case that I was already up for, you know, four years prior, and I am just not up to -- I have been through this once already. I don't want to be dragged through it again. I don't feel she's represented me to the best of her ability, in my opinion.

(Supp. Vol. I, TR. 9). To the trial court it appeared to be a communication problem rather than an "ineffective representation problem." (Supp. Vol. I, TR. 9). However, appellant again stated

that he thought his lawyer was not doing her job. (Supp. Vol. I, TR. 9).

Appellant mentioned that he would like the opportunity to hire his own lawyer: "I'd like to have that opportunity, even if that opportunity -- even if --even if I am not able to do that, I still don't feel that she would represent me to the best of her ability." (Supp. Vol. I, TR. 10). The following colloquy ensued between the trial court and the appellant:

THE COURT: She's your lawyer.

THE DEFENDANT: Being paid. As far as I can understand she's my lawyer, but I didn't hire her.

(Supp. Vol. I, TR. 9-10).

....

THE COURT: Let me explain your choices today, so we're clear. I have no reason at this point to think that Ms. Perry is ineffective as your counsel she -- and I don't know if anybody explained this to you: Are you aware of what is going on administratively regarding first chair and second chair list?

THE DEFENDANT: Yes, sir.

(Supp. Vol. I, TR. 11).

The trial court explained that Ms. Perry was qualified to represent the appellant, noting that she "been approved by committee and by the chief judge as being competent to serve on first degree cases." (Supp. Vol. I, TR. 11).

The trial court again asked appellant to explain why he thought "she's not doing a good job" on his case. (Supp. Vol. I, TR. 11). Appellant claimed that he did not like the fact that his

case was delayed until "March the 2nd..." (Supp. Vol. I, TR. 11). The appellant claimed that the State was not ready for trial and that he was ready to go. (Supp. Vol. I, TR. 12). In sum, appellant claimed the following:

...I feel the case revolves around me; it doesn't revolve around her, and if I feel I am ready to go to trial based on what she knows or what I know about my case, then I think I should have the right to say so and say I am ready to go to trial.

(Supp. Vol. I, TR. 12). The trial court explained to the appellant that he was conducting a "Nelson Hearing with respect to preparation motions to conduct discovery and to be ready for trial." (Supp. Vol. I, TR. 13).

Ms. Perry was asked by the trial court to detail some of the work she had performed on appellant's behalf. Ms. Perry stated:

I requested a demand for discovery: I have made at least four supplemental demands for discovery requesting approximately 50 to 75 items. I conducted depositions in this case at least four times and have been unsuccessful in deposing probably 20 to 25 witnesses out of a hundred.

I drafted several motions, I retained experts on Mr. Knight's behalf to investigate this case. I am doing what I usually do in these types of cases. I have seen Mr. Knight probably on an average of once every three weeks, sometimes once every two, it depends.

(Supp. Vol. I, TR. 13-14). Ms. Perry stated that she always does the best she can for her clients and that she was performing the work necessary to prepare a case of this magnitude. (Supp. Vol. I, TR. 14). Ms. Perry denied having any particular problem representing Mr. Knight: "I don't have any problem with Mr. Knight, but I do have a problem, if he's not trusting my

representation, but I certainly don't have a problem with it."
(Supp. Vol. I, TR. 14).

At the conclusion of the inquiry, the trial court gave appellant the following options:

Mr. Knight, these are your choices. If you want to discharge Ms. Perry, I will honor that request. I have no reason to believe that she's not doing a thorough job in preparing your case; I have no reason to think that she's ineffective in any way whatsoever. You don't like her, you don't want her, just say so, I will not replace her. At that point you will decide to proceed on your own. If you feel you want to do that, you can decide to proceed on your own. If you feel you want to do that, you can decide to proceed with Mr. Sosa, who is second chair appointed at this point.

If you want to hire own counsel be my guest. Today, I just need to know that you understand your choices and make an intelligent one.

(Supp. Vol. I, TR. 15). Appellant responded: "So I am to understand that you will go along with me in saying that she will be taken off of my case?" (Supp. Vol. I, TR. 15). The trial court advised appellant that Ms. Perry would be removed from his case; however, the trial court stressed that he "was not going to get another one at public expense." (Supp. Vol. I, TR. 16). In response, appellant stated: "Yes, sir, that's fine." (Supp. Vol. I, TR. 16).

After a brief discussion with second chair counsel Mr. Sosa, the trial court advised appellant:

...Let me back up to where we were at the beginning. The decision to do this is entirely yours, and if you don't feel comfortable making it today, don't do it. You brought this to my attention saying you no longer wanted Ms. Perry. Perhaps my advice to you is to keep Ms. Perry and Mr. Sosa, let them work together to help you on your

case. Again, my whole point of this hearing is to make sure you understand your choices so that you can decide what you want to do on your case.

(Supp. Vol. I, TR. 19). In response, appellant claimed again that "I know I do not want Ms. Perry representing me on my case any longer." (Supp. Vol. I, TR. 20).

At the conclusion of the first hearing, Ms. Perry was removed from the case pursuant to appellant's request. Appellant agreed to seek first chair counsel because Mr. Sosa indicated he could not perform that function. (Supp. Vol. I, TR. 21). Appellant advised the court: "I would not have that burden put on him. I'd just, today, like to have her taken off my case. I will get counsel to help." (Supp. Vol. I, TR. 21). The trial court advised appellant that if he was unable to obtain counsel:

Well, you need to think about that because you will be left with either being co-counsel on your own with Mr. Sosa, representing yourself without Mr. Sosa, or placing a heavy burden on Mr. Sosa, which he at this point indicates he's not willing to accept.

Do you understand that I am not going to replace Ms. Perry at public expense.

(Supp. Vol. I, TR. 22). Appellant again claimed he understood that fact and that he was prepared, "[i]f need be[,] to represent himself. (Supp. Vol. I, R. 22). Before granting the request to discharge Ms. Perry, the trial court again advised appellant of his choices:

Just for the last time, do you understand that that will leave you either representing yourself alone, or together with Mr. Sosa, or obtaining your own counsel if you are able to do that?

(Supp. Vol. I, TR. 25). Appellant stated on the record that he understood his choices.

2) Removal Of Second Chair Counsel Mr. Sosa And Appellant's Request For Self-Representation

On January 8, 1998, a hearing was called based upon appellant's correspondence complaining about the services of his remaining counsel, Mr. Sosa. (Vol. III, R. 300, 301). Appellant explained that he was unhappy with Mr. Sosa in that he had not had contact with him and had not received papers or "specific items" from Mr. Sosa pertaining to his case. (Vol. VII, R. 1062-63). Specifically, appellant claimed that he had no further knowledge of his case and had asked for specific items from his former attorney, Ms. Perry. (Vol. VII, R. 1063). Additionally, appellant noted that he discussed with Mr. Sosa a motion to withdraw and that he would like Mr. Sosa removed from his case. (Vol. VII, R. 1066). Again, however, the only deficiency appellant noted was that Mr. Sosa evidently agreed to a continuance previously with Ms. Perry and that he had not been consulting sufficiently with the appellant. Appellant was unwilling or unable, however, to pinpoint any particular deficiency on the part of Mr. Sosa except to note some ill defined sense that he was not speaking with him enough. Appellant was adamant that he would like Mr. Sosa removed from his case. (Vol. VII, R. 1066).

After hearing appellant's complaint, the following colloquy occurred between the appellant and the trial court:

THE COURT: Listen to me. Listen to me. At this point you need to cooperate with Mr. Sosa. If he's going to be your lawyer, if you want to be your own lawyer, you need to tell me that now.

THE DEFENDANT: Yes, sir.

THE COURT: You do?

