No. 19-_____

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In the
Supreme Court of the United States

TORRENCE DAVIS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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Appendix

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

TORRENCE E. DAVIS, *Appellant*.

No. 1 CA-CR 17-0529
FILED 1-22-2019

Appeal from the Superior Court in Maricopa County
Nos. CR2012-152527-001 DT
CR2016-135082-001 DT
The Honorable Christopher A. Coury, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jesse Finn Turner
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Maria Elena Cruz and Judge Kenton D. Jones joined.

W I N T H R O P, Presiding Judge:

¶1 Torrence E. Davis appeals his conviction and sentence for theft of means of transportation.[1] He argues the trial court committed reversible error by depriving him of his right to represent himself both (1) at trial and (2) before sentencing. For the following reasons, we affirm his conviction and sentence.

FACTS AND PROCEDURAL HISTORY[2]

¶2 Davis was stopped by law enforcement while driving a stolen vehicle. He was convicted of theft of means of transportation and sentenced to 11.25 years' imprisonment.

¶3 He timely appealed his conviction and sentence. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033(A)(1), (3), and (4).

ANALYSIS

I. The court did not deprive Davis of the right to represent himself at trial.

¶4 Before trial, Davis told the court he had discovery motions he wanted his attorney to file. Davis told the court that if his attorney did not

[1] Davis also appeals his probation revocation, for which he received a consecutive, minimum sentence of 1.5 years' imprisonment, but he raises no issue in that regard. We note that, pursuant to his plea agreement, he knowingly waived his right to appeal that conviction and sentence, and we find no error in the subsequent revocation and sentencing proceedings.

[2] We view the facts in the light most favorable to sustaining the verdict. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013) (citation omitted).

file those motions, he would be willing to represent himself. The court told him the following:

> Well, you can go pro per if you want to, but at this point, your attorney is the one that decides strategy. Your attorney is the one that decides what motions get filed and what motions don't get filed. He's not going to file a motion that he doesn't think there's a legal basis for.

Davis responded:

> I do. So if that's the case, I have to file, I have to go pro per, then that's what I want to do.

The court never directly addressed this statement. Davis argues the failure to address the statement amounted to the deprivation of his right to represent himself. We review the denial of a defendant's motion to represent himself for an abuse of discretion. *See State v. Boggs*, 218 Ariz. 325, 338, ¶ 62 (2008). Regardless of the standard of review, the erroneous denial of a pretrial or mid-trial motion for self-representation is structural error requiring reversal without a showing of prejudice. *See State v. McLemore*, 230 Ariz. 571, 575-76, ¶ 15 (App. 2012).

¶5 A defendant has a right to represent himself at trial. *See Faretta v. California*, 422 U.S. 806, 818-19 (1975). To invoke this right, a competent defendant must knowingly and voluntarily invoke his right to self-representation. *See State v. Weaver*, 244 Ariz. 101, 104, ¶ 8 (App. 2018) (citations omitted). A demand to represent oneself must also be unequivocal. *Id.* (citing *McLemore*, 230 Ariz. at 576, ¶ 17).

¶6 Here, Davis' demand to represent himself was not unequivocal. He conditioned his demand on his attorney's unwillingness to file requested motions. Davis' demands were preceded by conditional phrases, "if [the attorney] doesn't want to [file the requested motions], then I'm willing to put in the motions to go pro per myself," and "if [he does not think there is a legal basis for the requested motions], I have to file, I have to go pro per." These conditional statements leave open the possibility that Davis did not want to represent himself if his attorney fulfilled his requests. By placing conditions upon his desire to represent himself, Davis did not make an unequivocal demand.

¶7 Even if his demand was unequivocal, however, he subsequently abandoned his motion for self-representation. A defendant may abandon his *Faretta* motion. *See McLemore*, 230 Ariz. at 582, ¶ 36. When

determining whether abandonment has occurred, we consider the totality of the circumstances. *Id.* at 580, ¶ 29. We consider—among other factors—"the defendant's opportunities to remind the court of a pending motion [and] defense counsel's awareness of the motion." *Id.* at 582, ¶ 35. In this case, after his unanswered request, Davis attended eight pretrial conferences with his attorney. He did not raise his allegedly pending motion at any of these opportunities, suggesting he no longer desired to represent himself. Further, as stated before, Davis' *Faretta* motion was conditional, depending upon whether his attorney fulfilled certain requests. Davis argued the State had not disclosed discovery items it possessed. At conclusion of the pretrial conference in which Davis made his conditional demand to represent himself, the court ordered the State to provide outstanding discovery. This, combined with Davis' subsequent failure to remind the court about or re-urge his motion, indicates his requests had been fulfilled, and he had abandoned his *Faretta* motion. In addition, his attorney was aware of his motion. The court, on two later occasions, asked his attorney if there were any outstanding motions. On both occasions, his attorney told the court—with Davis present in the courtroom—that there were none. We find no abuse of discretion.

II. The court did not reversibly err by not allowing Davis to represent himself after his guilty verdict.

¶8 After Davis was convicted of theft of means of transportation, he unequivocally requested to represent himself. The court began the colloquy to ensure his request was knowing and voluntary. During the colloquy, Davis told the court he was willing to receive the maximum amount of time he could receive in prison. The court denied the motion for self-representation. Davis argues this denial was reversible error. Again, we review for an abuse of discretion. *See Boggs*, 218 Ariz. at 338, ¶ 62.

¶9 Although we view the erroneous denial of a pretrial or mid-trial *Faretta* motion as structural error, the post-trial denial of a motion for self-representation is subject to harmless-error review. Structural errors "affect the entire conduct of the trial from beginning to end, and thus taint the framework within which the trial proceeds." *State v. Henderson*, 210 Ariz. 561, 565, ¶ 12 (2005) (citations and internal quotations omitted). In contrast, a post-trial denial of a motion for self-representation does not affect the framework of the trial. Our analysis is supported by decisions of the Ninth Circuit. *See United States v. Maness*, 566 F.3d 894, 896-97 (9th Cir. 2009); *see also United States v. Walters*, 309 F.3d 589, 592-93 (9th Cir. 2002) (reviewing an alleged sentencing error involving representation for harmless error).

¶10 Even assuming without deciding the court erred, Davis cannot demonstrate prejudice. If he had represented himself, Davis would have received the same sentence. At a pre-sentencing hearing, the State presented evidence, and the court found beyond a reasonable doubt, that Davis was convicted of a class 2 felony for an offense committed on March 29, 2004. The current offense was committed on July 24, 2016. For a class 2 felony to be a historical prior felony, it must have been committed within ten years of the current offense. *See* A.R.S. § 13-105(22)(b). Because the calculation period excludes Davis' five-year period of incarceration, the class 2 felony is a historical prior felony. *See* A.R.S. § 13-105(22)(b). Davis also testified at trial that he committed another felony within five years of the commission of the charged offense, thereby admitting another historical prior felony. *See* A.R.S. § 13-105(22)(b)-(c). With two historical prior felonies, Davis was required to be sentenced as a Category 3 offender for a class 3 felony offense. *See* A.R.S. § 13-703(C). Further, the jury found Davis was on probation at the time of the offense, meaning he had to be sentenced to at least the presumptive term. *See* A.R.S. § 13-708(C). The jury also found the State had not proven any of the other alleged aggravating factors, meaning Davis could not have received a maximum or aggravated sentence. *See* A.R.S. §§ 13-701(C), -703(K). Therefore, Davis—regardless of representation—could only have been sentenced to 11.25 years' imprisonment. *See* A.R.S. § 13-703(J)-(K). Accordingly, Davis cannot demonstrate prejudice.

CONCLUSION

¶11 Davis' conviction and sentence are affirmed.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. TORRENCE E. DAVIS, Appellant.	No. 1 CA-CR 17-0529 Maricopa County Superior Court No. CR2012-152527-001 No. CR2016-135082-001

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ISSUES PRESENTED FOR REVIEW

1. **"The federal and state constitutions (of Arizona) guarantee [a defendant] the right to waive counsel and to represent himself." *State v. Dann*, 220 Ariz. 351, 359 (2009). On February 16, 2017, Torrence Davis made a request to represent himself. The Trial Court never addressed his request. Did the Court err in failing to address the request of Mr. Davis?**
2. **"[A] mentally incompetent defendant cannot validly waive the right to counsel." *State v. Dierf*, 191 Ariz. 583, 591 (1998). "A defendant is competent to stand trial if he has 'sufficient present ability to consult with his lawyer with a reasonable as well as factual understanding of the proceedings against him.'" *State v. Gunches*, 225 Ariz. 22, 24 (2010) (citing *Dusky v. United States*, 362 U.S. 402 (1960)). On July 17, 2017, Mr. Davis again requested the Trial Court allow him to represent himself. The court refused, citing their belief that Mr. Davis was not "in a mental state right now where you can effectively represent yourself free from emotion and knee-jerk reactions." (Reporter's Transcript "R.T." 7/17/17 at 27.) Did the Court err in rejecting this request from Mr. Davis?**

STATEMENT OF FACTS

On July 20, 2016, Mia Hill discovered that her car keys, and later her 2012 white Hyundai Sonata were stolen. (R.T. 6/12/17 at 70-71.) She immediately reported the car stolen. (*Id.* at 73.) On July 24, 2016, Glendale police got a report from a private monitoring company that the car was located at 4545 West Hatcher Street. (R.T. 6/13/17 at 15-16.) Officer Cody Nicholas located the car being driven and followed it to 4545 West Hatcher, where it parked. (*Id.* at 18.) Torrence Davis was removed as the driver of the vehicle and detained. (*Id.* at 23-24.) Ronald Wingo was pulled from the passenger seat. (*Id.* at 38.) At the police station, Mr. Davis was interrogated, where he admitted to both driving and cleaning the car. (*Id.* at 44.) When Mr. Davis was asked where he obtained the vehicle after being informed it was stolen, he declined to answer and said he did not want to be a "snitch." (*Id.* at 45.) He declined to answer any more questions. (*Id.*) Police also spoke to Mr. Wingo and Jeanie Lopez, a woman removed from the home at 4545 West Hatcher. (*Id.*) Miss Lopez said she had received a ride from Mr. Davis in the vehicle. (*Id.* at 54.) Mr. Wingo resided at the location. (*Id.* at 49.)

STATEMENT OF THE CASE

A. Pretrial Motions and Filings

On August 2, 2016, Mr. Davis was indicted on one count of Theft of Means of Transportation, a class 3 felony alleged to have been committed on July 24, 2016. (Electronic Instrument of Record "I" 9.)

Subsequent to the indictment, the State filed an Allegation of Historical Priors (I 22), an Allegation of Prior Felony Conviction Pursuant to A.R.S. § 13-703 and 13-704 (I 23), Allegation of Offenses Committed While Released From Confinement Pursuant to A.R.S. § 13-708(C) (I 24), a Request for a 609 Hearing (I 25), a Notice of Disclosure and Request for Disclosure (I 26), Allegation of Aggravating Circumstances (I 27), and a Supplemental Notice of Disclosure (I 36).

The Defense filed a Notice of Defenses and Disclosure Under Rule 15.2 of the Arizona Rules of Criminal Procedure (I 15), an Invocation of Fifth and Sixth Amendment Rights (I 16), a Motion for Discovery (I 17), a Motion to Modify Conditions of Release (I 29), and four Motions to Continue (I 43, 46, 50, 54). The motion to modify was denied (I 34). The motions to continue were all granted. (I 44, 47, 55, 61).

B. The First Request To Go *Pro Per*

A Final Trial Management Conference was held on February 16, 2017. (I 48). The ultimate result of the conference was a continuance of the trial so that the State could resolve a discovery matter. (*Id.*) During the hearing, Mr. Davis informed the Court that he was not ready to go to trial because of missing discovery and motions that he had wanted filed. (R.T. 2/16/17 at 4-5.) The Court informed Mr. Davis he could not file motions, only his attorney could. (*Id.* at 5.) Mr. Davis responded, "Well, if he doesn't want to, then I'm willing to put in the motions to go pro per myself…" (*Id.*) When the Court informed Mr. Davis he had the right to go *pro per* but until then his attorney was in charge of filing motions, Mr. Davis responded, "So if that's the case, I have to file, I have to go pro per, then that's what I want to do." (*Id.* at 5-6.) Mr. Davis's lawyer then interjected, a discussion about discovery ensued, and the Court never addressed the request from Mr. Davis to represent himself. (*Id.* at 6-9.) The request was not enshrined in the minute entry. (I 48.)

C. The Trial

Trial commenced on June 8, 2016. (I 70.)

a. Jury Selection

Neither side had any objections for hardship discharge. (R.T. 6/8/17 at 30, 64, 69-74.) There were equally no objections to any strikes for cause. (*Id.* at 111-112.)

b. Edward Bickett

The State's first witness was Edward Bickett. (R.T. 6/12/17 at 42.) Mr. Bickett was the registered owner who purchased the Sonata in question. (*Id.* at 43.) He provided it to his daughter, Mia Hills. (*Id.*) He had never met Mr. Davis. (I 48.)

c. James Valentinetti

The State next called James Valentinetti. (*Id.* at 55.) He was a resident near 4545 Hatcher on July 24, 2016. (*Id.*) He did not know Mr. Davis. (*Id.* at 56.) He did see the white Sonata on July 24, 2016 and made a note that he had never seen it before. (*Id.*) He witnessed a woman taking things out of the vehicle while a man was cleaning. (*Id.* at 57.) He knew the woman, but did not know the man. (*Id.* at 58.) He was sure the man was not Mr. Wingo. (*Id.*) He also witnessed the arrest. (*Id.* at 60.) He was not sure about the man, and would not be able to identify him if he saw him again. (*Id.* at 63.)

d. Mia Hill

The State next called Miss Hill. (*Id.* at 69.) Miss Hill testified that her car keys were stolen from her purse during a pool party on July 20, 2016. (*Id.* at 71.) At 4:30 the next morning she discovered her car was missing. (*Id.*) She had also never met Mr. Davis. (*Id.* at 73.)

e. Officer Cody Nicholas

The State next called Glendale Police Officer Cody Nicholas. (R.T. 6/13/17 at 13.) He testified that at 1:20 p.m. on July 24, 2016 he was informed that an outside private company tracking the vehicle through GPS had alerted the police that Miss Hill's vehicle was at 4545 West Hatcher. (*Id.* at 15-16.) Officer Nicholas spotted the vehicle driving on 45th Avenue, at which point it drove to 4545 West Hatcher and parked. (*Id.* at 17-18.) Officer Nicholas stopped the car and ordered the driver out, where he was detained by another officer. (*Id.* at 23.) Officer Nicholas identified the driver as Mr. Davis. (*Id.* at 24.) Officer Nicholas did not note any obvious signs of someone having broken into the vehicle. (*Id.* at 32.)

f. Detective Bret McLeod

The State next called Glendale Police Detective Bret McLeod. (*Id.* at 39.) Detective McLeod testified that during his interrogation of Mr. Davis, Mr. Davis admitted to driving the Sonata. (*Id.* at 44.) He also admitted to cleaning the vehicle in a manner consistent with what Mr. Valentinetti described. (*Id.*) Detective McLeod said he informed Mr. Davis that the vehicle was stolen and asked where he got it, to which Mr. Davis responded that he did not want to be a "snitch." (*Id.* at 45.) Mr. Davis said he did not wish to talk any more after that. (*Id.*) Detective McLeod confirmed that Mr. Wingo lived at 4545 West Hatcher, and the woman seen taking

things from the vehicle was Jeanine Lopez, who occasionally resided at that address. (*Id.* at 49.) He also interviewed Miss Lopez, who said she had received a ride from Mr. Davis in the vehicle. (*Id.* at 54.)

