

No: _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

ERIC HOPE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT**

PETITION FOR WRIT OF CERTIORARI

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT OF FLORIDA

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QUESTION PRESENTED

Do the Sixth and Fourteenth Amendments of the Constitution and this Court's decision in *Faretta v. California*, 422 U.S. 806 (1975) require the reappointment of counsel when a pro se defendant is removed from the courtroom for misconduct?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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No: _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A of the petition and is reported at *Hope v. State*, 5D16-4086; 2017 WL6542533, (Fla. 5th DCA 2017).

JURISDICTION

The date on which the highest State court decided this case was December 22, 2017. A copy of that decision appears at Appendix A. A timely Motion for Rehearing was thereafter denied on January 31, 2018, and a copy of the order denying rehearing appears at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

The United States Constitution, Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the...to have the Assistance of Counsel for his defence.”

Amendment XIV, Section 1

The United States Constitution, Fourteenth Amendment states, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...”

STATEMENT OF THE CASE

Eric Hope was charged with attempted first degree murder, armed burglary of a dwelling with an assault or battery, and aggravated assault with a firearm. Appendix C, H. Two of the State's witnesses alleged that he forced his way into their condominium, pointed a gun at them, and pulled the trigger while the gun was pointed in one witness' face, but the gun misfired. Appendix C, H.

Before and at the beginning of trial Mr. Hope requested a new court-appointed attorney, claiming that his counsel was providing ineffective assistance. Appendix C, H. In both instances the court held a hearing, found that counsel was providing competent representation, and denied the request for a new attorney. Appendix C, H.

After each of the State's first two witnesses testified Mr. Hope complained in front of the jury that his leg shackles were cutting him. Appendix C, H. The jury was not supposed to know that he was wearing shackles, so the court removed the jury both times. The deputies saw only a small abrasion, no bleeding. Appendix C, H.

When the jurors entered to hear the third witness, Mr. Hope addressed them, saying, "life sentence...Please keep that in mind...Please keep that in mind...they [sic] trying to give me a life sentence." Appendix C, H. The court removed the jury and warned Mr. Hope that one more outburst would result in him being removed from the courtroom. Appendix C, H. Mr. Hope again complained about

his attorney, initially asked to be removed, but then he asked to stay and proceed pro se. Appendix C, H. The trial court conducted a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975), warned that there would be no continuance, and discharged counsel, appointing her as standby counsel. Appendix C, H. The court informed Mr. Hope that if he continued to be disruptive it could terminate self-representation and remove him from the courtroom. Appendix C, H.

Mr. Hope complained extensively about being unprepared, requested a continuance, and said he would do anything to stop the trial. Appendix C, H. The court reminded him of the *Faretta* inquiry, his choice to proceed pro se in the middle of trial, and the court refused to grant a continuance. Appendix C, H.

At the close of the State's case Mr. Hope indicated that when the trial resumed the next day he wished to recall one of the alleged victims, one of the responding officers, and himself. Appendix C, H. That night Mr. Hope told people at the jail that he was thinking of hurting himself. Appendix C, H. The next day the court appointed a doctor to evaluate him. Appendix C, H. The corrections officers who transported Mr. Hope testified that he began kicking and screaming about a mile from the courthouse. Appendix C, H. The doctor testified that Mr. Hope's behavior was consistent with one feigning mental illness. Appendix C, H. Mr. Hope then started saying, "Somebody just talk, please," over and over. Appendix C, H.

When asked if he wanted to participate in the rest of the trial he began

saying, “Oh, God...taking me back.” Appendix C, H. The court repeated the question and upon hearing no response found that Mr. Hope was competent and feigning mental illness. Appendix C, H. The court ordered Mr. Hope’s removal, declaring that he voluntarily absented himself from trial by his actions and that the trial would go on. Appendix C, H.

The court asked standby counsel if she wanted to come back as lead counsel. Appendix C, H. She declined, stating that Mr. Hope did not indicate that he wanted her reappointed, she did not have any information or arguments to present to the court, and she did not know what he wanted to ask the witnesses. Appendix C, H.

The court asked if there was any reason the trial could not go forward. Appendix C, H. The State said that Mr. Hope exercised his constitutional rights to represent himself and to absent himself from the courtroom. Appendix C, H. The State released the witnesses that Mr. Hope wanted to call. Appendix C, H. The State presented its closing argument; no closing argument was heard from the defense. Appendix C, H.

Mr. Hope was convicted of attempted manslaughter and all other counts as charged. Appendix C, H. He was sentenced to life in prison for the armed burglary and fifteen years on the other charges. Appendix C, H.

A Notice of Appeal was filed on November 29, 2016, and Mr. Hope sought appellate review in Florida’s Fifth District Court of Appeal. Appendix C, H. On

direct appeal, Mr. Hope argued that the trial court should have reappointed counsel once he was removed from the courtroom and that without counsel his other rights were unprotected. Appendix C, D, E. Florida's Fifth District Court of Appeal issued an opinion affirming the conviction and sentence without discussion. Appendix A. An order denying the Motion for Rehearing/for Written Opinion was issued on January 31, 2018. Appendix B.

Review was not sought in the Supreme Court of Florida because that Court lacks subject matter jurisdiction for review of decisions from the State District Courts of Appeal. See *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). "Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court." *Id.*

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the failure to reappoint counsel after a pro se defendant is involuntarily removed from the court presents an important Federal issue not yet addressed by this Court, but should be, and in absence of this Court's guidance Federal and State courts are reaching conflicting decisions.

INTRODUCTION

By removing Mr. Hope from the courtroom without reappointing counsel the trial court violated his Sixth and Fourteenth Amendment Right to counsel.

Without counsel Mr. Hope's other constitutional rights were denied, including his due process rights to call witnesses, to testify in his own defense, and to give a closing argument. While his removal from the courtroom for misconduct was proper, the trial court should have reappointed counsel to finish the trial. This conviction is inconsistent with the Constitution.

PRESERVATION

"With very rare exceptions ... [this Court] will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Campbell v. Louisiana*, 523 U.S. 392, 403, 118 S.Ct. 1419, 1425 (1998) (internal quotation marks omitted) (citing *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (per curiam)). These arguments were well preserved by presentation to the appellate court below.

ARGUMENTS

- I. The decision below involves an important question of Federal law on which State courts of last resort and Federal Circuit Courts are reaching conflicting decisions and it involves an important question of Federal law not addressed by this Court, but should be.

Common reasons for this Court exercising discretion in granting certiorari are when State courts of last resort and Federal Circuit Courts reach conflicting decisions on an important Federal question or when such courts decide an important question of Federal law that has not been decided by this Court, but should be. SUP. CT. R. 10. In this case, Florida's Fifth District Court of Appeal is the State court of last resort due to the limited jurisdiction of the Supreme Court of Florida. *In re Emergency Amendments to Rules of Appellate Procedure*, 381 So.2d 1370, 1373 (Fla. 1980). The Florida Fifth District Court of Appeal's decision involved an important Federal question not yet addressed by this Court, but should be. Its decision also conflicts with decisions of the Federal Ninth Circuit, another State court of last resort, and several State intermediate appellate courts.

The assistance of counsel is a safeguard of the Sixth Amendment that is necessary to insure that the fundamental human rights of life and liberty are upheld. *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 796, 9 L.ed 2d 799, 796 (1966), citing *Johnson v. Zerbst*, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938). This right may be waived, but misconduct may result in the

termination of self-representation. *Faretta v. California*, 422 U.S. 806, 834, n. 46, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). However, *Faretta* does not answer the question of whether or not counsel must be reappointed if a pro se litigant is removed from the courtroom. Federal and State courts across the country are divided on the issue.

The Federal Ninth Circuit, the Supreme Court of Rhode Island, and appellate courts in the States of Texas, New York, California, Colorado, and Oregon ruled that counsel must be reappointed. *United States v. Mack*, 362 F.3d 597, 601 (9th Cir. 2004); *State v. Eddy*, 68 A.3d 1089, 1104 (RI 2013); *Saunders v. State*, 721 S.W.2d 359, 363 (Tex. Crim. App. 1985); *People v. Anderson*, 133 A.D.2d 120, 121 (N.Y. App. Div. 1987); *People v. El*, 126 Cal.Rptr.2d 88, 90-91 (Cal. Ct. App. 2002); *People v. Cohn*, 160 P.3d 336, 342-44 (Colo. App. 2007); *State v. Lacey*, 385 P.3d 1151, 1152-53 (Or. Ct. App. 2016). Tennessee by rule requires the reappointment of counsel. Rule 43 Tenn.R.Crim.P. The Federal Second Circuit handled such a situation in a Federal habeas corpus case, noting that it was not an unreasonable application of clearly established Federal law to not reappoint counsel. *Davis v. Grant*, 532 F.3d 132, 144-45 (2d Cir. 2008). However, the court indicated that had it heard the case on direct appeal it likely would have found that a pro se defendant who fails to follow the rules of procedure revokes the right to proceed pro se.

Other courts, such as the Federal First Circuit, the Supreme Court of Washington, and the First District Court of Appeal of Florida ruled that

reappointment of counsel may be prudent but is not constitutionally required.

United States v. Pina, 844 F.2d 1, 15 (1st Cir. 1988); *State v. DeWeese*, 117 Wash.2d 369, 381 (Wash. 1991); *Eady v. State*, 695 So.2d 752, 755 (Fla. 1st DCA 1997), review denied *Eady v. State*, 699 So.2d 1372 (Fla. 1997). The Eleventh Circuit affirmed a conviction where the pro se defendant absconded mid-trial and counsel was not reappointed. *United States v. Stanley*, 739 F.3d 633, 649 (11th Circuit 2014).

The Federal Second Circuit and the Court of Appeals of Oregon stated that given the fracture in decisions of Federal and State Courts, “more guidance from the Supreme Court would be helpful.” *Davis*, 532 F.3d 132, 140; *Lacey*, 385 P.3d 1151, 1154 n.1.

II. Petitioner has a likelihood of success on the merits.

The general trend among appellate courts is to mandate the reappointment of counsel when a pro se litigant is removed from the courtroom for misbehavior. This is the natural extension of this Court’s holding in *Faretta*. Florida and a handful of other courts are in the minority in that they do not require reappointment of counsel. When counsel is not reappointed for a pro se defendant who is removed from the courtroom, several essential due process rights are lost, such as the right to cross-examine and call witnesses (*Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973)), the right to give a closing argument (*Herrin v. New York*, 422 U.S. 853, 864-65, 95 S.Ct. 2550, 2556, 45

L.Ed.2d 593 (1975)), and the ability to object to improper actions by the prosecutor, preserving such issues for appeal. As the Court of Appeals of Oregon put it,

Where a criminal case is tried against a vacant defense table, the adversarial process has broken down, and cannot ensure that the convictions rendered are fair and reliable. Our system strives to be fair, even to those who...work the hardest to undermine it. *State v. Lacey*, 385 P.3d 1151, 1153 (Or. Ct. App. 2016), citing *United States v. Mack*, 362 F.3d, 597, 603 (9th Cir. 2004).

While the trial court's decision to remove Mr. Hope from the courtroom was proper, it should not have proceeded with trial without reappointing counsel. The trial court warned Mr. Hope that if he continued to misbehave self-representation would be terminated, but when the time came, his self-representation was not terminated. Such a result cannot be consistent with the Sixth and Fourteenth Amendments and this Court's decision in *Faretta*.

III. Petitioner has been irreparably harmed.

Mr. Hope's removal from the courtroom without reappointment of counsel resulted in a one-sided trial without essential constitutional protections, a conviction, and a life sentence. While it cannot be guaranteed that the reappointment of counsel would have produced a different outcome, a complete denial of counsel is a structural error that requires reversal. *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999), citing *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 796, 9 L.E.d 2d 799, 796 (1966). As the Court of Appeals of Oregon stated, when the State argues against an empty

chair there is a breakdown in the adversarial process, requiring reversal. *Lacey*, 385 P.3d 1151, 1153, citing *Mack*, 362 F.3d, 597, 603.

BASES FOR REVIEW

This Court should take up this case because a State court decided an important question of Federal Constitutional law that has not been, but should be, settled by this Court, or has decided an important Federal question in a way that conflicts with relevant decisions of this Court. The rule of law is constitutionally deficient as applied by the Florida courts because they have failed to provide adequate safeguards for the right to counsel when a pro se litigant is removed from the courtroom for misbehavior. By allowing trials to proceed without counsel, Florida courts are violating not only the right to counsel but also the various fundamental due process rights that having counsel protects.

This Court should take up this case because as noted above Federal Circuit courts, State courts of last resort, and State intermediate courts are divided on this issue. While a majority of courts ruled that counsel must be reappointed, some jurisdictions, including Florida, have ruled that the reappointment of counsel is not necessary. Two courts have expressed a desire for this Court's guidance on this issue. A decision by this Court is necessary to create uniformity on this important, reoccurring issue.

The ruling by the State court upholding the conviction cannot stand in light of the Sixth and Fourteenth Amendments to the United States Constitutions and

this Court's decision in *Faretta*. The issue was well preserved in this case by presentation to the State appellate court. This area of law is ripe for adjudication. In light of the above, this Honorable Court should accept jurisdiction to review the decision of the trial court to remove Mr. Hope without reappointing counsel, finding that decision to be inconsistent with the Sixth and Fourteenth Amendments and this Court's holding in *Faretta*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT OF FLORIDA

/s/ *Steven N. Gosney*

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COUNSEL FOR THE PETITIONER

No: _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

ERIC HOPE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PROOF OF SERVICE

I, Steven N. Gosney, do swear or declare that on this date, February 28, 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows: Marjorie Vincent-Tripp, Office of the Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 28, 2018.

/s/ Steven N. Gosney
Steven N. Gosney

No: _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

ERIC HOPE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT OF FLORIDA

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COUNSEL FOR THE PETITIONER

APPENDIX A

Opinion by the Fifth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ERIC HOPE,

Appellant,

v.

