

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF LOUISIANA,

Petitioner,

v.

DAVID H. BROWN,

Respondent.

On Petition for a Writ of Certiorari
to the Louisiana Supreme Court,

SUPPLEMENTAL APPENDIX

Cecelia Trenticosta Kappel*
Erica Navalance
THE CAPITAL APPEALS PROJECT
**Counsel of Record*
1024 Elysian Fields Avenue
New Orleans, LA 70117
(504) 529-5955
ctkappel@defendla.org

Attorneys for Respondent

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Supplemental Appendix A
Jury Trial – Penalty Phase, Closed Hearing,
State v. Brown, No. 520401 (La. 17th J. Dist. Ct., Oct. 31, 2016)

STATE OF LOUISIANA
17TH JUDICIAL DISTRICT COURT
PARISH OF LAFOURCHE
HONORABLE JOHN E. LEBLANC
PRESIDING JUDGE, DIVISION A

COPY

STATE OF LOUISIANA
VERSUS
DAVID BROWN
DOCKET NUMBER - 520401
JURY TRIAL - PENALTY PHASE
CLOSED HEARING
OCTOBER 31, 2016
THIBODAUX, LOUISIANA

APPEARANCES

CAMILLE A. MORVANT, II, KRISTINE RUSSELL, HEATHER HENDRIX, AND JOSEPH SOIGNET, ESQ.

District Attorney and Assistant District Attorneys, P.O. Box 431, Thibodaux, Louisiana 70301, Representing the State of Louisiana;
KERRY P. CUCCIA, DWIGHT DOSKEY, AND MEGHAN HARWELL, ESQ.

Attorneys at Law, 380 Canal Street, Suite 400, New Orleans, LA 70119, Representing the Defendant, David Brown;

DAVID BROWN,

The Defendant.

1 (Court resumed at 2:20 p.m. on October 31, 2016.
2 The jury and audience being absent from the
3 courtroom, the following **CLOSED PROCEEDING** was had
4 before the Court, counsel, and the defendant, out
5 of the presence and the hearing of the jury and the
6 audience.)

7 THE COURT:

8 The record will reflect counsel for the
9 State, counsel for Mr. Brown, and Mr. Brown
10 are present. The jury's in the jury room
11 and not in the courtroom. The courtroom has
12 been cleared to resolve or attempt to
13 resolve an issue or to notify me of an
14 issue that has developed. Now, who is going
15 to explain to me the issue?

16 MR. DOSKEY:

17 Well, I think it comes, properly, from
18 the Defense, Your Honor. The issue, Your
19 Honor, is that we have discussed, with the
20 defendant, what we plan on doing in the
21 penalty phase. That includes questioning of
22 his mother and about his mother, of some
23 other relatives and about - of other
24 relatives about his mother. A lot of it
25 will center on his mother.

26 The defendant does not want us to go
27 through those questions either about his
28 mother or by calling his mother to the
29 stand. I have explained to Mr. Brown that
30 the choices are to - either to let me go
31 ahead and handle the penalty phase the way
32 that I think I am ethically obligated to do

1 and in the best opportunity, which is by
2 talking about his mother and calling his
3 mother to the stand. He understands that
4 for the jury to return a life verdict, they
5 would not - we would not need to present
6 any mitigating evidence, but I think my
7 duty is to present the best case in
8 mitigation that I can.

9 We've also explained to Mr. Brown that
10 if we are not allowed to do that, then the
11 only way to prevent that is if he decides
12 that he wants to discharge us. And I think
13 that, at present, Mr. Brown has said that
14 he would like to discharge us and represent
15 himself under *Farella v. California*. And I
16 think, Mr. Brown, would you -

17 DAVID BROWN:

18 That's correct, Your Honor. Right now,
19 I'd like to waive counsel and represent
20 myself from here on out in the penalty
21 phase.

22 THE COURT:

23 I want to be careful, Mr. Brown, as to
24 how I respond. You have rights. These are
25 your rights. To be honest with you, this is
26 not something that I'm ready to rule on,
27 because I haven't - you and I would have to
28 have a discussion, with you under oath,
29 about your knowledge of what you're doing,
30 why you're doing it, and whether you even
31 understand the process and how the
32 proceedings should go forward. Do you

understand what I'm saying?

DAVID BROWN:

Yes, sir.

THE COURT:

When did you come up - when did you come to this decision?

DAVID BROWN:

I came to this decision years ago. I've discussed this with Mr. Doskey. And I told him if we got to this phase, my feelings on it. I don't know if Mr. Doskey had thought, maybe, by then I would change my mind or he would be able to talk me out of it somehow. I'm not going to allow my mother to get on the stand and be portrayed as a whore, as a slut, as a rape victim from her father, from her brothers. I will not do it.

What I will do is ask to represent myself. I will offer no mitigation, because the Defense has - I don't have an obligation to put up any evidence, any mitigating evidence. Defense is going to hear the State's case and then the Defense is going to rest. That is my plan, Your Honor. I understand the law. I understand what I'm obligated to do and my rights.

THE COURT:

And the potential is that they hear no mitigation.

DAVID BROWN:

Correct. They hear no mitigation and they make a decision on life or death. I've

1 sat through the *Witherspoon* process for six
2 weeks. I understand it.

3 THE COURT:

4 Now, and just - I'll address this with
5 you, again, at a later time, but I have to
6 ask: What medications are you on?

7 DAVID BROWN:

8 Blood pressure medicine.

9 THE COURT:

10 That's it?

11 DAVID BROWN:

12 Heartburn and Claritin.

13 THE COURT:

14 Nothing that affects your ability to
15 understand?

16 DAVID BROWN:

17 No, sir. No mental meds, if that's your
18 question.

19 THE COURT:

20 Well, anything that - I don't know
21 whether you're on pain meds or anything
22 like that.

23 DAVID BROWN:

24 No, sir. I just take 11 blood pressure
25 pills a day.

26 THE COURT:

27 Okay. Again, I'm being honest with you,
28 Mr. Brown. I have to look at this to make
29 sure that we can proceed. Because,
30 ultimately, the State is entitled to
31 proceed to complete their case.

32 DAVID BROWN:

1 Right. Well, if this makes this any
2 better, Your Honor, how about if I just
3 agree to accept death? You okay with that,
4 Mr. Morvant?

5 THE COURT:

6 Mr. Brown. Mr. Brown, that's not why I
7 said that.

8 DAVID BROWN:

9 Okay. Well, then, I misunderstood your
10 question.

11 THE COURT:

12 You did. You did. Because what I meant
13 to tell you is: I have to make sure that we
14 finish the process. Okay?

15 DAVID BROWN:

16 Okay.

17 THE COURT:

18 They're entitled to pursue the end of
19 the process. You're entitled to proceed, in
20 the balance of the process, as you wish.

21 DAVID BROWN:

22 Yes, sir.

23 THE COURT:

24 As I determine is appropriate. Which
25 means I have to look into your request to
26 represent yourself, your request to
27 discharge your present counsel, the issue
28 of whether there would be standby counsel.
29 All of these things are things that I'm
30 looking at on five minutes' notice.

31 DAVID BROWN:

32 Right.

1 THE COURT:

2 So give me a chance.

3 DAVID BROWN:

4 Okay. May I say one thing?

5 THE COURT:

6 Yes, sir. Just be careful. Just be
7 careful what you say.

8 DAVID BROWN:

9 Okay.

10 THE COURT:

11 Because is - we're talking. Go ahead.

12 DAVID BROWN:

13 Okay. I believe, with the strategy that
14 I'm taking, I understand the law, and I'm
15 just - I'm offering no defense.

16 MR. CUCCIA:

17 We're not in the *Farettta* hearing yet,
18 are we?

19 THE COURT:

20 No. We're not - we're not yet. So what
21 I'm going to do is that's the part that
22 we're gonna - what you understand, what
23 your knowledge of the process is, and how
24 we're going to proceed is what you and I
25 are going to discuss further, once you're
26 under oath, so that I can get this - right
27 now, we're just talking -

28 DAVID BROWN:

29 Yes, sir.

30 THE COURT:

31 - so that I can see what your position
32 is. Okay? So this is not a *Farettta* hearing.

1 We're going to have to have one or a
2 hearing of that nature. Whether you call it
3 a "Farettta hearing" or not, it's a
4 determination of what you know, how you
5 know it, will it help you? Will you be able
6 to control your own defense?

7 With counsel, you have - you give up
8 some control, and that's the issue that
9 you're telling me you're having right now.