At the conclusion of Detective McLeod's testimony, the State rested. (*Id.* at 58.) Defense Counsel made a request for a directed verdict under Rule 20 of the rules of criminal procedure which was denied. (*Id.* at 60-61.)

g. Lawrence Keith

In his defense Mr. Davis called Lawrence Keith. (*Id.* at 63.) Mr. Keith testified that he had been friends with Mr. Davis since 2012. (*Id.* at 64.) Mr. Keith stated that sometime in late July 2016 he was hanging out with Mr. Davis in the parking lot of the Coconut Grove apartment complex near 17th Avenue and Indian School Road. (*Id.*) Mr. Keith said that a woman was talking to Mr. Davis and asked him to take care of her car while she was going to work. (*Id.* at 65.) He specifically remembered the woman giving Mr. Davis the keys. (*Id.*) Mr. Keith remembered that the car was a white 4 door that looked new. (*Id.* at 66.) While he did not know who the woman was, he said it looked like the two knew each other. (*Id.*) He did not hear the specifics of the conversation. (*Id.*) Pursuant to Rule of Evidence 609, Mr. Keith admitted to having two prior felony convictions. (*Id.* at 73.)

h. Torrence Davis

Mr. Davis then took the stand in his own defense. (*Id.* at 81.) On direct examination Mr. Davis testified that he had driven the white Sonata for the first time on the evening of July 23, 2016. (*Id.* at 82.) Mr. Davis stated he had received the car from Miss Lopez while at the Coconut Grove apartments on the night of the 23rd. (*Id.* at 83.) He said that he had known her three or four months at that time. (*Id.* at 84.) Mr. Davis said that Miss Lopez gave him the keys and they left together. (*Id.*) He testified he drove her to work. (*Id.*) The location was a club at 19th Avenue and Campbell. (*Id.* at 85.) He then returned to the apartments and waited for her shift to end. (*Id.*) He had not seen her with the vehicle prior to that night. (*Id.* at 86.) He picked up Miss Lopez when her shift was over. (*Id.*) The next day Mr. Davis said he saw Miss Lopez in the parking lot again of the Coconut Grove and she asked him to help her move some things out of her boyfriend's apartment. (*Id.* at 88.) They both loaded some items in the car, then she drove to 4545 West Hatcher. (*Id.* at 88-89.) When they arrived Miss Lopez told Mr. Davis he could take a shower, which he did and saw inside was Mr. Wingo. (*Id.* at 91.) Mr. Davis had never met Mr. Wingo. (*Id.* at 92.) He then cleaned the car, at Miss Lopez's request. (*Id.* at 93.) Sometime thereafter Miss Lopez asked Mr. Davis to take Mr. Wingo to the store, and Mr. Davis departed with Mr. Wingo when Mr. Wingo repeated the request. (*Id.* at 95.) Shortly

afterward he saw the police, returned to the home, and was detained. (*Id.* at 97.) Regarding his interview with police, he stated that he told Detective McLeod he did not want to be a snitch because he did not want to say who gave him the keys to the car when he did not know anything was wrong with it. (*Id.* at 102.) He said the earlier testimony regarding Miss Lopez's statements were incorrect. (*Id.* at 103.) Pursuant to Rule 609 of the Rules of Evidence, Mr. Davis admitted he had a prior felony conviction. (*Id.* at 106.)

On cross-examination, Mr. Davis testified when he asked Miss Lopez why she wanted him to drive her to work, she replied that there were a lot of break-ins near her employment and she didn't feel safe parking there. (*Id.* at 110-111.) He said he and Miss Lopez had previously had a sexual relationship. (*Id.* at 113.) He said he had previously seen her with a "rinky dink" "crappy" car, and that was the first night he saw her with the Sonata. (*Id.* at 114.) Mr. Davis said he did not ask about the new car nor did it occur to him to do so. (*Id.*) He also stated he was cleaning the car because it had become dirty from all the items that Miss Lopez was transporting. (*Id.* at 119.) He admitted he never discussed Miss Lopez with Detective McLeod. (*Id.* at 126-127.)

On redirect, Mr. Davis stated he had a suspended license at the time, which influenced his decision to immediately return to the home and expect to be pulled

over. (*Id.* at 128.) He also said that he didn't say anything about Miss Lopez to the police because he was not obligated to do so. (*Id.*)

i. Recall of Detective McLeod

After Mr. Davis rested, the State recalled Detective McLeod in rebuttal. (R.T. 6/14/17 at 12.) Detective McLeod stated that none of what Mr. Davis had testified about regarding Miss Lopez was information conveyed to him on July 24, 2016. (*Id.* at 12-13.) Detective McLeod testified after interviewing Miss Lopez, he determined she was a passenger in the vehicle. (*Id.* at 17.)

j. Verdict and Aggravation Phase

Mr. Davis was convicted of Theft of Means of Transportation. (R.T. 6/15/17 at 5.) Prior to initiation of the Aggravation Phase, Mr. Davis requested to waive his presence and was removed from the courtroom. (*Id.* at 8.) The State called Sinisa Malisanovic of the Maricopa County Adult Probation Department. (*Id.* at 24.) He confirmed Mr. Davis was on probation, under his supervision, as of March 6, 2016 in CR2012-152527-001. (*Id.* at 27.) He was still on probation as of July 24, 2016. (*Id.* at 28.)

The jury returned a verdict that the aggravating factors of damage to property, pecuniary gain, and harm to the victim were not proven. (*Id.* at 46.) It found the factor of probation was proven. (*Id.*)

D. Sentencing

The trial on priors and sentencing commenced on July 17, 2017. (R.T. 7/1717 at 3.) Mr. Davis said he had filed a written motion to represent himself, which the Court had not received. (*Id*. at 5.) Mr. Davis stated his reasons for wanting to represent himself were to file "An extension to file a motion for a new trial, a motion to vacate judgment/guilt; and there are some more, but I wanted an extension if I can file it myself." (*Id.* at 7.) The Court informed Mr. Davis that the deadline for a motion to file for a new trial had passed, and he would not be granted an extension to file one if allowed to represent himself. (*Id.* at 8.) Mr. Davis said he understood that, but he still wanted to represent himself so he could file a motion to vacate judgment. (*Id.* at 9.) Mr. Davis was also complaining that his lawyer lied to him that he could not have a bench trial, to which the Court told Mr. Davis that would not be considered, he did not have the right to a bench trial without the State, and there would be little reason for him to represent himself at that point in the sentencing. (*Id.* at 11-12.) Mr. Davis stated he still wanted to represent himself and he requested the Court engage him in the prerequisite colloquy. (*Id.* at 13, 16.) During the colloquy, Mr. Davis said he had been diagnosed as having a serious mental illness for which he was not prescribed medication. (*Id.* at 17.) Mr. Davis said he wasn't sure if it was bipolar or schizophrenia. (*Id.* at 18.) Mr. Davis answered the majority of the Court's

questions with a simple yes or no. (*Id.* at 19-25.) Mr. Davis did complain that trust was broken with his attorney and he was not trying to be angry. (*Id.* at 25.) The court ended the colloquy by discussing the likely sentencing with Mr. Davis. (*Id.* at 26-27.) The colloquy concluded with:

> The Defendant: "Well it's all about the same amount of time. You can go ahead and give me the 3 and a half years on top of the 11 and a half years and just postpone it so I can see my family at court. I mean this on top, what is the difference? That is still 14 years, a year later, 12 years and 2 years, what is the difference? It doesn't matter. You can go ahead and give me the 2 and half years and go ahead and max it out. That way you postpone it. I can see my family. I was supposed to go to court on the 18th. That is what they said, the 18th. I'm supposed to go into jail on the 18th. My family isn't here so you can go ahead and do what you want to do. Max it out, you know what I mean; and it is what it is."
>
> The Court: "The Court finds that the Defendant is – Mr. Davis, I'm not letting you represent yourself. You are not making wise decisions. Based on your prior mental health diagnosis that you are bipolar, I do not believe that you are in a mental state right now where you can effectively represent yourself free of from emotion and knee-jerk reactions. Quite frankly, sir, I have never had anyone who wants to be maxed out due to an emotional response."

(*Id.* at 27-28.)

At that point Mr. Malisanovic re-took the stand. (*Id.* at 29.) Mr. Malisanovic testified that Mr. Davis had been convicted of three prior felony convictions. (*Id.* at

34-38.) After the priors were found, Mr. Davis requested and was granted an extension. (*Id.* at 54-58.)

On August 18, 2017, Mr. Davis was sentenced to 1.5 years with 401 days credit in CR2012-152527-001, with community supervision waived, and consecutive to 11.25 years in CR2016-135082-001. (I 104.)

Appellant filed a timely notice of appeal. This Court has jurisdiction under article 6, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A).

ISSUE 1

It has long been the law under both the United States and Arizona Constitutions that a defendant has the absolute right to represent himself if he so chooses. *Faretta v. California*, 422 U.S. 806 (1975); *State v. Dann*, 220 Ariz. 351 (2009). On February 16, 2017, Torrence Davis made a request to represent himself. The Trial Court never addressed his request. Did the Court err in failing to address the request of Mr. Davis?

Standard of Review

"We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993).

Argument

There is no way to distinguish this case from *Faretta*. In *Faretta*, the defendant "clearly and unequivocally declared to the trial judge that he wanted to represent himself and that he did not want counsel." *Id.* at 835. Here, Mr. Davis clearly and unequivocally stated "I have to go pro per, then that's what I want to do." (R.T. 2/16/17 at 5-6.) No reason was given by the Court why this right was not respected, why no colloquy was engaged in, nor why the request was not even

preserved in the minute entry. (I 48.) *Faretta* held that forcing a defendant to accept an attorney against his will deprives him of the constitutional right to conduct his own defense. *Id.* at 836. Such is the case here, where the Court conducted no follow up or colloquy with Mr. Davis concerning his request. Having been deprived of the right of the attorney of his choice, reversal and remand is therefore warranted.

ISSUE 2

The Trial Court denied the second request of Mr. Davis to represent himself due to his "mental state" and a fear of "knee-jerk reactions." Did the Trial Court err in applying this standard?

Standard of Review

"We review a trial court's determination that a defendant had knowingly, intelligently, and voluntarily waived counsel for an abuse of discretion." *Gunches* at 24 (citing *Dann* at 360).

Argument

A. Mr. Davis Was Not Incompetent When His Request Was Denied.

"[A] mentally incompetent defendant cannot validly waive the right to counsel. *State v. Dierf*, 191 Ariz. 583, 591 (1998). Under the Due Process Clause of the Fourteenth Amendment, the competency standard for waiving the right to counsel is the same as the competency standard for standing trial. *See Godinez v. Moran*, 509 U.S. 389, 399 (1993). A defendant is competent to stand trial if he has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him.' *Dusky v. United States*, 362 U.S. 402 (1960)." *Gunches* at 24.

Based on this analysis, for the Trial Court to properly deny the right of Mr. Davis to represent himself by using his diagnoses of a mental illness, they had to find him incompetent. Aside from the fact that the Court made no specific finding as to competency, the record does not support such a finding. Mr. Davis quoted proper rules of criminal procedure, accurately cited to not only multiple motions, but even acknowledged the deficiency in his motion for a new trial by recognizing the deadline had passed, and repeatedly acknowledged the Court's assessment of what remained of his case. He constantly spoke of the broken trust with his attorney and motions he wished to file, not an insufficient ability to consult with his lawyer. His affirmative answers to the majority of the colloquy did not demonstrate a lack of factual or rational understanding of the proceedings. The record is clear that Mr. Davis was "voluntarily exercising his free will." *Faretta* at 835. Finally, it should be noted that if the Court felt that Mr. Davis was in fact incompetent on July 17, 2017 it had a duty to have him evaluated for competency under Arizona Rule of Criminal Procedure 26.5.

B. There Was No Legitimate Basis For the Trial Court to Deny the Right of Mr. Davis to Represent Himself.

"[T]he constitution permits [s]tates to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from

severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Indiana v. Edwards*, 554 U.S. 164, 178 (2008). "*Edwards* recognized that some 'gray-area' defendants may be competent to stand trial but 'unable to carry out the basic tasks needed to present their own defense(s) without help of counsel." *Gunches* at 25.

In *Gunches*, the court found the defendant was not in this "gray-area" when he was engaged in a colloquy, assisted by advisory counsel, and even though he pled guilty, admitted an aggravator, and introduced no mitigation evidence. *Id.* Here, by the Court's own admission there was very little remaining and very little leeway it had in terms of what remained in the case. (R.T. 7/17/17 at 26-27.) Mr. Davis showed no deficiencies that would have identified himself as someone "unable to carry about the basic tasks needed to present his defense." Instead, he correctly cited motions he wished to file, acknowledged the deficiencies of his motion for new trial when informed by the Court, and acknowledged the limited ability of the Court to affect his sentencing at that juncture.

Finally, it should be noted that the Court's actual analysis does not fall within the two circumstances described in *Gunches* and *Edwards*. The Court's ruling was based on Mr. Davis not being in a "mental state free from emotion and knee jerk reactions." Nowhere in the analysis of *Faretta, Gunches*, or *Edwards* can such a

standard be implied. Emotion alone is insufficient to determine competency. Behaving calmly in a courtroom has been found to be insufficient for determining that one is competent. *Odle v. Woodford*, 238 F.3d 1084, 1088 (2001). The same could apply to an expression of emotion while nonetheless satisfying the requirements of competency and self-representation, as happened here. The Court's ruling was therefore in error.

CONCLUSION

The Trial Court caused structural error by interfering with the constitutional right of Mr. Davis to represent himself both before and after trial. Reversal and remand is therefore required.

Respectfully submitted,

MARICOPA COUNTY PUBLIC DEFENDER

By /s/
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Deputy Public Defender
Attorney for Appellant

SFJFT062918P

ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, Appellee, v. TORRENCE E. DAVIS, Appellant.	1 CA–CR 17–0529 Maricopa County Superior Court No. CR2016–135082–001

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court abuse its direction in not ruling on a motion for self-representation when the only statement Appellant Torrence Davis made that could be construed as such a motion was equivocal and made for the sole purpose of filing a fruitless discovery motion? Assuming Davis unequivocally demanded self-representation, did the trial court's inaction amount to structural error when a totality of the circumstances demonstrates that Davis abandoned any such request?

2. Did the trial court abuse its discretion in denying Davis's post-trial motion for self-representation when the request was untimely and Davis did not "intelligently and knowingly" waive his right to counsel?

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STATEMENT OF THE CASE

The State indicted Appellant Torrence Davis in Maricopa County Superior Court on August 2, 2016, for one count of theft of means of transportation, in violation of Arizona Revised Statute ("A.R.S.") § 13–1814. (S.R.O.A. 9.) The State further alleged: (1) four historical prior convictions committed in 2001, 2004, and 2012; (2) 12 aggravating factors; and (3) a violation of felony probation. (S.R.O.A. 22–23, 27, 77.)

The trial evidence—viewed in the light most favorable to sustaining Davis's conviction, *State v. Chappell*, 225 Ariz. 229, 233, ¶ 2 n.1 (2010)—established that, on July 24, 2016, Davis was arrested while driving a stolen vehicle. (R.T. 6/13/17, at 21, 23–25.) Davis drove the vehicle without permission from the vehicle's registered owner or lawful possessor. (R.T. 6/12/17, at 43, 45, 70, 73–74.)

Davis testified at trial coherently and generally without incident, but the topic of whether he had knowledge of the stolen vehicle frustrated him. (*See* R.T. 6/13/17, at 82–129, 132–33.) Davis testified that he did not know the vehicle was stolen when he drove it. (*Id.* at 102–03.) On cross-examination, when asked again about his knowledge and why he did not tell the interrogating officer where he got the vehicle, Davis denied having knowledge of the stolen vehicle, and then veered off-topic to exclaim:

> [Y]ou got her [referring to the person who gave Davis the keys to the stolen car] sitting in a house hiding … and you still release her, but you book me on it? You had a right to get the real perpetrator; you chose not to. You had tunnel vision on me. … I don't understand why I'm sitting here still.

(*Id.* at 125–26 (intermediate question omitted).)

In his testimony, Davis also admitted to having two felony convictions that he committed in Maricopa County in 2012, and for which he had legal representation. (*Id.* at 106–08.) The admitted-to convictions were two of the four historical prior felony convictions that the State had alleged. (S.R.O.A. 22.)

The jury found Davis guilty as charged. (S.R.O.A. 81, at 2.) As the court explained the aggravation phase to the jury, Davis interrupted and asked to be removed from the courtroom. (R.T. 6/15/17, at 8.) The court granted the request. (*Id.*) After leaving, Davis made "loud banging [noises] of some sort on the walls," and did so again four or five minutes later, all of which was heard from inside the courtroom. (*Id.* at 20.) The trial court later noted outside the jury's presence:

> In the event that this case continues to next week [sic], I will have [Davis] transported back in the event that he's cooled down. He was emotional and he also requested the Court, which was visible, I'm sure, on the FTR, but also on the record. He told you and he also told me that he didn't want to stay around any more [sic].

(*Id.*) Subsequently, the jury found no aggravating factors, but found the

sentence enhancement that Davis committed theft-of-means while on probation for a 2012 felony conviction. (S.R.O.A. 77, 81.)