THE DEFENDANT: Yes, sir.

THE COURT: You have been through prior court proceedings obviously?

THE DEFENDANT: Yes.

THE COURT: As you mentioned, you are already serving a life term, just so this record is clear, you have, have been through a complete jury trial; you have been through it from start to finish, so you know a little about what is going on; in fact, if I am not mistaken, you even went through a penalty phase in that case, did you not, after being convicted?

THE DEFENDANT: Yes, sir.

(Vol. VII, R. 1067-68).

Appellant again told the trial court that he wanted to have Mr. Sosa removed. (Vol. VII, R. 1068). The trial court reiterated that it would not simply let appellant to pick his lawyers at the public's expense. (Vol. VII, R. 1069). The trial court stated that it would not replace Mr. Sosa. The appellant responded: "I understand that completely." (Vol. VII, R. 1069).

The trial court conducted a Faretta inquiry, first exploring appellant's educational background and experience with the criminal justice system. Appellant admitted that he could read and write. (Vol. VII, R. 1070). The trial court's inquiry included the following colloquy:

THE COURT: In dealing with you, I have found you to be a fairly intelligent, bright young man. I just want to make sure the record is clear as to what education you obtained since being incarcerated. You obviously find your way through the law library, not only --

THE DEFENDANT: If at all possible, I take every chance that's possible.

THE COURT: You learned a certain amount of skills looking things up in the law books.

THE DEFENDANT: It's all basic knowledge.

THE COURT: But you feel that's enough to represent yourself in this matter?

THE DEFENDANT: At this point no, I don't.

Because, like I said, I have not received any kind of paperwork as to me serving a purpose for myself to go to a law library.

THE COURT: I don't mean whether you received discovery materials. Do you understand procedures enough and access to think you can do that without a lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And obviously you understand the importance of this case, you have been through one murder trial?

THE DEFENDANT: Yes, sir.

(Vol. VII, R. 1070-71).

The trial court emphasized that the State was seeking the death penalty and informed appellant of the benefits of representation by counsel and the disadvantages of self-representation. (Vol. VII, R. 1074-84). At the conclusion of this hearing, the trial court asked appellant if anyone had claimed that he suffered from mental illness. (Vol. VII, R. 1084). Appellant

denied that anyone had claimed he was mentally ill. (Vol. VII, R. 1084). Upon further questioning, however, he admitted that he received mental health counseling or had been examined at "A.G. Holly," approximately twelve years ago. (Vol. VII, R. 1085). Nonetheless, appellant denied that anyone from the jail had accused him of being crazy or insane. (Vol. VII, R. 1085).

B. Trial Testimony: The Robbery And Murder Of Richard Kunkel

Dain Brennault testified that appellant was his mother's boyfriend in 1993 and that appellant lived with him at his mother's Summer Creek Apartment. (Vol. IX, TR. 68-70). In July of 1993 Brennault testified that he had "just turned 17 years old." (Vol. IX, TR. 70).

On July 8, 1993 Brennault was "hanging out" with appellant and Timothy Pearson. (Vol. IX, TR. 71). They left Brennault's mother's apartment sometime after 8:00 o'clock in the evening with appellant driving his mother's black Camaro. (Vol. IX, TR. 72-73). They went to a bar called "Splash" where appellant and Pearson each consumed a beer. (Vol. IX, TR. 76). After staying there for a short period, they left that bar and "went to H.G. Rooster's." (Vol. IX, TR. 76). Brennault was aware that H.G. Roosters was known as a "gay" bar. (Vol. IX, TR. 77). Since Brennault was under age, he only went inside to use the bathroom while appellant and Pearson went inside. (Vol. IX, TR. 79). Brennault testified that only approximately five minutes elapsed before appellant and Pearson returned to the car. (Vol. IX, TR. 80). Brennault noticed

that another individual was with Knight and Pearson. Id. This individual got into his own car, a "white Toyota Supra." (Vol. IX, TR. 81).

When both cars stopped at a nearby stop light, appellant asked the victim, now known to Brennault as Richard Kunkel, if he wanted to go out to a party in Royal Palm. (Vol. IX, TR. 83-84). Kunkel stated that he would go with them. Brennault testified that while driving in a car from H.G. Roosters to Miami Subs appellant and he discussed robbing or rolling the guy [Kunkel]. (Vol. IX, TR. 85; Vol X, TR. 134). Appellant told Brennault that they were "just going to beat the guy up and take his money." (Vol X, TR. 134).

When they arrived at Miami Subs, Kunkel got out of his car and entered Brennault's car. (Vol X, TR. 137). They told Kunkel that they were going out to "Loxahatchee to a party." (Vol X, TR. 137). Appellant was driving the car, with Pearson, Brennault and Kunkel, as passengers. Id. Earlier that evening Brennault had observed a "Glock .9 millimeter" pistol near the center console of the car.¹ (Vol X, TR. 140). Brennault testified that this gun belonged to "Timothy Pearson." (Vol X, TR. 140).

After driving out on Okeechobee Road for some distance, appellant turned onto a dirt road and stopped the vehicle twice to urinate. (Vol X, TR. 141). The second time appellant stopped the

¹A ballistics expert testified that the fragmented bullet recovered from the victim was fired from a .38 class or nine millimeter and was consistent with having been fired from a "Glock .9 millimeter firearm[]." (Vol X, TR. 212).

car it was in a wooded area near a canal bank. (Vol X, TR. 144). After everyone urinated, Brennault got back in the car. (Vol X, TR. 145-46). Brennault observed appellant with a gun at the time he got back to the car. (Vol X, TR. 146). Appellant was standing near the driver's side door with the victim standing behind him. (Vol X, TR. 146). Brennault observed appellant point the gun at the victim and heard him say "he's not riding with us no more." (Vol X, TR. 147). Appellant told the victim to "get away from the car" and moved him toward the rear of the car. (Vol X, TR. 147). When the victim had his back to the appellant, appellant told him to "take his jeans off." (Vol X, TR. 148). When asked what happened next, Brennault testified: "And then he just shot him." (Vol X, TR. 148). When the victim was shot, the victim was facing away from the appellant--i.e, he was shot in the back. (Vol X, TR. 149). After being shot, the victim fell to the ground. Brennault testified that the victim was saying "help me" as he lay on the ground. (Vol X, TR. 149). Appellant ran around in circles for a moment, then returned to the victim, pointing the gun to his head, telling him to "shut up." (Vol X, TR. 150). According to Brennault, appellant shot the victim sometime after midnight.² (Vol X, TR. 157).

²Brennault testified that he and appellant smoked Marlboro brand cigarettes. (Vol X, TR. 163). Brennault was not sure if he and appellant smoked in the area where the victim was shot. Id. Beer bottles found at the scene of the murder looked like the type of bottles consumed by the group. (Vol X, TR. 164).

Appellant told Pearson and Brennault to go through the victim's pockets, but Brennault refused. However, Pearson complied with appellant's request and looked through the victim's pockets. (Vol X, TR. 150-51). According to Brennault, Pearson found "a \$20.00 bill, a beeper I think, I am not sure, might have been a beeper." (Vol X, TR. 151). Brennault testified that they might have found a wallet but that he wasn't sure. (Vol X, TR. 151).

After going through Kunkel's belongings, appellant instructed Pearson and Brennault to drag him across the road "and put him in the canal." (Vol X, TR. 151). Brennault refused, so appellant and Pearson dragged the victim across the street and "rolled him down." (Vol X, TR. 152). When they returned to the car, Brennault testified: "he pointed the gun at me and told me if I ever said anything, that I will be next." (Vol X, TR. 153). With Pearson driving, they returned to Miami Subs. (Vol X, TR. 154). According to Brennault, appellant was acting "pretty calm" after the shooting. (Vol X, TR. 154-55). Appellant and Brennault got in the white Toyota Supra owned by the victim and appellant drove the car to the Summer Creek Apartments. [Brennault's mother's residence]. (Vol X, TR. 155-56, 158).