10 DAVID BROWN:

11 Yes, sir.

12 THE COURT:

13 Okay. I understand. I just have to - I
14 had to get to that point where I
15 understand, because I have to have a reason
16 to break for today.

17 DAVID BROWN:

18 I'm sorry I wasn't being clear, Your
19 Honor.

20 THE COURT:

21 No. You're good. You're good. You're
22 crystal clear. But I'm kinda muddy on the
23 law and how we proceed. Okay? Now, I think
24 the State needs to look at - research this.
25 I think - you still have counsel, Mr.
26 Brown.

27 DAVID BROWN:

28 Yes, sir.

29 THE COURT:

30 I haven't released them, and I haven't
31 made any decisions on that, but I am
32 willing to break for the day, if that's

1 what's necessary for everybody to be
2 prepared.

3 MR. MORVANT:

4 And I do just have one other issue when
5 you're finished to address with you on the
6 record.

7 THE COURT:

8 Okay. But we're in agreement that we're
9 breaking for the day.

10 MR. MORVANT:

11 Yes, sir.

12 THE COURT:

13 Without objection.

14 MR. DOSKEY:

15 Correct, Your Honor.

16 THE COURT:

17 Okay.

18 MR. MORVANT:

19 Regarding the members of the family
20 that have a right to be present at all
21 court hearings. I was asked about it the
22 other day. And I understand you have a
23 right to run your courtroom, when we talked
24 about the juror and releasing him. I'd like
25 to know whether I have permission to tell
26 the members of the family what's going on.
27 They do have a right, under the
28 Constitution, to be present at all
29 proceedings in the courtroom at the trial.
30 And I don't want to do anything to cause
31 any issues. But I'm going to be asked about
32 it, and I don't want to tell them - I'm

1 asking you if I can tell them what's going
2 on. I think they have a right to know, but
3 that's your call.

4 THE COURT:

5 You can tell them that he's made the
6 request.

7 MR. MORVANT:

8 Yes. That's all I want to do. I'm not
9 going to tell them about the whole hearing.
10 I'm not going to do that.

11 THE COURT:

12 We haven't had a hearing. You can tell
13 them that he's made the request, and that
14 that's the reason that we're breaking for
15 today.

16 MR. MORVANT:

17 Okay.

18 THE COURT:

19 But you can't promise them, because I
20 haven't researched it, on whether they have
21 a right to be present at the Faretta
22 hearing, even.

23 MR. MORVANT:

24 Okay. I wouldn't do that until I looked
25 at it and asked you about it and addressed
26 it with you. I would not do that.

27 THE COURT:

28 We're going to have to make that
29 official determination. So I'm not
30 guaranteeing that they're going to be
31 sitting here while I'm doing this hearing
32 as to his ability to represent himself.

1 MR. MORVANT:

2 I wasn't even asking that, but that's
3 a good point. I was not - but that's a good
4 point to bring up.

5 THE COURT:

6 Things pop into this head sometimes.

7 MR. MORVANT:

8 So I just wanted to make sure that I
9 can tell them why we're breaking for today.
10 And I think they do have a right to know
11 that.

12 THE COURT:

13 And I can assure you I'm not going to
14 tell the jury why we're breaking for the
15 day, but I am going to tell them that we're
16 breaking for the day -

17 MR. MORVANT:

18 Okay.

19 THE COURT:

20 - because of a legal issue that has
21 arisen in the case that has to be
22 thoroughly researched by both sides, and
23 it's going to take us additional time to
24 prepare. Right now, they only think that
25 we're addressing legal issues to begin the
26 next phase of the process.

27 MR. MORVANT:

28 Fine, Judge.

29 THE COURT:

30 So you understand, Mr. Brown, that I
31 have to do that?

32 DAVID BROWN:

1 Yes, sir. I do understand that.

2 THE COURT:

3 Okay?

4 DAVID BROWN:

5 Okay.

6 THE COURT:

7 Now, in the meantime, your lawyers
8 still represent you. So don't just reject
9 everything out of hand that they tell you.
10 Okay? We've been as a group in this thing
11 for too long. But I understand where you -
12 sort of where you're coming from.

13 DAVID BROWN:

14 Thank you.

15 THE COURT:

16 Now, my decision doesn't mean - me
17 saying that doesn't mean you and I are
18 going to see eye-to-eye tomorrow or moving
19 forward, but I am going to make a decision
20 that I have to, and I'll let you know first
21 thing in the morning.

22 DAVID BROWN:

23 Okay. Thank you.

24 THE COURT:

25 Okay. So what we'll probably do is be
26 here at nine o'clock tomorrow, and I'll
27 bring the jury back, potentially, at ten.

28 Do you have something, Mr. Cuccia?

29 MR. CUCCIA:

30 May we approach for just one second?

31 MR. DOSKEY:

32 Judge, I know, too, that John would end

up - liking to know about whether you're going to order the Angola inmates be held down here or transported back to Angola and returned tomorrow. He asked me to find that out for him. It's fine with us.

THE COURT:

They're under your subpoena.

MR. DOSKEY:

And I think them staying down here is better, Judge, because that way we have no transportation problems.

THE COURT:

I will let - get in touch with John Foote and find out what Angola wants to do. If they want them back or find out what the jail - if the jail is willing to keep them. I'm not sure about that. So I'm not forcing them to keep them. If they return them, you've just got to understand he's traveling. We found another location for them.

MR. DOSKEY:

Right.

THE COURT:

Anything else?

MR. MORVANT:

No, sir. See you tomorrow morning at nine o'clock, Judge.

MR. SOIGNET:

Were you approaching, Kerry, or are you -

1 MR. CUCCIA:

2 No. We don't need to. But I need a few
3 minutes.

4 THE COURT:

5 Okay. I understand.

6 MR. SOIGNET:

7 Judge, are the parties - is the Court
8 going to entertain briefs on this?

9 MR. MORVANT:

10 Are you gonna hear what each side says
11 and we can all be on the same - rather than
12 just getting into an argument at the
13 hearing for the first time?

14 THE COURT:

15 I would love your legal input on the
16 issue to supplement my three minutes of
17 research while we were - while we got to
18 this point.

19 MR. MORVANT:

20 We'll try to get you something as soon
21 as we complete it.

22 THE COURT:

23 I understand. It's a very intense
24 situation.

25 (Court was adjourned at 2:35 p.m. on October 31,
26 2016.)

27 END OF TRANSCRIPT

28 *****

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30

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32

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C E R T I F I C A T E

I, Katrina J. Spera, Official Court Reporter, in and for the State of Louisiana, employed as an official court reporter by the 17th Judicial District Court, Parish of Lafourche, State of Louisiana, as an officer before whom this testimony was taken, do hereby certify that the above fourteen (14) pages constitute a true and faithful transcript executed to the best of my ability and understanding; that this proceeding was reported by me in the Stenomask reporting method; was prepared and transcribed by me or under my personal direction and supervision; and that the transcript has been prepared in compliance with the transcript format guidelines required by statute or by rules of the board or by the Supreme Court of Louisiana; and that I have no relationship with counsel or the parties herein, nor am I otherwise interested in the outcome of this matter which was held at Thibodaux, Louisiana, on October 31, 2016, in the matter numbered and entitled:

STATE OF LOUISIANA
VERSUS NUMBER-520401
DAVID BROWN

This certification is valid only for a transcript accompanied by my original signature and original imprinted seal on this page. Any copies must have a "COPY" stamp and my original imprinted seal.

In Faith Whereof, witness my signature this 20th day of February, 2017.


KATRINA J. SPERA, CCR
CERTIFICATE #99099

Supplemental Appendix B
Jury Trial – Penalty Phase, *Farett*a Hearing,
State v. Brown, No. 520401 (La. 17th J. Dist. Ct., Nov. 1, 2016)

STATE OF LOUISIANA
17TH JUDICIAL DISTRICT COURT
PARISH OF LAFOURCHE
HONORABLE JOHN E. LEBLANC
PRESIDING JUDGE, DIVISION A

COPY

STATE OF LOUISIANA
VERSUS
DAVID BROWN
DOCKET NUMBER- 520401
JURY TRIAL - PENALTY PHASE
NOVEMBER 1, 2016
FARETTA HEARING
CLOSED HEARING
THIBODAUX, LOUISIANA

APPEARANCES

CAMILLE A. MORVANT, II AND JOSEPH SOIGNET, ESQ.

District Attorney and Assistant District Attorney, P.O. Box 431, Thibodaux, Louisiana 70301, Representing the State of Louisiana;

KERRY P. CUCCIA AND DWIGHT DOSKEY, ESQ.