Case No. 5D16-4086

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 22, 2017

Appeal from the Circuit Court
for Orange County,
Marc L. Lubet, Judge.

James S. Purdy, Public Defender, and
Sean K. Gravel, Assistant Public Defender,
Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Marjorie Vincent-Tripp,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

We affirm the judgment and sentence entered against Eric Hope without discussion but remand for correction of a scrivener's error in the judgment. See Ashley v. State, 850 So. 2d 1265, 1268 n.3 (Fla. 2003) (defining scrivener's error as written clerical error that is not "the result of a judicial determination or error"). The judgment

erroneously cites to section 782.07, Florida Statutes (2015), for the crime of burglary of a dwelling with an assault or battery and a firearm when the correct statutory citation is section 810.02(2)(a), Florida Statutes (2015), and erroneously cites to section 810.02(2)(a) for the crime of aggravated assault with a firearm when the correct citation is section 784.021(2), Florida Statutes (2015). The judgment also erroneously lists the burglary of a dwelling with an assault or battery and a firearm conviction as a second-degree felony when it is a life felony, and it lists the aggravated assault with a firearm conviction as a life felony when it is a third-degree felony. We therefore remand for correction of the scrivener's errors. In all other respects, we affirm.

AFFIRMED; REMANDED FOR CORRECTION OF SCRIVENER'S ERRORS.

SAWAYA, BERGER and LAMBERT, JJ., concur.

APPENDIX B

Order Denying the Motion for Rehearing

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ERIC HOPE,

Appellant,

v.

CASE NO. 5D16-4086

STATE OF FLORIDA,

Appellee.

_____ /

DATE: January 31, 2018

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing, Written Opinion, Certification, and Rehearing En Banc, filed January 3, 2018, is denied.

*I hereby certify that the foregoing is
(a true copy of) the original Court order.*

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK



Panel: Judges Sawaya, Berger, and Lambert (acting on panel-directed motion(s))
En Banc Court (acting on en banc motion)

cc:

Office of Attorney General
Sean Kevin Gravel

Office of The Public
Defender

Marjorie Vincent-Tripp

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APPENDIX C

Initial Brief of Appellant

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF
THE STATE OF FLORIDA

ERIC HOPE,

Appellant,

v.

CASE NO. 5D16-4086

STATE OF FLORIDA,

Appellee.

_____ /

**APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

The Charges. The Defendant Eric Hope (“Appellant”) was convicted of attempted manslaughter by act with a firearm, armed burglary of a dwelling with an assault or battery, and aggravated assault with a firearm. (Record on Appeal, R, 813-14). Two of the State’s witnesses alleged that he forced his way into their condominium, pointed a gun at them, and pulled the trigger while the gun was pointed in one witness’ face, but the gun misfired. (R 391, 400-02, 406-07, 409-10, 413, 541-43). Mr. Hope was sentenced to life in prison for the armed burglary charge and fifteen years each on the other charges. (R 284). The judgment lists armed burglary of a dwelling with an assault or battery as a second degree felony and aggravated assault with a firearm as a life felony. (R 193).

Mr. Hope’s Conduct During Trial. Before trial Mr. Hope requested a hearing pursuant to *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973). (R 829). The trial court found that counsel was not ineffective. (R 851). On the day of trial Mr. Hope requested another *Nelson* hearing. (R 300). The court again found that counsel was providing competent representation. (R 305).

After the first witness testified, Mr. Hope asked that his leg shackles be loosened because they were cutting him. (R 472-73). The jury was removed and Mr. Hope continued to complain. (R 473-74). The deputies saw no

bleeding, just a small abrasion, but they loosened his shackles. (R 474-75).

After the second witness testified, Mr. Hope again claimed that he was bleeding from his shackles. (R 493). The jury was removed, the court and the deputies verified that he was not bleeding, and the deputies bandaged the abrasion. (R 493-94, 500, 502).

When the jurors were brought in to hear the third witness, Mr. Hope screamed to them, “life sentence...Please keep that in mind...Please keep that in mind...they [sic] trying to give me a life sentence.” (R 504). The court removed the jury again and warned Mr. Hope that one more outburst would result in him being removed from the courtroom. (R 505). Mr. Hope again complained about his attorney and asked to proceed pro se. (R 506-10). The court conducted a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975), warned that there would be no continuance, and discharged counsel, appointing her as standby counsel. (R 510-28). The court informed Mr. Hope that if he was disruptive it could terminate self-representation and remove him from the courtroom. (R 515).

Mr. Hope complained extensively about being unprepared, requested a continuance, and said he would do anything to stop the trial. (R 508, 532, 590-97, 601-08). The court reminded him of the *Faretta* inquiry, his choice to

proceed pro se in the middle of trial, and the court refused to grant a continuance. (R 594-97, 601-08).

At the close of the State's case Mr. Hope indicated that when the trial resumed the next day he wished to recall one of the alleged victims and one of the responding officers. (R 690-94). He also wished to testify. (R 532). That night Mr. Hope told people at the jail that he was thinking of hurting himself. (R 700-01). The next day the court appointed Dr. Jeffery Danzinger to evaluate him. (R 97-99, 700). The two corrections officers who transported Mr. Hope testified that he began kicking and screaming in the back of the van about a mile from the courthouse. (R 715-17). Dr. Danzinger testified that Mr. Hope's behavior was consistent with one feigning mental illness. (R 721-23). Mr. Hope then started saying, "Somebody just talk, please," over and over. (R 723-24).

When asked if he wanted to participate in the rest of the trial he began saying, "Oh, God...taking me back." (R 724). The court repeated the question and upon hearing no response found that Mr. Hope was competent and feigning mental illness. (R 728-30). The court ordered Mr. Hope's removal, declaring that he voluntarily absented himself from trial by his actions and that the trial would go on. (R 730).

The court asked standby counsel if she wanted to come back as general

counsel. (R 730). She declined, stating that Mr. Hope did not indicate that he wanted her to continue with the case, she did not have any information or arguments to present to the court, and she did not know what he wanted to present. (R 730-31).

The court asked if there was any reason the trial could not go forward. (R 733). The State said that Mr. Hope exercised his constitutional rights to represent himself and to absent himself from the courtroom. (R 733). The State released the witnesses that Mr. Hope wanted to recall. (R 736). The State presented its closing argument; no closing argument was heard from the defense. (R 743-67).

Notice of Appeal and Jurisdiction. Mr. Hope was convicted on October 21, 2016. (R 700, 813-14). The court entered the judgment and sentence on November 29, 2016. (R 183-93). A Notice of Appeal was filed on November 29, 2016. (R 209). An Amended Notice of Appeal was filed on March 22, 2017 and placed on this Court's docket on March 24, 2017. This appeal follows.

SUMMARY OF THE ARGUMENT

When the trial court removed Mr. Hope from the courtroom it should have terminated his self-representation. Trial counsel should have been reappointed. Because counsel was not reappointed, Mr. Hope was left completely unrepresented for the remainder of the trial, was unable to present evidence in his defense, and was unable to make a closing argument. This case should be remanded for new trial. There is also a scrivener's error in the judgment: the offense levels of the armed burglary and aggravated assault counts were switched.

ARGUMENT

- I. WHEN APPELLANT, WHO WAS PRO SE AT TRIAL, WAS REMOVED FROM THE COURTROOM, STAND-BY COUNSEL SHOULD HAVE BEEN REAPPOINTED AS LEAD COUNSEL

Standard of Review. A trial court's decision to allow a defendant to proceed pro se mid-trial is reviewed for abuse of discretion. *McGray v. State*, 71 So.3d 848, 870 (Fla. 2011). A trial court's decision on how to properly restrain a defendant is reviewed for abuse of discretion. *Jackson v. State*, 698 So.2d 1299, 1303 (Fla. 4th DCA 1997). Per se reversible error occurs when a defendant is completely denied counsel at a critical stage of a criminal proceeding. *Thornhill v. State*, 103 So.3 949, 951 (Fla. 4th DCA 2012).

Discussion. Mr. Hope does not contest the propriety of removing him from the courtroom. However, the trial court should have reappointed counsel. As the trial court indicated, when a defendant absents himself from trial, he waives his right to self-representation. (R 515). The failure to reappoint counsel resulted in the complete denial of Mr. Hope's rights to present a defense and closing argument. The State was effectively arguing against an empty chair during closing, creating a breakdown in the adversarial system.

1. Introduction

Criminal Defendants have the Sixth and Fourteenth Amendment right to

refuse counsel and represent themselves. *Faretta v. California*, 422 U.S. 806, 819 (1975). See also FLA. CONST. art. I, section 16. This right is not a license to abuse the dignity of the courtroom. *Faretta*, 422 U.S. 806, 834, n. 46. Trial courts may remove defendants, even pro se defendants, from the courtroom when they are disruptive, contumacious, and stubbornly defiant. *Illinois v. Allen*, 397 U.S. 337, 339 and 343 (1970). If standby counsel is appointed to a pro se defendant, the defendant must retain control over the organization and content of his defense. *McKaskle v. Wiggins*, 465 U.S. 168, 175 (1984). There is no right to hybrid representation. *Aycock v. State*, 769 So.2d 523, 524 (Fla. 5th DCA 2000).

2. Current Case Law in Florida

While the Supreme Court of Florida has yet to mandate that a trial court reinstate counsel when a pro se defendant is disruptive and removed from the courtroom, it found that the trial court may do so. *McCray v. State*, 71 So.3d 848, 868 (Fla. 2011), citing *United States v. Brock*, 159 F.3d 1077, 1079-81 (7th Cir. 1998). In *McCray* the defendant refused to cooperate with the trial court, obstructed the trial, and ignored the court's directions. *McCray*, 71 So.3d 848, 868. The Court found no error in terminating the defendant's self-representation and reappointing counsel. *Id.*

The First District decided a case where the defendant represented himself

and then asked to be removed from court, waiving his right to participate in the trial. *Eady v. State*, 695 So.2d 752, 755 (Fla. 1st DCA 1997). The appellate court noted that the defendant was probably doing so to delay the trial. *Id.* The trial court further indicated that had the defendant not volunteered to leave it would have removed him for misbehavior and not invited him back. *Id.* The First District found that there was no functional difference between a defendant refusing to participate and being removed for improper conduct. *Id.* at 756. The court went on to note that the appointment of standby counsel may have been prudent but was not constitutionally required. *Id.*

The dissent in *Eady* found that it was error to proceed with the defendant's interests, "completely unrepresented." *Eady*, 695 So.2d 752, 758 (Webster, J. dissenting). Under *Faretta* a trial court can terminate self-representation for misconduct. *Id.*, citing *Faretta*, 422 U.S. 806, 834 n.6. The dissent concluded that proceeding with no one present, "violates fundamental concepts of justice in our society and, therefore, requires reversal notwithstanding appellant's obstructive conduct." *Eady*, 695 So.2d 752, 759 (Webster, J. dissenting).

Mr. Hope, like the defendant in *McCray*, was disruptive and tried to delay his trial. (R 472-75, 493, 504-05, 508, 515, 532, 590-97, 601-08, 728-30). The trial court acted appropriately in removing him from the courtroom. However,

unlike in *McCray*, the court did not reappoint standby counsel to finish the trial. (R 730-31). This case is distinguishable from *Eady* because in *Eady* the case was, “virtually defenseless,” and there was no indication that the defendant wanted to present evidence. *Eady*, 695 So.2d 752, 756. Mr. Hope wanted to call one of the alleged victims, a reporting officer, and himself. (R 532, 690-94).

Admittedly, the trial court asked standby counsel if she wished to return as general counsel. (R 730). She declined because she did not know what Mr. Hope planned on asking the witnesses and she did not have a closing argument. (R 730-31). However, as explained by persuasive authority below, this Court should adopt the *Eady* dissent’s rule requiring the reappointment of counsel in such instances.

3. Case Law From Other States

The Appellate Court of Connecticut explained that the right to be present in trial serves three purposes: it safeguards the Sixth Amendment right to confront witnesses, it safeguards the Fifth Amendment due process right to participate in trial such as by presenting evidence, and it prevents the jury from drawing an adverse inference from the defendant’s absence. *State v. Strich*, 915 A.D.2d 891, 899-900 (Conn. App. Ct. 2007).

A Texas appellate court noted that when a disruptive, pro se defendant is

removed from the courtroom, both he and “his counsel” are removed. *Saunders v. State*, 721 S.W.2d 359, 363 (Tex. Crim. App. 1985). In such instances trial courts should terminate the defendant’s right to self-representation and reappoint counsel. *Id.* The failure to do so may be harmless in some instances. *Id.* Appellate courts in Colorado and California reached similar conclusions. *People v. Cohn*, 160 P.3d 336, 342-44 (Colo. App. 2007); *People v. El*, 126 Cal.Rptr.2d 88, 90-91 (Cal. Ct. App. 2002). The California court noted that a harmless error test only applies when there is not a complete denial of the right to counsel. *El*, 126 Cal.Rptr.2d 88, 90.

A New York court found that a defendant forfeits his right to proceed pro se by being disruptive. *People v. Anderson*, 133 A.D.2d 120, 121 (N.Y. App. Div. 1987). Oregon’s Court of Appeals reached the same decision, ruling that the trial court must appoint counsel or obtain a waiver of right to representation. *State v. Lacey*, 385 P.3d 1151, 1152-53 (Or. Ct. App. 2016), citing *State v. Menefee*, 341 P.3d 229 (Or. Ct. App. 2014) and *United States v. Mack*, 362 F.3d 597 (9th Cir. 2004). Situations such as this implicate three Sixth Amendment rights: the right to be present at trial, the right to self-representation, and the right to representation. *Lacey*, 385 P.3d 1151, 1152. The first two may be forfeited by a defendant’s misconduct, but the third may not. *Id.* When a criminal case is tried against an

empty seat, the adversarial process is broken down, undermining the fairness and reliability of convictions. *Id.* at 1153. Tennessee's Rule 43 requires representation by counsel if a defendant is removed. Rule 43 Tenn.R.Crim.P.