At sentencing, the State presented additional evidence (the testimony of Davis's probation officer and Davis's "pen pack") that showed that Davis had a total of four felony convictions: (1) a class-four misconduct involving weapons committed in 2012; (2) a class-three aggravated assault committed in 2012; (3) a class-two armed robbery committed in 2004; and (4) a class-six aggravated assault committed in 2001. (R.T. 7/17/17, at 29–39.) The 2012 convictions constituted a single historical prior because they resulted from the same incident. (*Id.* at 44.) Based on the State's additional evidence, and on Davis's trial testimony admitting to the 2012 convictions, the trial court found that the 2012 convictions and armed-robbery conviction amounted to a total of two historical priors and consequently classified Davis as a category-three repetitive offender. (*Id.* at 44–45, 47–48; S.R.O.A. 87, at 3.) No mitigation evidence was presented. (*See* R.T. 8/8/17, at 4–15.) Davis received the presumptive sentence of 11.25 years of imprisonment.[1] (S.R.O.A. 104, at 2.)

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[1] The court also sentenced Davis for violating his 2012 felony probation. (R.T. 8/8/17, at 15.) Davis's attorney argued that a mitigated sentence was appropriate due to the non-violent nature of the theft-of-means conviction, but he did not mention mental health. (*Id.* at 12.) The court nonetheless found that Davis's "mental health" was a mitigator and, having found no aggravators, (continued ...)

Davis filed a timely notice of appeal from the judgment and sentence. (R.T. 8/18/17, at 12–13; S.R.O.A 86.) This Court has jurisdiction under Arizona Constitution Article VI, Section 9, and A.R.S. §§ 12–120.21(A)(1), 13–4031, and 13–4033(A).

ARGUMENTS

I

THE TRIAL COURT DID NOT COMMIT STRUCTURAL ERROR IN NOT RULING ON A MOTION FOR SELF-REPRESENTATION BECAUSE DAVIS DID NOT UNEQUIVOCALLY MAKE SUCH A MOTION; AND, TO THE EXTENT THAT HE DID, HE ABANDONED IT.

Davis claims that the trial court committed structural error by not acting on a request for self-representation. (O.B., at 14–15.) That claim fails for two reasons. First, Davis did not make an unequivocal request for self-representation. Second, assuming Davis's statements at a pretrial conference amounted to an unequivocal request for self-representation, the totality of the circumstances establishes that Davis abandoned that request. Consequently, the fact that the trial court did not rule on a motion for self-representation was not error, let alone structural error. Davis's claim must be rejected.

(... continued)
imposed a minimum consecutive sentence of 1.5 years. (*Id.* at 15.) This appeal does not relate to Davis's probation violation. (*See* O.B., at 14–20; S.R.O.A. 9, 113–14.)

A. STANDARD OF REVIEW.

A ruling that denies a defendant the right to represent himself is reviewed for an abuse of discretion. *See State v. McLemore*, 230 Ariz. 571, 575, ¶ 15 (App. 2012). "A court's refusal or failure to exercise its discretion may be treated as an abuse of discretion." *Id.* (citation omitted). "However, regardless of the standard of review, an erroneous failure to accord a defendant his properly asserted right to represent himself when he is competent to waive counsel in a criminal case is structural error requiring reversal without a showing of prejudice." *Id.* (citation omitted); *accord State v. Ring*, 204 Ariz. 534, 552 (2003).

B. RELEVANT FACTS.

In August 2016, the defense filed a motion for discovery, requesting *inter alia*: (1) copies of any "tangible objects which the prosecutor will use at trial … including any tapes, statements or conversations"; (2) a "copy of any electronic surveillance of any conversation to which the defendant was a party, including jail tapes"; (3) a "copy of any officer body camera footage related to this case"; and (4) "[a]ll written or otherwise recorded statements of any witness disclosed by the State." (S.R.O.A. 17.) The State's disclosures included an audio recording of Davis's police interrogation. (R.T. 2/16/17, at 7.)

On February 16, 2017, the trial court conducted a final trial management conference. (S.R.O.A. 48.) During the conference, the defense attorney explained to the court that Davis was personally not ready to proceed to trial. (R.T. 2/16/17, at 4.) In response to the court's inquiry as to why, Davis stated that he wanted to file pretrial motions requesting "body cams, dash cams" relating to the theft-of-means charge and his interrogation. (*Id.*) He claimed that he had "been asking for" that evidence but "never got" it. (*Id.*) Davis stated that, if his attorney did not want to file those motions, he was "willing to put in the motions to go pro per." (*Id.* at 5.)

The trial court explained: "[Y]ou can go pro per if you want to, but at this point, your attorney is the one that decides strategy … what motions get filed and … don't get filed. He's not going to file a motion that he doesn't think there's a legal basis for." (*Id.*) Davis responded: "I do. So if that's the case, I have to file, I have to go pro per, then that's what I want to do." (*Id.* at 5–6.)

Immediately thereafter, the defense attorney asked for a continuance to locate a material witness, and Davis personally asked if there was any way to get the "body cams" and "dash cams" he wanted. (*Id.* at 6–7.) The State avowed to the court: (1) it had already inquired with the case agent about Davis's video request, given that Davis raised the same concern at a previous

hearing; (2) "there was no additional video from the incident"; and (3) it had already disclosed "[e]verything that the police had" to the defense. (*Id.* at 7.)

Still, Davis contended that there was video, not just audio, of his interrogation based on his belief that his interrogation room had a camera "up there." (*Id.*) The court asked the State to follow up with the police again; the State indicated that it would. (*Id.* at 8.) The conference ended shortly thereafter. (*Id.* at 8–9.) Aside from Davis's two brief statements—(1) "I'm willing to put in the motions to go pro per," and (2) "I have to file, I have to go pro per, then that's what I want to do"—Davis did not mention self-representation or a withdrawal of counsel. (*See id.* at 4–9.)

Over the next four months, the trial court conducted an additional eight pretrial conferences, including a settlement conference, and Davis attended each of them with his attorney representing him. (S.R.O.A. 47, 49, 55, 58, 60–61, 63, 66, 70.) Those conferences occurred as follows:

- **March 2, 2017:** The parties discussed the defense's motion to continue. (S.R.O.A. 47.) The topic of Davis's representation was not raised. (*Id.*)

- **April 3, 2017:** The parties discussed the defense's motion to continue. (S.R.O.A. 49.) The topic of Davis's representation was not raised. (*Id.*)

- **April 27, 2017:** The parties discussed scheduling, and the defense's motion to continue and interest in having a settlement conference. (S.R.O.A. 55.) Although Davis objected *pro se* to excluding time for a continuance, he did not take that opportunity

to inquire about self-representation or any pending self-representation motion, or to object to being represented by counsel. (*See id.*; R.T. 4/27/17, at 5–8.)

- **May 3, 2017, a.m.:** The parties discussed the settlement conference and trial schedules. (S.R.O.A. 60; R.T. 5/3/17, a.m., at 4–7.) The topic of Davis's representation was not raised. (*See* R.T. 5/3/17, a.m., at 4–7.)

- **May 3, 2017, p.m. (settlement conference):** The parties discussed Davis's theft-of-means and probation-violation charges; pending plea offer; applicable sentencing range; and potential instruction for a lesser-included offense. (S.R.O.A. 58; R.T. 5/3/17, p.m., at 4–12, 23–30.)

  Following the settlement judge's advisement that Davis may face a probation violation regardless of the verdict in this case, Davis responded that he would "beat that" and was intending to ask for a *Willits*[2] instruction. (R.T. 5/3/17, p.m., at 12.) Davis explained that he wanted to request such an instruction "because the State allowed the cops to get rid of evidence," and he believed he could prove that the State lied about there being no interrogation video or "body cams." (*Id.*) Davis's attorney conveyed to the settlement judge that the State informed the defense that it had "looked for everything" but found no video, and that Davis nevertheless believed his interrogation was video-recorded. (*Id.* at 12–13.) Davis subsequently claimed that the "body cam and the dash cam" were "pertinent to [his] case." (*Id.*) The settlement judge inquired how that evidence would help Davis's probation-violation case. (*Id.* at 14.) A discussion on that topic followed, in which Davis actively participated. (*Id.* at 14–23.)

  Next, believing the indictment was based on police lies, Davis complained about his theft-of-means charge and the grand jury proceeding. (*Id.* at 23–30.) When it was explained to him

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[2] *State v. Willits*, 96 Ariz. 184 (1964).

that any challenge to the indictment would be untimely, Davis responded: "This is all trash. … That's crazy. That's all I can say about this. [Y]ou're trying to bully me into a plea. I told you I didn't want to do this in the first place. This is a waste of my time, your time, the taxpayer's money, same thing. It's trash." (*Id.* at 28–29.)

Despite his active participation throughout the settlement conference, Davis did not express an interest in self-representation, inquire about any pending self-representation motion, or object to being represented by counsel. (*See id.* at 4–30; S.R.O.A. 58.)

- **May 8, 2017:** The parties discussed the defense's motions to continue and to transport a witness. (S.R.O.A. 61; R.T. 5/8/17, at 4–6.) Davis voiced his frustration about the multiple continuances, but he did not raise the issue of self-representation and did not object to being represented by counsel. (*See* R.T. 5/8/17, at 4–6.)

- **May 25, 2017:** The parties discussed the defense's motion to continue. (S.R.O.A. 63.) The topic of Davis's representation was not raised. (*Id.*)

- **June 1, 2017:** The parties discussed the defense's motion to continue and Davis's rejection of the State's plea offer. (S.R.O.A. 66; R.T. 6/1/17, at 6.) Before resetting the trial date, the trial court asked the parties if there were any "outstanding motions." (R.T. 6/1/17, at 4.) The defense attorney indicated that there were none, and Davis said nothing in response. (*Id.* at 4–5.) The topic of Davis's representation was not raised. (*See id.* at 4–6.)

- **June 8, 2017 (Trial, day 1)[3]:** Before jury selection commenced, the court asked the parties if there were "any matters that [they]

[3] The transcript's coversheet for this day was incorrectly dated June 8, 2016, rather than June 8, 2017. (*See* R.O.A. 70.)

> need[ed] to address prior to trial." (R.T. 6/8/17, at 3.) The defense attorney responded, "No, not from defense's perspective." (*Id.*) Davis remained silent; he neither raised the issue of self-representation nor objected to representation by counsel. (*Id.* at 3–5; S.R.O.A. 70, at 1–2.)

Finally, Davis did not file any *pro se* pretrial motions either to waive his right to counsel or to proceed *pro se*, nor did his defense attorney file any pretrial motions to withdraw. (*See generally* R.O.A.)

C. THE TRIAL COURT DID NOT COMMIT STRUCTURAL ERROR.

Davis's claim that the trial court committed structural error by denying a request for self-representation (O.B., at 14–15) is baseless because Davis did not unequivocally demand self-representation. To the extent that he did make such a demand, Davis abandoned his request before the court could rule on it.

1. *Davis did not unequivocally demand self-representation.*

Both the United States and Arizona constitutions protect a defendant's right to proceed without counsel and represent himself. *Faretta v. California*, 422 U.S. 806, 818–19 (1975); *State v. Lamar*, 205 Ariz. 431, 436, ¶ 22 (2003).

To exercise the right of self-representation, the defendant must unequivocally demand it. *Faretta*, 422 U.S. at 819. "An unequivocal demand to proceed *pro se* should be, at the very least, sufficiently clear that if it is granted the defendant should not be able to turn about and urge that he was improperly denied counsel." *State v. Hanson*, 138 Ariz. 296, 300 (App. 1983)

(citation and quotation marks omitted). A statement fails to meet the unequivocal standard if it was "momentary caprice"; the result of thinking out loud"; akin to negotiating; or was an "impulsive" or "emotional" response. *Jackson v. Ylst*, 921 F.2d 882, 888–89 (9th Cir. 1990); *State v. Henry*, 189 Ariz. 542, 548 (1997). A statement that only contemplates self-representation—"I think I will [represent myself]"—likewise fails to satisfy the unequivocal standard, particularly when it was the only time self-representation was mentioned; and it was made solely because the defendant wanted to present a specific motion to the court without otherwise objecting to his counsel. *Meeks v. Craven*, 482 F.2d 465, 467 (9th Cir. 1973).

Davis did not make an unequivocal demand to represent himself. The only pretrial statement Davis made that could be construed as such a request was the statement, "I have to file, I have to go pro per, then that's what I want to do." (*See supra*, Section I(B).) That comment, however, does not satisfy the unequivocal standard given the context in which it was said. Prior to making that comment, Davis expressed frustration about his attorney not filing motions to obtain the interrogation and body camera evidence, despite his constant demands for that evidence. (R.T. 2/16/17, at 4–5, 7.) Immediately after Davis made the "I have to file" comment and his attorney requested a continuance for a different reason, Davis—instead of returning the

conversation to the topic of self-representation—asked the court if there was any way to get the video evidence he wanted, and accused the State of lying and withholding that evidence. (*Id.* at 6–8.)

In other words, immediately before and immediately after Davis made his "I have to file" comment, he was concerned only with obtaining the video evidence he believed existed. The "I have to file" comment was thus ambiguous as to whether it referred to a *pro se* discovery motion for video evidence or to a sincere motion for self-representation—the surrounding context, as described above, suggests it was the former. Additionally, not once before trial did Davis object to having legal representation, request a ruling, or revisit the topic of self-representation. (*Supra*, Section I(B).) Meanwhile, at subsequent pretrial proceedings, Davis repeatedly revisited the video-evidence issue and complained about his attorney not filing discovery motions (*supra*, *id.*), further demonstrating that obtaining the video evidence was Davis's only objective.

Moreover, Davis's comment was saddled between expressions of frustration and suspicion about unmet demands, lies, and evidence withholding, suggesting Davis's comment was momentary caprice or an emotional response. In that light, Davis's "I have to file" comment was more of a hasty, thoughtless tactic to get what he wanted than a sincere request for self-representation.

Davis's one-time ambiguous comment thus did not amount to an unequivocal demand for self-representation, and the trial court could not have committed structural error for that reason.

2. *The totality of the circumstances established that Davis abandoned any request for self-representation.*

Assuming, arguendo, that Davis's "I have to file" comment constituted an unequivocal demand for self-representation, the trial court still did not commit any error because Davis abandoned his request before the trial court could rule on it.

Although the trial court should grant a valid request for self-representation, its failure to do so does not constitute structural error when the totality of the circumstances demonstrates that the defendant abandoned the request before it could be ruled on. *Lamar*, 205 Ariz. at 436, ¶ 22 (citation omitted); *McLemore*, 230 Ariz. at 580, ¶ 29. Indeed, when a court "omit[s] to rule on [such] a motion," "it is reasonable to require the defendant who wants to take on the task of self-representation to remind the court of the pending motion" because "[d]efendants who sincerely seek to represent themselves have a responsibility to speak up" in the "busy and hectic" world of the trial court. *McLemore*, 230 Ariz. at 581, ¶ 33 (citation omitted).

When determining if a defendant abandoned his request,

> [i]nformative factors include but are not limited to a consideration

> of the defendant's opportunities to remind the court of a pending motion, defense counsel's awareness of the motion, any affirmative conduct by the defendant that would run counter to a desire for self-representation, whether the defendant waited until after a conviction to complain about the court's failure to rule on his or her motion (thus indicating the defendant was gaming the system), and the defendant's experience in the criminal justice system and with waiving counsel.

Id. at 582, ¶ 35. This determination may be made based on the record alone. *See id.* at ¶ 36 (finding an evidentiary hearing unnecessary given the record).

Here, Davis's conduct is conclusive: he failed to act, though he was able and had ample opportunities to request a ruling or otherwise inquire about self-representation. Davis only mentioned self-representation twice in two ambivalent and brief statements, which is noteworthy considering Davis attended all subsequent pretrial proceedings and freely voiced his complaints and objections about other topics on numerous occasions during those proceedings. (*Supra*, Section I(B).)

Davis also squandered three perfect opportunities to raise self-representation. Assuming Davis's comment constituted a request for self-representation, the settlement conference gave Davis the first perfect opportunity to bring the pending issue to everyone's attention. Davis was generally an active participant at that conference, and discussed at length his request for "dash and body camera" evidence and its importance to him. (R.T. 5/3/17, p.m., at 12–23; *see generally id*. at 6–30.) Although that evidentiary

topic prompted Davis to raise the topic of self-representation in the past (R.T. 2/16/17, at 4–6), it did not similarly prompt him to raise the topic of self-representation again during the conference (R.T. 5/13/17, p.m., at 12–14; *see also id*. at 15–30). The June 1st hearing and first day of trial before jury selection were likewise perfect, yet squandered, opportunities to raise self-representation. The trial court asked the parties on both occasions whether there was any outstanding motion or other matter that it needed to address before trial; Davis remained silent both times. (R.T. 6/1/17, at 4–5; R.T. 6/8/17, at 3–5.)