Attorneys at Law, 380 Canal Street, Suite 400, New Orleans, LA 70119, Representing the Defendant, David Brown;

DAVID BROWN,

The Defendant.

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1 (Court resumed at 8:45 a.m. on November 1, 2016.
2 The jury and audience being absent from the
3 courtroom, the following **CLOSED PROCEEDING** was had
4 before the Court, counsel, and the defendant, out
5 of the presence and hearing of the jury and the
6 audience.)

7 THE COURT:

8 We were here, yesterday, and recessed
9 the proceedings, and everyone was in a
10 position of wonder, and I had sent an email
11 around. Perhaps, I misstated what occurred
12 yesterday. I've seen all the responses. I'm
13 glad y'all are here. It's not 8:45, but
14 it's ten to nine. Sorry I'm late.

15 I intend to conduct - well, let me just
16 ask Mr. Brown. Mr. Brown, has your position
17 changed?

18 DAVID BROWN:

19 No, sir.

20 THE COURT:

21 Then you and I are going to have a
22 Faretta hearing.

23 DAVID BROWN:

24 Yes, sir.

25 THE COURT:

26 I didn't receive any briefing on the
27 procedure. I got an email that the State
28 wants to participate in the Faretta
29 hearing. But I'm not familiar with the
30 State's participation. There will be no
31 questioning of Mr. Brown. If you want to be
32 here and observe -

1 MR. SOIGNET:

2 Yes, Judge. We're here -

3 THE COURT:

4 You can be here and observe, but that's
5 it.

6 MR. SOIGNET:

7 I don't mean, necessarily, we have any
8 questions to ask. I think this is between
9 the Court and the defendant.

10 THE COURT:

11 I'm going to start that in a few
12 minutes. I received a motion to withdraw,
13 at least a copy of it, and a memo from
14 Defense Counsel. I note that its authorship
15 was fairly early this morning. I appreciate
16 that effort.

17 MR. CUCCIA:

18 May I ask the Court a question?

19 THE COURT:

20 Yes.

21 MR. CUCCIA:

22 As far as the motion to withdraw is
23 concerned, as I tried to explain in my
24 email, we didn't perceive, yesterday, that
25 a motion to withdraw was -

26 THE COURT:

27 I understand. I understand that that
28 motion to withdraw was in response to my
29 comment in the email. He - the issue is
30 whether I let him discharge you. So you
31 don't have to withdraw if I let him
32 discharge you. But that's going to be the

basis of the *Faretta* hearing. So I understand.

MR. CUCCIA:

Thank you, Judge.

THE COURT:

And I'm - Mr. Brown, it's your option.

We can start now, or I can wait until nine o'clock.

DAVID BROWN:

We can start, now, sir.

THE COURT:

Okay. Then I want you to come up here and get under oath. (Defendant complied.)

THE DEFENDANT, DAVID BROWN, AFTER BEING DULY SWEORN
TO TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT
THE TRUTH SO HELP HIM GOD, TESTIFIED AS FOLLOWS:

THE COURT:

Come on and have a seat in the chair,
Brown. (Defendant complied.)

EXAMINATION

BY THE COURT:

Q. What's your name?

A. David Harley Brown.

24 Q. And where was the last town you lived in before
25 incarceration?

A. I guess that would be Lockport.

27 Q. Okay. What's your date of birth?

28 A. 11/14/77.

29 Q. Where were you born?

30 A. New Orleans, Louisiana, Charity Hospital.

31 Q. And how far did you go in school?

32 A. Technically, the eighth grade. I went to the

1 11th grade in what they call a "TAPS" program -
2 "Tabernacle Appraised," but the Louisiana School
3 Board didn't recognize its credits. So I ended up
4 being a 17-year-old in the eighth grade when I did
5 go back to public school.

6 Q. Okay. Can you read and write?

7 A. Yes, sir.

8 Q. I've seen you taking notes. I've observed your
9 actions - interactions with your lawyers. You've
10 been able to provide them with notes and questions.

11 A. If you'd like, I'll read something out loud to
12 you.

13 Q. That's okay. I just want to make sure that my
14 observations of what you were doing was, in fact,
15 that you were writing notes and not drawing and
16 scribbling and that -

17 A. Yes, sir.

18 Q. Okay. You've been able to do that throughout
19 their representation of you, correct?

20 A. Yes, sir.

21 Q. Provide them with writings, have them provide
22 you with documents that you could read and observe.

23 A. Yes, sir.

24 Q. In fact, you've gone through the entire file
25 with them, at least, several times, correct?

26 A. Yes, sir.

27 Q. Okay. You're married?

28 A. No, sir.

29 Q. How many children?

30 A. Six children.

31 Q. Okay. And their ages?

32 A. From 21 down to 7.

1 Q. Medical history. You said, yesterday, you have
2 high blood pressure.

3 A. Yes, sir. They have me on Metotovol (Spelled
4 phonetically) - Metoprolol, 50 mg. twice a day;
5 Hydralazil (Spelled phonetically) 50 mg. twice a
6 day; Lisinopril, 40 mg.; Norpace, 5 mg.; and
7 Clonidine, 3.3 mg. three times a day.

8 Q. And you're taking your meds regularly, correct?

9 A. Yes, sir.

10 Q. As prescribed. Do any of those medicines affect
11 your ability to understand?

12 A. No, sir.

13 Q. What about mental health issues? Have you ever
14 been treated for mental health issues?

15 A. I'm not being treated for mental health.

16 Q. You're not now.

17 A. No.

18 Q. Have you ever been?

19 A. When I was a juvenile, I was brought to a
20 psychiatrist for sniffing gasoline and that sort of
21 stuff, you know.

22 Q. Okay. Are you on any mental health meds?

23 A. No, sir.

24 Q. Have you ever been on mental health medication,
25 even as a juvenile?

26 A. As a juvenile.

27 Q. What was that?

28 A. I remember it used to be Wellbutrin. And I
29 don't remember the second medication, but I took it
30 for about a week and quit - and I had stopped. It
31 made me a zombie, so I didn't take it.

32 Q. Okay. Now, you have been represented by the

1 Capital Defense team, Mr. Cuccia and Mr. Doskey -

2 A. Correct.

3 Q. - for how long?

4 A. Well -

5 Q. Two and a half years?

6 A. Yes. A little over 2½ years, almost three with
7 these. I had a couple other lawyers a couple of
8 times, you know.

9 Q. Right. But, I mean, that was early -

10 A. But right - going on three years with these
11 gentlemen.

12 Q. Right. And during the - I'll call it the "guilt
13 phase," and preparation for that, you were able to
14 interact with them.

15 A. Yes, sir.

16 Q. And they represented you.

17 A. Yes, sir.

18 Q. And we got through that phase.

19 A. Correct.

20 Q. All through this three years of representation,
21 they have - have they also worked with you on the
22 penalty phase potentiality and evidence that would
23 be presented?

24 A. When you mean working with me, I guess you -

25 Q. I mean as far as discussed potential witnesses
26 and mitigating evidence and those types of things.

27 A. Yes. We have discussed that.

28 Q. Okay.

29 A. And that's where our disagreement comes in.

30 Q. All right. So you know - do you know that they
31 have subpoenaed and intend to call witnesses on
32 your behalf?

1 A. Correct.

2 Q. Do you know who those witnesses are?

3 A. My mother; my niece; my brother, Jason; my
4 Uncle Calvin; I believe, Dr. Cunningham; Dr.
5 Piasecki; and maybe a Cole Domangue, if I want -
6 now, whether they use them or not, I believe he was
7 one of them.

8 Q. Adam Billiot?

9 A. I thought that was the State's -

10 Q. But he's under - they asked me to maintain him
11 under subpoena.

12 A. Okay. Well, then, Adam Billiot. Yes, sir.

13 Q. And potentially Carlos Nieves, Jr.

14 A. Yes, sir.

15 Q. On the mitigation issues for intoxication.

16 A. Correct.

17 Q. Okay. And as I appreciate the discussion,
18 yesterday, from Mr. Doskey, it's his intention to
19 call them all.

20 A. Yes, sir. That's his intention.

21 Q. Now, -

22 A. The disagreement comes just with my mother and
23 my Uncle Calvin.

24 Q. Okay.

25 A. Because there's some - there's stuff that's in
26 the past that I believe should stay in the past.
27 And it took my mother many, many years to get over
28 this. And to be drug back out, put in the
29 newspaper - like I told you, I'm willing to accept
30 death before I let my mother get on the stand. So
31 if y'all agree, I agree -

32 Q. Mr. Brown -

1 A. - we're done.

2 Q. Mr. Brown, that's not what we're here for.

3 A. Okay.

4 Q. I'm on the issue of whether you're going to be
5 able to represent yourself.

6 A. Yes, sir.

7 Q. That's what we're here for. It's not about
8 making any agreements with the State.

9 A. Yes. Okay.

10 Q. You and I are talking. They can't respond.

11 A. Okay.

12 Q. I've told them they can't respond.

13 A. Well, Your Honor, this is my understanding of
14 it. My understanding, through the *Witherspoon*
15 process that we - you know, many weeks - is that
16 I'm not obligated to put up a defense in
17 mitigation. That I have to show no evidence. That
18 the jurors have to consider both sides regardless
19 if I produce any evidence.