Sometime later they left the apartment, driving the victim's Toyota Supra to Kunkel's condominium in order to "[g]et valuables." They learned where Kunkel lived from the "identification" taken after he had been shot. (Vol X, TR. 158). The victim lived in a condominium called "Whitehall." (Vol X, TR. 159). Brennault

testified that appellant and Pearson entered the victim's condo while he remained standing by the entrance. (Vol X, TR. 159). When they returned from the condo, appellant was carrying a large bag filled with change and other items. (Vol X, TR. 160). They got back into the victim's car and drove to Taco Bell. (Vol X, TR. 160). After eating some tacos, appellant drove the car out on "Beeline Highway" to see how fast Kunkel's car would go. (Vol X, TR. 161). When they returned to Brennault's mother's house it was "real late." (Vol X, TR. 161).

When asked why he did not come forward earlier, Brennault testified that he was afraid of the appellant. Brennault had threatened to kill him if he told of the murder which occurred on July 9, 1993:

He threatened me in the car, yes, we were leaving, he pointed the gun at that time and told me to chill out and shot [sic] up' if anything was ever said, that he gets out of jail and, you know, went from there, and you know, kill him -- kill me.

(Vol X, TR. 164). Brennault testified that while he was afraid of the appellant, he also thought of him as a big brother figure:

I said why, in some of my statements, why I lied. I was very young, just fresh out of, you know, school. I was following you. You were like a bigger brother, you were actually very friendly sometimes. I basically was a follower and not -- definitely not a leader.

(Vol X, TR. 192).

Brennault talked to his friend Tracey Bauchaman shortly after the murder. Bauchaman also knew the appellant and had been friends with Brennault for a number of years. (Vol XI, TR. 301-02).

Bauchaman had observed appellant with a plastic, black gun, "a Glock." (Vol XI, TR. 303). Brennault talked to Bauchaman about this case, stating:

He was real upset; I could tell something was really wrong; he just broke down crying, I didn't know. I said, what did you do, tell me? He said, I can't, man. And he just said that Ronnie Knight shot somebody.

(Vol XI, TR. 304). Brennault said they picked this guy up in a homosexual bar "[t]o rob him." (Vol XI, TR. 305). On cross-examination, Bauchaman admitted that he and Brennault were drinking beer and could have smoked marijuana the evening the statement was made. (Vol XI, TR. 308).

Heather Edwards testified that she was appellant's girlfriend from "September of '93 until May 17, of '94."³ (Vol X, TR. 264). During that period of time appellant "pretty much" lived with her. (Vol X, TR. 264). Ms. Edwards recalled one occasion where appellant told her about a homicide he was involved in. (Vol X, TR. 265). Ms. Edwards testified that in October of 1993, Timothy [Pearson], Dain and another man were talking about "dong a home

³On cross-examination by the appellant, Ms. Edwards admitted that they had problems in their relationship: "Yes, you beat the hell out of me." (Vol X, TR. 272). Also on cross-examination, when appellant asked if they had problems, Ms. Edwards testified: "I basically did what I was told, when I was told or had the hell knocked out of me. If I didn't do what I was told, I was threatened, smacked, punched, kicked or thrown against the wall." (Vol X, TR. 284). Ms. Edwards stated that she was "scared to death of you and was afraid to leave." (Vol X, TR. 284). In fact, Ms. Edwards testified that after she filed a police report against appellant she was "constantly being threatened." (Vol X, TR. 286).

invasion..." (Vol X, TR. 266). At some point during the conversation, Dain [Brennault] got mad and took off outside. Appellant stated that Brennault was "not the same since the last time." (Vol X, TR. 266). Ms. Edwards questioned appellant by what he meant 'the last time' and appellant stated: "He laughed and told me that he took a man out to Loxahatchee, stuck him on his knees, shot this man with a .9 millimeter gun while Tim and Dain watched." (Vol X, TR. 266). Appellant told her that he met the man "[a]t some gay bar." (Vol X, TR. 266).

Appellant talked about killing the victim a couple of times, bragging to other people, stating:

That all gay men needed to be shot and that he didn't like any of them. If he had his choice -- he had his choice, he'd line them up and shoot them all.

(Vol X, TR. 268).

Ms. Edwards testified that she had observed appellant in possession of a 9 millimeter gun. Appellant kept it in house Ms. Edwards shared with appellant from the last week of January to the second week of February in 1994. (Vol X, TR. 267). The gun was black and appellant told her it was the one he used to kill the man out in Loxahatchee. (Vol X, TR. 268). According to appellant, the hand gun belonged to Timothy Pearson. (Vol X, TR. 269-70).

In 1994, Jeffrey Pearson, Timothy Pearson's brother, found a gun in his mother's closet. (Vol X, TR. 241). Timothy Pearson knew his brother put it there for safe keeping. (Vol X, TR. 242). In fact, Timothy Pearson recalled that shortly after the "incident"

his brother told him what happened. Timothy testified:

My brother called me soon after the incident had happened to tell me what happened so somebody would know, because he was scared for his own life at that time.

....

Because he said after the incident happened, that Ronald also pointed the gun at him and Dain [Brennault] and told them that they'll be next.

(Vol X, TR. 242). Timothy Pearson sold the gun for money and drugs. (Vol X, TR. 243). Timothy Pearson testified that the gun was a "Glock .9 millimeter model 19." (Vol X, TR. 245). Shortly after selling the gun, appellant angrily demanded that he get the gun back. Appellant told Pearson that it should not be on the "streets." (Vol X, TR. 243).

Appellant also admitted to Christopher Holt that he shot the victim as he was running away near some orange groves. (Vol XI, TR. 311). Holt lived with appellant Sherry Brennault, Dain Brennault and Robbie Brennault. (Vol XI, TR. 313). Appellant claimed that the victim was rubbing his neck in the car and that it irritated him "real bad." (Vol XI, TR. 311). Appellant told Holt:

The guy fell. He said he remembers I remember he said that the guy was still breathing after he shot him, and that he kicked him over in the canal and told and the gun to Tim and Dain and said if they said anything, he'd kill them.

(Vol XI, TR. 317). When asked to describe appellant's demeanor as he was describing the murder, Holt testified: "Bragging." (Vol XI, TR. 318). Holt, who considered appellant a friend, testified that appellant bragged about shooting Richard Kunkel "[a] few times." (Vol XI, TR. 319). When first questioned about the murder, Holt

admitted he gave a false statement to the police, telling them he knew nothing about the murder of Richard Kunkel. (Vol XI, TR. 328-29). While denying he received any direct threats from the appellant, Holt testified that he did not want to get involved: "The only thing is knowing the type of person that you are, I would expect that I would receive a threat from you." (Vol XI, TR. 330). Holt claimed that he finally became involved out of a guilty conscience. (Vol XI, TR. 331).

Robbie Brennault, Dain Brennault's older sister, also testified for the State. (Vol X, TR. 214). Ms. Brennault recalled reading over depositions with appellant after the original murder charge had been nolle prossed. (Vol X, TR. 217). Appellant claimed that people had lied about him and was laughing about it. (Vol X, TR. 217). However, when Robbie told appellant that she did not believe he did it [murdered Richard Kunkel], appellant stated: "yeah I did it." (Vol X, TR. 218).