The Supreme Court of Washington approved a different remedy where the disruptive, pro se defendant was offered the chance to watch his trial with a video monitor so that he could return to cross-examine witnesses. *State v. DeWeese*, 117 Wash.2d 369, 381 (Wash. 1991). The Court also approved the refusal to appoint substitute counsel, noting that the defendant apparently was trying to get a different attorney. *Id.* at 376-81.

Pennsylvania and Arizona courts found that there is no abuse of discretion in reappointing counsel when a disruptive, pro se defendant is removed from the courtroom. *Commonwealth v. Thomas*, 879 A.2d 246, 256 (Pa. Super. Ct. 2005); *State v. Delvecchio*, 519 P.2d 1137, 1143 (Ariz. 1974). The Supreme Court of Arizona indicated that it is the wiser option. *Delvecchio*, 519 P.2d 1137, 1143. North Carolina and Maryland courts held that the trial may proceed but the defendant must be given an opportunity to learn what is happening and an opportunity to return upon assurance of good behavior. *State v. Thomas*, 518 S.Ed.2d 222, 230-31 (N.C. Ct. App. 1999); *Bilgari v. State*, 847 A.2d 1239, 1249 (Md. Ct. Spec. App. 2004).

The Supreme Court of Delaware approved a trial court's decision to move forward with a trial when the defendant voluntarily refused to participate. *Thomas v. State*, 842 A.2d 1244, 2 (Del. 2004). A New York court approved of the removal of the defendant for disruptive behavior, but the court did not discuss reappointment of counsel after his removal. *People v. Davis*, 270 A.D.2d 162, 162-63 (N.Y. App. Divs. 2000). The Federal habeas corpus cases based on these two decisions are discussed in the next section.

4. Federal Case Law

The Supreme Court of the United States has not addressed the issue of if standby counsel should be appointed when a defendant proceeds pro se and then waives the right to be present. *Thomas v. Carroll*, 581 F.3d 118, 124 (3d Cir. 2009). The Second and Third Circuits found that in Federal habeas cases it was not an unreasonable application of Federal law for State courts to not reappoint counsel in such situations. *Davis v. Grant*, 532 F.3d 132, 144-45 (2d Cir. 2008) and *Thomas v. Carroll*, 581 F.3d 118, 124-25 (3d Cir. 2009). However, the Second Circuit noted that if it was hearing the case on direct appeal, giving it broader rule-making authority, it would likely find that a waiver of counsel requires the defendant's ability and willingness to follow the rules of procedure. *Davis*, 532 F.3d 132, 144.

The Fourth Circuit found no error in proceeding with the trial after removing a disruptive, pro se defendant, but the court did not address the issue of reappointing counsel. *United States v. Beckham*, 420 Fed.Appx. 261, 265 (4th Cir. 2011). The First Circuit encouraged trial judges to use, “wisdom to appoint standby counsel,” in such situations but declined to mandate it. *United States v. Pina*, 844 F.2d 1, 15 (1st Cir. 1988).

The Ninth Circuit in a direct appeal found that the right to counsel was violated when a defendant was removed from court and upon return told not to speak, even to object. *United States v. Mack*, 362 F.3d 597, 601 (9th Cir. 2004). The court found that in effect the defendant was removed as his own counsel with no one stepping in to fill the gap. *Id.* While the trial court had to do something about the defendant’s obnoxious behavior, leaving him without any representation was, “far from appropriate.” *Id.* This resulted in the defendant being precluded from both calling his own witnesses and presenting closing arguments, both of which are fundamental rights in the trial process. *Id.* at 602. The court concluded that it was a structural error to completely deprive the defendant of counsel, himself or anyone else, thus a harmless error test could not apply, requiring reversal. *Id.* at 602-03.

5. The Lack of Any Representation Violated Mr. Hope’s Rights

to Present a Defense and Closing Argument

Criminal defendants have a fundamental right to present a defense. *Quaggin v. State*, 752 So.2d 19, 26 (Fla. 5th DCA 2000). This right is not absolute and may be limited by the rules of evidence. *McCray*, 71 So.3d 848, 872-73. The Second District once reversed when a trial court excluded statements that tended to disprove a defendant's specific intent. *Story v. State*, 589 So.2d 939, 943 (Fla. 2d DCA 1991). In *Shepherd v. State*, 453 So.2d 215, 216-17 (Fla. 5th DCA 1984) this Court found exclusion of an insanity defense too harsh a sanction for a defense discovery violation, implicating the defendant's right to defend himself.

It is "an absolute violation of the Sixth Amendment" to deny a defendant a closing argument. *J.M.S. v. State*, 921 So.2d 813, 816 (Fla. 5th DCA 2006). The denial of this right, unless expressly waived, violates due process¹ and is per se prejudicial. *Id.*

In the case at bar the trial court's removal of Mr. Hope from the courtroom without reappointment of counsel left him unable to present a defense and closing argument. This violated his fundamental rights to do so, requiring reversal.

¹ U.S. CONST. amend. XIV; FLA. CONST. art. I, section 9.

6. The Trial Court Should Have Reappointed Counsel

This Court should adopt the rule laid down by the dissent in *Eady* and the courts in Texas, Colorado, New York, California, Tennessee, and the Federal Ninth Circuit and find that by being disruptive and causing his removal from court, Mr. Hope waived his right to self-representation, but not his rights have any representation or to present a defense. See *Lacey*, 385 P.3d 1151, 1152. As the Texas appellate court and the Ninth Circuit pointed out, removing a pro se defendant simultaneously removes his counsel. *Saunders*, 721 S.W.2d 359, 363; *Mack*, 362 F.3d 597, 601. The denial of the right to counsel is per se reversible error. *Thornhill*, 103 So.3 949, 951. It is also fundamental error. *Gonzalez v. State*, 838 So.2d 1242, 1243 (Fla. 1st DCA 2003). It is usually not subject to a harmless error analysis. *Smith v. State*, 849 So.2d 485, 486 (Fla. 2d DCA 2003). See *Leerdam v. State*, 891 So.2d 1046, 1050-51 (Fla. 2d DCA 2004) for an exception regarding the opportunity to confer with counsel during a recess.

Mr. Hope's case is analogous to *Mack*, 362 F.3d 597. In both cases the defendant was removed from the courtroom, left with no counsel at all, and was unable to present witnesses or a closing argument. (R 728-30). As the Court of Appeals of Oregon noted, a hallmark of the American justice system is the adversarial process which cannot function if the State is prosecuting an empty

chair. *Lacey*, 385 P.3d 1151, 1153. The failure to reappoint counsel resulted in Mr. Hope having no opportunity at all to present a defense or closing argument, rights this Court affirmed in *Quaggin*, 752 So.2d 19, 26; *Shepherd*, 453 So.2d 215, 216-17; and *J.M.S.*, 921 So.2d 813, 816.

The trial court should have reappointed standby counsel as general counsel for Mr. Hope even though he did not indicate that he wanted her reappointed. During the *Faretta* warning the court even told Mr. Hope that further disruption would result in his removal and the termination of his self-representation, yet when that time came the judge did not reappoint counsel. (R 515, 730-31).

While standby counsel did not know what Mr. Hope wanted to ask the witnesses or have a closing argument, a brief recess would have allowed her to confer with Mr. Hope to resolve these issues. Her reappointment might have persuaded Mr. Hope to behave himself and return to trial. Further, nothing in the record indicates that Mr. Hope was allowed to watch the end of his trial or offered a chance to return upon assurance of his good behavior. This case should be reversed for new trial.

II. THERE IS A SCRIVENER'S ERROR IN THE JUDGMENT

There is a scrivener's error in the judgment: it lists armed burglary of a dwelling with an assault or battery as a second degree felony and aggravated assault with a firearm as a life felony. Armed burglary with an assault should be listed as a first degree felony punishable by life and aggravated assault should be listed as a second degree felony. Section 784.021, Florida Statutes (2016) and Section 810.02(2), Florida Statutes (2016). This case should be remanded for correction of the error in the judgment. See *Lucas v. State*, 175 So.3d 939, 939 (Fla. 5th DCA 2015).

CONCLUSION

BASED UPON the foregoing cases and authorities Mr. Hope requests that this Honorable Court reverse and remand his case for new trial. Also, the scrivener's error on the judgment should be corrected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 at crimappdab@myfloridalegal.com and mailed to Mr. Eric Hope, #15038119, Orange County Jail, Post Office Box 4970, Orlando, Florida 32802 this 11th day of April, 2017.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

DESIGNATION OF EMAIL ADDRESS

I HEREBY CERTIFY that the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and gravel.sean@pd7.org (secondary).

/s/ Sean Kevin Gravel
SEAN KEVIN GRAVEL
ASSISTANT PUBLIC DEFENDER

APPENDIX D

Answer Brief of Appellee

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ERIC HOPE,

Appellant,

v.

CASE NO. 5D16-4086

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State generally accepts Eric Hope's ("Hope") statement of the case and facts but notes the following additions and/or corrections in support of its Answer Brief.

Before jury selection, Hope told the court that he did not think his attorney had his "best interest at heart." (R. 300, 319).

The only question I have for the Court is why they're forcing me to go to trial with my attorney when I've been so verbal and on record to -- to be not going with this attorney because I feel like it's not in my best interest but you're going to explain to me that my best interest is not with someone -
- you know, it doesn't count.

(Id. at 317).

The following occurred after the State called its third witness:

THE COURT: Okay. Call your next witness.

MS. HICKS: State calls Deputy Jeremy Gatzey.

THE DEFENDANT: Ladies and gentlemen of the jury --

THE COURT: Hey --

THE DEFENDANT: -- life sentence --

THE COURT: Listen, sir --

THE DEFENDANT: Please keep that in mind -

-

THE COURT: Sir --

THE DEFENDANT: Please keep that in mind -

-

THE COURT: Sir --

THE DEFENDANT: -- they trying to give me a life sentence --

THE COURT: Ladies and gentlemen of the jury, leave the courtroom again, please. Okay, that's it. Leave the courtroom, please.

(The jury exited the courtroom.)¹

THE COURT: Sir, you are attempting to create a mistrial in this case, and that's fine. You can try and do that. But if I have one more outburst from you, I am telling you you're being removed from the courtroom, the trial is going on without you. If you want that, if you want to leave the courtroom, we'll take you out right now. One more outburst, you're out of here. You're disrupting this Court continually now. Do you understand me? You don't have to respond. You're sitting 25 feet away from me. I know you hear me.

THE DEFENDANT: No, sir, I don't understand, because the simple fact, I told you since the beginning of this trial, that I did not want to go through this with my attorney but you're forcing me to do this any way [sic].

THE COURT: Okay.

THE DEFENDANT: And that's where I'm personally coming from. That's why I'm doing this.

THE COURT: So you're trying to create a mistrial on purpose --

THE DEFENDANT: -- these shackles cut me. I'm bleeding. I'm bleeding. You won't let me get medical attention. I mean, everything about this trial is just wrong because I -- I begged for you to give me proper counsel --

THE COURT: Uh-huh.

THE DEFENDANT: -- but you -- but you -- but you, for some reason, you won't do it. And, I mean --

THE COURT: Proper counsel is, in my determination, already being provided to you,

¹ This was the third time that the jury was asked to leave the courtroom because Hope disrupted the proceedings. (R. 507).

sir. You don't happen to like your lawyer, you don't want to be in trial on these charges, you don't want to be here at all. And, sir, the problem is, you are.

THE DEFENDANT: The trial is not the problem. It's my counsel. And I told you that. I put in a Nelson² hearing. I told you before the trial.

THE COURT: Uh-huh.

THE DEFENDANT: I told you and I told you --

THE COURT: And we gave you a Nelson hearing.

THE DEFENDANT: And, Your Honor...

THE COURT: Sir, you're not gonna stop this trial. I've had two Nelson hearings, actually, I think, for your attorney. And both times you have not told me one thing she's done wrong or illegal or unethical. We're not doing a Nelson hearing in the middle of the trial.

THE DEFENDANT: I understand. But she sent my depo out over e-mail to --

THE COURT: Sir, that has nothing to do with --

THE DEFENDANT: They wanted my family to read it to me in the county jail on the phones that you-all got recordings on and got people coming here to testify against me.

THE COURT: Sir, that has nothing to do with the legitimacy of this trial, nor your attorney's abilities to be a competent, effective lawyer. You are causing your own -- being your own worst problem here.

MS. CRAG-CHADERTON: For the record, just because of his outburst and the disclaimers that he made to the jury, I would ask, for the record, again, for a mistrial.

² Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), approved by Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988).

THE COURT: Denied.

THE DEFENDANT: You can take me out of the courtroom and do the trial.

THE COURT: You want -- you want to leave the courtroom? Do you want to leave the courtroom? If you do, I will take you out right now.

THE DEFENDANT: Yes. You were saying that you remove me and I can do this -- you can do this without me.

THE COURT: I can try this case without you. I can find that you are a disruption, continual disruption. This is the third one. Now you're trying to talk to the jury about the sentence you might get if you get convicted. That's a continual disruption --

THE DEFENDANT: I am gonna get the way this trial is going. And we -- and you -- we all know it. And my life is on the line and, Your Honor, yes, I would do anything to stop that.

THE COURT: And I can see you're trying to do that.

THE DEFENDANT: No. Not...

MS. CRAG-CHADERTON: If I could have a moment?

THE COURT: You're not gonna get a mistrial when you keep trying to cause one. I'm going to remove you from the courtroom, if you want to be removed.

MS. CRAG-CHADERTON: May I have a moment, please?

THE COURT: Do you want -- yes, you can.

(Defense conferring with defendant.)

THE COURT: Does your client want to be removed from the courtroom?