20 Q. Right.

21 A. And I want to defend myself because Mr. Doskey
22 finds it a moral obligation on his part that he
23 should put up the best defense.

24 Q. It's actually a professional obligation on his
25 part.

26 A. Professional obligation, also. Excuse me.

27 Q. He's required.

28 A. To put up the best defense possible for me.

29 Q. Right.

30 A. And he thinks that putting my mother up and my
31 Uncle Calvin up is part of that defense, and that's
32 where we disagree.

1 Q. Okay. But the thing about self-representation
2 is you can't have it halfway.

3 A. Well, this is my plan, Your Honor. My plan is
4 being the law states that I have not - I don't have
5 to put any defense up, I'm going to rest -

6 Q. Okay.

7 A. - all through the process.

8 Q. Well, so let me get - I don't necessarily have
9 to know your strategy, although, it is good to
10 know. That's part of - that's going to be part of
11 what I base my decision on, that you have a
12 strategy. But if you're allowed - if I allow you to
13 represent yourself, you can't change your mind and
14 say, "Well, I want Mr. Doskey to call some of the
15 witnesses and not all of the witnesses."

16 A. Correct. I understand.

17 Q. Because if he's representing you, he's calling
18 them.

19 A. Well, that was the conflict. You see, I was
20 willing - if he was willing to not put my mother
21 and Uncle Calvin, we could of called anybody that
22 he wanted besides that. But he's unwilling to do
23 that, so this is the step that I have to take to
24 protect my mother.

25 Q. But what I'm telling you is you can still call
26 other witnesses if you wish to.

27 A. I understand. I'm not - I don't think I can
28 question a witness. You understand what I'm saying?
29 I feel that I don't - I'm not saying have the
30 skills, I just don't have - emotionally, I don't
31 know how to question somebody - you know what I'm
32 saying - in a situation like this. Because this -

1 believe it or not, this is my first time going
2 through a process like this. And, to me, the best
3 thing that I can do is just rest, and then whatever
4 the jurors decide, that's what they decide. What's
5 important, right here, is my mother.

6 Q. Some other things you need to understand is
7 that once the jury makes its decision, there's
8 going to be a procedure called the "appeal
9 process." First of all, if you represent yourself,
10 you can't later ask for a new trial, because of the
11 fact that I allowed you to represent yourself.

12 A. Yes, sir.

13 Q. You can't - you'll be giving up any claim that
14 you might have for ineffective assistance of
15 yourself in representing -

16 A. Correct.

17 Q. - ineffective self-representation, so to speak.

18 A. Now, does that carry through to the guilt
19 phase, also?

20 Q. The guilt phase is done.

21 A. Right. So I don't waive anything on the guilt
22 phase.

23 Q. We're talking about representation - you
24 representing yourself, if it gets to that point.
25 Whatever mistakes, whatever risk you take for
26 representing yourself, whatever problems you cause
27 for yourself is on you.

28 A. Correct.

29 Q. As they say, you have to go into this with your
30 eyes open.

31 A. Yes, sir.

32 Q. When we talked about mitigation - the

1 circumstances that are shown to the jury in
2 mitigation may be understandably personally painful
3 to you, but may also be extremely beneficial and
4 helpful to you, because that's - mitigation is for
5 your benefit.

6 A. I understand.

7 Q. You - by not putting on any mitigation
8 evidence - if you choose not to when you're asked -
9 because I'm going to ask you throughout the process
10 if I allow you to represent yourself.

11 A. Yes, sir.

12 Q. It's your time to call, you can call whatever
13 witnesses you want, because they're under subpoena
14 and they're here.

15 A. Yes, sir.

16 Q. You run the risk of not having the jurors
17 recognize mitigation if it's not presented to them.
18 They can look for it.

19 A. Yes, sir.

20 Q. And they've told us that they would. But if
21 it's not shown to them, it makes it a little
22 difficult to find it. That's your risk if you
23 choose it.

24 A. Yes, sir. I just feel this is the decision I
25 have to make to protect my mother, and whatever
26 consequences I have to suffer I'm willing to take
27 that.

28 Q. Are you refusing to allow the Capital Defense
29 team to represent you?

30 A. I think the disagreement we have, yes, I would
31 ask them to stand down.

32 Q. Let me address one other thing that you said.

1 The Court is not allowed to assist you in
2 presenting your evidence if you chose to present
3 any.

4 A. Yes, sir.

5 Q. I couldn't question people for you.

6 A. Correct.

7 Q. And the rules and procedures and the law are
8 things that Mr. Doskey and Mr. Cuccia have
9 extensive experience with.

10 A. Yes, sir.

11 Q. As they've demonstrated -

12 A. Yes, sir.

13 Q. - throughout the case in the guilt phase.
14 That's what their job was to do.

15 A. Yes, sir.

16 Q. It's not a question of whether - at least part
17 of my decision is not whether I think you have the
18 legal capabilities to do this, whether you have the
19 legal understanding, but whether you're doing this
20 with a clear mind - whether you understand.

21 A. Well, I understand the consequences I'm facing.
22 I don't know if you understand the reasons that I'm
23 doing it for. That's - and I know I'm not capable
24 of asking the questions that need to be asked like
25 Mr. Doskey would be doing, and I recognize that.

26 Q. But you can still ask questions.

27 A. Sure. Sure. I can still ask questions. But
28 that's why I've made the decision to just rest and
29 protect my mother. You think it's a mental
30 decision. I would agree with you. I think
31 everything we do is mental.

32 Q. I think it's a foolish decision.

1 A. I agree with you, in a sense. I agree with you.
2 But it's my decision, and I believe protecting my
3 mother and her past instead of dragging her through
4 this for something she might not be able to shake
5 off after this is the greater of the two evils.
6 That's my personal opinions on it.

7 THE COURT:

8 Mr. Doskey.

9 MR. DOSKEY:

10 Yes, Your Honor.

11 THE COURT:

12 The witnesses that you have, are they
13 all available that you've lined up?

14 MR. DOSKEY:

15 There's Mr. Billiot, who will be in
16 here at approximately 2 p.m. Mr. Nieves, I
17 believe, is going to be here this morning.
18 He's under subpoena, and I believe he'll be
19 here this morning. Dr. Cunningham is in
20 town. Dr. Piasecki is in town. Jason Brown
21 and Calvin Dumas are - either stayed over
22 here - I'm being informed by Joe that
23 they're, in fact, available. Rosalind Brown
24 is also here. Judy Brown is here. Little
25 Judy Brown - the grand - Little Judy - I'm
26 sorry - Garcia - I believe it is - Jimenez
27 (Spelled phonetically.) is here. So, yes,
28 they're all here and available. We've got
29 Dr. Piasecki and Dr. Cunningham housed in
30 our hotel, and we're willing to continue to
31 pay whatever expenses are necessary for
32 them.

1 THE COURT:

2 Okay.

3 BY THE COURT:

4 Q. The reason I asked him for that recitation, Mr.
5 Brown, is I want you to understand what's available
6 for you through their actions.

7 A. Yes, sir.

8 Q. And you have the option, whether they represent
9 you or not, to call all of those witnesses. You'll
10 be asked that.

11 A. Yes, sir.

12 Q. You can stand down.

13 A. Thank you. (Defendant exited the witness
14 stand.)

15 THE COURT:

16 The record will reflect counsel for the
17 State, counsel - Mr. Doskey and Mr. Cuccia
18 are present, Mr. Brown is present, and the
19 Court has conducted a *Farett*a colloquy for
20 determination of Mr. Brown's request to
21 represent himself in the penalty phase. Mr.
22 Brown was previously and has been
23 represented by Mr. Cuccia and Mr. Doskey
24 and the Capital Defense - I call it the
25 "Capital Defense team" throughout the last
26 approximately three years and through the
27 guilt phase and into the preparation for
28 the penalty phase over the last few days.