Dr. Steven Nelson, Chief Medical Examiner for the Tenth Judicial Circuit, conducted an autopsy of the victim, Richard Kunkel on July 10, 1993. (Vol X, TR. 120-22). The cause of death was a gun shot wound to the chest. The fatal shot entered the chest from the back, on the right shoulder blade. (Vol X, TR. 122, 124). The shirt the victim was wearing when his body was recovered had a bullet hole approximately 8 inches down from the collar of the shirt "just right in the middle back." (Vol IX, TR. 50). Dr. Nelson testified that death would occur within a very short time of

suffering such a wound: "[H]is lungs had filled, the chest cavity had filled with blood, blood had gone through liver and filled his belly with blood and clots." (Vol X, TR. 132).

C. Representation by Mr. Sosa During The Penalty Phase And The Trial Court's Sentencing Order

Appellant agreed to let Mr. Sosa represent him during the penalty phase of the trial. (Vol XII, TR. 377). The trial court conducted an inquiry into the matter and appellant stated that he wanted Mr. Sosa to represent him during the sentencing phase of this trial. (Vol XII, TR. 377-78).

After hearing testimony at the hearing, the trial court found three aggravating factors. The trial court found that appellant had been "convicted of a prior capital felony or of a felony involving the use or threat of violence to the person. F.S. 921.141(5)(b)." The trial court noted: On "December 8, 1995, the defendant was adjudicated guilty of First Degree Murder and Armed Robbery with a Firearm. His conviction has been upheld on appeal and he is currently serving a life sentence."⁴ (Vol XII, R. 427).

The second statutory aggravator found by the trial court "was that the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of a robbery. F.S. 921.141(5)(d)." This aggravator was merged with the fact the

⁴Detective John Van Houton testified about appellant's prior conviction for the murder of twenty-one-year-old Brendan Meehan. (Vol XII, TR. 389-93). The murder and robbery of Mr. Meehan was similar to the murder of the victim in this case. (Vol XII, TR. 393-98).

murder was committed for "pecuniary gain" in the trial court's sentencing order. (Vol XII, R. 428).

The final aggravator was that the murder was "committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. F.S. 921.141(5)(I)." (Vol XII, R. 428). The trial court noted that this factor requires proof of a heightened form of premeditation. The trial court observed:

The evidence in this case showed that the defendant and his partners started the evening armed with a semi-automatic firearm. During their outing, Brennault and Pearson agreed to the defendant's plan to pick up a stranger and rob him. Clearly, the defendant intended to do more than that and had plenty of time to plan the execution of Richard Kunkel. After luring the victim out west of town under the guise of going to a party, the defendant stopped the vehicle on a remote stretch of dirt road. The defendant had already decided that only three of them would be getting back into the car. The victim was taken in by the group's "party" attitude and did not suspect that he was in any danger. After advising the victim that he was no longer welcome to ride in the car, the defendant coldly and deliberately ordered the victim to get away from the car. The defendant then ordered the victim to remove his jeans. While the victim was facing away, the defendant shot him in the back. Richard Kunkel did not die immediately. While he lay on the ground dying, he cried for help. The defendant turned the gun on his cohorts and ordered them to drag Kunkel across the road into the ditch while he was still alive. When Brennault refused, Pearson and the defendant dragged Kunkel's dying body over to the side of the road where he later died and was ultimately discovered...

(Vol. XII, R. 428).

The trial court found two statutory mitigating factors in this case. The trial court noted the defense presented the testimony of two experts who agreed that the "defendant suffered from a paranoid disorder which greatly affected his life." (Vol. XII, R. 429).

The court observed that "[w]hile the condition is real and its effects pronounced, there was no evidence or opinion indicating that at the time of the murder the defendant was under any particular stress or emotional disturbance." (Vol. XII, R. 429). The trial court gave this factor considerable weight. Id.

Second, the trial court gave "some consideration to the fact that his capacity was *somewhat* impaired." (Vol. XII, R. 429). While appellant's mental condition caused a diminished capacity to appreciate the criminality of his conduct, each expert concluded "that he could distinguish right from wrong, and could control his actions."⁵ (Vol. XII, R. 429).

⁵The trial court found two non-statutory mitigating factors which had been presented by the defense, but gave those factors little weight. (Vol. XII, R. 429).

SUMMARY OF THE ARGUMENT

ISSUE I--The trial court was under no obligation to conduct a full Nelson hearing on appellant's motion to discharge his second chair counsel, Mr. Sosa. First, the State was under no obligation to appoint at the public's expense a second chair or co-counsel. Second, appellant's general grievances against Mr. Sosa did not in any way question his competence as an attorney.

ISSUE II--The trial court in this case did essentially renew the offer of counsel immediately prior to trial. The court provided appellant with a copy of the transcript of his recent Farretta hearing wherein appellant was fully advised of the dangers of self-representation and the benefits of having the assistance of counsel. Appellant claimed he read the transcript of that hearing and that his answers to the trial court's questions would not change. Appellant again expressed his unequivocal desire to represent himself at trial.

The trial court did not abuse its discretion in allowing appellant to represent himself in this case. The trial court found appellant to be an intelligent man and his appropriate responses to the trial court's pretrial inquiries did not in any way suggest appellant was somehow incompetent to waive the right to counsel.

ISSUE III--Section 921.141(5)(b) of the Florida Statutes authorizing use of a prior capital felony or violent felony conviction as an aggravator is not unconstitutionally vague.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FAILING TO
CONDUCT A NELSON INQUIRY IN RESPONSE TO
APPELLANT'S PRETRIAL MOTION TO HAVE
APPELLANT'S SECOND CHAIR COUNSEL DISMISSED?
(STATED BY APPELLEE).

Appellant complains that the Court failed to conduct an adequate Nelson inquiry prior to granting appellant's motion to discharge his appointed second chair counsel, Mr. Sosa. The State disagrees.

The trial court was under no obligation to conduct a Nelson inquiry upon appellant's *pro se* motion to discharge Mr. Sosa. First, the State was under no obligation to provide appellant with a second chair or co-counsel. Second, appellant's general complaints about Mr. Sosa did not raise an allegation of incompetency as the reason for Mr. Sosa's dismissal. Therefore, the trial court was under no obligation to conduct a full Nelson inquiry.

A. The Trial Court Was Under No Obligation To Conduct A Nelson Inquiry When Appellant Sought To Discharge The Court Appointed Co-Counsel

Mr. Sosa's responsibility for appellant's defense was clearly that of a second chair or co-counsel. (Vol. II, R. 73); See Lowe v. State, 650 So.2d 969 (Fla. 1994), cert. denied, 516 U.S. 887, 116 S.Ct. 230, 133 L.Ed.2d 159 (1995)(A defendant has no right to the appointment of co-counsel); Reaves v. State, 639 So.2d 1, 6

(Fla. 1994), cert. denied, 513 U.S. 990, 115 S.Ct. 488, 130 L.Ed.2d 400 (Fla. 1994) (“There is no general requirement that a defendant must have co-counsel in capital cases...”). Appellant was well aware that Mr. Sosa was going to continue in his capacity as second chair or co-counsel after Ms. Perry was removed from his case. At the conclusion of the hearing on appellant’s motion to discharge Ms. Perry, appellant was advised by the trial court that Ms. Perry would not be replaced at public expense. Appellant was given an opportunity to hire first chair counsel, but was advised by the trial court of the consequences if he was unable to obtain counsel. The trial court advised the appellant:

Well, you need to think about that because you will be left with either being co-counsel on your own with Mr. Sosa, representing yourself without Mr. Sosa, or placing a heavy burden on Mr. Sosa, which he at this point indicates he’s not willing to accept.

(Supp. Vol I, TR. 22).