MS. CRAG-CHADERTON: Mr. Hope? The Judge has asked a question.

THE COURT: Do you want to stay here and behave yourself or do you want to be removed from the courtroom?

THE DEFENDANT: I want a fair trial. I want a fair trial.

THE COURT: Sir, you're getting a very fair trial. You don't like the way it looks like it's going. That doesn't mean it's not a fair trial.

THE DEFENDANT: Not the way it's going. This is before I made my complaint before this trial started.

THE COURT: About your attorney.

THE DEFENDANT: About -- yes. Yes. Yes. And that's -- that's -- I can't do it with this attorney, Your Honor. I can't do it. I don't have a fighting chance for my life with this attorney.

THE COURT: Well, if, in fact, this attorney is doing anything illegal, unethical, or below the standards of Strickland-vs-Washington,³ if you get convicted on these charges, you can file a 3.850 and ask the court to reconsider, showing the court how your attorney was not acting effectively or improperly for you. You have that opportunity to do that. But I have not heard anything from you that would cause me to believe she's not been a good lawyer in this case or an effective lawyer or sufficient lawyer under Washington-vs-Strickland [sic].

That's what I have to go with is the law, sir. And because you don't like the way she's handling things or the way your trial is going is not grounds for me to ever remove your attorney. I tried to explain that to you.

Now, I'm gonna tell you one last time. If you have another outburst of any sort, I am warning you not to do that. You will be held in contempt of court if you have another outburst. Also, you will be removed from the courtroom and we'll continue the trial without you.

THE DEFENDANT: I would like to go ahead and fire this attorney and proceed on my own.

³ Strickland v. Washington, 466 U.S. 668 (1984).

THE COURT: I'm not gonna let you fire your attorney in the middle of the trial.

All right. You know what? I just -- I just might do that. You want to do that? You seriously want to do that? You want to fire your lawyer and go on your own?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Let's do a Faretta⁴ hearing. Counsel, I'm gonna appoint you as standby counsel, though.

MS. CRAG-CHADERTON: I'll be in the back, Judge.

THE COURT: Sir, in order to do that, I have to do a Faretta hearing, which I will now do. You're gonna have to answer some questions for me.

THE DEFENDANT: Yes, sir.

(R. 504-10). The court placed Hope under oath and conducted a Faretta hearing. (R. 511-28). The court explained that standby counsel was

not gonna do anything for you, except sit with you and perhaps answer questions for you. That's all they're gonna do. They're not gonna argue the case. They're not gonna do the closing argument. And they're not going to go over jury instructions. You're gonna have to do all that on your own.

(Id. at 517). Hope also fired Rachel Crag-Chaderton as his attorney in a separate case. (Id. at 531).

After the State rested, Hope told the court that he wanted to call Deputy Angela Batista as a witness and recall two witnesses. (Id. at 689, 690, 694). Hope also intended to testify in his defense. (Id. at 690).

⁴ Faretta v. California, 422 U.S. 806 (1975).

After hearing from Dr. Jeffrey Danziger the following day, the trial court determined that Hope was competent to proceed with the trial.⁵ (R. 727-28).

I am not finding that Mr. Hope is mentally ill nor incompetent but that he is behaving in a fashion which is intended to stop this trial. He fired his attorney yesterday. He did a very adequate job of cross-examining five witnesses. And all of a sudden when he's coming back this morning, a man with no prior history of mental illness, that we are aware of, decides he's going to behave in an incredibly erratic fashion. And he's not partic- -- he obviously is not gonna behave himself or participate in this trial.

(Id. at 728). Ms. Crag-Chaderton said that during her interactions with Hope, he never indicated that he was mentally unstable. (Id. at 729).

The trial court asked Hope if he wanted to participate in his trial. (Id. At 724, 727). Hope did not respond. (Id.).

THE COURT: All right. Thank you.

All right. We are gonna continue with the trial. I'm finding that he is, under federal and state law, he is voluntarily absenting himself from this trial because of his actions. He is, according to the doctor's testimony, Dr. Danziger, a psychiatrist, he is feigning this action to attempt to keep this trial from going forward. And we're gonna have to remove him from the courtroom.

And you need, unfortunately, to hold him downstairs. And we're gonna continue the trial.

. . . .

⁵ Hope's erratic behavior began about a mile from the courthouse. (R. 725-26).

I believe Mr. Hope is competent to proceed, and especially since the doctor said he was. And I also believe Mr. Hope is feigning this mental illness and this incompetency and that he's trying to stop this trial. He has absented himself from the courtroom because of his behavior. And he had an opportunity to participate and he's chosen not to.

(R. 730, 735-36).

When the proceedings resumed, the trial court instructed the jury as follows:

The defendant has chosen not to participate in this trial any further. You need to understand the defense has no burden whatsoever to prove or disprove anything. And the fact that the defendant has chosen not to participate in the trial any further can in no way be used by you in your deliberations to render a verdict of guilty or not guilty in this case. It can't be considered by you, discussed by you, or in any way talked about by the members of the jury the fact that the defendant has excused himself from the trial. He has nothing to prove. The entire burden is on the State.

(Id. at 742-43).

Ms. Crag-Chaderton was present during the remainder of the trial.⁶ (Id. at 731, 802-03). She moved for a mistrial on Hope's behalf, which the trial court denied. (Id. at 733-34, 736). Ms. Crag-Chaderton also provided input as to wording the instruction on Hope's *pro se* status. (Id. at 740, 741). Counsel had no objections to the jury instructions or verdict forms. (Id. at 802). Ms. Crag-

⁶ Ms. Crag-Chaderton declined to be reappointed as counsel, noting Hope had "not indicated that he wants me to continue with the case, Judge." (R. 731).

Chaderton apparently was not present when the verdicts were read. (Id. at 805).

Ms. Crag-Chaderton represented Hope at sentencing.⁷ (R. 231). The court determined that Hope was competent to proceed with sentencing because nothing had been presented to indicate otherwise. (R. 238-39). There were no outbursts from Hope during the sentencing hearing. (R. 228-89).

As to Hope's prior experience with the legal system, the trial court noted:

This young man is -- he is certainly well acquainted with the system. He's been to prison, I believe, four times already.

MS. HICKS: I confirmed over the lunch hour he's a 14-time convicted felon, at least. Those are the J&Ss that I have.⁸

(Id. at 732-33).

⁷ Ms. Crag-Chaderton was reappointed on November 3, 2016. (R. 169).

⁸ Hope told the court that he had been to prison "[a]t least four times, and twice previously been to trial. (R. 524, 525).

SUMMARY OF THE ARGUMENTS

POINT I: The trial court was not required to reappoint standby counsel as counsel where Hope, by feigning mental illness, was voluntarily absent from his trial. Hope did not relinquish his right to self-representation or rescind his waiver of the right to counsel, and never indicated to the trial court that he wanted Ms. Crag-Chaderton reappointed as counsel. Hope's behavior was part of his stated intent to stop his trial. Because Hope made a calculated choice as to how his trial should proceed, this Court should affirm.

POINT II: It appears that remand is proper where the judgment incorrectly lists burglary of a dwelling with an assault or battery, with a firearm as a second-degree felony and aggravated assault with a firearm as a life felony.

ARGUMENTS

POINT I

THE SIXTH AMENDMENT DOES NOT MANDATE THE TRIAL COURT REAPPOINT COUNSEL FOR A *PRO SE* DEFENDANT WHO VOLUNTARILY ABSENTED HIMSELF FROM TRIAL BY FEIGNING MENTAL ILLNESS AND DID NOT RESCIND HIS WAIVER OF THE RIGHT TO COUNSEL.

The first issue presented by this appeal is whether a trial court is required to reappoint standby counsel as counsel when a defendant, who is proceeding *pro se*, voluntarily absents himself from the courtroom by feigning mental illness. In this case, standby counsel, Ms. Crag-Chaderton, declined to be reappointed as Hope's attorney after the trial court removed Hope from the courtroom. The State made its closing argument and the jury proceeded to deliberate and render its verdicts. Hope contends that the trial court should have reappointed counsel to represent him and that the court's failure to do so violated his Sixth Amendment right to counsel; specifically, to present a defense and closing argument. Hope argues that he is therefore entitled to a new trial. The State respectfully disagrees.

A criminal defendant has a constitutional right to representation by counsel. Amend. VI, U.S. Const.; Art. I, § 16, Fla. Const. A defendant also has a constitutional right to self-representation at trial. Faretta v. California, 422 U.S. 806 (1975). However, "the trial court has the power to terminate a defendant's self-representation if he continues to abuse the court

system." McCray v. State, 71 So. 3d 848, 868 (Fla. 2011). The denial of counsel is a "structural defect" which is not subject to harmless error analysis. United States v. Gonzalez-Lopez, 548 U.S. 140, 148-49, (2006). "Denial of counsel is always harmful, regardless of the strength of the admissible evidence, and can be properly categorized as per se reversible." State v. DiGuilio, 491 So. 2d 1129, 1137 (Fla. 1986)

Hope urges this Court to adopt the standard enunciated by the dissent in Eady v. State, 695 So. 2d 752 (Fla. 1st DCA), reh. denied, rev. denied, 695 So. 2d 1372 (Fla. 1997). With respect to Eady's absence from the courtroom, Judge Webster wrote:

I am also of the opinion that reversible error occurred when appellant's trial took place in his absence, and without anyone present to represent him. The trial judge was certainly justified in ordering appellant removed from the courtroom. However, at that point, appellant's interests were left completely unrepresented. That could easily have been avoided. In Faretta, the Court said that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct," and that "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." Had the trial judge availed herself of one of these options when it became apparent, prior to trial, that appellant was not going to cooperate in any way, the problem could have been avoided and appellant's rights preserved. It seems to me that what occurred here violates fundamental concepts of justice in

our society and, therefore, requires reversal notwithstanding appellant's obstructive conduct.

Id. at 758-59 (internal citations omitted).

The instant case is distinguishable from that of removal after mere disruptive behavior or a display of a lack of self-control. Hope made it clear to the court that he did not want to proceed with Ms. Crag-Chaderton as his attorney, despite the court finding that there was no basis to remove her as counsel. Hope also made it clear to the court that he was intentionally disrupting the proceedings with one goal in mind: "I told you since the beginning of this trial, that I did not want to go through this with my attorney but you're forcing me to do this any way [sic]. . . . That's why I'm doing this." (R. 505). Hope told the court that he "would do anything to stop" the trial. (Id. at 508). Hope disrupted the trial three times. His mental breakdown the next day, which Dr. Danziger determined was feigned, was apparently a calculated continuation of his agenda. The trial court concluded that Hope was "voluntarily absenting himself from this trial because of his actions." (R. 730). Hope took those actions after knowingly and intelligently waiving his right to counsel in the midst of his trial, fully aware of standby counsel's limited role. As in Eady, Hope's behavior was "a calculated, if unsuccessful, effort to achieve a delay" and provoke the trial court "into committing reversible error." Eady, 695 So. 2d at 755.

In addition, Hope was not deprived of counsel. Ms. Crag-Chaderton remained as standby counsel and represented Hope as needed until the jury retired to deliberate. Counsel moved for a mistrial on Hope's behalf and provided input as to the jury instructions and verdict forms.

Further, other jurisdictions have concluded that the Sixth Amendment does not require a trial court to appoint counsel when a *pro se* defendant voluntarily absents himself or herself from trial. See, e.g., People v. Brante, 232 P.3d 204, 208 (Colo. App. 2009) (holding that the trial court was not required to sua sponte appoint counsel to represent a defendant; "without a request from Brante for counsel during his absence or obstreperous conduct justifying termination of his self-representation, the trial court's sua sponte appointment of counsel could have violated his right to self-representation"); State v. Worthy, 583 N.W.2d 270, 280 (Minn. 1998) (concluding that the trial court did not abuse its discretion in not reappointing dismissed attorneys; although the defendants' refusal to remain present was "neither wise nor beneficial, the trial court did not have a duty to reject their valid waivers of their right to counsel or their right to be present"); State v. Eddy, 68 A.3d 1089, 1103-04 (R.I. 2013) (a defendant may waive both the right to be present at trial and the right to counsel; "[N]either the United States Constitution, nor article 1, section 10 of the Rhode Island Constitution mandates

that counsel be appointed when a *pro se* defendant voluntarily absents himself from his trial.”).

United States v. Stanley, 739 F.3d 633 (11th Cir. 2014), is instructive. In Stanley, a *pro se* defendant absconded from trial after the government rested, with three potential defense witnesses and closing arguments remaining. Id. at 642. The trial court refused to appoint the defendant’s standby counsel as counsel, noting the defendant “had been ‘fully advised by the Court of the risks and dangers inherent in self-representation,’ and that Harris ‘indicated quite clearly and unambiguously that he wants to represent himself,’ and that Harris nonetheless absconded.” Id. On appeal, the defendant argued that the trial court should have allowed standby counsel to represent him. Id. at 650. The Eleventh Circuit Court of Appeals rejected that argument:

In the face of Harris’ knowing and intelligent Sixth Amendment waiver, the district court did not violate Harris’s right to counsel by refusing to allow standby counsel to represent the runaway Harris during the final days of the trial.

. . . .

Quite simply, Harris cannot show on this record that he rescinded his waiver of the right to counsel by absconding. With no other clues, his flight alone does not indicate unambiguously a desire to revoke his valid Sixth Amendment waiver and reinstate Machel as counsel of record. Harris instead argues that the district court should have terminated his self-representation because he deliberately engaged in serious and obstructionist

misconduct. When *pro se* criminal defendants have been removed from a courtroom because of disruptive behavior, standby counselors have been permitted to step in. As a result, Harris insists that the district court *could* have allowed Manchel to serve in Harris's absence. But in this case we are not confronted with the question, and thus need not decide, whether the Sixth Amendment would have *allowed* the district court to permit standby counsel to represent an absconded Harris. Harris cannot show that the Sixth Amendment *required* the court to permit standby counsel to take over. And we have little doubt that if the district court had permitted Manchel to pick up the representation of Harris after his flight, we would be confronted with the argument that the district court had improvidently and without any record support overruled Harris's earlier unambiguous desire for self-representation.