29 The Court was informed, yesterday, that
30 there was a substantial disagreement
31 between Mr. Brown and his counsel as to the
32 scope and breadth of the mitigation

1 evidence intended to be put forth that
2 cannot be resolved based on the defendant's
3 desires and wishes and the Defense
4 Counsel's professional, ethical, moral
5 obligations to defend and present
6 mitigation evidence that's known to him or
7 to them.

8 According to *Faretta v. California*, Mr.
9 Brown has the right to choose between the
10 right to counsel and the right to represent
11 himself when such a conflict arises. But he
12 has to do so knowingly, intelligently, and
13 without waver. As we discussed, he has to
14 do so and understand the risk of self-
15 representation and understand the benefits,
16 potentially, of representation. Mr. Brown
17 is aware - when we were in the guilty
18 phase - Mr. Brown has been present for
19 approximately six weeks of penalty
20 qualification, and has summarized it, in
21 his own words, as he has the right not to
22 present anything if he chooses to.

23 The Court has informed him that even if
24 the Court grants his right to self-
25 representation, the witnesses are available
26 for his presentation of whomever he chooses
27 to. Mr. Brown has indicated that he
28 understands, if he represents himself, it
29 cannot be a basis for future issue with
30 regard to that self-representation, such as
31 seeking a new trial based on the penalty
32 phase, because he represented himself,

1 seeking an ineffective assistance of
2 counsel for representing himself.

3 He has sufficient mental abilities and
4 understandings. He is not under any mental
5 health treatment, nor has he demonstrated
6 any lack of ability to understand what he's
7 doing, when he's doing it, and throughout
8 this process. In fact, he's demonstrated an
9 extreme ability to control his own actions.

10 The Court finds that Mr. Brown's waiver
11 of his right to counsel for the remaining
12 portion of the trial, including the penalty
13 phase, is a knowing and voluntary decision
14 having been fully informed of the benefits
15 and the risks, and he has a full
16 understanding of what he is doing. As I
17 indicated to Mr. Brown, it is my view that
18 it's a foolish decision, but it is not one
19 that is contrary to the law in
20 consideration of *Faretta v. California*. It
21 is also - there was even a federal case,
22 *State v. - I'm sorry - United States v.*
23 *Lynn Davis* that discussed the judge's
24 attempt to appoint a special defense
25 counsel to come in and handle the penalty
26 phase as a friend of the Court, which I
27 can't do. It's beyond the scope of anything
28 I can do.

29 There are numerous state cases, among
30 them: *State v. Bell*, *State v. Gregory*
31 *Brown* that allowed and authorized self-
32 representation in capital cases. I'm going

1 to grant his right to represent himself.

2 Now, the Court - because I'm not sure
3 that he would understand how to rally the
4 witnesses or have the witnesses called, if
5 you would choose to call the witnesses, I
6 will assist in having them here, because
7 they're under subpoena. But that's the only
8 assistance I can give you. When you're
9 asked to call a witness, if you want to
10 call any witnesses, you tell me their
11 names. We have them under subpoena,
12 they'll be brought. I have used the
13 phrase - I'm not going to use it. Anyway,
14 that's the ruling of the Court.

15 DAVID BROWN:

16 Thank you, Your Honor.

17 THE COURT:

18 Now, the awkward position will be that
19 you'll be at the table by yourself, because
20 you've discharged your lawyers. In order to
21 avoid causing too much - I'm not - this is
22 the part that I'm not sure of. And I don't
23 know whether it would make it worse or
24 better to have counsel seated behind you
25 not being able to do anything or having
26 counsel absent and you sitting at the table
27 by yourself. I don't know. I'll have to -

28 MR. CUCCIA:

29 May I ask a question, Judge?

30 THE COURT:

31 Yes, you may.

32 MR. CUCCIA:

Do you intend to inform the jury that Mr. Brown has selected to represent himself in the penalty phase?

THE COURT:

I will have to if you're not here.

MR. CUCCIA:

Can I talk to Mr. Brown for a second?

(An off-the-record discussion was held between the defendant and Mr. Cuccia, which was not reported.)

THE COURT:

Do you have a question, Mr. Morvant?

MR. MORVANT:

I just wanted a clarification. I was speaking to Mr. Soignet. I didn't hear the exact question. I know the answer. But I assume the question was -

THE COURT:

He wanted to know if I would inform the jury that Mr. Brown has elected to represent himself if they're not here. And I have to if they're not here.

MR. MORVANT:

We were gonna ask you that. I didn't hear the question, but I heard the answer and I figured that's what it was. Thank you.

MR. CUCCIA:

Judge, what I would - I would like permission to sit next to Mr. Brown, so the jury doesn't get the impression -

THE COURT:

Think about it. Take a moment. This is

1 a - I can tell, from looking at counsel,
2 that y'all are distressed by my decision as
3 much as you're distressed by his decision.
4 But I have - I can't allow you to sit
5 there, but then say stuff.

6 MR. CUCCIA:

7 We won't say anything.

8 THE COURT:

9 So if you sit with him, I will be
10 directing my questions to him, as in: Do
11 you intend to call witnesses? Do you have
12 anything to present? Do you have any
13 objection to the offer of the State's
14 evidence? Do you have any response? And all
15 questions will be directed to Mr. Brown.

16 MR. CUCCIA:

17 We understand, Judge.

18 THE COURT:

19 Y'all will remain there. I think that
20 is a reasonable way to avoid the jury from
21 the shock of you not being there, after
22 they've seen you there for seven weeks and
23 the speculation that would draw from that.

24 Now, they may - they also know that you
25 do not have - we've informed them that
26 y'all don't have to do anything, so that
27 leaves that open.

28 MR. CUCCIA:

29 I would not object - I think it would
30 be appropriate to tell the jury that Mr.
31 Brown has elected to represent himself in
32 the penalty phase, since he's going to be

1 the one speaking. So I think that both
2 would be appropriate. You allow us to sit
3 here, but take no action, of course, as
4 well as inform the jury. Then they would
5 understand why we sit silent and why Mr.
6 Brown answers the questions.

7 THE COURT:

8 Okay. Thank you. I will allow you to
9 remain at counsel table.

10 MR. CUCCIA:

11 Thank you, Judge.

12 THE COURT:

13 You look concerned, Mr. Soignet. You
14 all right?

15 MR. SOIGNET:

16 No, sir.

17 THE COURT:

18 Okay. The jury will be here at ten
19 o'clock. Are you ready to proceed?

20 MR. SOIGNET:

21 The State's ready, Your Honor. Your
22 Honor, may we approach real quick?

23 THE COURT:

24 Yes, you can - well -

25 MR. SOIGNET:

26 I was just going to be handling - I'll
27 do the opening. I just wanted to make the
28 Court aware -

29 THE COURT:

30 We can go off the record. Off the
31 record.

32 **END OF TRANSCRIPT**

COPY

C E R T I F I C A T E

I, Katrina J. Spera, Official Court Reporter, in and for the State of Louisiana, employed as an official court reporter by the 17th Judicial District Court, Parish of Lafourche, State of Louisiana, as an officer before whom this testimony was taken, do hereby certify that the above twenty-two (22) pages constitute a true and faithful transcript executed to the best of my ability and understanding; that this proceeding was reported by me in the Stenomask reporting method; was prepared and transcribed by me or under my personal direction and supervision; and that the transcript has been prepared in compliance with the transcript format guidelines required by statute or by rules of the board or by the Supreme Court of Louisiana; and that I have no relationship with counsel or the parties herein, nor am I otherwise interested in the outcome of this matter which was held at Thibodaux, Louisiana, on November 1, 2016, in the matter numbered and entitled:

STATE OF LOUISIANA
VERSUS NUMBER-520401
DAVID BROWN

This certification is valid only for a transcript accompanied by my original signature and original imprinted seal on this page. Any copies must have a "COPY" stamp and my original imprinted seal.

In Faith Whereof, witness my signature this 20th day of February, 2017.