Furthermore, without objection, Davis attended all subsequent pretrial proceedings with his attorney representing him, and his attorney did not make any pretrial motions to withdraw. (*See supra*, Section I(B).) Based on the totality of these circumstance (Davis's repeated failure to follow-up on or raise self-representation, and his unobjected-to acquiescence to counsel), Davis abandoned any request he made for self-representation.

This Court reached the same conclusion in the analogous case, *State v. McLemore*. The defendant in that case was deemed to have abandoned his request for self-representation based on his failure to follow-up on his motion for self-representation. *McLemore*, 230 Ariz. at 579–80, ¶¶ 25, 29. Specifically, the defendant never raised his self-representation motion at any of

his subsequent court proceedings, including at a hearing that presented him with the "perfect" opportunity to do so since the hearing concerned his attorney's possible withdrawal. *Id.* at 582, ¶ 36. The defendant (like Davis) also continued to attend his pretrial proceedings with an attorney representing him, without any objection to the attorney's conduct. *Id.*

Other jurisdictions have reached similar conclusions based on similar facts. *See United States v. Barnes*, 693 F.3d 261, 272 (2d Cir. 2012) ("Where there has been no clear denial of the request to proceed *pro se* and the question of self-representation [i]s left open for possible further discussion, the defendant's failure to reassert his desire to proceed *pro se* and his apparent cooperation with his appointed counsel, who conducts the remaining pretrial and trial proceedings, constitute[s] a waiver of his previously asserted Sixth Amendment right to proceed *pro se*.") (citations and internal quotation marks omitted); *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982) ("A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself. The present case presents an example of waiver through subsequent conduct after an initial request."); *Hodge v. Henderson*, 761 F. Supp. 993, 1003 (S.D.N.Y. 1990) (holding that the petitioner "abandoned" his request to proceed *pro se* given that "[he] did not persist in his desire to appear *pro se* and it was not reasserted unambiguously

before [the presiding justice] at trial"), *aff'd*, 929 F.2d 61 (2d Cir. 1991); *People v. Kenner*, 272 Cal. Rptr. 551, 555 (Cal. Dist. Ct. App. 1990) (finding the appellant abandoned or withdrew his self-representation motion because he "had ample opportunity to call the court's attention to the neglected [self-representation] motion, but did not"; his "conduct throughout the proceedings indicated unequivocally that he agreed to and acquiesced in being represented by counsel"; and "[a]lthough he spoke more than once, he said and did nothing suggesting any dissatisfaction with counsel's representation").[4]

Like *McLemore* and the persuasive cases cited, Davis's conduct demonstrated his intent to abandon any request for self-representation that he may have made. As a consequence, the trial court's inaction with regard to such a request did not constitute structural error.

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[4] In Arizona, unlike some of these jurisdictions, a request to exercise the right of self-representation may only be abandoned, not waived. *See McLemore*, 230 Ariz. at 580, ¶ 28 (rejecting the argument that the defendant's subsequent conduct waived his right of self-representation because that right had not "ripened or become effective until the court [ ] granted the request").

II

THE TRIAL COURT PROPERLY DENIED DAVIS'S POST-TRIAL REQUEST FOR SELF-REPRESENTATION BECAUSE (1) THE REQUEST WAS UNTIMELY, AND (2) DAVIS DID NOT INTELLIGENTLY AND KNOWINGLY WAIVE THE RIGHT TO COUNSEL.

Davis contends that the trial court's denial of his post-trial request to represent himself was an abuse of discretion. (O.B., at 17.) Davis's request was untimely, for which reason alone denying it was proper. Further, Davis's allegation that the trial court based its ruling on an unsubstantiated finding that he was incompetent to waive the right to counsel is baseless. (*Id.* at 17–18.) The trial court denied the request, not because Davis was incompetent, but because Davis did not waive his right to counsel "intelligently and knowingly," a necessary condition for self-representation. More specifically, Davis did not understand the consequences of waiving *all* counsel because the record demonstrates that he only wanted to file *pro se* motions to withdraw his *appointed* counsel and to vacate the judgment. Absent a valid waiver of counsel, the trial court did not abuse its discretion in denying Davis's self-representation request.

A. STANDARD OF REVIEW AND APPLICABLE LAW.

The right of self-representation goes hand-in-hand with waiving the right to counsel because a defendant must intelligently and knowingly relinquish the

right to counsel in order to represent himself. *Faretta*, 422 U.S. at 835.

A finding that the defendant waived his right to counsel is reviewed for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, 359, ¶ 16 (2009). "Whether [the defendant] has made an intelligent and knowing waiver of counsel is a question of fact. A waiver finding is based substantially on the trial judge's observation of the defendant's appearance and actions." *Id.* at 358, ¶ 10 (citation omitted).

When determining whether the defendant has waived his right to counsel, "courts indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (emphasis added) (citations omitted); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'") (footnotes omitted), *overruled on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981); *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989) ("Because a defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself.") (citation omitted); *Hodge*, 761 F. Supp. at 1001 (acknowledging that a "strong presumption against waiver of the right of counsel" exists) (citation omitted).

The presumption against waiver exists to ensure that the automatic right to counsel is not inadvertently waived so that a defendant may represent himself. As succinctly explained in *Hodge v. Henderson*:

> When the right to counsel and the right to proceed *pro se* collide, it is reasonable to favor the right to counsel over the right to self-representation in that the former attaches automatically and has to be affirmatively waived to be lost whereas the latter does not attach until it is asserted. The consequences of being deprived of counsel are far more serious than those of not being allowed to proceed uncounselled [sic].

761 F. Supp. at 1003 (citations omitted); *accord Johnson*, 304 U.S. at 465; *Adams*, 875 F.2d at 1444; *McLemore*, 230 Ariz. at 576, ¶ 17.

A finding of no valid waiver will be upheld for any legally correct reason. *State v. Doss*, 116 Ariz. 156, 160 (1977); *State v. Weaver*, 244 Ariz. 101, ¶ 8 n.1 (App. 2018).

B. RELEVANT FACTS.

Neither party nor the court appeared to raise any issue about Davis's competency. (*See* S.R.O.A. 13, 15, 34, 37.) And, according to Davis's 2016 presentence report, Davis did not have any mental problems, but he experienced "mood swing[s]." (S.R.O.A. 33.)

1. *Davis's post-trial request.*

Davis "put in a motion" sometime after his trial concluded. (R.T. 7/17/17, at 5.) Later statements made by Davis and his attorney suggested that

"put in a motion" meant Davis had submitted a motion to his attorney that asked for his attorney's withdrawal. (*Id.* at 3–5.)

On July 17, 2017, the date set for sentencing, Davis's attorney informed the trial court:

> Davis [] filed a motion since our trial to have me withdrawn — taken off the case, and I hadn't seen it yet [sic]. … I don't know if it's withdraw me [sic] and appoint somebody else or if he wanted to be pro per. **He has indicated to me he doesn't want me to have anything else to do with the rest of his case.** That is absolutely fine. So I think we need to determine counsel if that is what [] Davis desires.

(*Id.* at 3–4 (emphasis added).)

Having also not seen Davis's *pro se* motion, the court invited Davis to clarify his position. (*Id.* at 4–5.) Davis then explained that he did not want his appointed attorney to represent him. (*Id.* at 5–7.) He claimed that his attorney falsely told him that a bench trial was not "good" for criminal trials; and Davis claimed that he had wanted a bench trial because his case involved "technicalities." (*Id.*) The defense attorney denied the allegation that he lied, and Davis responded, "Wow." (*Id.* at 7–8.)

Davis further complained that his attorney did not file a motion for a new trial or a motion to vacate the judgement, as Davis had wanted. (*Id.* at 7.) The trial court explained to Davis that a motion for a new trial would be untimely and no extension to file such a motion would be granted; and, so, it

denied Davis's request to the extent Davis was asking to represent himself for the exclusive purpose of filing such a motion. (*Id.* at 8–9; S.R.O.A. 87, at 2.)

The court also explained to Davis that a motion to vacate the judgment could still be filed but not until after sentencing. (R.T. 7/17/17, at 10–11.) It went on to explain that imposing sentence was all that remained of Davis's trial; and that only a few sentencing issues were outstanding because Davis already admitted to some of his prior convictions during trial and the court's sentencing discretion was limited. (*Id.* at 11–12.)

The court next asked Davis to clarify if he wanted to start representing himself at sentencing, or if he wanted to wait and represent himself only for a post-sentence motion to vacate the judgment. (*Id.* at 12–13.) Rather than answer the question, Davis responded, "So basically it doesn't matter?" (*Id.* at 13.) The court stated that Davis's answer did matter even though the remaining issues were narrow, to which Davis replied: "I understand everything you are saying. Nobody is understanding [sic] that I have been railroaded to this point." (*Id.*)

Assuming Davis's last comment referred to the defense attorney's alleged bench-trial lie, the trial court stated that it would have similarly found Davis guilty based on the trial evidence, rendering any alleged lie not prejudicial. (*Id.* at 13–14.) The prosecutor added that the State would not have

agreed to a bench trial had Davis requested one. (*Id.* at 28.) The trial court also noted that the jury proved itself to be fair and impartial in its deliberations given that it found none of the State's alleged aggravating factors proven. (*Id.* at 14.) Davis responded, "I'm not worried about the factors or the time or whatever"; instead, Davis challenged whether the knowledge element for theft-of-means was proven and believed that such a "technicalit[y]" was best decided by a judge than jury. (*Id.* at 6, 14.)

Although the trial court informed Davis that knowledge was an issue for appeal and not sentencing, Davis complained repeatedly, "That is what I'm saying. It is a railroad," followed by, "I don't want [the defense attorney]" as my counsel. (*Id.* at 14–15.) The trial court subsequently explained that it did not believe Davis was in a "present state of mind to represent [him]self [that day]" or that he was "calm enough" or "cogently following things" because he continuously failed to answer the court's question about when he wanted to start representing himself, and appeared to only want to argue. (*Id.* at 15–16.) Davis disagreed and expressed that he just wanted to be heard. (*Id.* at 16.)

Thereafter, the following dialogue occurred:

> THE COURT: … You want to represent yourself here today. Let's go ahead and ask you the questions.
> . . . .
> THE COURT: **Do you suffer from any mental illness?**

THE DEFENDANT: **They say I'm SMI.**

THE COURT: When was the designation that you were SMI, sir?

THE DEFENDANT: They say I am. Then they say I am not, and then they say I am. This is the State. **I don't know. They say I am. They say I'm not. They say I am.**

THE COURT: Are you taking any medications for your —

THE DEFENDANT: No.

THE COURT: — for the allegation, I guess, that you are SMI?

THE DEFENDANT: No.

THE COURT: You have been — the SMI that you have been diagnosed with is, what, bipolar, sir?

THE DEFENDANT: Bipolar, schizophrenic, something else.

. . . .

THE COURT: **Sir, do you understand that there are dangers and disadvantages of representing yourself? Do you understand that?**

THE DEFENDANT: **No.**

THE COURT: **Okay. Well, let's talk through this.** Are you trained in the law?

THE DEFENDANT: No.

THE COURT: Have you ever represented yourself before?

THE DEFENDANT: No.

THE COURT: Have you had any legal education?

THE DEFENDANT: No.

THE COURT: Okay. Do you understand that having a lawyer represent you, a lawyer is versed in the law, procedure, courtroom procedures; **a lawyer is trained in all of these areas where you are not trained, sir. There may be — it may be of great benefit to have a lawyer represent you. Do you understand that?**

THE DEFENDANT: **Yes.**

. . . .

THE COURT: … The jury found that you were on probation at the time of the 2016 case occurred [sic]. The jury did not find any aggravating circumstances that the State alleged. So, therefore, I believe that I'm locked into the presumptive term on [this] case; and really what is in play is the length of your sentence that will run consecutively on the 2012 [probation-violation] case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, the State may disagree with me on that determination; and **it may be to your significant benefit to have a lawyer able to argue this [sentencing issue] because your lawyer is trained in the law. Do you understand that?**

THE DEFENDANT: **Not really. I don't understand what the benefit of it is.**

THE COURT: The State — I anticipate the State is going to argue that I can still impose an aggravated term in the 2016 case.

THE DEFENDANT: Okay.

THE COURT: And I read the law a little bit differently. I think having a veteran-experienced lawyer like [the defense attorney] might be of tremendous assistance to you to rebut the legal argument that the State, I'm anticipating, is going to make here later today. **Do you understand that it may be to your benefit to have a lawyer representing you when the law starts getting argued?**

THE DEFENDANT: **I think it will be because I don't know the law.**

THE COURT: You are right.

THE DEFENDANT: **I'm just being—I mean, I know you think I'm being angry or violent or argumentative. I'm just saying it's kind of hard when the trust has been broken especially when [my attorney] sat here and lied to me. That is what I'm saying.**

THE COURT: I understand where you are coming from. I really — I do understand. Sir, you understand the sentences must be stacked under Arizona law? You understand that?

THE DEFENDANT: Yeah, they are going to stack another 3 years on top.

THE COURT: That I'm required by law to do that, right. I just have to confirm that you understand that. You do understand that? Yes?

THE DEFENDANT: Yes.

THE COURT: Okay. You understand that for the last sentence that you serve, you are required to serve a term of community supervision. It is one day for every seven days. You understand that?

THE DEFENDANT: Yes.

. . . .

THE COURT: Sir, you understand if you represent yourself, you are going to be held to the same standard as an attorney regarding the presentation of your case at both the trial on the priors and at the time of sentencing. Again, it includes: Knowledge of courtroom procedure, applicable case law, Arizona Criminal Code, Arizona Rules of Criminal Procedure and rules of evidence. Do you understand that?

THE DEFENDANT: Your Honor?

THE COURT: Yes, sir.

THE DEFENDANT: What was that based on again, on the 2016 case?

THE COURT: The 2016 case. The presumptive term is 11 and a quarter years. The mitigated term is 7 and a half years. The aggravated term is 25 years. Under the law, that is what the range is. My reading of the law — which I'm thinking the lawyers are — I'm probably going to appreciate some legal argument on this. My reading is that my hands are tied at 11 and a quarter years. My reading is that the only thing that I have got some flexibility on is how long the misconduct involving weapons sentence should be [for purposes of the probation-violation sentence]; whether it should be 2 and a half years, a presumptive term or less than that all the way down to 1 year or more than that all the way up to 3.75 years. That is the only thing that I believe is in play.

THE DEFENDANT: Well, it's all about the same amount of time. **You can go ahead and give me the 3 and a half years on top of the 11 and half years and just postpone it so I can see my family at court. I mean, this is all a waste of time. 11 and a half years, 3 and a half on top, what is the difference? That is still 14 years, a year later, 12 years and 2 years, what is the difference? It doesn't matter. You can go ahead and give me the 2 and a half years and go ahead and max it out.** That way you postpone it. I can see my family. I was supposed to go to court on the 18th. That is what they said, the 18th. I'm supposed to go into jail on the 18th. **My family isn't here so you can go ahead and do what you want to do. Max it out, you know what I mean; and it is what it is.**

THE COURT: The Court finds that the Defendant is — [ ] Davis, I'm not letting you represent yourself. You are not making wise decisions. Based on your prior mental health diagnosis that you are bipolar, I do not believe that you are in a mental state right now where you can effectively represent yourself free from

> emotion and knee-jerk reactions. Quite frankly, sir, I have never had anyone who wants to be maxed out due to an emotional response.

(*Id.* at 17–18, 20–21, 23–27 (emphasis added).) Davis did not object to the court's ruling. (*See id.* at 27–29; S.R.O.A. 87.)

Further into that same proceeding, but before the trial court imposed a sentence, Davis's attorney moved for a continuance to allow for a mitigation hearing, something Davis's family could attend; Davis readily agreed and the court granted the motion. (R.T. 7/17/17, at 55–56.)