Stanley, 739 F.3d at 650 (internal citations omitted) (emphasis in original).

Here, like the defendant in Stanley, Hope voluntarily absented himself from his trial. Although the court questioned Hope about his desire to continue participating in his trial, Hope never replied. Hope also never indicated to the court that he rescinded his waiver of counsel and wanted standby counsel, Ms. Crag-Chaderton, reappointed as counsel. Further, the trial court could not conclude that Hope waived his right to self-representation based on Hope's conduct. See Lindsey v. State, 69 So. 3d 363, 365 (Fla. 5th DCA 2011) ("[T]he right may be waived through the defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether."). Hope admits that

"he did not indicate that he wanted [Ms. Crag-Chaderton] reappointed. (IB. at 16). Had the court reappointed Ms. Crag-Chaderton as counsel, Hope's claim on appeal likely would be that the trial court violated his right to self-representation. See McKaskle v. Wiggins, 465 U.S. 168, 178 (1984) ("If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the Faretta right is eroded.").

Contrary to Hope's assertion (IB. at 15-16), this case is distinguishable from United States v. Mack, 362 F.3d 597 (9th Cir. 2004). In Mack, the trial court refused to allow the *pro se* defendant to have the standby counsel of his choice. Id. at 599. Consequently, the defendant proceeded to trial without standby counsel. Id. The defendant was removed from the courtroom, not to return until jury instructions. Id. Thus, he had no representation for a portion of his trial. Here, Ms. Crag-Chaderton remained as standby counsel through jury deliberations.

Reversal in this case "would reward a defendant who was attempting to 'frustrate orderly proceedings.'" Eady, 695 So. 2d at 755 (citation omitted). Hope's "absence from the courtroom was, in effect, the final part of his trial strategy, and he must now live with the consequences." Id. at 756. This Court should affirm.

POINT II

REMAND IS PROPER TO CORRECT THE SCRIVENER'S
ERRORS IN THE JUDGMENT.

Hope asserts that there is a scrivener's error in the judgment. It appears that Hope is correct.

The jury found Hope guilty of burglary of a dwelling (count two) with the special findings that Hope possessed, carried, displayed, used, threatened to use, or attempted to use a firearm during the commission of the offense, and committed an assault or battery upon another person. (R. 105-07). As to count three, the jury found Hope guilty of aggravated assault with the special finding that he possessed, carried, displayed, used, threatened to use, or attempted to use a firearm during the commission of the offense. (Id. at 108-09). The judgment lists count two as a second-degree felony and count three as a life felony.

The judgment appears to be incorrect. Burglary of a dwelling with an assault or battery with a firearm is punishable by life imprisonment. See §§ 775.087(1)(a), 810.02(2)(a), Fla. Stat. (2015). Aggravated assault with a firearm is a third-degree felony. See § 784.021(1)(a), Fla. Stat. (2015). Remand is proper in order to correct the final judgment. See Davis v. State, 211 So. 3d 354, 355 (Fla. 5th DCA 2017).

CONCLUSION

Based on the arguments and authorities presented herein, the

State respectfully requests this Honorable Court affirm Hope's judgment and sentence in all respects.

DESIGNATION OF E-MAIL ADDRESSES

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, in this proceeding: crimappdab@myfloridalegal.com (primary) and Marjorie.Vincent-Tripp@myfloridalegal.com (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Answer Brief of Appellee has been furnished by e-mail to counsel for Appellant, Assistant Public Defender Sean Kevin Gravel (444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118) at appellate.efile@pd7.org and at gravel.sean@pd7.org on May 8, 2017.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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APPENDIX E

Reply Brief of Appellant

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF
THE STATE OF FLORIDA

ERIC HOPE,

Appellant,

v.

CASE NO. 5D16-4086

STATE OF FLORIDA,

Appellee.

_____ /

**APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENTS

Appellant was the Defendant and Appellee was the Prosecution in the Felony Division of the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida. In the Brief the Appellee will be referred to as “the State” and the Appellant will be referred to as he appears before this Honorable Court of Appeal.

In the Brief the following symbols will be used:

“R” - Original record on appeal.

“T” – Trial transcript.

“IB” - Appellant’s Initial Brief.

“AB” - Appellee’s Answer Brief.

This Reply Brief is intended solely to respond to the Attorney General’s contentions that require further discussion for a proper determination of the issues raised on appeal. This brief does not respond to issues that Appellant believes were adequately discussed in the Initial Brief, and Appellant intends no waiver of these issues by not expressly reiterating them herein.

SUMMARY OF ARGUMENT

When Mr. Hope, a pro se defendant, was removed from the courtroom for disruptive behavior, he was left unrepresented. The State was arguing against an empty chair, creating a breakdown in the adversarial system that violated Mr. Hope's rights to representation, to present evidence, and to make a closing argument. Standby counsel should have been reappointed as main counsel to conduct the remainder of the trial. This case should be reversed and remanded for new trial.

ARGUMENT

WHEN APPELLANT, WHO WAS PRO SE AT TRIAL, WAS REMOVED FROM THE COURTROOM, STAND-BY COUNSEL SHOULD HAVE BEEN REAPPOINTED AS LEAD COUNSEL

Mr. Hope and the State agree that the denial of the right to counsel is a “structural defect” that is “always harmful”. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006); *State v. DiGuilio*, 491 So.2d 1129, 1137 (Fla. 1986) (IB 6; AB 11-12). The parties disagree as to whether or not Mr. Hope was denied his right to counsel and his rights to present a defense and closing argument when he chose to proceed pro se at trial but was then removed from the courtroom for disruptive behavior. (IB 6, 14; AB 11).

The State correctly notes that Mr. Hope did not want to proceed to trial with Ms. Crag-Chaderton as his attorney and indicated that he would do anything to stop the trial. (R 508-09; AB 12). This supports Mr. Hope’s argument that reappointment of counsel should be required: it would have protected his constitutional rights and the threat of being reappointed the attorney he wanted nothing to do with might have persuaded him to behave himself. (IB 16). The State argues that reversal would reward Mr. Hope for his misbehavior at trial (AB 17), but this does not change the fact that the trial court’s chosen remedy violated his constitutional rights. As the Federal Ninth Circuit and Judge Webster of

Florida's First District respectively put it, leaving Mr. Hope without any representation was, "far from appropriate," and, "violates fundamental concepts of justice in our society and, therefore, requires reversal notwithstanding appellant's obstructive conduct." *United States v. Mack*, 362 F.3d 597, 601 (9th Cir. 2004); *Eady v. State*, 695 So.2d 752, 759 (Fla. 1st DCA 1997) (Webster, J. dissenting).

The State's argument that Mr. Hope was not deprived of counsel due to Ms. Crag-Chaderton's appointment as standby counsel is without merit. (AB 14, 17). When standby counsel is appointed, the defendant retains control over the organization and content of the defense. *McKaskle v. Wiggins*, 465 U.S. 168, 175 (1984). There is no right to hybrid representation. *Aycock v. State*, 769 So.2d 523, 524 (Fla. 5th DCA 2000). Pro se defendants bear the entire responsibility for their defense, even when standby counsel is appointed. *Paul v. State*, 152 So.3d 635, 641 (Fla. 4th DCA 2014). Standby counsel's main role is to assist the court in conducting orderly and timely proceedings, to aid the accused upon request for help, and to be available if self-representation is terminated. *Id.*, citing *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). The State acknowledges the limited role of standby counsel in its Answer Brief, noting that allowing standby counsel to make tactical decisions erodes the right to self-representation. (AB 17).

In Mr. Hope's case, Ms. Crag-Chaderton arguably exceeded her role as

standby counsel by moving for mistrial and providing input on the jury instructions and verdict forms without Mr. Hope's presence. (R 733-34, 736, 740-41; AB 8, 14). For her to do these things the trial court needed to terminate Mr. Hope's self-representation and formally reappoint her. Because she was only standby counsel, Mr. Hope like the defendant in *Mack* was completely unrepresented.

This further illustrates the constitutional problems of not reappointing counsel when a pro se defendant is ejected from the courtroom: trial errors such as jury instruction flaws or errors warranting mistrial would go uncorrected and unpreserved for appeal. Ms. Crag-Chaderton's role was merely to help Mr. Hope when he asked and to instruct him on procedure. She should have been reappointed so that she could finish conducting the trial by calling witnesses and giving a closing argument.

Mr. Hope acknowledges that there are conflicting decisions by various State appellate courts and Federal Circuit Courts regarding whether or not removal of a pro se defendant from the courtroom requires reappointment of counsel. (IB 9-13). The Supreme Court of the United States has yet to resolve the issue. *Thomas v. Carroll*, 581 F.3d 118, 124 (3d Cir. 2009). Many cases finding that the reappointment of counsel is required were decided after the First District's 1997 decision in *Eady*: *People v. El*, 126 Cal.Rptr.2d 88, 90-91 (Cal. Ct. App. 2002);

People v. Cohn, 160 P.3d 336, 342-44 (Colo. App. 2007); *United States v. Mack*, 362 F.3d 597, 601 (9th Cir. 2004); *State v. Lacey*, 385 P.3d 1151, 1152-53 (Or. Ct. App. 2016).

All of the cases cited by the State are inapplicable to this case. (AB 14-16). These cases involved defendants who voluntarily left the courtroom in protest or refused to show up for trial. *People v. Brante*, 232 P.3d 204, 207-09 (Colo. App. 2009), *State v. Worthy*, 583 N.W.2d 270, 280 (Minn. 1998), *State v. Eddy*, 68 A.3d 1089, 1104 (RI 2013), and *United States v. Stanley*, 739 F.3d 633, 642 (11th Cir. 2014). The Supreme Court of Rhode Island held that reappointment of counsel is not required when a defendant **voluntarily** absents himself but is required when the defendant is **involuntarily** removed from the courtroom. *Eddy*, 68 A.3d 1089, 1107-08.

In Mr. Hope's case he was involuntarily removed from the courtroom despite the trial court's statement that by his conduct, "he is voluntarily absenting himself from this trial." (R 730). The court went on to say, "we're gonna have to remove him from the courtroom," indicating that his absence was not actually, "voluntary." (R 730). Admittedly the First District rejected such a distinction in *Eady* when the defendant voluntarily left and the trial court indicated that he would not be invited back because of his misbehavior. *Eady*, 695 So.2d 752, 755-56.

However, for the reasons set forth in this brief and the Initial Brief this Court should find that Mr. Hope's involuntary removal from the courtroom required reappointment of counsel as explained in the *Eady* dissent and in *Mack*, 362 F.3d 597, 601.

CONCLUSION

BASED UPON the foregoing cases and authorities Mr. Hope requests that this Honorable Court reverse and remand his case for new trial. If he again proceeds pro se and forces the trial court to remove him for misconduct, counsel should be appointed. Also, as stipulated by the State in the Answer Brief, the scrivener's error on the judgment should be corrected. (AB 18).

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ Sean Kevin Gravel
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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 at crimappdab@myfloridalegal.com and mailed to Mr. Eric Hope, #15038119, Orange County Jail, Post Office Box 4970, Orlando, Florida 32802 this 9th day of May, 2017.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

DESIGNATION OF EMAIL ADDRESS

I HEREBY CERTIFY that the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and gravel.sean@pd7.org (secondary).

/s/ Sean Kevin Gravel
SEAN KEVIN GRAVEL
ASSISTANT PUBLIC DEFENDER

RECEIVED, 1/3/2018 1:46 PM, Joanne P. Simmons, Fifth District Court of Appeal

APPENDIX F

Motion for Rehearing

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

ERIC HOPE,

Appellant,

v.

DCA CASE NO. 5D16-4086

STATE OF FLORIDA,

Appellee.

_____/

**MOTION FOR REHEARING, WRITTEN OPINION, CERTIFICATION OF
A QUESTION OF GREAT PUBLIC IMPORTANCE, AND REHEARING
EN BANC**

The Appellant, pursuant to Florida Rules of Appellate Procedure 9.330(a) and 9.331(d), moves for rehearing, issuance of a written opinion, certification of a question of great public importance, and for rehearing en banc.

1. On December 22, 2017 this Court entered an opinion in this case affirming the judgment and sentence without discussion and remanding for correction of a scrivener's error in the judgment.

Memorandum in Support of Motion for Rehearing

2. The purpose of the rule regarding rehearing is solely to point out points of fact or law this Court overlooked or misapprehended, not to reargue the case. While motions for rehearing are rarely granted when a decision is entered

without opinion, they do occasionally happen. *Lewis v. Lewis*, 450 So.2d 1123, 1124 (Fla. 2d DCA 1983), citing *Whipple v. State*, 431 So.2d 1011 (Fla. 2d DCA 1983).

3. The most common instance of seeking rehearing after issuance of an opinion without discussion is when a decision by another District Court or the Supreme Court is rendered after briefing and oral argument. *McDonnell v. Sanford Airport Authority*, 200 So.3d 83, 85 (Fla. 5th DCA 2015).

4. However, in this case statements at oral argument indicate points of fact and law that this Court may have overlooked or misapprehended.

5. At oral argument this Court indicated that part of its reasoning for affirming may have been the Federal Eleventh Circuit's decision in *United States v. Stanley*, 739 F.3d 633, 649 (11th Cir. 2014).

6. In that case the Eleventh Circuit ruled that the defendant, "cannot show on the record that he rescinded his waiver of the right to counsel by absconding." *Id.*

7. The court did not establish a bright line rule regarding every instance of a pro se defendant's absence as this Court indicated, but rather it made a ruling based on the particular record before it.