KATRINA J. SPERA, CCR
CERTIFICATE #99099

Supplemental Appendix C

Motion for New Trial, Exhibit B: Affidavit of Kerry Cuccia,
State v. Brown, No. 520401 (La. 17th J. Dist. Ct., July 7, 2017)

EXHIBIT B

STATE OF LOUISIANA

PARISH OF ORLEANS

AFFIDAVIT OF KERRY CUCCIA

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, Kerry Cuccia, Esq., who being by me first duly sworn said:

1. My name is Kerry Cuccia. I am the Director of the Capital Defense Project of Southeast Louisiana, and an attorney duly admitted to practice law in Louisiana.
2. I represented David Brown on the charges of first degree murder under case number 520-401 in the Seventeenth Judicial District Court in Lafourche Parish.
3. Between the time of the offense (November 4, 2012), and June of 2013, Mr. Brown essentially did not have an attorney. In June of 2013, Jeffery Smith and Dylan Utley were appointed to represent Mr. Brown.
4. I enrolled as counsel for Mr. Brown in December of 2013. Initially Claude Kelly was on the case, but he later left the office and was replaced by Graham da Ponte, who also left the office. Dwight Doskey was my co-counsel at the time of trial.
5. The primary individuals from my office who had contact with Mr. Brown were myself, Mr. Doskey, and Ken Richardson, a mitigation specialist at my office; however, I met with Mr. Brown the most and usually suggested what topics would be discussed if he was visited by other members of the team.
6. Trial began on September 16, 2016, and jury selection lasted for approximately 6 weeks. Opening arguments were on October 24, 2016. After jury selection ended, I communicated with Mr. Brown at the defense table but I did not go visit him at the jail. I may have visited him once during jury selection at the jail.
7. At a few times prior to and during trial, I indicated to Mr. Brown that if he was not satisfied with my representation of him, that he should complain to the judge and ask for a new attorney. At no time did Mr. Brown bring up the topic of representing himself, or any desire to do so. If he had done so, I would remember that.
8. I did not tell Mr. Brown that he had the right to control his own defense at penalty phase. I advised Mr. Brown that if we were going to represent him at the penalty phase, we were going to do it our way. The option was never presented to Mr. Brown for us to remain as counsel, but not call his mother, or present the expert witnesses without also presenting his family members. I did not advise Mr. Brown that the court had discretion to order myself and/or Mr. Doskey to act as hybrid or standby counsel.
9. The last member of the defense team who visited with Mr. Brown at the jail was Mr. Doskey.
10. After the hearing on October 31, I felt we had two things to do: 1) prepare a motion to withdraw as counsel of record; and 2) per the judge's request, research the law regarding waiver of counsel.
11. I did not communicate with Mr. Brown, on the phone or in person, from the time we left court on October 31, until we came back to court on November 1.
12. During the *Farett*a hearing, I took no actions on behalf of Mr. Brown. I had filed a notice of withdrawal as counsel the night before. I did not notice whether the statements Mr. Brown gave to the court regarding his educational or mental health history were accurate.
13. Mr. Brown did not have a copy of his entire case file in his cell at any point prior to or during trial. I did not review the entire defense penalty phase file with him.

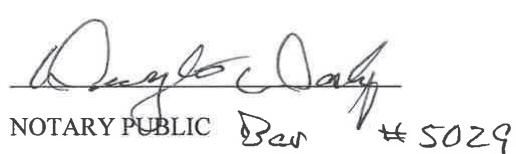
14. Throughout the court of the trial, including penalty phase, Mr. Brown was wearing a stun-device and leg braces. He was under the threat of being shocked by the stun-device if he made any sudden moves. He did not walk in front of the jury. When he walked outside the presence of the jury, he walked with a stiff leg and oddly. It would have been apparent to jurors there was some device restricting his movement.
15. I was also aware that Mr. Brown, in addition to having to wear a stun-device and leg braces, also suffered from chronic pain. The cause of this pain, at least in part, was the fact that he had had a traumatic amputation of some of his toes and ankle from being run over as a child by a lawn-mower operated by his older brother. It is my understanding this deformity has resulted in chronic, untreated pain over time, and the development of pain in his opposite leg and back. Mr. Brown was not being treated for this condition at the time of trial that I was aware.
16. I have personal knowledge of the facts set forth above, and I am competent to testify to these facts.

Further, affiant sayeth naught.



Kerry Cuccia
KERRY CUCCIA

PERSONALLY SWORN AND SUBSCRIBED BEFORE ME, this 7th day of July,
2017.



Douglas Daly
NOTARY PUBLIC Bar # 5029

Supplemental Appendix D

Motion for New Trial, Exhibit C: Affidavit of Dwight Doskey,
State v. Brown, No. 520401 (La. 17th J. Dist. Ct., July 7, 2017)

EXHIBIT C

STATE OF LOUISIANA

PARISH OF ORLEANS

AFFIDAVIT OF DWIGHT DOSKEY

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, Dwight Doskey, Esq., who being by me first duly sworn said:

1. My name is Dwight Doskey. I am an attorney duly admitted to practice law in Louisiana.
2. I represented David Brown on the charges of first degree murder under case number 520-401 in the Seventeenth Judicial District Court in Lafourche Parish.
3. I began representing Mr. Brown in 2014, and remained on the case until I withdrew as counsel on October 31, 2016.
4. My role in the case was to focus on the penalty phase and development of mitigation evidence.
5. Kerry Cuccia had most contact with Mr. Brown pretrial out of the members of the defense team. Mr. Cuccia preferred to be the primary contact with Mr. Brown. However, I visited Mr. Brown at the jail during trial.
6. Mr. Brown's mother, Judy Courteau, was present during nearly every day of the six-week voir dire, and the deputies would also allow short visits between them in the courtroom. Then, after the court excluded Ms. Courteau during guilt phase, Mr. Brown was not able to see her.
7. Following the guilty verdict, I tried to set up a visit between Mr. Brown and his mother. However, to the best of my knowledge, the visit fell through after the sheriff said it had to happen at the jail.
8. The last time I visited with Mr. Brown at the jail, he told me he did not want us to call his mother as a witness at penalty phase. I told him that we had to call her as part of our professional obligation to him, and that the only way to prevent us from calling her as a witness would be to dismiss us as counsel and represent himself.
9. At no time prior to this did Mr. Brown ever express a problem with mitigation and he never said he wanted to represent himself. Only that he did not want his mother to be called as a witness. Indeed, Mr. Brown willingly participated in evaluations by our experts for the preparation of the penalty phase. Mr. Brown never took any action prior to the guilty verdict indicated he wished to waive mitigation.
10. Mr. Brown had a hard time understanding the concept of mitigation, mental illness, and what we were going to present.
11. I did not tell Mr. Brown that he had the right to control his own defense at penalty phase. I did not advise him that he could choose not to have his mother testify, or that he could present the expert witnesses without also presenting his family members as witnesses. I did not advise Mr. Brown that the court had discretion to allow myself and/or Mr. Cuccia to act as hybrid or standby counsel.
12. I did not communicate with Mr. Brown, on the phone or in person, from the time we left court on October 31, until we came back to court on November 1.
13. During the Faretta hearing, I was told I had no role to play as an advocate. I did not notice whether the statements Mr. Brown gave to the court regarding his educational or mental health history were accurate; however, I did possess information relevant to the determination the court needed to make and did not share any of it because I believed I could not as I was not part of the proceedings.

14. I never gave Mr. Brown a copy of his case file, nor did I review the entire file with him. I did not share with him any of the investigation memoranda, or their contents. I did not provide him with a copy of the report of Mark Cunningham to keep in his cell, although I did provide it to the district attorney and the trial court. While Mr. Brown and I discussed the Mark Cunningham's report, we only did so as to the tenor of the report; nothing specific. We did not discuss Dr. Cunningham's conclusions. While discussing this report, Mr. Brown took no notes of its contents.
15. Throughout the course of the trial, including penalty phase, Mr. Brown was wearing a stun-belt and leg braces. He was under the threat of being shocked by the stun-belt if he made any sudden moves. He did not walk in front of the jury, but if he had, the leg brace would have locked and he would have had to walk with a stiff leg. When he stood before the jury, the leg brace would lock, and he would have to adjust it to sit back down.
16. Mr. Brown was taking medicine during trial. I remember there were periodic issues with deputies not bringing the medications he was supposed to receiving for his blood pressure management.
17. I am aware that Mr. Brown suffered from severe, chronic pain as a result of a childhood lawnmower incident. To my knowledge, he was not receiving pain medication at the time of trial.
18. I have personal knowledge of the facts set forth above, and I am competent to testify to these facts.

Further, affiant sayeth naught.



DWIGHT DOSKEY

PERSONALLY SWORN AND SUBSCRIBED BEFORE ME, this 5th day of July,
2017.