On the day set for the mitigation/sentencing hearing, though still represented by counsel, Davis filed a *pro se* motion to "[s]et aside the verdict of judgment" and, in it, requested an evidentiary hearing. (S.R.O.A. 97.) When given the opportunity to address the court at the mitigation/sentencing hearing, Davis did not mention any remorse or other factor that could mitigate his sentence. (*See* R.T. 8/18/17, at 7–11, 14–15.) He only clarified the reason he previously "wanted to go pro per," explaining that he generally wanted to move to set aside the verdict because he believed that the indictment and his conviction were based on police lies and that he could prove his innocence if his *pro se* "motion for an evidentiary hearing" was granted. (*Id.* at 8–10.) Davis also clarified the intended meaning of his prior "max it out" comment. (*Id.* at 10.) He stated: "What I meant by that when I said, I don't care about the

years because [sic] I know I'm innocent of this crime. If I beat this crime then my probation is void." (*Id.*)

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DAVIS'S POST-TRIAL REQUEST TO REPRESENT HIMSELF.

1. *Davis's request was untimely.*

It was proper to deny Davis's self-representation request because the request was not timely. A request is timely only if it was made before jury selection began. *Weaver*, 244 Ariz. at ¶¶ 9–10; *see also State v. Boggs*, 218 Ariz. 325, 338, ¶ 59 & n.4 (2008) (stating it is within the court's discretion to deny a motion for self-representation that was made "in the middle of the sentencing proceedings"); *State v. Cornell*, 179 Ariz. 314, 326 (1994) ("[I]t is uniformly held that all motions [for *pro se* status] made after jury selection has begun are untimely ….") (citation and internal quotation marks omitted).

Davis's request was untimely because Davis made it on the day set for sentencing, before it was known the proceeding would be continued and long after jury selection occurred. *See Jackson*, 921 F.2d at 888 (finding a *Faretta* request made after the defendant moved for a new trial untimely); *Ramirez v. Yates*, 71 F. Supp. 3d 1100, 1118 (N.D. Cal. 2014) (finding the defendant's *Faretta* request untimely when it was made on the day set for sentencing).

"Denial of a defendant's untimely motion is not an abuse of discretion." *Cornell*, 179 Ariz. at 326 (citation omitted); *see also Boggs*, 218 Ariz. at 338,

¶ 61 ("When a defendant has waived his right to self-representation, the trial court may exercise its discretion in deciding whether to permit or deny a subsequent attempt to proceed pro per.") (citation omitted). Accordingly, the trial court did not abuse its discretion when it denied Davis's untimely request.

On a related note, because Davis's request for self-representation was untimely, it was within the trial court's discretion to balance the integrity and efficiency of the proceedings against Davis's right of self-representation. *See Boggs*, 218 Ariz. at 338, ¶¶ 59–62 (finding no abuse of discretion to deny the defendant's untimely subsequent request for self-representation because the court wanted to avoid the inconvenience of having the defendant go back-and-forth on the issue). A person's right to represent himself is not absolute, particularly in this case where Davis appeared to have been only requesting permission to file untimely and fruitless motions *pro se*. *See Martinez v. Ct. of Appeal of Calif., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000) ("Even at the trial level, … the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."); *Boggs*, 218 Ariz. at 338, ¶ 59 ("The right to proceed without counsel is not unqualified, but must be balanced against the government's right to a fair trial conducted in a judicious, orderly fashion") (citation and quotation marks omitted); *Lamar*, 205 Ariz. at 436, ¶ 27 (explaining that the defendant's

"right to represent himself does not exist in a vacuum"); *State v. De Nistor*, 143 Ariz. 407, 413 (1985) (explaining that the trial court may balance the right of self-representation with other factors, including "the disruption and delay expected in the proceedings if the request [for self-representation] were to be granted) (citation omitted).

2. *Davis did not intelligently and knowingly waive his right to counsel.*

Untimeliness aside, Davis's claim that the trial court improperly denied his request for self-representation still fails. The trial court denied Davis's request because it found that Davis's waiver of counsel was not made "intelligently and knowingly," not because it implicitly found Davis to be incompetent, as Davis alleges (O.B., at 16–17).

The right to proceed *pro se* applies at all stages of criminal proceedings, including sentencing. *See Dann*, 220 Ariz. at 359, ¶ 16 (resentencing); *Henry*, 189 Ariz. at 550 (sentencing). Before he may represent himself, a criminal defendant must waive his right to counsel. *Godinez v. Moran*, 509 U.S. 389, 396 (1993). A valid waiver of counsel is one made intelligently, knowingly, and voluntarily by a defendant competent to waive his right to counsel.[5] *Id.* at

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[5] The voluntariness of Davis's waiver is not at issue. Neither the State nor Davis suggests that Davis was coerced to waive counsel.

399–401; *Faretta*, 422 U.S. at 835; *McLemore*, 230 Ariz. at 577, ¶ 18; *see also* Ariz. R. Crim. P. 6.1(c).

The "intelligent and knowing" requirement for a waiver of counsel refers to a person's actual understanding. *Godinez*, 509 U.S. at 401 n.12. While there is no prescribed test to satisfy this requirement, a defendant is considered to have intelligently and knowingly waived his right to counsel if he knew what he was doing and made his choice "with eyes open." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (citation omitted); *see also Hodge*, 761 F. Supp. at 1001 ("In other words, a trial judge must determine whether a defendant genuinely means what he says.") (citation omitted). At a minimum, the defendant should have understood "(1) the nature of the charges against him, (2) the dangers and disadvantages of self-representation, and (3) the possible punishment upon conviction." *Dann*, 220 Ariz. at 360, ¶ 24 (citation omitted). The court may consider the defendant's conduct, background, understanding, and knowledge when making that determination. *Johnson*, 304 U.S. at 464; *Dann*, 220 Ariz. at 359, ¶ 16; *Doss*, 116 Ariz. at 160.

Davis's responses did not satisfy the "intelligent and knowing" requirement. During the colloquy, Davis admitted, both initially and even after further explanation, that he did not "really" understand the benefits of having a lawyer. (*Supra*, Section II(B).) When he finally acknowledged those benefits,

Davis *simultaneously* complained that "what [he was] saying" was that he lost trust in his appointed attorney. (*Supra, id.*) By making that simultaneous concession and loss-of-trust complaint, Davis clarified that his motive for making a self-representation request had nothing to do with self-representation and everything to do with his dissatisfaction with his appointed attorney.

Davis complained pretrial and post-trial about his appointed attorney not filing certain motions and allegedly lying to him; Davis "put in a motion" regarding his representation; when asked to clarify what Davis sought in that "motion," his first response was that he did not want his appointed attorney to represent him; he repeated his desire to have his attorney removed at least twice in the sentencing proceeding; Davis clarified after sentencing that his intended objective when he made his self-representation request at sentencing was to file a *pro se* motion to vacate the judgment, believing himself to be innocent and in the absence of his attorney's cooperation; and Davis filed a *pro se* motion to set aside the verdict on the day he was sentenced, despite still being represented by counsel. (*Supra*, Sections I(B), II(B).) With that history in mind, Davis's simultaneous loss-of-trust complaint reasonably established that Davis wanted to waive his appointed counsel (or appoint new counsel) rather than waive all counsel. Given such ambiguity, it cannot reasonably be said that Davis knew exactly what he was asking for, or that he understood the

consequences of his inadvertent election to waive all counsel and represent himself—at least not enough to overcome the strong presumption against a waiver of counsel.

In addition, Davis's request, itself, lacked sincerity. As the trial court observed, Davis was emotional and "not calm" before and during the colloquy. (*Supra*, Section II(B); *see also* Statement of the Case.) He was frustrated with his attorney, felt "railroaded," or attacked, by the system, and he was upset about the possibility of not seeing his family before being sentenced. (*Supra*, Section II(B); *see also* Section I(B).) Davis's self-representation request and attempted waiver were thus, more likely than not, impulsive reactions—part of one of Davis's "mood swing[s]" (*supra*, Section II(B)). In fact, in the closely-related context of determining whether a self-representation request is unequivocal, emotional requests of the kind Davis made demonstrate a lack of sincerity and justify the denial of a request for self-representation. *See United States v. Edwards*, 535 Fed. App'x. 285, 287–88 (4th Cir. 2013) (finding no error in denying the petitioner's self-representation request where his reasons suggested that he was making the request reluctantly, believing he had little choice, partly because he mistrusted his attorney, was disappointed with his representation, and "would rather proceed pro-se than be represented" by that attorney who he believed was incompetent); *United States v. Vampire Nation*,

451 F.3d 189, 207 (3d Cir. 2006) ("[W]e read [the petitioner's] motion as an expression of his frustration with our judicial process's requirement that communications take place between attorneys, not between parties and attorneys, and not as a clear request for self-representation."); *Hodge*, 761 F. Supp. at 1003 (dismissing the petitioner's claim that the lower court wrongly denied his *Faretta* request, in part because the request was only made once during an angry outburst); *Stowe v. State*, 590 P.2d 679, 681–82 (Okla. Crim. App. 1979) (holding the defendant's statement that he wanted nothing to do with his defense attorney and "would rather defend [him]self" was not an unequivocal request to represent himself partly because the defendant made the statement during an angry outburst, while frustrated with his attorney's poor communication). The emotional aspect of Davis's request considered, and the lack of sincerity and rational understanding it signifies, Davis did not act "with eyes open" when he opted to waive counsel. In other words, Davis did not intelligently and knowingly waive all counsel.

Davis contends, on the other hand, that the court found an invalid waiver of counsel based entirely on a finding of incompetency. (O.B., at 16–17.) Unlike the "intelligent and knowing" requirement, the competency requirement for a waiver of counsel refers to the defendant's capacity or ability to understand rather than his actual understanding. *See Godinez*, 509 U.S. at 401

n.12 ("The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.") (emphasis in original) (citations omitted).

Because the court's ruling was based entirely on Davis's lack of actual understanding, Davis's argument lacks merit. According to his argument, the court allegedly found Davis incompetent, and denied his request on that ground, because it referenced Davis's "prior mental health diagnosis" in its ruling and found that Davis was not "in a mental state" to represent himself "free from emotion and knee-jerk reactions." (*See* O.B., at 17; R.T. 7/17/17, at 27–28.) A defendant's ability to represent himself (as opposed to his ability to waive a right) is admittedly not a factor that the trial court should have considered when making its waiver ruling, *see Godinez*, 509 U.S. at 399; however, the court's ruling was ultimately not erroneous because, as already explained, a legally correct reason (no intelligent and knowing waiver) supports it. *See Doss*, 116 Ariz. at 160; *Weaver*, 244 Ariz. at ¶ 8 n.1. As for the trial court's reference to Davis's mental health, the trial court was only conveying its finding that Davis lacked actual understanding of the choice he

was making, though the court's choice of words rendered its reasoning somewhat confusing.

Indeed, the trial court would not have questioned Davis's competency. A criminal defendant is presumed competent. *See State v. Hegyi*, 242 Ariz. 415, 417, ¶ 13 (2017) (acknowledging the presumption of sanity). Competency becomes a concern only when "facts and circumstances known to the trial judge" show that "there was or should have been a *good faith doubt* about the defendant's *ability* to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and to make a reasoned choice among the alternatives presented," in which case the trial court has a duty to conduct a hearing to determine competency. *Cornell*, 179 Ariz. at 322–23 (emphasis added) (citations and quotation marks omitted); *see also State v. Johnson*, 147 Ariz. 395, 398 (1985) ("[A] court is required to order a mental examination only if reasonable grounds exist to question the defendant's mental condition.") (citation omitted).

The trial court has broad discretion to determine if a good-faith doubt exists to warrant a competency hearing. *State v. Salazar*, 128 Ariz. 461, 462 (1981). "Such a doubt arises when there is *substantial* evidence of incompetence." *Cornell*, 179 Ariz. at 323 (emphasis added) (citations and quotation marks omitted). Evidence of incompetence may include the

defendant's background, history of irrational behavior, and trial demeanor; the trial court's personal observations of the defendant; and medical opinion. *State v. Glassel*, 211 Ariz. 33, 44–45 (2005); *Cornell*, 179 Ariz. at 323; *Johnson*, 147 Ariz. at 398.

Davis was presumptively competent and nothing in the record overcame that presumption, a point with which Davis agrees (O.B., at 17). Neither party at any time requested a competency hearing and the trial court did not order one *sua sponte*. (*See supra*, Section II(B).) Davis was occasionally disruptive or emotional (*e.g.*, banging on walls in reaction to a guilty verdict, complaining of unfairness, expressing frustration, being argumentative), but his overall courtroom conduct and testimony were mostly unremarkable; and neither the court's observations of Davis nor the record in general suggests otherwise. (*See supra*, Statement of the Case; Section II(B).)

Moreover, Davis's claim of having been diagnosed with a mental illness or disorder—"[b]ipolar, schizophrenic, or something else"—did not give rise to a good faith doubt about Davis's competency. Such a diagnosis, even if true, was simply one of many factors regarding competency; it hardly constituted substantial evidence of incompetence without corroboration. *Cf. Indiana v. Edwards*, 554 U.S. 164, 175 (2008) ("Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an

individual's functioning at different times in different ways."); *cf.* Ariz. R. Crim. P. 11.1(b) ("A defendant is not incompetent to stand trial merely because the defendant has a mental illness, defect, or disability.").

Absent substantial evidence of incompetence, the court would not have questioned Davis's competency, let alone base its ruling on that ground. *See State v. Moody*, 208 Ariz. 424, 443, ¶ 49 (2004) ("We presume that a court is aware of the relevant law and applies it correctly in arriving at its ruling.") (citation omitted).[6] Because Davis's responses during the colloquy, and the sentencing proceedings overall, demonstrated Davis's lack of actual understanding, and in turn an invalid waiver, denying Davis's request for self-representation was proper. The trial court did not err in ruling as it did.

D. EVEN IF THE TRIAL COURT ERRED IN DENYING DAVIS'S REQUEST, THE ERROR WAS HARMLESS.

Assuming the trial court's denial of Davis's self-representation request was erroneous and, as a result, erroneously deprived Davis of his right of self-representation, the court's ruling was nevertheless harmless under these specific facts. *See Sullivan v. Louisiana*, 508 U.S. 275, 278–79 (1993)

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[6] Davis's reliance on *Indiana v. Edwards*, 554 U.S. 164 (2008), *Odle v. Woodford*, 238 F.3d 1084 (9th Cir. 2001), and *State v. Gunches*, 225 Ariz. 22 (2010), is unavailing as those cases concern competency and are thus inapposite. (O.B., at 17–19.)

(explaining that most constitutional errors are amenable to harmless-error analysis).

The erroneous deprivation of a person's right of self-representation is generally structural error. *Ring*, 204 Ariz. at 552; *see also McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless.").

However, in the Ninth Circuit, such an error is subject to harmless error analysis if—as here—the error occurred at sentencing and the guilt-or-innocence determination was isolated from any harm. *See United States v. Spangle*, 626 F.3d 488, 494 n.2 (9th Cir. 2010) (acknowledging that the harmless error analysis applies when a defendant is improperly denied the right to represent himself at sentencing) (citation omitted); *United States v. Maness* 566 F.2d 894, 897 (9th Cir. 2009) (analyzing for harmless error and concluding that the erroneous denial of a self-representation motion at the sentencing phase was "not intrinsically harmful to the entire proceedings") (citation omitted); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002) (reasoning that an erroneous denial of counsel at the sentencing phase "did not

affect the conduct of the trial from beginning to end" and "did not affect the framework within which the trial proceeded," and was thus harmless) (quotation marks omitted); *but see Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017) (defining three types of structural errors, including an error where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest" (*e.g.*, the right to conduct one's own defense)) (citation omitted).

Although it does not appear that Arizona courts have addressed this exact issue, their reasoning in analogous circumstances are comparable to the Ninth Circuit's reasoning favoring harmless error analysis in the sentencing context. One example is *State v. Ring*. Ring challenged whether the lower court's failure to submit his capital sentencing factors to a jury violated his constitutional right to a jury trial. *Ring*, 204 Ariz. at 543, ¶ 3. The United States Supreme Court agreed with Ring, concluding that only a jury may find "an aggravating circumstance necessary for imposition of the death penalty." *Ring v. Arizona*, 536 U.S. 584, 609 (2002). On remand, the Arizona Supreme Court questioned whether the violation of Ring's right to have a jury decide his sentencing factors should be analyzed for structural error or harmless error. *Ring*, 204 Ariz. at 552–53, ¶¶ 44, 47. It concluded that the sentencing error was *not* structural and thus reviewable for harmless error. *Id.* at 555, ¶ 53.