8. In contrast to *Stanley*, as noted in the briefs and at oral argument Mr. Hope was informed that his misbehavior would result in his removal from the

courtroom and termination of his self-representation, indicating that his removal for misconduct was effectively a rescission of his waiver of counsel.

Memorandum In Support of Motion for Written Opinion and Certification

9. This motion is confined to the issues of construing provisions of the State and Federal Constitutions, establishing conflict with the Supreme Court of Florida's decision in *McCray v. State*, 71 So.3d 848 (Fla. 2011), and certifying a question of great public importance. See *Palumbo v. State*, 52 So.3d 834, 834 (Fla. 5th DCA 2011) where this Court granted a motion for written opinion for the purpose of acknowledging conflict with the Second District Court of Appeal regarding the definition of statutory language.

10. Affirmance in this case requires interpretation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Florida Constitution, as well as an analysis of the First District's interpretations of these provisions in *Eady v. State*, 695 So.2d 752 (Fla. 1st DCA 1997) and the Supreme Court of Florida's ruling in *McCray v. State*, 71 So.3d 848 (Fla. 2011).

11. As argued at oral argument, *McCray* only provides two options for a trial court to handle a disruptive, pro se defendant: (1) terminate self-representation or (2) terminate self-representation and remove the defendant from the courtroom. 71 So.3d 848, 868. A written opinion in this case would create a

third option of removing the defendant without terminating self-representation, conflicting with the Supreme Court's decision in *McCray*.

12. The Court of Appeals of Oregon and the Federal Second and Third Circuits have previously noted the importance of this issue, that State and Federal courts are fractured on this issue, and that the guidance from the Supreme Court of the United States would be helpful. *State v. Lacey*, 385 P.3d 1151, 1154 n.1 (Or. App. 2016); *Davis v. Grant*, 532 F.3d 132, 140 (2d Cir. 2008); *Thomas v. Carroll*, 581 F.3d 118, 124 (3d Cir. 2009).

13. Florida District Courts generally do not write opinions when the law is well settled on the issues presented or the principles of law upon which the decision rests are so generic that even reference to a citation would add nothing to the jurisprudence. Judicial Management Council, Final Report and Recommendations, Committee on Per Curiam Affirmed Decisions 47, 53 (May 2000).

14. The American Bar Association's Standards of Judicial Administration recommend, that "every decision should be supported, at a minimum, by a citation of the authority or statement of grounds upon which it is based."

15. Presently, in Florida only the First District has expressly ruled on the issue of removal of a pro se defendant without reappointment of counsel, but given the fracture of State and Federal court decisions, the issue is likely to reoccur, and

guidance from the Supreme Court of Florida will be necessary, so this Honorable Court should certify the following question as one of great public importance:

DOES THE REMOVAL OF A PRO SE DEFENDANT FROM THE COURTROOM FOR MISCONDUCT REQUIRE THE REAPPOINTMENT OF COUNSEL?

16. I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because it will construe provisions of the State and Federal Constitutions, it will conflict with the Supreme Court of Florida's decision in *McCray*, and it will certify a question of great public importance.

Memorandum in Support of Rehearing En Banc

17. Rehearing en banc may be sought when the case or issue is one of exceptional importance. Rule 9.331(d)(1), Fla.R.App.P.

18. Cases of exceptional importance include those that affect large numbers of people and cases that interpret fundamental legal or constitutional rights. *In Interest of D.J.S.*, 563 So.2d 655, 657 n.2 (Fla. 1st DCA 1990), citing Federal Rule of Appellate Procedure 35.

19. This case involves an issue that impacts a large number of people, given how many cases from various jurisdictions have addressed the issue.

20. This case involves an issue that interprets a legal and constitutional right, the right to counsel.

21. I express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance.

WHEREFORE, Appellant hereby requests that this Honorable Court grant his motion for rehearing, enter a written opinion, certify a question of great public importance in his case, and grant rehearing en banc.

Respectfully submitted,
JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ Sean Kevin Gravel
Sean Kevin Gravel
Assistant Public Defender
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, and mailed to Mr. Eric Hope #117284, Gulf Correctional Institution, 500 Ike Steele Road, Wewahitchka, FL 32465 on this 3d day of January, 2018.

/s/ Sean Kevin Gravel
Sean Kevin Gravel
Assistant Public Defender

APPENDIX G

Hyperlink to oral argument

<http://www.5dca.org/ArchivedOAs/2017/Aoa12-05-17.pdf>

APPENDIX H
Excerpts from the Record on Appeal

3

1 - - -
2 P R O C E E D I N G S
3 (September 26, 2016; 10:57 a.m.)
4 THE COURT: All right. We have a Nelson hearing with
5 Eric Hope.
6 MS. HICKS: Yes, Your Honor.
7 THE CLERK: 2015-CF-14844 and 2015-CF-14861.
8 THE COURT: Ms. Chaderton, you are appointed on both
9 of these?
10 MS. CRAG-CHADERTON: Yes, Your Honor.
11 THE COURT: And, Mr. Hope --
12 THE DEFENDANT: Yes, sir?
13 THE COURT: -- you still want a Nelson hearing?
14 THE DEFENDANT: Yes, sir.
15 THE COURT: Okay. Do you know what a Nelson hearing
16 is, Mr. Hope?
17 THE DEFENDANT: To my understanding, it's a hearing
18 to present to the court some reason why I'm asking to have
19 Ms. Chaderton removed from my cases as my attorney.
20 THE COURT: Yeah. And you're asking for a new
21 attorney to be appointed.
22 THE DEFENDANT: Yes, sir.
23 THE COURT: Okay. You have to advise me -- she's
24 going to swear you in first.
25 Go ahead.

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1 THE COURT: Well, your attorney has told you what's
2 in them.

3 THE DEFENDANT: She gave me --

4 THE COURT: All right. Okay.

5 MS. CRAG-CHADERTON: I'll do the order, Judge.

6 THE COURT: We'll get you the depositions, but I can't --

7 THE DEFENDANT: (Indiscernible) --

8 THE COURT: My problem is, I can't guarantee
9 Ms. Hicks is going to leave the offer open any further.

10 THE DEFENDANT: Yes. And I understand.

11 So my Nelson hearing, that's a --

12 THE COURT: I'm not going to grant -- I'm not going
13 to find she did anything wrong. I -- you haven't told me
14 enough to -- I've granted Nelson hearings before. I think
15 twice or three times in 10 years.

16 But she hasn't done anything unethical or incompetent
17 with you. She's made decisions that she felt were in your
18 best interests. Whether you did or not, they were her
19 decisions to make, like your speedy trial issue; not yours.
20 And there's case law right on point that says an attorney,
21 if they're not ready for trial, can waive your right to
22 speedy trial and move the case further back. That's the
23 law.

24 THE DEFENDANT: And the bond issue is, too? All
25 that --

1 MS. CRAG-CHADERTON: Yes, he does.

2 THE DEFENDANT: I want to go to trial and I want
3 to put on the record, man, that I don't think this
4 attorney has my best interest at heart, Your Honor.

5 THE COURT: Okay. We can do another Nelson
6 hearing --

7 MS. CRAG-CHADERTON: We can.

8 THE COURT: -- if you want real quick?

9 THE DEFENDANT: Another one. Yes, sir.
10 Because --

11 THE COURT: Okay. Why doesn't she have your best
12 interest at heart?

13 THE DEFENDANT: Because she just -- she's just
14 too intent on me to take this time, to take this deal.

15 THE COURT: Do --

16 THE DEFENDANT: And -- and -- and -- and she has
17 done nothing on my behalf to prepare me for this
18 trial. We have not had one discussion about the
19 merits of this trial. She comes and spends five
20 minutes. She hasn't spent over 15 minutes with me in
21 the whole year that I have known her. She done sent
22 my depo to -- to my girlfriend's house, when I was
23 supposed to get it. I mean -- I mean, Your Honor,
24 this lady does not have my best interest at heart. I
25 do not feel comfortable going into trial with her.

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1 saying, and she is a very experienced lawyer. And
2 what -- what she's trying to do is keep you from doing
3 life in prison, because if you get convicted on either
4 one of those counts, you're never going to get out
5 again.

6 So you can go to trial. We got a jury coming up
7 right now, and we'll pick a jury, and for the next day
8 and a half, we'll try this case and see what the jury
9 says. But once I bring that jury in, there's no more
10 discussing deals.

11 **THE DEFENDANT:** I understand.

12 **THE COURT:** So you want to go to trial?

13 **THE DEFENDANT:** Yes, sir.

14 **THE COURT:** All right, sir. That's up -- that's
15 your choice.

16 Okay. Let's -- let me hear your motion in
17 limine.

18 **MS. CRAG-CHADERTON:** Judge, the --

19 **THE COURT:** I'm going to deny the request to
20 replace you with another lawyer. I still haven't
21 heard anything you've done illegal, unethical, or
22 incompetently in this case. Even if you didn't ask
23 for a preliminary hearing, that has nothing to do with
24 your preparation for trial. Even if you didn't ask
25 for a bond hearing, that has nothing to do with this

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1 MS. HICKS: I am. At some point --
2 Rachael, do you need to listen to any more of
3 this?
4 MS. CRAG-CHADERTON: Yes. Just a little bit.
5 MS. HICKS: I can just --
6 MS. CRAG-CHADERTON: Oh, the rest of it? No, I'm
7 fine.
8 MS. HICKS: Okay.
9 THE COURT: Are we good?
10 MS. HICKS: I'm just gonna give the clerk the two
11 jail calls that I'm using.
12 THE COURT: All right.
13 MS. HICKS: These are the redacted jail calls.
14 THE COURT: Are we ready to bring the jury in?
15 MS. HICKS: Yes.
16 THE COURT: All right. Let's bring the jury in,
17 please, sir.
18 COURT DEPUTY: Jury's entering.
19 (The jury entered the courtroom.)
20 THE COURT: All right, folks, we're ready to go
21 back to this trial.
22 Call your next witness, please.
23 MS. HICKS: State calls Sergeant Paul Volkerson.
24 THE DEFENDANT: Your Honor, before we get
25 started, can I get these shackles unloose? They're

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1 cutting --

2 THE COURT: Sir, have a seat.

3 THE DEFENDANT: My shackles are cutting --

4 THE COURT: Shut up. I don't want you to say
5 another word. Not another word.

6 Ladies and gentlemen --

7 Take the jury back out, please.

8 (The jury exited the courtroom.)

9 THE COURT: All right. For the record, the
10 defendant, in front of the jury, announced he was
11 shackled. The jury is not, obviously, supposed to
12 know that.

13 THE DEFENDANT: Ain't nobody tell me that.

14 THE COURT: But you can't create your own error
15 like that, or create a mistrial by screaming something
16 out like that. So, I -- if you were planning on
17 asking for a mistrial --

18 MS. CRAG-CHADERTON: I have to --

19 THE COURT: -- it's gonna be denied.

20 MS. CRAG-CHADERTON: I have to ask for it on the
21 record, Judge --

22 THE COURT: Sure.

23 MS. CRAG-CHADERTON: -- based on his outbursts
24 and prejudicing this pool. And I would ask the Court
25 for a mistrial on those grounds.

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1 THE COURT: No. That will be denied. He created
2 this problem. No one else.

3 THE DEFENDANT: I'm bleeding.

4 THE COURT: We're gonna take care of it, but you
5 don't do it the way you did it.

6 THE DEFENDANT: I didn't -- ain't nobody tell me
7 that.

8 THE COURT: All right. You want to loosen his
9 shackles? I didn't say take them off, but...

10 THE DEFENDANT: I'm bleeding. I didn't know.
11 Didn't nobody explain that to me. I'm sorry. Didn't
12 nobody explain that to me. I did not try to cause --

13 THE COURT: Well, you're not getting a mistrial
14 because you created the problem.

15 THE DEFENDANT: I'm bleeding.

16 THE COURT DEPUTY: Give it one more click.

17 THE COURT: Loosen them up significantly so that
18 he's not uncomfortable over there.

19 THE COURT DEPUTY: They're pretty loose, Judge.
20 Only like one click.

21 THE COURT: All right.

22 THE COURT DEPUTY: Keep your foot still.

23 One more click. There you go. Now lock it.

24 THE COURT: Is that better? Mr. Hope, is that
25 better?

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1 THE DEFENDANT: Yes, sir. I'm bleeding, though.

2 But yes, sir, it is loose enough. But I am bleeding.

3 THE COURT: Well, I don't have any bandages.

4 THE COURT DEPUTY: Only way we would be able to
5 do that, Judge, is take him back downstairs and then
6 they would take him to 33rd. I don't know if they
7 have any medical upstairs. It doesn't look -- it
8 looks like an abrasion. It doesn't seem to be
9 actually --

10 THE COURT DEPUTY: That's common with leg irons.

11 MS. CRAG-CHADERTON: Do you want a paper towel
12 with some water -- saturated with some water or
13 something?

14 THE DEFENDANT: I guess so.

15 MS. CRAG-CHADERTON: Yes or no?

16 THE COURT DEPUTY: Judge, that is common with leg
17 irons.

18 THE COURT: I'm sure.

19 THE COURT DEPUTY: He's got socks on to prevent
20 from actually metal to skin.

21 THE COURT: So he doesn't have metal to skin?

22 THE COURT DEPUTY: No.

23 THE COURT: All right. Are you ready to start
24 again?

25 MS. HICKS: Yes, sir.

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1 **THE DEFENDANT:** Your Honor, I'm sitting here
2 bleeding from these shackles.

3 **THE COURT:** Sir.

4 **THE DEFENDANT:** I don't care, man.

5 **THE COURT:** Sir.

6 **THE DEFENDANT:** I'm sitting here bleeding from
7 these shackles.

8 **THE COURT:** Sir.

9 **THE DEFENDANT:** I'm bleeding.

10 **THE COURT:** Stop.