In Jimenez v. State, 703 So.2d 437, 439 (Fla. 1997), cert. denied, 140 L.Ed.2d 945, 118 S.Ct. 1806 (1998), the defendant alleged “that the trial judge improperly denied his request to discharge his court-appointed second chair counsel, Andrew Kassier, and conducted an insufficient hearing on the matter.” This Court disagreed, stating: “First, a defendant has no right to co-counsel, and second, a trial court must conduct an inquiry only if a defendant questions an attorney’s competence.” Jimenez, 703 So.2d at 439 (citing Smith v. State, 641 So.2d 1319, 1321 (Fla. 1994); Watts v. State, 593 So.2d 198, 203 (Fla. 1992))[footnote omitted].

The defendant had requested that Kassier be replaced because "he had a conflict with him, he could not reach him, and he did not know what was going on in his case." Jimenez, 703 So.2d at 439. When the trial court inquired as to the nature of the conflict, Kassier and the defendant declined to explain. The lead counsel indicated that further inquiry would be fruitless. This Court concluded that under the facts presented in Jimenez, where the defendant "had no constitutional right to co-counsel" and he did not "question Kassier's competence" no further inquiry was warranted. Jimenez, 703 So.2d at 437.

Sub judice, as in Jimenez, the trial court was under no obligation to conduct a Nelson inquiry because Sosa remained second chair or co-counsel after Ms. Perry was removed at appellant's request. As noted above, appellant had no constitutional right to the appointment of co-counsel at the public's expense.⁶ Moreover, as in Jimenez, appellant in this case did not question Mr. Sosa's competence. Instead, it appears appellant was unhappy with the level of consultation with Mr. Sosa and his inability to obtain certain papers or documents previously held by Ms. Perry. As this Court noted in Jimenez, such generalized complaints do not warrant a Nelson inquiry.

⁶ In Jimenez this Court observed that the trial court did not err in failing to inform appellant of his right to self-representation because the defendant never voiced an unequivocal request to represent himself and he retained the services of his lead counsel. 703 So.2d at 439.

The trial court conducted a thorough Nelson inquiry upon appellant's motion to discharge Ms. Perry, the appointed first chair counsel.⁷ Appellant asserts no deficiency in the Nelson inquiry pertaining to the removal of Ms. Perry. It was made clear to the appellant after removing Ms. Perry that he was to either obtain first chair counsel on his own or be forced to represent himself with the assistance of Mr. Sosa.

Since it was not contemplated that Mr. Sosa would act as anything but a second chair counsel after removal of Ms. Perry, the trial court was under no obligation to conduct a full Nelson inquiry upon appellant's request to discharge Mr. Sosa. See Reaves v. State, 639 So.2d 1, 6 (Fla. 1994)(there is no general requirement that a defendant in a capital case have co-counsel). However, the trial court was obligated to conduct a Faretta inquiry when it determined that appellant could not hire private counsel and that he wished to proceed on his own. The trial court satisfied this requirement, fully advising appellant of the benefits of representation by counsel and the disadvantages of self-representation. (Vol. VII, R. 1074-84). Nothing more was

⁷ The trial court was under no obligation to conduct a Faretta inquiry upon the removal of Ms. Perry because appellant sought to hire first chair counsel and did not make an unequivocal request to represent himself. See Jimenez, 703 So.2d at 439 (since the defendant made no unequivocal request to represent himself, "the trial court was not obliged to inform him of his right to self-representation."); State v. Craft, 685 So.2d 1292, 1295 (Fla. 1996)("This Court has repeatedly held that only an unequivocal assertion of the right to self-representation will trigger the need for a Faretta inquiry.")(citation omitted).

required under the law. In any case, as noted above, the trial court was under no obligation to conduct a full Nelson inquiry where appellant expressed merely generalized complaints about Mr. Sosa and did not question his competency.

B. The Trial Court Was Under No Obligation To Conduct A Nelson Inquiry Where Appellant Did Not Question Mr. Sosa's Competence

Pursuant to Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), when a defendant complains about his court-appointed counsel, the judge should inquire of both the defendant and his attorney to determine if there is reasonable cause to believe that the attorney is rendering ineffective assistance. If no reasonable basis appears for a finding of ineffectiveness, the trial court should so state on the record and advise the defendant that if he discharges his counsel the State may not thereafter be required to appoint a substitute. However, not all a defendant's complaints require a full Nelson inquiry.

When a defendant merely expresses generalized grievances about his or her attorney without questioning his attorney's competence, no additional inquiry is required. See Lowe v. State, 650 So.2d 969 (Fla. 1994)(defendant's general grievances did not warrant additional inquiry where the defendant "could point to no specific acts of counsel's alleged incompetence."); Smith v. State, 641 So.2d 1319, 1321 (Fla. 1994), cert. denied, 513 U.S. 1163, 130 L.Ed.2d 1091, 115 S.Ct. 1129 (???)(While the defendant expressed dissatisfaction with the level of experience of court appointed

counsel, he did not question the attorney's competence so as to require a Nelson hearing). In deciding whether a trial court conducted an appropriate Nelson inquiry, appellate courts apply the abuse of discretion standard of review. Kearse v. State, 605 So.2d 534, 536 (Fla. 1st DCA 1992), rev. denied, 613 So.2d 5 (Fla. 1993).

Appellant's claim to the contrary, appellant was indeed given an opportunity by the trial court to air his grievances against Mr. Sosa. After being sworn in, the trial court asked appellant the following: "...You have given me an indication that perhaps you and Mr. Sosa are not getting along, why don't you tell me about that." (Vol. VII, R. 1062). Appellant then embarked upon a lengthy and uninterrupted explanation of his complaints against Ms. Perry and Mr. Sosa. (Vol. VII, R. 1062-67). Appellant's chief complaints appeared to be that Mr. Sosa had agreed to a continuance with Ms. Perry and that he was not adequately consulting with appellant or providing him with documents relating to his case.⁸ (Vol. VII, R. 1064-65). Appellant's complaint about the continuance was in fact a renewal of his earlier grievance against Ms. Perry.⁹ (Vol. VII, R. 1063). Appellant closed his statement

⁸While he complained about the lack of consultation with Mr. Sosa and Ms. Perry, appellant later admitted that he had discussions with them concerning his case. (Vol. VII, R. 1083-84).

⁹ Disagreement over whether or not a continuance is warranted in the State's opinion, does not raise any concern about the competence of a defendant's counsel. See generally Peede v. State, 474 So.2d 808, 815-16 (Fla. 1985); Sweet v. State, 624 So.2d 1138, 1141 n.2 (Fla. 1993). In this case, Ms. Perry's motion for continuance reflects several valid reasons and appears well taken.

by claiming that he was not speaking with Mr. Sosa and that they were not compatible in this case. (Vol. VII, R. 1065). See Morris v. Slappy, 461 U.S. 1, 14, 75 L.Ed.2d 610, 621, 103 S.Ct. 1610 (1983)(the Sixth Amendment does not guarantee a "'meaningful relationship' between an accused and his counsel.")

While the trial court did not make any formal findings regarding Mr. Sosa's representation, in denying appellant's request for a different standby counsel, the trial court stated: "You are down to one lawyer; this is the lawyer we are talking about. You have not given me any reason to think that Mr. Sosa could not perform that function." (Vol. VII, R. 1088-89). In response, appellant was unable or unwilling to provide the trial court with any reason why Mr. Sosa could not perform the function of standby counsel. (Vol. VII, R. 1089). And, in fact, appellant later expressed satisfaction with having Mr. Sosa appointed as standby counsel. (Vol. III, R. 326-27)("I am pleased that you will allow Mr. Sosa to sit beside me during trial.").