In reaching that conclusion, *Ring* reasoned that the sentencing judge's error in imposing the death sentence "did not render the entire trial fundamentally unfair" because (1) an impartial jury decided Ring's guilt using the correct standard of proof; (2) Ring had legal representation available during all phases of prosecution; and (3) the sentencing judge was impartial in its decision-making and also used the correct standard of proof, beyond a reasonable doubt. *Id.* at 554, ¶ 50 (citing *Neder v. United States*, 527 U.S. 1, 9 (1999)) (footnote omitted); *cf. State v. Bush*, 244 Ariz. 575, ¶ 67 (2018) (concluding that the trial court's failure to instruct the jury that the defendant was not eligible for release if sentenced to life imprisonment was not structural error because such an error only occurs during a capital sentencing proceeding, and it neither deprives the defendant of basic protections nor infects the trial from beginning to end).

Applying *Ring*'s logic, as well of that of the Ninth Circuit, to the unique circumstances of Davis's case, the result is the same: any error here should be analyzed for harmless error. The trial court's ruling denying Davis self-representation at sentencing did not infect Davis's trial from beginning to end with fundamental unfairness; any harm inflicted was limited to the sentencing proceedings; and Davis had legal representation at all stages of prosecution, including throughout the trial (*see supra*, Sections I(B)–(C)).

Moreover, any potential harm to Davis is amenable to harmless error analysis because it is quantifiable sans speculation, thereby distinguishing it from most structural errors. *See Weaver*, 137 S. Ct. at 1908 (defining some structural errors as those that "are simply too hard to measure," or where proving harmlessness would be futile); *State v. Anderson*, 197 Ariz. 314, 323–24 (2000) ("[Trial errors] are susceptible to a harmless error analysis because they may be quantitatively assessed in the context of … other evidence. But [structural] errors … affect the entire conduct of the trial from beginning to end, damage the framework within which the trial proceeds, and are therefore not subject to harmless error analysis.") (citation and quotation marks omitted).

Davis's classification as a category three repetitive offender was irrefutable: Davis admitted to one historical prior at trial (the 2012 felonies combined); and Davis's probation officer and "pen pack" established the second historical prior (armed robbery). (*Supra*, Statement of the Case.) *See* A.R.S. § 13–703(C) (classifying the defendant as a category three repetitive offender if he has two historical prior felony convictions). The court also imposed the presumptive sentence (11.25 years), which was the only sentence Davis could have received under these circumstances because no mitigation evidence was presented and Davis alluded to none, and the jury found no aggravators. (*Supra*, Statement of the Case; *see also* Section II(B).) *See*

A.R.S. §§ 13–701(C) (permitting a lesser or greater sentence than the presumptive only if aggravation or mitigation factors are found); 13–703(J) (defining 11.25 years as the presumptive sentence for a class three felony committed by a category three offender). As a matter of law, Davis's sentence was the presumptive.

Furthermore, on this record, it can reasonably be determined what Davis would have said if he represented himself, thereby eliminating any speculation about what Davis would have said on his behalf to mitigate his sentence. *Cf. State v. Mann*, 188 Ariz. 220, 230 (1997) (finding the defendant's absence at sentencing structural error because "one cannot know what a defendant might have said" about testimony given at that proceeding). Davis's "max it out" comment demonstrates that Davis was indifferent about his sentence. (R.T. 7/17/17, at 28.) Davis did not advocate for a lesser sentence when he was given a chance to speak at the mitigation/sentencing hearing. (R.T. 8/18/17, at 7–11, 14–15.) Instead, Davis claimed innocence and asked for an evidentiary hearing to prove his innocence, which demonstrated that Davis was concerned solely with proving his innocence, not mitigating his sentence. (*See id.*) His complaints and allegations made during the sentencing proceedings about the defense attorney, police lies, and the unproven knowledge-element further demonstrate that Davis only desired to dispute his guilt. (*See id.*; R.T. 7/17/17,

at 5–16, 25, 27–28.) Consequently, had Davis represented himself at sentencing, it is probable that Davis would have only argued his innocence, advocated for an evidentiary hearing, or blamed his trial attorney's incompetence; none of those arguments would have mitigated Davis's sentence. Therefore, Davis's sentence would have been no different had Davis represented himself at sentencing.

Any alleged error was thus harmless. Should the court disagree with the State's position, then Davis is only entitled to resentencing on his theft-of-means conviction; the error does not jeopardize the conviction itself (or Davis's probation violation[7]). *Cf. State v. Montano*, 206 Ariz. 296, 301, ¶ 27 (2003) (Jones, J., concurring) (recommending a remand for resentencing if the court committed structural error by not having the jury determine all questions pertaining to sentencing); *State v. Harrison*, 195 Ariz. 1, 5, ¶ 17 (1999) (affirming lower court's remand for resentencing when the trial court committed structural error while sentencing the defendant); *People v. Wardlaw*, 849 N.E.2d 258, 260 (N.Y. Ct. App. 2006) (acknowledging that, where the defendant's right to counsel was violated at a suppression hearing,

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[7] Davis's sentence for his probation violation would not be affected by any remand for resentencing because that conviction is not at issue in this appeal. (*Supra*, note 1.)

and if the error did not affect the trial, the appropriate relief was a new suppression hearing, not a reversal of the conviction) (citations omitted).

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. . .

CONCLUSION

Based on the foregoing authorities and arguments, the State of Arizona respectfully requests that this Court affirm the trial court's judgment and sentence.

Respectfully submitted,

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/s/
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. TORRENCE E. DAVIS, Appellant.	No. 1 CA-CR 17-0529 Maricopa County Superior Court Nos. CR2012-152527-001 DT and CR2016-135082-001 DT

APPELLANT'S REPLY BRIEF

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ISSUES PRESENTED FOR REVIEW

1. **"The federal and state constitutions (of Arizona) guarantee [a defendant] the right to waive counsel and to represent himself." *State v. Dann*, 220 Ariz. 351, 359 (2009). A defendant must unequivocally make a request to represent himself if it is to be considered. *Faretta v. California*, 422 U.S. 806, 819 (1975). When Mr. Davis made such a request on February 16, 2017, was the request unequivocal?**
2. **If a defendant makes a motion to represent himself, and that motion is not considered by the court, a failure of the defendant to remind the court of the motion may be considered an abandonment of the motion. *State v. McLemore*, 230 Ariz. 571, 580 (App. 2012). Whether or not a motion has been abandoned is determined by the totality of the circumstances. (*Id.*) Mr. Davis' motion of February 16, 2017 was not ruled on by the Court, nor brought up at subsequent hearings by Mr. Davis. Did he abandon the motion?**

ISSUE 1

Did Torrence Davis make an unequivocal demand to represent himself on February 16, 2017?

Argument

In Sum:

- On February 16, 2017, while addressing the trial court, Mr. Davis stated "Well if he doesn't want to, then I'm willing to put in the motions to go pro per myself, if I—" (Reporter's Transcript "R.T." 2/16/17 at 5.) At that point the court interrupted him to tell him he could go pro per if he wanted. (*Id.*) Mr. Davis responded with "I do. So if that's the case, I have to file, I have to go pro per, then that's what I want to do." (*Id.* at 5-6.)
- Mr. Davis' attorney interjected and asked to address an issue prior to the court ruling on the request of Mr. Davis. (*Id.* at 6.)
- The Court never addressed the motion of Mr. Davis. (*Id.* at 6-9.)
- This failure by the Court was structural error.
    - Mr. Davis made a clear and unequivocal request that all parties understood required a ruling based on the comments from his attorney.

- Such action (or lack thereof) resulted in an erroneous failure to accord Mr. Davis his properly asserted right to represent himself. (*McLemore* at 575, ¶15, *citing State v. Torres*, 208 Ariz. 340, 343-44, ¶11 (2004)).

Appellee's arguments have not changed these basic facts.

I. The Cases Cited By Appellee Support A Finding That The Statement From Mr. Davis Is Unequivocal.

"An unequivocal demand to proceed *pro se* should be, at the very least, sufficiently clear that if it is granted the defendant should not be able to turn about and urge that he was improperly denied counsel." *State v. Hanson*, 138 Ariz. 296, 300 (App. 1983). Such a definition applies to a clear statement without conditions such as "That's what I want to do."

A case cited by *Hanson* is *Meeks v. Craven*, 482 F.2d 465 (9th Cir. 1973). While helping to define what an unequivocal request would be, it is helpful to juxtapose what was not unequivocal there and the statement of Mr. Davis. In *Meeks* the court took note of the fact that but for one motion, the defendant was ok with his attorney proceeding forward with the case. (*Id.* at 467.) That is not what happened here, where Mr. Davis had multiple issues with the way his case was litigated and put no such qualifiers on his request. (R.T. 2/16/17 at 6-7.)

In addition, rather than the clear statement "That is what I want to do" that was made by Mr. Davis, the defendant in *Meeks* made his request by saying "I think I will." (*Meeks* at 467.) "An 'unequivocal' demand to proceed *pro se* should be, at the very least, sufficiently clear that if it is granted the defendant should not be able to turn about and urge that he was improperly denied counsel. 'I think I will' hardly meets the constitutional criteria for waiver of counsel." (*Id.*) Mr. Davis made clear he wanted to represent himself, and rather than equivocating with qualifiers and hesitant words like "I think," he clearly stated "That is what I want to do."

One case cited by appellee is *State v. Henry*, 189 Ariz. 542 (1997). First, the motion in that case was both considered and denied, the opposite of the circumstances here. (*Id.* at 546.) Second, the motion was immediately preceded by and included argument regarding a motion to change counsel for conflict, something that was not present or argued about by Mr. Davis. (*Id.* at 546-548.) In addition, the defendant in *Henry* clearly put preconditions on his request that the judge had no duty or interest in addressing. (*Id.* at 547-548.) No such preconditions or arguments were present in the request of Mr. Davis. While Mr. Davis did reference motions he wanted to file, he did not ask for the court's opinion on them or other considerations as a result of his request. Rather than an unequivocal request, the *Henry* opinion

termed the defendant's request "negotiation" and "thinking out loud." (*Id.* at 548.) Neither term applies here.

Another case cited by appellee is *Jackson v. Ylst*, 921 F.2d 882 (9th Cir. 1990), "The trial court properly may deny a request for self-representation that is a 'momentary caprice or the result of thinking out loud.'" (*Id.* at 888, *citing Adams v. Carroll*, 875 F.2d 1441, 1445 (9th Cir. 1989). In *Jackson*, the Court found that the defendant's request was this type of momentary caprice given that it came immediately after his request for a new attorney was denied, and was accompanied by complaints about that denial. (*Id.* at 888-889.) The Court found that his statements were not a request for self-representation, rather "it is quite clear that he wanted to be represented by a different attorney…" (*Id.* at 889.) Again, no such discrepancy or alternative intent is present here. Mr. Davis clearly said "I have to go pro per, that is what I want to do." He made no qualifiers about his attorney or anything else and gave no alternative intent. It was therefore not the 'momentary caprice' mentioned in *Jackson* and argued by Appellee.

Mr. Davis' post-conviction request for self-representation should also be included when considering whether or not it was a "momentary caprice." Although untimely, Mr. Davis made a 2nd request for self-representation at sentencing that was different than his request on February 16, 2017. (R.T. 7/17/17 at 5.) In this latter

request Mr. Davis did reference his earlier request, but also made complaints about counsel concerning issues that post-dated that request. (*Id.* at 7.) He again requested self-representation for the purpose of filing specific motions, without any qualifiers or equivocal language. (*Id.* at 13, 16.) His intent was clear on both occasions and showed his desire was neither momentary nor "thinking out loud."

In this case, Mr. Davis expressed an interest in representing himself, the trial court explained he had the right to if he wanted, to which Mr. Davis replied "I do…that's what I want to do." He put no qualifiers on his request, made no preconditions, did not ask for a different attorney, and asked for no predictions from the trial court. His request was therefore unequivocal and the court had a duty to evaluate it as such.

ISSUE 2

Mr. Davis did not ask the trial court to rule on his request after February 16, 2017. Did he abandon his motion?

Standard of Review

When a *Faretta* motion is properly made but the superior court fails to rule on it and it is not thereafter urged by the defendant, the analysis of whether or not such motion is abandoned is determined by the totality of the circumstances. (*McLemore* at 582, ¶35.) "Informative factors include but are not limited to a consideration of the defendant's opportunities to remind the court of a pending motion, defense counsel's awareness of the motion, any affirmative conduct by the defendant that would run counter to a desire for self-representation, whether the defendant waited until after a conviction to complain about the court's failure to rule on his or her motion (thus indicating the defendant was gaming the system), and the defendant's experience in the criminal justice system and with waiving counsel." (*Id.*) "At some point, the delay is long enough that it could be effectively deemed an impermissible denial of the motion resulting in a *per se* abuse of discretion and reversible error." (*Id.* at 582, ¶37.)

Argument

I. The Circumstances of the Case of Mr. Davis and Those In *McLemore* Are Not as Similar As Appellee Contends.

Appellee argues that *McLemore*, in which the Court of Appeals found that a motion for self-representation was abandoned, is analogous to Mr. Davis and supports a finding that this request was similarly abandoned. (A.B. at 15.) This argument disregards significant differences between Mr. Davis and the *McLemore* case.

One of the factors to be considered in the totality of the circumstances analysis is whether or not defense counsel was aware of the motion. This is a distinguishing factor between the two cases, and established beyond all doubt. "There is no indication in the record whether McLemore's appointed counsel … received or ever knew about the motion." (*McLemore* at 575, ¶11.) With Mr. Davis, the request was made in front of and with full knowledge of his attorney. In fact, the court's consideration was interrupted by defense counsel, who acknowledged a ruling would be needed after he was done speaking. (R.T. 2/16/17 at 7.)

In this same vein, although not mentioned specifically in the circumstances to be considered, one should consider the knowledge of the trial court. In both cases three different judges wound up working in the case after the motion was made.

(*McLemore* at 575, Electronic Instrument of Record "I" 48, 70.) As noted in the original brief, the request was not preserved in the minute entry of February 16, 2017. (I 48.) In *McLemore*, the motion was available for any court to look at if they chose to examine the record. (*Id.* at 574-575, ¶11.) The opposite was the case here.

The issue most relied upon by both the *McLemore* opinion and Appellee is the time between hearings and number of opportunities for the defendant to remind the court of his motion. (*Id.* at 582, A.B. at 14-15.) Here too there are two significant distinctions. The first is the time between the hearings. Mr. McLemore had a hearing set one month after his motion was filed. (*Id.* at 582, ¶38.) Mr. Davis was not in court again for 3 months, and it should be noted, at a time when the court and defense counsel were aware of the request. The second distinction is that Mr. McLemore remained silent even during a hearing to determine counsel. (*Id.* at 575, ¶13.) Once again, no such hearing was held in the case of Mr. Davis.

II. Other Circumstances Bear On the Totality That The Motion Was not Abandoned.

Appellee argues that Mr. Davis intended to abandon his motion given that he voiced many complaints and objections regarding other topics, particularly discovery and evidentiary issues, which appellee argues was ample opportunity to reassert his motion. (Answering Brief "A.B." at 14.) In fact, this conduct is one of

the factors identified by *McLemore* that would tend to show the motion was not abandoned. *McLemore* identified the factor of whether or not there is "any affirmative conduct by the defendant that would run counter to a desire for self-representation." (*Id.* at 582.) Rather than expressing such a desire, Mr. Davis appears to have expressed the opposite on a number of occasions. These would include lengthy discussions with the Court and the State regarding a number of evidentiary issues at the settlement conference referenced by Appellee. (A.B. at 14, R.T. 5/3/17 at 12-23.) One could almost see such conduct as Mr. Davis trying to represent himself regardless of the trial court's failure to rule on his motion.