11 **THE DEFENDANT:** You all acting like --

12 **THE COURT:** Stop --

13 **THE DEFENDANT:** -- you don't care about that,
14 man.

15 **THE COURT:** Stop.

16 Take the jury out again, please.

17 **THE DEFENDANT:** This is crazy.

18 (The jury exited the courtroom.)

19 **MS. CRAG-CHADERTON:** Judge, may I approach
20 briefly?

21 **THE COURT:** Yes.

22 **MS. CRAG-CHADERTON:** Briefly.

23 **THE DEFENDANT:** I'm sitting here bleeding from
24 these shackles.

25 (The following conference was held at the bench.)

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1 **MS. CRAG-CHADERTON:** In goes without saying I
2 have no --

3 **MS. HICKS:** Wait till I get there, please.

4 **MS. CRAG-CHADERTON:** Sorry.

5 I have no idea what is happening, nor was I
6 informed that he was bleeding prior to his outburst in
7 court. Please do not in any way think I have anything
8 to do with this stunt.

9 **THE COURT:** I don't.

10 **MS. CRAG-CHADERTON:** Okay. I want to make that
11 clear.

12 **THE COURT:** I don't.

13 (The following proceedings were held on the
14 record in open court.)

15 **THE COURT:** Take a look. Homes, can you take a
16 look at his leg and see if he is bleeding.

17 **COURT SECURITY OFFICER JOHNSON:** Judge, it's just
18 an abrasion, and that's normal from wearing shackles.

19 **THE COURT:** I mean, does he have blood dripping
20 down his leg?

21 **COURT SECURITY OFFICER JOHNSON:** No, sir. Far
22 from it, Judge.

23 **MS. CRAG-CHADERTON:** Judge, I need a minute. May
24 I be excused for two minutes, please?

25 **COURT DEPUTY GIBSON:** You want me to bring him in

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1 that -- there's a -- there's a pole holding the chair
2 up. Like the attorney's sitting in. Could his ankle
3 be cuffed to that chair?

4 **SERGEANT STULL:** Well, we can't put him on a
5 chair with wheels.

6 **THE COURT:** Okay. Could you put him on the
7 other -- a chair without wheels?

8 **COURT DEPUTY GIBSON:** He already is but...

9 **THE COURT:** And cuff the cuff to the chair?

10 **SERGEANT STULL:** Well, we're not allowed to -- we
11 aren't allowed to handcuff people to stationary
12 objects. That's actually in our policy.

13 **THE COURT:** Well --

14 **THE DEFENDANT:** Can I please get some medical
15 attention?

16 **THE COURT:** Sir, you don't really need medical
17 attention.

18 **THE DEFENDANT:** Can I have a doctor tell me that
19 or a nurse or somebody tell me that? Anybody --

20 **THE COURT:** We're not stopping this trial today,
21 sir. And I think that's exactly what you're trying to
22 do.

23 **THE DEFENDANT:** No, it's not. I didn't cause
24 this abrasion.

25 **THE COURT:** Sir, you're not breeding.

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1 THE DEFENDANT: I didn't cause this abrasion. I
2 didn't cause it like --

3 THE COURT: You're not bleeding. I saw no blood.

4 THE DEFENDANT: Your Honor, this is...

5 COURT DEPUTY GIBSON: Homes, you want to pull the
6 sock down so the sergeant can see that?

7 THE COURT: Let the sergeant see that.

8 THE DEFENDANT: You see blood right there? You
9 see the blood where your thumb at covering it up where
10 the blood at? You see the blood? You see that?

11 COURT SECURITY OFFICER JOHNSON: But that's
12 normal, Sarge, with leg irons.

13 THE DEFENDANT: I've been wearing leg irons for
14 years and this has never happened.

15 COURT SECURITY OFFICER JOHNSON: Most people that
16 wear leg irons oftentimes don't have socks on and this
17 is all they get, so it's standard. And it's only one
18 place.

19 THE DEFENDANT: Do you see blood now?

20 COURT SECURITY OFFICER JOHNSON: It's standard to
21 do this, Sarge.

22 THE DEFENDANT: Can I get medical attention?
23 Give me a Band-aid. Okay? Give me a Band-aid so it
24 don't rub up against it.

25 COURT DEPUTY GIBSON: We can actually probably do

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1 the Band-Aid.

2 THE COURT: All right. Put a Band-Aid -- can
3 you-all get a Band-Aid? If you can't, I can get one
4 from my chambers and we'll put a Band-Aid on it.

5 SERGEANT STULL: Okay.

6 THE COURT: Does he have them up here or does he
7 got to go downstairs?

8 SERGEANT STULL: He's looking in the room.

9 MS. CRAG-CHADERTON: Judge, we're finished with
10 the witness.

11 THE COURT: You're finished with the witness?

12 MS. HICKS: Uh-huh.

13 THE COURT: All right. Sergeant, you're excused.

14 THE WITNESS: Thank you, sir.

15 THE COURT: Unless you want to apply medical
16 care.

17 THE WITNESS: That's not really my thing.

18 MS. HICKS: May I step out for a second, Judge?

19 COURT DEPUTY GIBSON: Roll this around the ankle.

20 Judge, what we're gonna do is wrap it with this
21 gauze around and tape it and that way it will be even
22 softer for him.

23 THE COURT: All right. You're putting gauze
24 around this little abrasion and putting tape on it.
25 All right. That will be fine.

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1 MS. HICKS: Okay.

2 THE COURT: All right. Ready to bring the jury
3 back in?

4 MS. HICKS: Yes, Your Honor.

5 THE COURT: Thank you.

6 Let's bring the jury back in.

7 THE COURT DEPUTY: Jury's entering.

8 (The jury entered the courtroom.)

9 THE COURT: Okay. Call your next witness.

10 MS. HICKS: State calls Deputy Jeremy Gatzey.

11 THE DEFENDANT: Ladies and gentlemen of the
12 jury --

13 THE COURT: Hey --

14 THE DEFENDANT: -- life sentence --

15 THE COURT: Listen, sir --

16 THE DEFENDANT: Please keep that in mind --

17 THE COURT: Sir --

18 THE DEFENDANT: Please keep that in mind --

19 THE COURT: Sir --

20 THE DEFENDANT: -- they trying to give me a life
21 sentence --

22 THE COURT: Ladies and gentlemen of the jury,
23 leave the courtroom again, please. Okay, that's it.
24 Leave the courtroom, please.

25 (The jury exited the courtroom.)

1 **THE COURT:** Sir, you are attempting to create a
2 mistrial in this case, and that's fine. You can try
3 and do that. But if I have one more outburst from
4 you, I am telling you you're being removed from the
5 courtroom, the trial is going on without you. If you
6 want that, if you want to leave the courtroom, we'll
7 take you out right now. One more outburst, you're out
8 of here. You're disrupting this Court continually
9 now. Do you understand me? You don't have to
10 respond. You're sitting 25 feet away from me. I know
11 you hear me.

12 **THE DEFENDANT:** No, sir, I don't understand,
13 because the simple fact, I told you since the
14 beginning of this trial, that I did not want to go
15 through this with my attorney but you're forcing me to
16 do this any way.

17 **THE COURT:** Okay.

18 **THE DEFENDANT:** And that's where I'm personally
19 coming from. That's why I'm doing this.

20 **THE COURT:** So you're trying to create a mistrial
21 on purpose --

22 **THE DEFENDANT:** -- these shackles cut me. I'm
23 bleeding. I'm bleeding. You won't let me get medical
24 attention. I mean, everything about this trial is
25 just wrong because I -- I begged for you to give me

1 proper counsel --

2 THE COURT: Uh-huh.

3 THE DEFENDANT: -- but you -- but you -- but you,
4 for some reason, you won't do it. And, I mean --

5 THE COURT: Proper counsel is, in my
6 determination, already being provided to you, sir.
7 You don't happen to like your lawyer, you don't want
8 to be in trial on these charges, you don't want to be
9 here at all. And, sir, the problem is, you are.

10 THE DEFENDANT: The trial is not the problem.
11 It's my counsel. And I told you that. I put in a
12 Nelson hearing. I told you before the trial.

13 THE COURT: Uh-huh.

14 THE DEFENDANT: I told you and I told you --

15 THE COURT: And we gave you a Nelson hearing.

16 THE DEFENDANT: And, Your Honor...

17 THE COURT: Sir, you're not gonna stop this
18 trial. I've had two Nelson hearings, actually, I
19 think, for your attorney. And both times you have not
20 told me one thing she's done wrong or illegal or
21 unethical. We're not doing a Nelson hearing in the
22 middle of the trial.

23 THE DEFENDANT: I understand. But she sent my
24 depo out over e-mail to --

25 THE COURT: Sir, that has nothing to do with --

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1 **THE DEFENDANT:** They wanted my family to read it
2 to me in the county jail on the phones that you-all
3 got recordings on and got people coming here to
4 testify against me.

5 **THE COURT:** Sir, that has nothing to do with the
6 legitimacy of this trial, nor your attorney's
7 abilities to be a competent, effective lawyer. You
8 are causing your own -- being your own worst problem
9 here.

10 **MS. CRAG-CHADERTON:** For the record, just because
11 of his outburst and the disclaimers that he made to
12 the jury, I would ask, for the record, again, for a
13 mistrial.

14 **THE COURT:** Denied.

15 **THE DEFENDANT:** You can take me out of the
16 courtroom and do the trial.

17 **THE COURT:** You want -- you want to leave the
18 courtroom? Do you want to leave the courtroom? If
19 you do, I will take you out right now.

20 **THE DEFENDANT:** Yes. You were saying that you
21 remove me and I can do this -- you can do this without
22 me.

23 **THE COURT:** I can try this case without you. I
24 can find that you are a disruption, continual
25 disruption. This is the third one. Now you're trying

1 to talk to the jury about the sentence you might get
2 if you get convicted. That's a continual
3 disruption --

4 **THE DEFENDANT:** I am gonna get the way this trial
5 is going. And we -- and you -- we all know it. And
6 my life is on the line and, Your Honor, yes, I would
7 do anything to stop that.

8 **THE COURT:** And I can see you're trying to do
9 that.

10 **THE DEFENDANT:** No. Not...

11 **MS. CRAG-CHADERTON:** If I could have a moment?

12 **THE COURT:** You're not gonna get a mistrial when
13 you keep trying to cause one. I'm going to remove you
14 from the courtroom, if you want to be removed.

15 **MS. CRAG-CHADERTON:** May I have a moment, please?

16 **THE COURT:** Do you want -- yes, you can.

17 (Defense conferring with defendant.)

18 **THE COURT:** Does your client want to be removed
19 from the courtroom?

20 **MS. CRAG-CHADERTON:** Mr. Hope? The Judge has
21 asked a question.

22 **THE COURT:** Do you want to stay here and behave
23 yourself or do you want to be removed from the
24 courtroom?

25 **THE DEFENDANT:** I want a fair trial. I want a

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1 fair trial.

2 THE COURT: Sir, you're getting a very fair
3 trial. You don't like the way it looks like it's
4 going. That doesn't mean it's not a fair trial.

5 THE DEFENDANT: Not the way it's going. This is
6 before I made my complaint before this trial started.

7 THE COURT: About your attorney.

8 THE DEFENDANT: About -- yes. Yes. Yes. And
9 that's -- that's -- I can't do it with this attorney,
10 Your Honor. I can't do it. I don't have a fighting
11 chance for my life with this attorney.

12 THE COURT: Well, if, in fact, this attorney is
13 doing anything illegal, unethical, or below the
14 standards of *Strickland-vs-Washington*, if you get
15 convicted on these charges, you can file a 3.850 and
16 ask the court to reconsider, showing the court how
17 your attorney was not acting effectively or improperly
18 for you. You have that opportunity to do that. But I
19 have not heard anything from you that would cause me
20 to believe she's not been a good lawyer in this case
21 or an effective lawyer or sufficient lawyer under
22 *Washington-vs-Strickland*.

23 That's what I have to go with is the law, sir.
24 And because you don't like the way she's handling
25 things or the way your trial is going is not grounds

1 for me to ever remove your attorney. I tried to
2 explain that to you.

3 Now, I'm gonna tell you one last time. If you
4 have another outburst of any sort, I am warning you
5 not to do that. You will be held in contempt of court
6 if you have another outburst. Also, you will be
7 removed from the courtroom and we'll continue the
8 trial without you.

9 **THE DEFENDANT:** I would like to go ahead and fire
10 this attorney and proceed on my own.

11 **THE COURT:** I'm not gonna let you fire your
12 attorney in the middle of the trial.

13 All right. You know what? I just -- I just
14 might do that. You want to do that? You seriously
15 want to do that? You want to fire your lawyer and go
16 on your own?

17 **THE DEFENDANT:** Yes, sir.

18 **THE COURT:** Okay. Let's do a *Faretta* hearing.
19 Counsel, I'm gonna appoint you as standby
20 counsel, though.

21 **MS. CRAG-CHADERTON:** I'll be in the back, Judge.

22 **THE COURT:** Sir, in order to do that, I have to
23 do a *Faretta* hearing, which I will now do. You're
24 gonna have to answer some questions for me.

25 **THE DEFENDANT:** Yes, sir.

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1 THE COURT: All right. Sir, do you understand --

2 do you understand you are --

3 Place him under oath, please.

4 THE CLERK: Raise your right hand.

5 ERIC HOPE

6 the defendant, was called as a witness and, having first

7 been duly sworn, testified as follows:

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. Sir, do you understand
10 that you have a right to a lawyer?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: If you cannot afford an attorney, one
13 will be appointed for you. Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: The State of Florida will pay for a
16 lawyer to advise you in these court proceedings. Do
17 you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you want me to continue with your
20 court-appointed attorney?

21 THE DEFENDANT: No, sir.

22 THE COURT: Okay. I want to explain to you some
23 ways that having a lawyer to represent you can be an
24 advantage to you.