NOTARY PUBLIC

Supplemental Appendix E

Motion for New Trial, Exhibit D: Correspondence and Motion to Withdraw,
State v. Brown, No. 520401 (La. 17th J. Dist. Ct., July 7, 2017)

EXHIBIT D

Jennifer Lynn

From: Kerry Cuccia
Sent: Tuesday, November 01, 2016 2:49 AM
To: Judge John LeBlanc; Joe Soignet
Cc: Meghan Harwell; Cam Morvant; Kristine Russell; Dwight Doskey; Heather Hendrix; Jennifer Lynn; Kacy Bordis; Cheri Dufour
Subject: RE: Memos on Faretta and self-rep
Attachments: Brown Motion To Withdraw 2016-10-31.docx; Brown Memorandum On Defendant's Right To Self Representation 2016-10-31.docx

Categories: David Brown

Dear Judge Lebalnc,

Attached is the briefing you requested and the Motion To Withdraw which will be filed on Mr. Brown directions. Please contact me with any questions. Sincerely, Kerry P. Cuccia

From: Judge John LeBlanc [<mailto:judgea@17thjdc.com>]
Sent: Monday, October 31, 2016 9:21 PM
To: Joe Soignet
Cc: Meghan Harwell; Cam Morvant; Kristine Russell; Dwight Doskey; Kerry Cuccia; Heather Hendrix; Jennifer Lynn; Kacy Bordis; Cheri Dufour
Subject: Re: Memos on Faretta and self-rep

As noted on the record this afternoon in a closed proceeding, all counsel, Mr. Brown and the Court agreed to a recess of the penalty phase to research the issues presented. The request was granted for all of us to research and consider the issues. Later today, I gave a time to present memos of 8:00 pm tonight.

You have each chosen to treat my directive as an invitation. Your courtesy in declining to do so will also be made a part of the record.

I have not received any motion to withdraw from representation of Mr. Brown.

Generally, refusal by a party to supply memoranda means you are waiving argument, comment and objection.

You may want to reconsider before 8:00 am.

This email string will be filed in the record under seal for later review at 8:30 am.

Respectfully,

John E. LeBlanc
17th JDC
(985) 447-3780
judgea@17thjdc.com

On Mon, Oct 31, 2016 at 6:48 PM, Joe Soignet <jsoignet@lpda.org> wrote:

Your Honor:

STATE OF LOUISIANA * 17TH JUDICIAL DISTRICT
VERSUS * PARISH OF LAFOURCHE
* * * * * * * * * * STATE OF LOUISIANA
* * * * * * * * * * NO. 520401 DIV. "A"

FILED: _____ DEPUTY CLERK
MOTION TO WITHDRAW
(DM-143)

Now into Court comes Kerry P. Cuccia and Dwight M. Doskey of the Capital Defense Project who move to withdraw as counsel-of-record for the defendant, David Brown, because Mr. Brown disagrees with the defense strategy which they intend to present in the penalty phase of this capital case and he wishes to defend himself in a manner which they believe is inappropriate.

Respectfully submitted:
Capital Defense Project of Southeast Louisiana

Kerry P. Cuccia, La. Bar Roll No. 04635
Dwight Doskey, La. Bar Roll No. 05029
Attorneys for David Brown
3801 Canal St., Suite 400, New Orleans, LA 70119
Ph. (504) 595-8965, Fax (504) 558-0797
Email: kerrycc@capitald.org
DDoskey@capitald.org

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CERTIFICATE OF SERVICE

I, Kerry P. Cuccia, do hereby certify that a copy of the foregoing *Motion To Withdraw* (DM-143) has been served on the District Attorney for Lafourche Parish, by email delivery on this 31st day of October, 2016.

Kerry P. Cuccia

ORDER

Considering the foregoing

IT IS ORDERED BY THE COURT that the foregoing Motion To Withdraw
(DM-143) is set for hearing on the 1st day of November, 2016 at 9:00 a.m.

Thibodaux, Louisiana this _____ day of _____, 2016.

JUDGE

STATE OF LOUISIANA * 17th JUDICIAL DISTRICT COURT
VERSUS * PARISH OF LAFOURCHE
DAVID BROWN * STATE OF LOUISIANA
* * * * * NO. 520401 DIVISION: "A"

FILED: _____ DEPUTY CLERK

COUNSEL'S RESPONSE TO
THE COURT'S REQUEST FOR BRIEFING ON
ASSERTION OF DEFENDANT'S RIGHT TO SELF-REPRESENTATION
(DM-144)

MAY IT PLEASE THE COURT:

In response to the Court's request for briefing on the law regarding Mr. Brown's request to represent himself in the penalty phase of this capital case, defense counsel provide the following.

The leading case on the right to self-representation is *Faretta v. California* 422 U.S. 806, 835 (1975). In deciding whether a defendant should be allowed to represent himself, the Court directed trial courts to determine if the defendant is making a knowing and intelligent waiver of his right to appointed counsel, whether that waiver is clear and unequivocal, and whether the waiver is timely. Herein, counsel understands the Court seeks briefing on two primary questions:

1. The applicability of *Faretta* to capital cases, and
2. Whether a defendant can be allowed to represent himself after the trial has commenced.

The answer to both questions seems to be yes.

In the capital case of *State v. Gregory Brown* 907 So. 2d 1 (2005) the defendant believed he was better suited than his appointed counsel to effectively cross-examine certain witnesses and asked to represent himself in that portion of the trial. The trial judge allowed the defendant to conduct certain cross-

examination but not others.¹ In approving and labelling this arrangement as “hybrid representation,”² the Court focused on the *Farella* factors such as the defendant’s awareness of the dangers and disadvantages of self-representation. Awareness of technical legal knowledge is not the key to determining if the defendant is making a knowing exercise of his right to defend himself. Instead, the trial judge need only determine that “the accused is competent to waive counsel and is voluntarily exercising his informed free will” to grant the defendant’s request to represent himself.³

“Nonetheless, the defendant cannot exploit his right to self-representation in order to create reversible error. In the capital case of *State v. Bodley* 394 So. 2d 589, 593 (La. 1982), the Court acknowledged that the trial court has the discretion to allow the defendant and his attorney “to conduct different phases of the defense in a criminal trial” but the defendant cannot claim reversible error when his request is granted.⁴ The Court employed this reasoning in *Brown* when it refused to reverse Mr. Brown’s conviction.

After the trial was in progress, Mr. Brown asserted his right to self-representation. He had accepted “hybrid representation” but later claimed reversible error because he wanted to present an alibi defense instead of the reasonable doubt defense relied on by his appointed counsel. The Court found this claim to be a clear effort to manipulate the trial process and not in accordance with the requirement that the request for self-representation be made at a reasonable

¹ An unpublished appendix contains a full discussion of the issue but is not available to counsel at this time.

² Citing *McKaskle v. Wiggins* 465 U.S. 168, 184 (1984)

³ Citing *State v. Santos* 770 So. 2d 319, 321 (La. 2000)

⁴ In *Bodley*, the defendant requested assistance of counsel but claimed reversible error when he disagreed with counsel’s decision to request a mistrial.

time, in a reasonable manner and at an appropriate stage of the proceeding.”⁵

Like Gregory Brown, David Brown is asserting his right to self-representation after the trial has begun. But the circumstances are distinguishable. Herein, David Brown is asking to represent himself in the penalty phase which has not yet started. Unlike Gregory Brown, he does not want appointed counsel’s assistance in deciding the penalty phase defense strategy. To the contrary, he seeks sole control over his penalty phase defense.

Since the penalty phase has not commenced, Mr. Brown’s request could be deemed to come at an appropriate stage of the proceeding. He is not asking for a delay. And, since there has been no action by appointed counsel in the penalty phase, Mr. Brown’s request cannot be deemed an effort to create reversible error because appointed counsel refused to employ his theory of defense.⁶

This memorandum is submitted at the Court’s request for briefing on the law concerning Mr. Brown’s request to represent himself in the penalty phase of this case. It should not be taken to suggest the Court should grant or deny Mr. Brown’s request. But the law seems to authorize the granting of his request if the Court is satisfied that:

1. Mr. Brown is mentally competent,⁷
2. Mr. Brown is asserting his right to self-representation with his eyes wide open⁸, and
3. It is made clear on the Record that he will not be able to claim reversible error if his request is granted.⁹

⁵ State v. Seiss, 428 So.2d 444, 447 (La. 1983)

⁶ Brown at 27

⁷ See Santos (supra)

⁸ See Faretta (supra)

⁹ See Bodley (supra)

Respectfully submitted:
Capital Defense Project of S.E. Louisiana

Kerry P. Cuccia, La. Bar. No. 04635
Dwight M. Doskey, La. Bar No. 05029
Attorneys for Defendant
3801 Canal Street, Suite 400
New Orleans, La 70119
Ph. (504) 595-8965
Fax. (504) 558-0797
Email: kerryc@capitald.org;
ddoskey@capitald.org

CERTIFICATE OF SERVICE

I, Kerry P. Cuccia, do hereby certify that a copy of the foregoing *Memorandum In Response To The Court's Request For Briefing On Defendant's Right To Self-Representation (DM-144)* has been served on the District Attorney for Lafourche, by email delivery, on this date.