The last paragraph of the *McLemore* opinion should also be considered when evaluating the case of Mr. Davis. "Despite our conclusion, we remind and encourage trial courts to promptly rule on defendants' motions to represent themselves to avoid the defendant incorrectly assuming the motion has somehow been denied when the defendant wants to pursue the right of self-representation. Moreover, such a delay places the defendant in a difficult position because the defendant might feel the need to work with appointed counsel but that cooperation might be deemed to be an abandonment of the *Faretta* motion." (*Id.* at 583, ¶39.) One might consider this paragraph to be the *McLemore* opinion conceding to common sense and circumstances alternate to what was found in that case. When the specific

circumstances of Mr. McLemore and Mr. Davis are compared, it is clear Mr. Davis falls into this concession much more so than the abandonment that appellee argues. In *McLemore*, there was no evidence that either the court or either attorney was ever made aware of the motion, the motion was not mentioned in court the next month nor even when there was a hearing to determine counsel, no complaints were made about the defense counsel, and the issue was not even raised after conviction. Here, the court and defense counsel were aware of the motion and it was ignored. Mr. Davis was not in court again until three months later. Mr. Davis continued to complain about discovery and other issues, particularly at his settlement conference, that were argued almost as if he was representing himself. Mr. Davis complained about his counsel and made a second request to represent himself after trial. Both a totality of the circumstances and common sense would what make it likely that Mr. Davis believed or had reason to believe that his request had been denied or otherwise disposed of and he had to manage his best accordingly. All of his actions following February 16, 2017 are consistent therein.

CONCLUSION

Mr. Davis once again submits that his *Faretta* rights for self-representation were violated and a remand is therefore warranted.

Respectfully submitted,

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ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. TORRENCE E. DAVIS, Appellant.	No. CR-_____-PR Court of Appeals No. 1 CA-CR 17-0529 Maricopa County Superior Court No. CR2012-152527-001 No. CR2016-135082-001 **PETITION FOR REVIEW** Oral Argument Requested

Appellant, through undersigned counsel, pursuant to Arizona Rule of Criminal Procedure 31.21, petitions the Arizona Supreme Court for review of the memorandum decision of the Arizona Court of Appeals, Division One, entered in the above cause on January 22, 2019. This petition is supported by the following memorandum of points and authorities.

RESPECTFULLY SUBMITTED February 21, 2019.

MARICOPA COUNTY PUBLIC DEFENDER

By /s/
JESSE FINN TURNER
Deputy Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. Issues Presented for Review

1. **On February 16, 2017, Mr. Davis made a request to represent himself which was not considered by the trial court. In order to avail himself of that right, his request had to be unequivocal. *Faretta v. California*, 422 U.S. 806, 819 (1975). If the request was unequivocal, the trial court was not allowed to ignore it. *Id.* Did the trial court err in failing to address the request of Mr. Davis?**
2. **After his request was ignored by the trial court, Mr. Davis did not raise it again prior to trial. Whether or not his motion was abandoned would be determined by a totality of the circumstances. *State v. McLemore*, 230 Ariz. 571, 580 (App. 2012). Does *McLemore* apply to the circumstances of Mr. Davis?**

II. Facts Material to Consideration of the Issue

At a Final Trial Management Conference on February 16, 2017, Mr. Davis directly addressed the Court about motions that he wanted filed. (Reporter's Transcript "R.T." 2/16/17 at 4-5.) When the Court informed Mr. Davis that only his attorney could file motions, Mr. Davis responded by saying "Well, if he doesn't want to, then I'm willing to put in the motions to go pro per myself..." (*Id.* at 5). After further discussion, Mr. Davis stated "So if that's the case, I have to file, I have to go

pro per, then that's what I want to do." (*Id.* at 5-6). Before the judge could consider the request, Mr. Davis' attorney stated "And, Your Honor, before the Court makes a ruling, there is one issue I was speaking with Mr. Elias (the State) this morning potentially one of the witnesses that we were going to be interviewing, the State is no longer intending on calling them, so that might put a wrench in my plans." (*Id.* at 6.) Further discovery discussions ensued and neither the Court nor Mr. Davis nor his Attorney brought the subject up again during the hearing. (*Id.* at 6-9.) The request was not reflected in the minute entry. (Electronic Instrument of Record "I" 48.) The request was not made again on the record prior to trial. Mr. Davis was represented by the same attorney on February 16, 2017 through the conclusion of the case. (I 48, 102).

Trial commenced on June 8, 2017. (I 70). A second request for self-representation was made after trial and denied after a full colloquy. (R.T. 7/17/17 at 7-28.)

III. Reasons to Accept Review

a. The Court of Appeals Was Incorrect In Finding The Request Of Mr. Davis To Be Equivocal.

The Court of Appeals found that the request by Mr. Davis to represent himself was equivocal based on the presence of "conditional statements." (Memorandum Opinion "Opinion" at 3, ¶ 6.) The conditional statements pointed out by the Court

are that he wanted his motions filed. (*Id.*) The Court of Appeals cited no authority for this ruling. (*Id.*)

i. Mr. Davis placed no conditions on his request.

Mr. Davis did not request that his motions be granted prior to his request to represent himself. He also did not say, nor make any indication that he wanted his attorney to resume representation after the motions were filed. His statement about representing himself was "That is what I want to do." The Court of Appeals has confused the statement of a reason for the placement of a condition.

ii. Precedent identifying conditional requests are in circumstances different from Mr. Davis.

A case mentioned by both Appellant and Appellee is *Meeks v. Craven*, 482 F.2d 465 (9th Cir. 1973). In *Meeks*, the defendant clearly only wanted one motion granted, and said he was otherwise fine with his attorney representing him. *Id.* at 467. This is the type of conditional request found to be equivocal. No such qualifiers were placed on the request of Mr. Davis.

iii. Other precedent favors the finding that Mr. Davis made an unequivocal request.

In *Adams v. Carroll*, 875 F.2d 1441 (9th Cir. 1989), the 9th Circuit found that a request was unequivocal even when based on another request being denied. In *Adams*, the defendant made a request for self-representation with the specific

perquisite that he wanted to represent himself if his request for new counsel was to be denied. *Id.* at 1444-1445. The defendant repeated this statement, and the Court found "Adams, by contrast took one position and stuck to it: if the court would not order substitute counsel, he wished to represent himself." *Id.* at 1445. The reasoning could well be identical here in the position Mr. Davis took and stuck to: If Mr. Davis could not have his motions heard through his attorney, he wished to represent himself. When comparing *Adams* to the case of Mr. Davis, this highlights the fact that the Court of Appeals in their memorandum opinion is confusing a condition with a reason.

In *Armant v. Marquez,* 772 F.2d 552, 555 (9th Cir. 1985), the 9th Circuit found a request to be unequivocal even when a defendant announced he was not ready for trial. The defendant made an unequivocal request, then said he was not ready for trial, and requested a continuance. *Id.* The Court in *Armant* found that even with this statement about not being ready without a continuance, the request was unequivocal. *Id.* No such preconditions, waffling, or comparable statements were made by Mr. Davis.

Similar to *Armant* is *United States v. Farias*, 618 F.3d 1049 (9th Cir. 2010). The defendant there made a request to represent himself, but stated he was not sure he wanted to proceed when the Court told him no request for a continuance he might make would be granted. *Id.* at 1051. The Court found this request was still

unequivocal as it found this lack of certainty was based on impermissible court action. *Id.* at 1054. The later equivocation was considered irrelevant. *Id.* at 1055.

In *State v. Henry*, 189 Ariz. 542, 548 (2010), the Arizona Supreme Court found a request to be equivocal as it was "thinking out loud," but the opinion still has relevance to this matter. The defendant in *Henry* wanted specific assurances from the court that his motions would be granted prior to making a request for self-representation. *Id.* at 547-548. This type of precondition offers a definitive dividing line in the case of Mr. Davis – Mr. Davis wanted the right to file his motions, but made no demands that they be granted before he requested self-representation.

b. Mr. Davis Did Not Abandon His Motion For Self-Representation.

The Court of Appeals applied the totality of the circumstances test found in *McLemore* to determine that Mr. Davis abandoned his request for self-representation. (Opinion at 3-4, ¶ 7.) The factors the Court considered were: Mr. Davis' opportunities to remind the court of the motion; Defense Counsel's awareness of the motion; and the conditional nature of the request for self-representation. (*Id.*)

i. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) supports a finding that the knowledge of the defense attorney for Mr. Davis of his request supports a finding of non-abandonment.

Subsequent to the case of Mr. Davis the U.S. Supreme Court decided *McCoy*. The decision in the case concerned whether or not a lawyer would be allowed to concede guilt over the wishes of their client when addressing the jury, even when the evidence is overwhelming. *Id.* at 1508-1509. However, the opinion has significant implications for the right of self-representation and Mr. Davis. The Court explicitly equated the right of having one's attorney assert their innocence with the right of self-representation, both being part of the autonomy a defendant has over their case. *Id.* at 1508. "Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial." *Id.*

Having found that the issue implicates a defendant's autonomy, the Court further found that the actions of the attorney did not invite an ineffective assistance of counsel analysis. *Id.* at 1510-1511. "Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence…" *Id.* The Court found that the error was structural, noting "An error may be ranked structural, we have explained, 'if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed

to make his own choices about the proper way to protect his own liberty.'" *Id.* at 1511 (*citing Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 *citing Faretta* at 834).

Within this framework the knowledge of the Defense Attorney of the request for self-representation by Mr. Davis creates another ground for reversal. Defense Counsel for Mr. Davis ignored his request, interrupted the Court before the request could be considered, and did not bring the Court's attention back to it. In much the same way that the defense attorney in *McCoy* committed structural error by interfering with the autonomy of the defendant, Defense Counsel here interfered with the autonomy of Mr. Davis by failing to alert the Court to further consideration of the request of Mr. Davis. As in *McCoy* Defense Counsel may have felt this action was in the best interest of Mr. Davis, but the *McCoy* opinion makes clear that the duty of a Defense Counsel is to preservation of a defendant's autonomy. Failure to do so is structural error.

ii. Other factors distinguish Mr. Davis from *McLemore*.

The Court of Appeals found abandonment in *McLemore* when Defense Counsel was not shown to have any knowledge of the request. *Id.* at 575, ¶ 11. This distinction would tend to show that abandonment should be disfavored when Defense Counsel knows of the motion even without the guidance of *McCoy*.

The Court of Appeals notes that after February 16 Mr. Davis attended eight more pretrial conferences with his attorney without repeating the request. (Opinion

at 4, ¶ 7.) While true, this is an incomplete look at one of the factors identified in *McLemore*, that of the opportunity for a defendant to remind the court of his motion. First, in *McLemore* the attorney was unaware of the motion, while here Defense Counsel was aware, meaning Defense Counsel also did not bring up the request again, affecting both Mr. Davis in general and under *McCoy*. Second, unlike *McLemore*, the Court was not aware of the request at all the subsequent hearings. (I 48, 70.) In *McLemore*, the request was filed in writing and therefore available to each subsequent judge. *Id.* at 575. Here, three different judges held hearings in the case, the latter two being unaware of the request due to it not appearing in the February 16, 2017 minute entry. (I 48.) It should also be noted that the defendant in *McLemore* remained silent even when there was a hearing to determine counsel, which did not happen with Mr. Davis. *Id.* at 575, ¶ 13.

c. *McLemore* Is Unconstitutional.

The *McLemore* opinion was not reviewed by the Arizona Supreme Court. Review of the *McLemore* opinion is warranted given the significance of the right of self-representation, the recent *McCoy* opinion, and secondary authority.

i. *McLemore* is a problematic application of *Faretta*.

Faretta and its progeny have held for 44 years one immutable concept: when a defendant makes an unequivocal request for self-representation, the request must be considered by the trial court, and once the waiver of counsel is found to be

knowing, intelligent, and voluntary, the request must be granted. A failure to do so deprives a defendant of his right to assistance of counsel under the sixth amendment to the U.S. Constitution. *Faretta* at 836; *McCoy* at 1508; *see also State v. Dann*, 220 Ariz. 351 (2009). Limitations have been placed for evaluating equivocation (*State v. Hanson*, 138 Ariz. 296 (App. 1983)) and competency. *Indiana v. Edwards*, 554 U.S. 164 (2008). At no time has it previously been found that a trial court had the right to ignore an unequivocal request for self-representation. *See McLemore* at 577, ¶¶ 19-20.

In *McLemore,* the motion was "indisputably timely and unequivocal." *Id.* at 577, ¶ 20. Under the structural error analysis of *Faretta* and the autonomy analysis of *McCoy*, that is where the opinion should have ended, with a reversal.

ii. *McLemore* is inconsistent with *McCoy.*

McCoy, decided six years after *McLemore*, further calls it into question. The language in *McCoy* about the importance of the autonomy of the defendant is at odds with the abandonment analysis of *McLemore.* While *McLemore* addresses the idea of the evaluation of abandonment of a request for self-representation via a totality of the circumstances tests, *McCoy* appears to create a bright line rule regarding attorney knowledge. In *McLemore*, attorney knowledge is merely just one of a totality of circumstances. *McCoy* would make it a determinative factor.

Conflict between the two cases is highlighted via a California case cited and quoted by *McLemore*, *People v. Kenner*, 223 Cal. App. 3d 56, 272 Cal. Rptr. 551 (1990).

> From this record, it is apparent that the motion was not acted upon due to the confusion caused by appellant's changing custody situation. Thus the case presents a stark judicial choice: who should bear the burden of the omission – the trial court or the mysteriously silent defendant? By urging that the judgment must be reversed, appellant would absolve himself of any vestige of responsibility. That position is not supported by either the law or the facts.

McLemore at 581 (*citing Kenner* at 59, 551).

This finding of the California Court of Appeals, cited by the Arizona Court of Appeals, is antithetical to the analysis found in both *Faretta* and *McCoy*. The burden in *Faretta* was on the court, and in *McCoy* was borne by the attorney. In addition, the *McCoy* court did address the idea of a balance between the Court and the defendant while ruling for the defendant. "Preserving for the defendant the ability to decide whether to maintain innocence should not displace counsel's, or the court's, respective trial management roles." *Id.* at 1509. The role of trial management still applies to both the Court and Defense Counsel, but *McCoy* makes clear these types of issues should still be resolved in favor of the defendant.

The *McLemore* opinion further cited *Kenner-*

> Defendants who sincerely seek to represent themselves have a responsibility to speak up. The world of the trial court is busy and hectic, and it is to be expected that occasionally a court may omit to rule on a motion. When that happens, as here, we believe it is reasonable to require the defendant who wants to take on the task of self-representation to remind the court of the pending motion.

McLemore at 581 (*citing Kenner* at 62, 551).

It is first worth noting that Mr. Davis did in fact speak up in open court as recommended here. Contrast the quote above with following from McCoy:

> Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*. *See Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.")

McCoy at 1508.

The idea of the "vestige of responsibility," as contrasted with "choices about what client's objectives *are*" being above a mere strategic choice is a conflict that should be resolved with the overruling of *McLemore*.

iii. Kansas supports overruling *McLemore*.

The Court of Appeals in *McLemore* looked to California for guidance, but there is additional guidance from Kansas that would hold the opposite. In *State v. Bunyard*, 307 Kan. 463, 466, 477 (2018), the defendant made an unequivocal request to represent himself. The trial court told the defendant to put the request in writing and refused to otherwise address it. *Id.* at 477. The defendant was unable to do so, and was subsequently silent about the request in further hearings. *Id.* The Kansas Supreme Court held "In this context, Bunyard's silence on Monday when other pro se motions were heard was understandable. He had been left with a firm impression that he would not be permitted to represent himself. His failure to reassert his right to do so in such circumstances … did not amount to an implicit decision not to pursue self-representation." *Id.* In *Bunyard* the failure to speak up was not seen as abandonment, but acceptance of an effective denial that had not actually been ruled by the trial court, warranting a reversal.

IV. Conclusion

Review should be granted in this case. The Court of Appeals made a finding that the request of Mr. Davis was equivocal without any citation to or consideration

for those cases that would support the opposite finding. They further relied on *McLemore* in spite of both the distinguishing characteristics between *McLemore* and Mr. Davis, and the unconstitutional basis on which *McLemore* was decided. Review is necessary in order to preserve critical Sixth Amendment rights and the duty to find structural error in cases where the right to self-representation has been denied.

RESPECTFULLY SUBMITTED February 21, 2019.

MARICOPA COUNTY PUBLIC DEFENDER

By /s/
JESSE FINN TURNER
Deputy Public Defender

SFJFT022119P

Appendix

Memorandum Decision, *State v. Davis,* 1 CA-CR 17-0529

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

TORRENCE E. DAVIS, *Appellant.*

No. 1 CA-CR 17-0529
FILED 1-22-2019

Appeal from the Superior Court in Maricopa County
Nos. CR2012-152527-001 DT
CR2016-135082-001 DT
The Honorable Christopher A. Coury, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jesse Finn Turner
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Maria Elena Cruz and Judge Kenton D. Jones joined.