In response to appellant's stated concerns, the trial court noted that appellant was down to one lawyer and that he needed to cooperate with Mr. Sosa. (Vol. VII, R. 1067). The trial court asked appellant if he wanted to represent himself. Appellant responded: "Yes, sir." (Vol. VII, R. 1067). The trial court embarked upon a lengthy inquiry informing appellant of the benefits

(Vol. III, R. 203).

of counsel and the disadvantages of self-representation. At the conclusion, of this inquiry came the following exchange:

THE COURT: Well, Mr. Knight, having advised of your right to counsel, the advantages of having counsel, the disadvantages and dangers of proceeding without counsel the nature of the charges and its possible consequences of that outcome here, are you certain that you do not want to have a lawyer represent you here?

THE DEFENDANT: Yes, sir.

(Vol. VII, R. 1087).

Based upon appellant's complaints, the trial court was not required to conduct a full Nelson inquiry. Appellant merely expressed general dissatisfaction with counsel and a belief that he had not received adequate consultation with Mr. Sosa or had not received papers relating to his case. See Augsberger v. State, 655 So.2d 1202, 1204 (Fla. 2d DCA 1995) ("Appellant's stated basis for dissatisfaction was obviously founded on what he perceived to be inadequate conferences with his attorney which, without a more specific claim of incompetence, does not require a full Nelson inquiry.") (citing Lee v. State, 641 So.2d 164 (Fla. 1st DCA 1994) and Kenney v. State, 611 So.2d 575 (Fla. 1st DCA 1992)). Appellant, did not, however, raise any question concerning the competency of Mr. Sosa.

Appellant's reliance upon Scull v. State, 533 So.2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037, 104 L.Ed.2d 408, 109 S.Ct. 1937 (1989), is misplaced. In Scull the defendant raised an issue concerning conflict with his court appointed attorney. While the

defendant did mention this conflict was based, at least in part, upon inadequate consultation, the trial court did not allow the defendant to explain his grievances against his attorney. This Court noted that "each time Scull tried to explain his objections, the trial judge interrupted him." Scull, 533 So.2d at 1140. While this Court found that the inquiry into the defendant's grievances against his attorney was inadequate, it found such error harmless based upon his later expression of satisfaction with appointed counsel.

In this case, unlike Scull, the trial court did not interrupt the appellant when he attempted to explain his reasons for requesting Mr. Sosa's discharge. And, appellant's general complaints did not in any way question Mr. Sosa's competence as an attorney. Moreover, unlike Scull, the appellant made an unequivocal request to represent himself, thereby reducing or eliminating the need for any additional inquiry into Mr. Sosa's representation of the appellant.

In sum, appellant's complaints against his publicly funded attorneys did not raise any question concerning their competence. Consequently, he was not entitled to the appointment of additional counsel at tax payer expense. The appellant was properly advised of his options by the trial court prior to making an informed decision to remove both of his court appointed attorneys and represent himself. Appellant later requested that Mr. Sosa be allowed to represent him during the penalty phase. (Vol. XII, TR.

376). Consequently, if the inquiry regarding Mr. Sosa was in any way inadequate, the error can be deemed harmless under the facts of this case. Based upon this record, appellant has not carried his burden of establishing prejudicial error requiring reversal of his convictions. See Section 924.051(3), Fla. Stat. (1997)(...“A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.”).

ISSUE II

WHETHER THE TRIAL COURT'S INQUIRY ESTABLISHED THAT APPELLANT'S WAIVER OF COUNSEL WAS KNOWING, VOLUNTARY, AND INTELLIGENT? (STATED BY APPELLEE).

Appellant contends that the trial court erred in failing to renew the offer of counsel prior to trial. Appellant also apparently contends that the trial court erred in allowing him to represent himself where he suffered from a psychological condition which rendered him incapable of waiving the right to counsel.

A. Renewal Of The Offer Of Counsel

First, the State disagrees with appellant's contention that the trial court failed to make a proper inquiry regarding his choice to represent himself immediately prior to trial. The trial court in this case provided appellant with a copy of the January 8, 1998, hearing prior to trial. The trial court specifically asked appellant if he had finished his "homework assignment" which was to read over the transcript of the January 8th hearing. Under oath, appellant stated that he had read the transcript and that he still desired to represent himself at trial. (Vol. IX, TR. 3).

Appellant does not apparently challenge the adequacy of the Faretta inquiry which was conducted at the hearing on January 8th. Any such challenge would be frivolous as the trial court fully advised appellant of the advantages of representation by counsel and the disadvantages of self-representation. The trial court stressed that the State was seeking the death penalty and that he

would be at a distinct disadvantage should he choose to represent himself. (Vol. VII, R. 1074-84). Nonetheless, at the conclusion of this inquiry, appellant told the trial court that he desired to forego representation by counsel¹⁰ and that he wished to represent himself in this case. The trial court closed the inquiry on January 8th by asking the appellant the following:

THE COURT: Well, Mr. Knight, having advised of your right to counsel, the advantages of having counsel, the disadvantages and dangers of proceeding without counsel, the nature of the charges and its possible consequences of that outcome here, are you certain that you do not want to have a lawyer to represent you here?

THE DEFENDANT: Yes, sir.

(Vol. VII, R. 1087).

It matters little whether the offer of counsel was made on the record immediately prior to trial where the trial court in this case provided appellant with a transcript of the full Farretta inquiry addressing the waiver of counsel.¹¹ Appellant claimed he read over this inquiry which occurred just over eight weeks prior

¹⁰Appellant stated that he did not want either Ms. Perry or Mr. Sosa representing him. (Vol. VII, R. 1074).

¹¹This inquiry included the following advisement:

THE COURT: And you do not wish to have an attorney, Mr. Sosa, Ms. Perry to represent you?

THE DEFENDANT: No. Neither one of them, no, sir.

(Supp. Vol. I, R. 42).

to trial and that none of his answers would change.¹² Consequently, appellant was again specifically agreeing to waive counsel. Appellant also claimed on the record that it was his desire to finish representing himself at trial. (Vol. IX, TR. 3-5). Thus, the trial court did much more than simply offer appellant the assistance of counsel prior to starting trial, he specifically re-advised the appellant of the dangers of self-representation and appellant reaffirmed his desire to proceed without counsel. Moreover, when the trial court renewed the offer of counsel for the penalty phase appellant stated that he would like to continue representing himself with the assistance of Mr. Sosa as standby counsel.¹³ (Vol. XI, TR. 370).

Appellant's reliance upon Sproule v. State, 719 So.2d 349 (Fla. 4th DCA 1998), is misplaced. In Sproule, unlike the instant case, the defendant was not given a transcript of the prior hearing wherein counsel was waived immediately prior to trial. *Sub judice*, not only was appellant given a copy of the waiver hearing wherein a full Faretta hearing was conducted, but he claimed that he read it and told the trial court under oath that his responses to that inquiry would not change.

In any case, the State questions whether or not the trial

¹²The trial court previously determined that appellant could read and write.

¹³Later, appellant agreed that he wanted Mr. Sosa to represent him during the sentencing phase. (Vol. XII, TR. 376-77). Mr. Sosa did fully represent appellant during the penalty phase of this trial.

court was even required to renew the offer of counsel immediately prior to trial where the prior waiver of counsel [the January 8th hearing] was clearly made with regard to the trial stage. In Lamb v. State, 535 So.2d 698 (Fla. 1st DCA 1988), a pretrial hearing three weeks prior to the start of trial addressed the defendant's motion to have counsel withdrawn so that he could represent himself. In the three weeks prior to trial there were no intervening proceedings. The First District affirmed the defendant's conviction even though the trial court did not renew the offer of counsel at the beginning of trial, finding:

The pretrial hearing on the waiver of counsel addressed Lamb's competence and ability to appear *pro se* at the trial stage, and the fact that the trial occurred three weeks later is immaterial. The rule does not place a time limitation on an offer and waiver of counsel. Since there was no change in that critical stage, rule 3.111(d)(5) does not come into play and no error occurred.