Thibodaux, Louisiana, this _____ day of _____, 2016.

Kerry P. Cuccia

Jennifer Lynn

From: Kerry Cuccia
Sent: Monday, October 31, 2016 11:06 PM
To: Judge John LeBlanc; Joe Soignet
Cc: Meghan Harwell; Cam Morvant; Kristine Russell; Dwight Doskey; Heather Hendrix; Jennifer Lynn; Kacy Bordis; Cheri Dufour
Subject: RE: Memos on Faretta and self-rep

Categories: David Brown

Dear Judge Leblanc,

Please accept my apology. I did not understand your response to Mr. Soignet's query (I believe he asked if you would accept briefing) as an order to brief the issue. My recollection is you replied to him that you would welcome such but not that you were requiring us to do so or be exposed to possible sanctions as stated in your email of 9:21 p.m. Thus when Ms. Harwell spoke with me about the awkwardness of briefing the issue where the request was made by Mr. Brown, I suggested the language contained in her email of 5:42 p.m. I certainly expected Mr. Soignet to submit a brief because his question suggested a desire to brief the issue and, as stated in Ms. Harwell's email, we stood ready to provide a response to the State's briefing if needed to make sure the law was accurately represented to the Court. Again, I apologize and now provide the product of our research to you; it will be put in the form of a pleading by 8:00 a.m.

I understand your primary concerns to be whether a defendant's right to self-representation under Faretta applies to a capital case and, if so, does it apply after the trial has begun. Both questions seem to be answered affirmatively by the decision in the capital case of State v. Gregory Brown 907 So. 2d 1, (La. 2005). Therein, the Court referred to Faretta in approving the trial court's decision to allow a defendant's request to conduct cross examination though not every witness (an unpublished appendix provides an in depth discussion but that is not available to me at this time). The Court described this situation as a "hybrid" and, while referring to the Fareretta inquiry, does not require strict compliance. This "hybrid" representation is discussed in the non-capital case of State v. Mathieu 68 So. 3d 1015 where, in part, the Court discusses it as the defendant representing himself in one portion of the trial and appointed counsel representing him in another. The cases also allow the Court appoint "stand by counsel" to assist to the defendant in whatever capacity the Court deems is necessary. The question is one that falls in the Court's discretion with the guiding factors to be whether the Court is satisfied the defendant knows the risks he is taking and voluntarily exercising his informed free will.

We were not asked to take a position by Mr. Brown though it is clear Mr. Brown does not want us to continue as his counsel – at least not as the decision maker. And, to my knowledge, there was no indication that a Motion To Withdraw would be required to perfect Mr. Brown's request for self-representation. If so, we will file one in the morning unless Mr. Brown instructs us otherwise.

Again, I apologize for our misunderstanding and will file a brief in accordance with the above authorities in the morning. Thank You, Kerry P.Cucia

From: Judge John LeBlanc [mailto:judgea@17thjdc.com]
Sent: Monday, October 31, 2016 9:21 PM
To: Joe Soignet
Cc: Meghan Harwell; Cam Morvant; Kristine Russell; Dwight Doskey; Kerry Cuccia; Heather Hendrix; Jennifer Lynn; Kacy Bordis; Cheri Dufour
Subject: Re: Memos on Faretta and self-rep

Jennifer Lynn

From: Joe Soignet <jsoignet@lpda.org>
Sent: Tuesday, November 01, 2016 7:22 AM
To: 'Judge John LeBlanc'
Cc: Meghan Harwell; 'Cam Morvant'; 'Kristine Russell'; Dwight Doskey; Kerry Cuccia; 'Heather Hendrix'; Jennifer Lynn; 'Kacy Bordis'; 'Cheri Dufour'
Subject: RE: Memos on Faretta and self-rep
Categories: David Brown

Your Honor and Mr. Cuccia:

On behalf of the State of Louisiana, I wanted to respond to the most recent emails from both this Honorable Court and Mr. Cuccia. As both of you are aware, our office has timely responded to every pleading filed over the last four years in this matter, and as we left court yesterday afternoon, we fully intended to do so again.

Once we began our research and spoke with other capital prosecutors, we began to realize that while we certainly understood the issues the court wished us to brief, we could not know all of the factual information which precipitated yesterday's events. This is not simply an issue of law, but an issue of fact. As matters currently stand, there are a number of facts which have not yet been disclosed by either the defendant or defense counsel. Thus, the need for a Faretta hearing.

Accordingly, we could not take an informed position on the matter. Nonetheless, I proceeded with drafting a response in anticipation of receiving a memorandum submitted on behalf of the mover, who carried the burden of proof.

When Meghan informed all parties that no memorandum would be forthcoming, I likewise informed everyone that we too would not be responding. The matter now before the court was precipitated by the defendant, not the State of Louisiana. With no defense memorandum to respond to, nor any ruling of the court to object to, there was no prudent reason to take a position at that point. We have no burden to carry on this issue. Likewise, our failure to submit a memorandum is not a waiver of any rights we would have in contesting the motion currently pending before the Court.

And while the State might not be able to take a position on what is ultimately a dispute between a defendant and his counsel, we fully intend to participate at the Faretta hearing and vigorously protect the State's rights not only to continue with the penalty phase in this matter, but to insure that a proper record is made for review by any appellate court, should the issue arise.

I hope this clarifies our position.

Joe Soignet

From: Judge John LeBlanc [mailto:judgea@17thjdc.com]
Sent: Monday, October 31, 2016 9:21 PM
To: Joe Soignet
Cc: Meghan Harwell; Cam Morvant; Kristine Russell; Dwight Doskey; Kerry Cuccia; Heather Hendrix; Jennifer Lynn; Kacy Bordis; Cheri Dufour
Subject: Re: Memos on Faretta and self-rep

As noted on the record this afternoon in a closed proceeding, all counsel, Mr. Brown and the Court agreed to a recess of the penalty phase to research the issues presented. The request was granted for all of us to research and consider the issues. Later today, I gave a time to present^{the}memos of 8:00 pm tonight.

You have each chosen to treat my directive as an invitation. Your courtesy in declining to do so will also be made a part of the record.

I have not received any motion to withdraw from representation of Mr. Brown.

Generally, refusal by a party to supply memoranda means you are waiving argument, comment and objection.

You may want to reconsider before 8:00 am.

This email string will be filed in the record under seal for later review at 8:30 am.

Respectfully,

John E. LeBlanc
17th JDC
(985) 447-3780
judgea@17thjdc.com

On Mon, Oct 31, 2016 at 6:48 PM, Joe Soignet <jsoignet@lpda.org> wrote:

Your Honor:

After reviewing Meghan Harwell's recent email, and after spending the afternoon consulting with other capital prosecutors from across the state, we also believe that it would be inappropriate for the State to take a position at this time. This is particularly true in light of the fact that the State is perhaps not privy to all of the relevant information which led to this afternoon's developments. Thus, the State cannot take an informed position on the issue now before the court.

We will be in court at 8:45 to discuss matters before the jury returns.

Joe Soignet

From: Meghan Harwell [mailto:MHarwell@capitald.org]
Sent: Monday, October 31, 2016 5:43 PM
To: Judge John LeBlanc; Joe Soignet; Cam Morvant; Kristine Russell; Dwight Doskey; Kerry Cuccia; Heather Hendrix
Cc: Jennifer Lynn; Kacy Bordis; Cheri Dufour
Subject: RE: Memos on Faretta and self-rep

Dear Judge LeBlanc:

We appreciate your invitation to submit briefs on Mr. Brown's request to represent himself during the penalty phase of the trial. Under these particular circumstances, we do not believe it is appropriate to take a position. However, should the State submit briefing that we believe to contain an incorrect statement of the law, we would reserve the right to respond.

Sincerely,

Meghan Harwell

From: Judge John LeBlanc [judgea@17thjdc.com]
Sent: Monday, October 31, 2016 4:35 PM
To: Joe Soignet; Meghan Harwell; Cam Morvant; Kristine Russell; Dwight Doskey; Kerry Cuccia; Heather Hendrix
Cc: Jennifer Lynn; Kacy Bordis; Cheri Dufour
Subject: Memos on Faretta and self-rep

Please submit your memos by 8:00 pm tonight. I'd like to meet at 8:45 am and start court at 9:00.

Thanks,

John E. LeBlanc
17th JDC
(985) 447-3780
judgea@17thjdc.com