W I N T H R O P, Presiding Judge:

¶1 Torrence E. Davis appeals his conviction and sentence for theft of means of transportation.[1] He argues the trial court committed reversible error by depriving him of his right to represent himself both (1) at trial and (2) before sentencing. For the following reasons, we affirm his conviction and sentence.

FACTS AND PROCEDURAL HISTORY[2]

¶2 Davis was stopped by law enforcement while driving a stolen vehicle. He was convicted of theft of means of transportation and sentenced to 11.25 years' imprisonment.

¶3 He timely appealed his conviction and sentence. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033(A)(1), (3), and (4).

ANALYSIS

I. The court did not deprive Davis of the right to represent himself at trial.

¶4 Before trial, Davis told the court he had discovery motions he wanted his attorney to file. Davis told the court that if his attorney did not

---

1 Davis also appeals his probation revocation, for which he received a consecutive, minimum sentence of 1.5 years' imprisonment, but he raises no issue in that regard. We note that, pursuant to his plea agreement, he knowingly waived his right to appeal that conviction and sentence, and we find no error in the subsequent revocation and sentencing proceedings.

2 We view the facts in the light most favorable to sustaining the verdict. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013) (citation omitted).

file those motions, he would be willing to represent himself. The court told him the following:

> Well, you can go pro per if you want to, but at this point, your attorney is the one that decides strategy. Your attorney is the one that decides what motions get filed and what motions don't get filed. He's not going to file a motion that he doesn't think there's a legal basis for.

Davis responded:

> I do. So if that's the case, I have to file, I have to go pro per, then that's what I want to do.

The court never directly addressed this statement. Davis argues the failure to address the statement amounted to the deprivation of his right to represent himself. We review the denial of a defendant's motion to represent himself for an abuse of discretion. *See State v. Boggs*, 218 Ariz. 325, 338, ¶ 62 (2008). Regardless of the standard of review, the erroneous denial of a pretrial or mid-trial motion for self-representation is structural error requiring reversal without a showing of prejudice. *See State v. McLemore*, 230 Ariz. 571, 575-76, ¶ 15 (App. 2012).

¶5 A defendant has a right to represent himself at trial. *See Faretta v. California*, 422 U.S. 806, 818-19 (1975). To invoke this right, a competent defendant must knowingly and voluntarily invoke his right to self-representation. *See State v. Weaver*, 244 Ariz. 101, 104, ¶ 8 (App. 2018) (citations omitted). A demand to represent oneself must also be unequivocal. *Id.* (citing *McLemore*, 230 Ariz. at 576, ¶ 17).

¶6 Here, Davis' demand to represent himself was not unequivocal. He conditioned his demand on his attorney's unwillingness to file requested motions. Davis' demands were preceded by conditional phrases, "if [the attorney] doesn't want to [file the requested motions], then I'm willing to put in the motions to go pro per myself," and "if [he does not think there is a legal basis for the requested motions], I have to file, I have to go pro per." These conditional statements leave open the possibility that Davis did not want to represent himself if his attorney fulfilled his requests. By placing conditions upon his desire to represent himself, Davis did not make an unequivocal demand.

¶7 Even if his demand was unequivocal, however, he subsequently abandoned his motion for self-representation. A defendant may abandon his *Faretta* motion. *See McLemore*, 230 Ariz. at 582, ¶ 36. When

determining whether abandonment has occurred, we consider the totality of the circumstances. *Id.* at 580, ¶ 29. We consider—among other factors—"the defendant's opportunities to remind the court of a pending motion [and] defense counsel's awareness of the motion." *Id.* at 582, ¶ 35. In this case, after his unanswered request, Davis attended eight pretrial conferences with his attorney. He did not raise his allegedly pending motion at any of these opportunities, suggesting he no longer desired to represent himself. Further, as stated before, Davis' *Faretta* motion was conditional, depending upon whether his attorney fulfilled certain requests. Davis argued the State had not disclosed discovery items it possessed. At conclusion of the pretrial conference in which Davis made his conditional demand to represent himself, the court ordered the State to provide outstanding discovery. This, combined with Davis' subsequent failure to remind the court about or re-urge his motion, indicates his requests had been fulfilled, and he had abandoned his *Faretta* motion. In addition, his attorney was aware of his motion. The court, on two later occasions, asked his attorney if there were any outstanding motions. On both occasions, his attorney told the court—with Davis present in the courtroom—that there were none. We find no abuse of discretion.

II. The court did not reversibly err by not allowing Davis to represent himself after his guilty verdict.

¶8 After Davis was convicted of theft of means of transportation, he unequivocally requested to represent himself. The court began the colloquy to ensure his request was knowing and voluntary. During the colloquy, Davis told the court he was willing to receive the maximum amount of time he could receive in prison. The court denied the motion for self-representation. Davis argues this denial was reversible error. Again, we review for an abuse of discretion. *See Boggs*, 218 Ariz. at 338, ¶ 62.

¶9 Although we view the erroneous denial of a pretrial or mid-trial *Faretta* motion as structural error, the post-trial denial of a motion for self-representation is subject to harmless-error review. Structural errors "affect the entire conduct of the trial from beginning to end, and thus taint the framework within which the trial proceeds." *State v. Henderson*, 210 Ariz. 561, 565, ¶ 12 (2005) (citations and internal quotations omitted). In contrast, a post-trial denial of a motion for self-representation does not affect the framework of the trial. Our analysis is supported by decisions of the Ninth Circuit. *See United States v. Maness*, 566 F.3d 894, 896-97 (9th Cir. 2009); *see also United States v. Walters*, 309 F.3d 589, 592-93 (9th Cir. 2002) (reviewing an alleged sentencing error involving representation for harmless error).

¶10 Even assuming without deciding the court erred, Davis cannot demonstrate prejudice. If he had represented himself, Davis would have received the same sentence. At a pre-sentencing hearing, the State presented evidence, and the court found beyond a reasonable doubt, that Davis was convicted of a class 2 felony for an offense committed on March 29, 2004. The current offense was committed on July 24, 2016. For a class 2 felony to be a historical prior felony, it must have been committed within ten years of the current offense. *See* A.R.S. § 13-105(22)(b). Because the calculation period excludes Davis' five-year period of incarceration, the class 2 felony is a historical prior felony. *See* A.R.S. § 13-105(22)(b). Davis also testified at trial that he committed another felony within five years of the commission of the charged offense, thereby admitting another historical prior felony. *See* A.R.S. § 13-105(22)(b)-(c). With two historical prior felonies, Davis was required to be sentenced as a Category 3 offender for a class 3 felony offense. *See* A.R.S. § 13-703(C). Further, the jury found Davis was on probation at the time of the offense, meaning he had to be sentenced to at least the presumptive term. *See* A.R.S. § 13-708(C). The jury also found the State had not proven any of the other alleged aggravating factors, meaning Davis could not have received a maximum or aggravated sentence. *See* A.R.S. §§ 13-701(C), -703(K). Therefore, Davis—regardless of representation—could only have been sentenced to 11.25 years' imprisonment. *See* A.R.S. § 13-703(J)-(K). Accordingly, Davis cannot demonstrate prejudice.

CONCLUSION

¶11 Davis' conviction and sentence are affirmed.

Supreme Court

STATE OF ARIZONA

ROBERT M. BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

JANET JOHNSON
Clerk of the Court

July 30, 2019

RE: STATE OF ARIZONA v TORRENCE E DAVIS
Arizona Supreme Court No. CR-19-0060-PR
Court of Appeals, Division One No. 1 CA-CR 17-0529
Maricopa County Superior Court No. CR2016-135082-001
Maricopa County Superior Court No. CR2012-152527-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 30, 2019, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Janet Johnson, Clerk

TO:
Mark Brnovich
Joseph T Maziarz
Gracynthia Claw
Jesse Finn Turner
Torrence E Davis, ADOC 167617, Arizona State Prison, Yuma – Cibola Unit
Amy M Wood
jd

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
Plaintiff,	)	
v.	)	1 CA-CR 17-0529
TORRENCE E DAVIS,	)	CR2012-152527-001
Defendant.	)	CR2016-135082-001

_____)

Phoenix, Arizona

February 16, 2017

9:01 a.m.

BEFORE: THE HONORABLE JUSTIN BERESKY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FINAL TRIAL MANAGEMENT CONFERENCE

(Original)

Scott A. Kindle, RPR
Certified Reporter No. 50711

SUPERIOR COURT
Phoenix, Arizona

A P P E A R A N C E S

For the Plaintiff:

MATTHEW ELIAS, Deputy County Attorney

For the Defendant:

NICHOLAS DEHNER

SUPERIOR COURT
Phoenix, Arizona

Phoenix, Arizona
February 16, 2017

THE COURT: State of Arizona versus Torrence Davis, CR2012-152527, CR2016-135082.

MR. ELIAS: Good morning. Matthew Elias for the State.

MR. DEHNER: Good morning, Your Honor. Nicholas Dehner on behalf of Mr. Davis, who is present in custody, standing in the front of the jury box.

THE COURT: Sir, can you tell me your name and date of birth, please.

THE DEFENDANT: Torrence Davis. 6/10/83.

THE COURT: All right. You can have a seat if you like.

Where are we on this case?

MR. DEHNER: Judge, prior to coming up to the podium, I was ready to announce we're ready for trial. There's only a couple witness interviews left. We're going to finish those off next week, so we were ready to send this to the Master Calendar. However, speaking with my client this morning, he indicates to me he's not ready to go to trial, so --

THE COURT: Are you ready to go to trial?

MR. DEHNER: I will be ready by the time we come to next -- to the Master Calendar for the 23rd. I

anticipate I will have the interviews finished next week. Assuming we go to the Master Calendar on the 23rd, we both anticipate probably starting a jury on Monday, so that will give me ample time to finish what I need to do, but --

THE COURT: All right.

MR. DEHNER: -- at this time my client indicates to me he's not ready to go to trial.

THE COURT: Why aren't you ready to go to trial?

THE DEFENDANT: Because I have some motions I want to be turned in. I have some things I asked to be, like body cams, dash cams, that were never given.

THE COURT: Okay.

THE DEFENDANT: And I know he came late on my case. So the first two lawyers, I didn't fire. The State got rid of them. And I've been asking for things --

THE COURT: The State got rid of them?

THE DEFENDANT: Well, the first one, I guess because of the arraignment, or whatever, they got rid of him. Then the other lady, she quit on her own saying conflict of interest. And then I got him.

So I've been asking for the body cams, the dash cams. I never got -- I got the last dash cam out of 15 officers. So that happened.

I asked for a special action on my violation of my

Miranda rights, which were never given.

THE COURT: Well, he can only file motions that he believes that there's a valid basis for. You're not in charge of strategy. You're not in charge of what motions get filed. He is.

THE DEFENDANT: I understand that. But if I don't file these motions now, even if they're denied, if I lose in trial, I have no appeal basis on them. And I know this for a fact. That's why I'm ready to file the motions now before I go to trial.

THE COURT: Well, he's the one that files the motions, not you.

THE DEFENDANT: Well, if he doesn't want to, then I'm willing to put in the motions to go pro per myself if I --

THE COURT: Okay.

THE DEFENDANT: I'm not going to sit here and be railroaded no more.

THE COURT: Well, you can go pro per if you want to, but at this point, your attorney is the one that decides strategy. Your attorney is the one that decides what motions get filed and what motions don't get filed. He's not going to file a motion that he doesn't think there's a legal basis for.

THE DEFENDANT: I do. So if that's the case,

I have to file, I have to go pro per, then that's what I want to do.

MR. DEHNER: And, Your Honor, before the Court makes a ruling, there is one issue I was speaking with Mr. Elias this morning potentially one of the witnesses that we were going to be interviewing, the State is no longer intending on calling them, so that might put a wrench in my plans. I might have to locate him, find him, and interview him. So a brief continuance, I guess, at this point I'm not objecting to if the State doesn't have an issue with that, and obviously Mr. Davis is not ready to go next week, so I don't know, maybe two weeks or something like that.

THE COURT: Well, what witness do you -- well, is it a civilian witness or --

MR. DEHNER: It is, Your Honor. This is a theft of means case and actually somebody that was riding in the car with him that day.

THE COURT: Okay.

MR. DEHNER: So I believe it's going to be material to my case.

MR. ELIAS: The State hasn't had any contact with that individual.

THE DEFENDANT: Excuse me.

THE COURT: Yes, sir?

THE DEFENDANT: Is there any way we can get these dash cams or these body cams that's been asked for since the beginning? The last time they asked the State, he laughed at it like it's a joke.

THE COURT: Sir, is there a dash cam?

MR. ELIAS: After the last hearing when Mr. Davis brought up these concerns, I followed up with the case agent, was informed that there was no additional video from the incident. Everything that the police had had already been turned over to the State and had already been disclosed to the defense.

THE COURT: Okay. So there is no dash cam.

THE DEFENDANT: Okay. What about the interrogation video at Glendale precinct? They're saying there's no interrogation -- no video of that either, which I know for a fact is a lie. I was in the room myself. There's a camera up there, so I know he's lying about that. So they're being coy about something here.

(Counsel confer.)

THE DEFENDANT: Your Honor, Mr. Beresky, all I want to do is a fair shake at trial. That's all I'm saying, and I'm not getting it. They gave me an audio, but I need the video and the audio.

MR. DEHNER: Judge, we were just speaking on that issue. I've received the audio recording that my

client was interviewed by the police. I don't believe I was ever provided, and I don't know if it even exists if there was video taken of that, so -- but I do have his recorded interview that happened after he was arrested, Your Honor.

THE COURT: Okay.

MR. DEHNER: At this point, I don't know if there's any other evidence out there that I don't have that the State has not disclosed.

THE COURT: Well, I'll ask the State to follow up with whoever did the interrogation to make sure if there is a video or not. If there is a video, it needs to be disclosed.

MR. DEHNER: Absolutely.

MR. ELIAS: Yes, Your Honor.

THE COURT: There may have been a camera, but that doesn't necessarily mean there's a video. Sometimes they're dummy cameras.

THE DEFENDANT: Your Honor, I mean I hate to say this ain't my first rodeo. I've been arrested before in Glendale. I know for a fact that interrogation room has running video. That's what I'm saying.

THE COURT: Okay. I believe you.

THE DEFENDANT: Yes.

THE COURT: I'll continue the trial one week,

reset it to March 2nd.

THE BAILIFF: Are we doing an FTMC or just the trial?

THE COURT: Just the trial.

MR. DEHNER: That's fine, Your Honor.

THE BAILIFF: March 2nd.

THE COURT: March 2nd at 8:00 a.m. before the Master Calendar. All right.

MR. DEHNER: And this will serve as the final TMC, then; correct?

THE COURT: Right.

MR. DEHNER: Thank you.

THE COURT: Thank you.

(Whereupon the matter concluded at 9:07 a.m.)

C E R T I F I C A T E

I, Scott A. Kindle, do hereby certify that the foregoing pages constitute a true and accurate transcript of my stenographic notes, taken at said time and place, all done to the best of my skill and ability.

I CERTIFY that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome thereof.

I CERTIFY that I have complied with the ethical obligations set forth in ACJA 7-206(F)(3) and ACJA 7-206 J(1)(g)(1) and (2).

DATED this 2nd day of January, 2018.

/s/ Scott A. Kindle

Scott A. Kindle, RPR
Certified Reporter No. 50711

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/21/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2016-135082-001 DT 02/16/2017

COMMISSIONER JUSTIN BERESKY

CLERK OF THE COURT
V. Burton/E. Canas
Deputy

STATE OF ARIZONA MATTHEW H ELIAS

v.

TORRENCE E DAVIS (001) NICHOLAS JAMES DEHNER

TRIAL CONTINUED/RESET

9:01 a.m. This is the time set for Final Trial Management Conference.

Courtroom CCB 901

State's Attorney:	Mathew H. Elias
Defendant's Attorney:	Nicholas James Dehner
Defendant:	Present

Court Reporter, Scott Kindle, is present.

A record of the proceedings is also made digitally.

The Court and parties discuss the status of the case.

Counsel for the State advises the Defense that all discovery has been provided but will review to determine if an interrogation video exists.

IT IS ORDERED resetting the Firm Trial Date set on 02/23/2017 to 03/02/2017 at 8:00 a.m. before the Master Calendar Assignment Judge in Courtroom 5B in the South Court Tower.

All subpoenaed witnesses are to report to Courtroom 5B in the South Court Tower for trial and will be directed to the trial court from there.

IT IS FURTHER ORDERED affirming prior custody orders.

LAST DAY REMAINS: 03/26/2017.

9:07 a.m. Matter concludes.