Lamb, 535 So.2d at 699. Accord McCarthy v. State, 24 Fla.L.Weekly D946 (Fla. 4th DCA, April 14, 1999)(trial court did not err in failing to renew the offer of counsel prior to voir dire where the hearing two weeks prior to the scheduled trial addressed the defendant's "ability to competently handle the mechanics of the trial process on his own.").

While appellant points to record cites which suggest that various motions were heard prior to trial (Appellant's Brief at 36-37), he does not contend that in any of the motions appellant expressed a desire to retract his earlier decision to proceed

without counsel. In addition, those motions specifically addressed the conduct or timing of the impending trial, i.e, the critical stage to which the earlier waiver applied. Moreover, as in Lamb, the trial court's inquiry regarding counsel and appellant's waiver was clearly directed toward appellant handling the mechanics of the trial stage of the proceedings on his own. Thus, in the State's view, the trial court was under no obligation to renew the offer of assistance of counsel on March 11, 1998. Nonetheless, as noted above, the trial court in this case essentially renewed the offer of counsel and addressed appellant's waiver by having appellant read the transcript of the earlier waiver hearing. See generally Jones v. State, 449 So.2d 253, 258 (Fla.), cert. denied, 469 U.S. 893, 83 L.Ed.2d 205, 105 S.Ct. 269 (1984)(declining to find error where the trial court did not renew the offer of counsel prior to capital defendant's sentencing proceeding where such a finding would "exalt form over substance" as the issue "of counsel was before the court and the defendant was merely repeating his earlier merit less arguments that he was entitled to a lawyer of his choice."). In this case, appellant unequivocally expressed his desire to represent himself immediately prior to the beginning of trial on March 11, 1998. (Vol. IX, TR. 4).

B. The Trial Court Did Not Abuse Its Discretion In Allowing Appellant To Represent Himself

Although appellant's claim is somewhat difficult to decipher, appellant apparently contends that although he was competent to

stand trial, the trial court erred in allowing him to represent himself where he in fact suffered from psychological conditions which may have rendered him incapable of waiving the right to counsel. Appellant's argument is devoid of merit.

Florida Rule of Criminal Procedure 3.111(d)(3) provides:

(3) No waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of a mental condition, age, education, experience, nature or complexity of the case or other factors.

The trial court's finding that appellant's waiver of counsel was knowing, intelligent, and voluntary is entitled to great deference. In Potts v. State, 718 So.2d 757, 759 (Fla. 1998), this Court discussed the standard of review applied to a trial court's decision to allow self-representation:

A defendant's demand for self-representation places the trial court in a quandary, for the court must balance seemingly conflicting fundamental rights--i.e., the court must weigh the right of self-representation against the rights to counsel and to a fair trial. Because the court's ruling turns primarily on an assessment of demeanor and credibility, its decision is entitled to great weight and will be affirmed on review if supported by competent substantial evidence in the record.

As noted above, the trial court conducted a full Faretta inquiry prior to allowing appellant to represent himself. The trial court discussed and considered the appellant's age, education and mental condition. In addition, the trial court inquired into whether appellant understood the dangers and disadvantages of self-representation, the seriousness of the charge and the possibility of a death sentence. The trial court inquired into appellant's

recent experience with the criminal justice system. The trial court also inquired whether appellant understood he would be required to abide by court-room procedures and appellant was advised that he could expect no special treatment because he was proceeding *pro se*. The trial court's inquiry followed virtually in its entirety the factors required by Faretta and its progeny. Appellant's appropriate responses to the inquiry and his obvious ability to communicate effectively do not suggest that he was in any way incompetent to waive the right to counsel. See Hill v. State, 688 So.2d 901, 904 n. 1 (Fla. 1996), cert. denied, 522 U.S. 907, 139 L.Ed.2d 191, 118 S.Ct. 265 (????)("Despite the absence of expert testimony on this issue, the record demonstrates that Hill's mental condition did not affect his ability to make an intelligent and understanding choice to waive his right to counsel.")(citation omitted).

Appellant's suggestion that the later testimony of his penalty phase experts casts doubt upon his earlier waiver of counsel is without merit. The defense experts concluded that although appellant suffered from some type of severe paranoid disorder, that he did not meet the criteria to be considered insane. (Vol. XII, TR. 378, 480, 513, 514). Appellant also has the capacity to tell right from wrong. (Vol. XII, TR. 482). In fact, one defense expert, licensed Mental Health Counselor and Sex Therapist Susan Lafehr Hession, testified that she believed appellant's paranoid

illness was less severe than it was when she first observed him in 1995.¹⁴ (Vol. XII, TR. 483). Ms. Lafehr Hession testified that appellant was an intelligent man and that he was capable of understanding that he was not going to get out of prison. (Vol. XII, TR. 488). And, one expert observed that appellant was doing well in prison "academics." (Vol. XII, TR. 518). See e.g. Muhammad v. State, 494 So.2d 969, 973 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987)(although the defendant's proffer indicated the defendant suffered from mental problems, "one need not be mentally healthy to be competent to stand trial.").

Aside from the fact that this information [defense expert testimony] was not before the trial court at the time appellant chose to waive counsel¹⁵, the level of competence required to waive counsel is no different from that of standing trial. Godinez v. Moran, 509 U.S. 389, 399, 125 L.Ed.2d 321, 332, 113 S.Ct. 2680 (1993). All information available to the trial court suggested that appellant was indeed competent to waive the right to counsel.

¹⁴According to Ms. Lafehr Hession appellant's paranoid disorder caused him to focus his anger and frustration against homosexuals. (Vol. XII, TR. 490).

¹⁵See Watts v. State, 537 So.2d 699 (Fla. 4th DCA 1989)(Trial judge did not err in failing to *sua sponte* appoint experts to examine defendant who slept during much of his trial. Even though the newfound knowledge that the defendant had been on drugs may have affected his "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," that knowledge cannot be attributed to the court *at the time of trial*)(emphasis in original).

As the Supreme Court noted in Godinez:

We do not mean to suggest of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence. See Drope v. Missouri, 420 U.S. 162, 180-81, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975); Pate v. Robinson, 383 U.S. 375, 385, 15 L.Ed.2d 815, 86 S.Ct. 836 (1966).

509 U.S. at 401 n. 13, 125 L.Ed.2d at 333 n. 13.

Appellant's claim that the trial court erred in allowing him to represent himself appears to emanate from a belief that appellant's work experience, education, and mental health rendered him incapable of conducting a competent defense. (Appellant's Brief at 36). However, as this Court noted in State v. Bowen, 698 So.2d 248, 251 (Fla. 1997), the trial court is not required to ascertain whether or not appellant was competent [legally] to represent himself:

...[W]e hold that once a court determines that a competent defendant of his own free will has "knowingly and intelligently" waived the right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented. See Fla.R.Crim.P. 3.111.[]. The court may not inquire further into whether the defendant "could provide himself with a substantively qualitative defense," *Bowen*, 677 So.2d at 864, for it is within the defendant's rights, if he or she so chooses, to sit mute and mount no defense at all.

Significantly, appellant had recently been convicted of First Degree Murder after a jury trial and had been subjected to the penalty phase--i.e, appellant was presumptively competent to stand

trial. Also significant was the fact that the trial court found appellant to be an intelligent man, stating: "In dealing with you, I have found you to be a fairly intelligent, bright young man." (Supp. Vol I, TR. 38). Appellant's correspondence to the trial court reflected the ability to communicate effectively and demonstrated an ordered, logical thought process. (Vol. II, R. 59-60; Vol. III, R. 326-27). Appellant was able to communicate clearly with witnesses throughout the trial.¹⁶ See e.g. Vol. III, TR. 327-28, 221-26. Indeed, at the close of the State's case appellant argued a motion for a judgment of acquittal displaying an impressive degree of legal sophistication for a *pro se* litigant. (Vol. III, TR. 350-51).

Based upon the record before this Court there is absolutely no reason to second guess the trial court and find that appellant was somehow incompetent to waive the right to counsel.

¹⁶Appellant was remarkably adept at conducting cross-examination of the State's witnesses, including the use of prior statements, e.g:

"I am going to have Mr. Sosa bring you copies of statements that you made, some of them are sworn statements, one of them is a deposition that you made on 12/1997 at a bond hearing and a statement that you made on March 20 of 1997, and a statement of 8/4/95 that you made, so you can have those up there with you."

(Vol. X, TR. 170).

ISSUE III

WHETHER USE OF A PRIOR CONVICTION FOR ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON AS AN AGGRAVATOR UNDER SECTION 921.141(5)(b) OF THE FLORIDA STATUTES IS UNCONSTITUTIONAL? (STATED BY APPELLEE).

Appellant contends that Section 921.141(5)(b) of the Florida Statutes is unconstitutional because it allows the State to use a prior conviction in aggravation based upon criminal activity which occurred after the murder for which he is being sentenced. The State disagrees.

Of course, there is a presumption of constitutionality inherent in any statutory analysis. Griffin v. State, 396 So.2d 152 (Fla. 1981); Scullock v. State, 377 So.2d 682, 683-4 (Fla. 1979). And, "all doubts as to the validity of a statute should be resolved in favor of its constitutionality." McKibben v. Mallory, 293 So.2d 48 (Fla. 1974). Appellant has not carried his burden of establishing that Section 921.141(5)(b) is unconstitutional.

This Court has specifically authorized use of a prior conviction under the exact circumstances presented in this case. In Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977), the defendant argued that it was improper to consider a previous conviction for murder as an aggravator under Section 921.141(5)(b), Florida Statutes (1975) where the murder "occurred after the killing in the instant case." This Court disagreed, stating:

Such an assertion simply does not comport with a plain reading of the statute. It is clear that the Legislature referred to "previous convictions" and not "previous crimes." It is apparent that the appellant had at the time of the trial in this case been convicted of the Nelson murder...

Elledge, 346 So.2d at 1001. This Court observed that it had previously held that "prior conviction" was the essential element of that aggravating circumstance. Accord Daugherty v. State, 419 So.2d 1067, 1069 (Fla. 1982). Further, this Court stated in Elledge that "the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." "Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge." Elledge, 346 So.2d at 1001.

Aside from this Court's specific prior approval of using prior convictions in circumstances identical to this case, there is nothing irrational in using prior murder and armed robbery convictions as a statutory aggravator.¹⁷ Appellant's convictions

¹⁷Appellant was on notice that any additional violent conduct might subject him to enhanced punishment. See generally Preston v. State, 444 So.2d 939, 945 (Fla. 1984) ("the death penalty statute itself puts a defendant charged with a capital felony on notice that the provisions of 9211.141(5) will be applied.") (citing Spinkellink v. Wainwright, 578 F.2d 582, 609-10 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 976 (1979)). Schmitt v. State, 590 So. 2d 404, 413 (Fla. 1991), cert. denied, 118 L.Ed.2d 216 (1992) (In other words, a due process violation occurs if a criminal statute's means is not rationally related to its purposes and, as a result, it criminalizes innocuous conduct. Art. I, Sec. 9, Fla. Const.).

for another murder and robbery shed light on his character and obvious lack of regard for human life. Which this Court recognized in Elledge and King v. State, 390 So.2d 315, 321 (Fla. 1980), cert. denied, 450 U.S. 989, 67 L.Ed.2d 825, 101 S.Ct. 1529 (???) is a valid concern in capital sentencing. See also Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981), cert. denied, 488 U.S. 1044, 109 S.Ct. 872 (???) ("Certainly the fact that a defendant has been found guilty by a jury and adjudicated guilty by the trial court of such violent crimes is material to this [death penalty] character analysis.").

Pardo v. State, 563 So.2d 77 (Fla. 1990), provides no support for appellant's position on appeal. In Pardo when this Court stated "only the criminal activity, not the convictions for that activity, must occur prior to the murders for which the defendant is being sentenced[]," it was discussing the trial court's application of a mitigating factor. The mitigating factor at issue in Pardo was the absence of a "significant history of prior criminal activity." Section 921.141(6)(a), Fla. Stat. (1993).

In Pardo the State appealed the trial court's "refusal to apply the aggravating factor of a prior conviction for a capital felony to the final four murder episodes." 563 So.2d at 80. This Court found that the trial court's failure to consider contemporaneous murder convictions as an aggravator was improper, stating that "[w]e have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating

circumstance, so long as the two crimes involved multiple victims or separate episodes." Pardo, 563 So.2d at 80.

In this case, the trial court was applying the statutory aggravator which specifically refers to prior convictions. Section 921.141(5)(b), Fla. Stat. (1997). Consequently, this Court's opinion in Pardo actually provides support for the State's position on appeal--i.e, that a subsequent capital felony conviction may be used as an aggravating circumstance in this case.

Appellant appears to challenge the statute for its vague and broad definition of "prior conviction." Appellant's Brief at 41. Appellant's cryptic argument to the contrary, the provision is easy to understand and simple for the sentencing court to apply. There is nothing vague about the phrase "previously convicted of another capital felony..." contained in Section 921.141(5)(b). In a vagueness challenge, appellant bears the burden of showing that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, 29 L.Ed. 2d 214, 217 (1971). Obviously, appellant was on notice that committing any additional murders would subject him to severe penalties under the law. That a subsequent murder could serve as an aggravator for an earlier murder under Section 921.141 is not in any way unfair or

constitutionally infirm.¹⁸ See Lightbourne v. State, 438 So.2d 380, 385 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 9 L.Ed.2d 725 (1984)(noting that "[t]his Court has ruled on numerous occasions upholding the constitutionality of the section [921.141], finding that the statutorily prescribed circumstances were not vague but rather 'provided [m]eaningful restraints and guidelines for the discretion of judge and jury.'" (quoting State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974))).

¹⁸While not raised as an issue in this appeal, the State observes that the death penalty is appropriate and proportional in this case. The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). This Court has upheld death sentences for defendants committing similar offenses with fewer aggravators and/or more mitigation. See e.g. Hayes v. State, 581 So.2d 121 (Fla.), cert. denied, 502 U.S. 972, 116 L.Ed.2d 468, 112 S.Ct. 450 (1991)(Hayes was an eighteen year old that volunteered to shoot a cab driver that he and his codefendant intended to rob); Gamble v. State, 659 So.2d 242 (Fla. 1995)(twenty year old offender with childhood abuse and neglect and severe emotional problems killed landlord during robbery), cert. denied, 116 S.Ct. 933 (1996); Ferrell v. State, 680 So. 2d 390 (Fla. 1996)(death sentence affirmed where Ferrell shot his girlfriend in the head and the only aggravator was a prior violent felony conviction, for second degree murder); Duncan v. State, 619 So. 2d 279 (Fla. 1993), cert. denied, 126 L.Ed.2d 385, 114 S.Ct. 453 () (single factor of prior violent felony convictions supported death sentence, despite existence of numerous nonstatutory mitigating factors).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Curtis G. Levine, Esq., 199 E. Boca Raton Road, Suite 1-A, Boca Raton, Florida 33432, this _____ day of September 1999.

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