25 A lawyer's legal knowledge and experience may

1 assistance may be useful in preparing a sentencing
2 ensuring that favorable facts are brought to the
3 attention of the Court, ensuring that the Court is
4 advised of all legally available favorable
5 dispositions, and ensuring that the sentence is
6 lawfully imposed.

7 Do you understand?

8 **THE DEFENDANT:** Yes, sir.

9 **THE COURT:** An attorney's legal knowledge and
10 experience may be useful in filing an appeal and in
11 seeking release on bail pending appeal.

12 Do you understand?

13 **THE DEFENDANT:** Yes, sir.

14 **THE COURT:** It's almost always unwise to
15 represent yourself in court. Let me tell you a few of
16 the disadvantages of representing yourself.

17 Do you understand you will not get any special
18 treatment from the Court just because you're
19 representing yourself?

20 **THE DEFENDANT:** Yes, sir.

21 **THE COURT:** Do you understand that you're not
22 entitled to a continuance just because you want to
23 represent yourself?

24 **THE DEFENDANT:** Yes, sir.

25 **THE COURT:** You also will be limited to legal

1 resources that are available to you while you're in
2 custody. You will not be entitled to any additional
3 library privileges just because you're representing
4 yourself. A lawyer has fewer restrictions in
5 researching your defense.

6 Do you understand?

7 **THE DEFENDANT:** Yes, sir.

8 **THE COURT:** You're not required to possess legal
9 knowledge or skills of an attorney in order to
10 represent yourself. However, you are required to
11 abide by the rules of criminal law and rules of
12 courtroom procedure. That means no outbursts. These
13 laws took lawyers years to learn and abide by. If you
14 demonstrate an unwillingness to abide by these rules,
15 I may terminate your self-representation or remove you
16 from the courtroom.

17 Do you understand?

18 **THE DEFENDANT:** Yes, sir.

19 **THE COURT:** Do you understand that if you are
20 disruptive in court, that the Court can terminate your
21 self-representation, remove you from the courtroom, in
22 which case this case would continue without your
23 presence? Do you understand?

24 **THE DEFENDANT:** Yes, sir.

25 **THE COURT:** Do you understand that your access to

1 **MS. CRAG-CHADERTON:** Thank you, Judge.

2 **THE COURT:** We've just gone over all the *Faretta*
3 inquiry and colloquy and I believe he is competent to
4 make that decision.

5 Mr. Hope, have you decided yet whether you're
6 going to testify in this case? You don't have to tell
7 me if you haven't decided yet.

8 **THE DEFENDANT:** Yes, sir. Yes, sir.

9 **THE COURT:** Yes what?

10 **THE DEFENDANT:** Yes, sir, I will testify. I will
11 be testifying.

12 **THE COURT:** Okay. All right. No more outbursts,
13 Mr. Hope.

14 **THE DEFENDANT:** Yes, sir. For the record, can I
15 let the Court know that I ain't got no, no, no
16 paperwork as far as pertaining to this case?

17 **THE COURT:** Counsel, you want to give him your
18 file and any depositions or whatever you have?

19 **THE DEFENDANT:** And, also, for the record, can it
20 be noted that the depositions of these officers, the
21 witnesses being called by the State, that I have not
22 received any depositions by them? I don't know if they --
23 if you released them or not.

24 **THE COURT:** I don't release depositions. I have
25 nothing to do with them.

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1 MS. HICKS: Yes.

2 THE COURT: Was there anybody else?

3 THE DEFENDANT: I will be taking the stand.

4 THE COURT: Okay.

5 MS. HICKS: Will or will not?

6 THE COURT: He's going to.

7 MS. HICKS: Yes?

8 THE DEFENDANT: I don't know how to do that as

9 far as I understand that the State will be asking me

10 questions. But would I -- like, I got stuff I wanted

11 to present to the jury, would I just --

12 THE COURT: When you take the stand?

13 THE DEFENDANT: Yes.

14 THE COURT: I'm gonna have you placed under oath

15 and let you tell them your story.

16 THE DEFENDANT: Okay. Okay. I would like to

17 call Eric Dozier back tomorrow also. I never got the

18 chance to cross him.

19 THE COURT: Yeah, you got a chance to cross him.

20 THE DEFENDANT: No. Not me per se.

21 THE COURT: Your attorney did. You want to call

22 him back in your case in chief?

23 Brian, can you bring him back tomorrow?

24 THE COURT DEPUTY: Dozier is on the way.

25 THE COURT: You got him coming back tomorrow?

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1 **THE COURT DEPUTY:** Yes.

2 **MS. HICKS:** Judge, obviously the rules of
3 evidence still apply. I understand we're giving him
4 some leeway. But he doesn't get -- the way he -- as
5 you and I well know, the way he cross-examined
6 Veda Polynice was completely outside any assemblance
7 of the rules of evidence. And the defendant can't
8 just put Darryl Dozier back up there and start doing
9 some sort of fishing expedition.

10 **THE COURT:** No. And he can't lead him, either.

11 **MS. HICKS:** He can't ask leading questions. He
12 can't put a witness on the stand simply to impeach
13 him. And so I would ask the Court to inquire of the
14 defendant what exactly are his intentions in asking
15 Mr. Dozier what questions he intends -- why is he
16 calling him back to the stand.

17 **THE COURT:** I understand your curiosity, as mine
18 is piqued. But I don't think I can force him to tell
19 us what his defense is with Mr. Dozier at this point.

20 **MS. HICKS:** I do think you can ask that he
21 proffer the questions. Or I would certainly ask
22 Your Honor to not give him any leeway then and make
23 him follow the rules of evidence when I object.

24 **THE COURT:** Well, he's going to have to follow
25 the rules of evidence on his direct examination.

1 I cannot force you to tell us what you're gonna
2 ask Mr. Dozier. Do you want to explain to me why
3 you're calling back Dozier? You don't have to.

4 **THE DEFENDANT:** I just want to -- I want to
5 cross --

6 **THE COURT:** You're not crossing him, sir. It's
7 direct examination if you call him back.

8 **THE DEFENDANT:** I don't know --

9 **THE COURT:** And you cannot lead him. You can ask
10 him questions.

11 **THE DEFENDANT:** I don't know what that mean,
12 either, Your Honor.

13 **THE COURT:** Sir, you chose to go on your own.

14 **THE DEFENDANT:** I don't know nothing about it.

15 **THE COURT:** I know. But you chose to go on your
16 own after a *Faretta* hearing and after being warned
17 this was probably not a real good idea.

18 **MS. HICKS:** I would ask the Court to proffer the
19 testimony, at least initially, so that we know that
20 this isn't going to be a circus in front of the jury,
21 Judge. The State obviously has the right to have, as
22 I said many times, equal justice under the law. And
23 we're getting to a point here where it's getting very
24 prejudicial to the State because the defendant is
25 being allowed to do what he wants as a pro se

1 defendant.

2 THE COURT: Counsel, I have watched this case and
3 I don't see anything prejudicial to the State that has
4 happened in this entire case.

5 MS. HICKS: I understand. But tomorrow is a new
6 ball game when he starts calling witnesses.

7 THE COURT: Well, he says he's gonna call
8 Mr. Dozier. He has a right to call a witness if he
9 wants to call him, and I'm gonna let him call
10 Mr. Dozier if he wants tomorrow morning. I want this
11 jury deliberating sometime tomorrow, though, so it
12 isn't gonna go on all day. We're gonna do closing
13 statements and jury instructions at some point in
14 time.

15 So, I mean, if you have a real reason that you
16 want to call Mr. Dozier, try to get some other
17 information out of him that he hasn't already
18 testified to, then fine. But if you're just calling
19 him back to go over the same facts again, that's
20 probably gonna be improper because there's an
21 objection called asked and answered. If you have new
22 stuff to talk to him about, I have no problem with
23 that.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: But if it's not new, if it's the same

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1 - - -
2 P R O C E E D I N G S

3 (The following proceedings commenced on October
4 21, 2016 at 10:58 a.m.)
5 (Defendant not present.)

6 THE COURT: All right. Standby counsel.

7 MS. CRAG-CHADERTON: Yes, Your Honor.

8 THE COURT: And Ms. Hicks.

9 MS. HICKS: Hi, Judge.

10 THE COURT: Hi. Dr. Danziger is going to
11 evaluate the defendant at noon.

12 MS. HICKS: Okay.

13 THE COURT: So, I will have the jury come back at
14 1:30.

15 MS. HICKS: How long does one of those
16 evaluations take?

17 THE COURT: Forty-five minutes. He will know by
18 1:00. And he wants to testify by phone. I said it's
19 fine.

20 THE CLERK: That is Kristin. Dr. Danziger's
21 assistant says he is planning to check in via phone as
22 soon as he's done speaking with the defendant. His
23 assistant is -- or he's gonna check in before he
24 actually evaluates him, so we will know like a more
25 precise time. It will be around 1:30 he's able to

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1 call.

2 **THE COURT:** Oh, okay.

3 As standby counsel, I am going to -- well, let's
4 make a record here as to what happened.

5 I was called this morning at about 8:15, 8:20 by
6 my JA who told me that Mr. Hope is -- has last night
7 went to the people at the jail and told them he was
8 thinking about harming himself.

9 Mr. Hope yesterday, as I recall what happened --
10 and, please, counsel, correct me if I'm wrong, either
11 one of you. I have the State here and Defense as
12 standby counsel -- stated he was going to -- when he
13 was having his outbursts in court, attempting to
14 disrupt the court because he didn't want to go forward
15 on the trial because he needed time to do research or
16 something of that nature.

17 Do either of you recall that?

18 **MS. HICKS:** I mean, I don't remember him
19 specifically saying "I'm going to do it" but it was
20 very clear from his actions that's what he was trying
21 to do.

22 **THE COURT:** Right.

23 **MS. CRAG-CHADERTON:** His implicit -- he implied
24 that by saying something to the effect that "you're
25 basically forcing me to do this because you're having

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1 And I have standby counsel still in the courtroom.
2 Correct, standby?
3 **MS. CRAG-CHADERTON:** Yes, Your Honor.
4 **THE COURT:** Okay. And I've got the State here.
5 Yes, sir. Give me your name, please.
6 **CORPORAL CRUZ:** Corporal Nelson Cruz, Orange
7 County Corrections.
8 **THE COURT:** All right. And your name?
9 **CORPORAL ARMSTRONG:** Corporal Eric Armstrong,
10 Orange County Corrections.
11 **THE COURT:** All right. Swear them both in,
12 please.
13 **THE CLERK:** Raise your right hands.
14 **CORPORAL CRUZ & CORPORAL ARMSTRONG**
15 **were called as witnesses and, having first been duly sworn,**
16 **testified as follows:**
17 **THE COURT:** Okay. Corporal Cruz, what's going
18 on?
19 **CORPORAL CRUZ:** Essentially, we were instructed
20 to bring Hope here. He's here. He's downstairs. We
21 were just informed that he needed to be brought back
22 to the Orange County Jail for some assessment.
23 **THE COURT:** How is he behaving?
24 **CORPORAL CRUZ:** He says he needs to speak to
25 someone. And what he's -- with the meaning, I guess,

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1 the spirit and intent of that is that he wants to
2 speak with someone with a mental health background.
3 He's acting out at the moment, meaning he's --

4 **CORPORAL ARMSTRONG:** He's fully restrained still,
5 chains, leg irons. We're having to sit him in a
6 wheelchair because he's -- the whole way over here he
7 was kicking and banging his head against the back of
8 the van.

9 **THE COURT:** Okay.

10 **CORPORAL ARMSTRONG:** So, we're gonna try to
11 get -- I'm trying to figure out, do we take him back
12 to the jail --

13 **THE COURT:** Yes. Here's -- let me tell you
14 what's going on.

15 **CORPORAL ARMSTRONG:** Okay.

16 **THE COURT:** First of all, he shouldn't have
17 really been brought over. And that's not you guys'
18 fault. I've got Dr. Danziger out at the jail who says
19 he's gonna see him between 12 and 1. Dr. Danziger is
20 a psychiatrist. And he's gonna make a report to me as
21 to whether he is competent to go forward or whether he
22 believes Mr. Hope is malingering and feigning this
23 problem because he doesn't want to go to trial. And
24 we see that occasionally.

25 So I don't know which. And we'll have to hear

1 what Dr. Danziger says. I don't want you guys getting
2 hurt, obviously. But I need you to take him back as
3 quickly as possible so -- and then make sure that --
4 somehow make sure that your people know -- that
5 Dr. Danziger knows where he is, if you-all are gonna
6 run him back up to medical or psychiatric.

7 And then I'm gonna need him brought back here,
8 unless you hear from Dr. Danziger, and I don't think
9 you will, that he is incompetent to proceed.

10 CORPORAL ARMSTRONG: Okay.

11 THE COURT: That's a problem. I understand it's
12 a lot of traveling. But this problem has been created
13 by Mr. Hope.

14 CORPORAL CRUZ: He was fine walking over to the
15 Booking and Release Center from the main facility
16 where he was housed. About less than a mile from the
17 courthouse is when he started acting up.

18 THE COURT: Oh, he didn't start acting up -- he
19 started acting up in the van?

20 CORPORAL CRUZ: Correct. Less than a mile.
21 Basically as soon as we got off the South Street exit
22 on I-4 is when he started acting out. So he was
23 fine --

24 THE COURT: Up until that time he was calm?

25 CORPORAL CRUZ: He was fine up until that time.

1 THE COURT DEPUTY: Yes.

2 (Defendant now present.)

3 THE COURT: Okay? All right. Dr. Danziger, the
4 defendant's in the courtroom. He's banging his head
5 against the chair that he's sitting in.

6 Did you have an opportunity -- let's place
7 Dr. Danziger under oath, please.

8 JEFFREY DANZIGER, M.D.
9 was called as a witness and, having first been duly sworn,
10 testified as follows:

11 THE WITNESS: I do.

12 THE CLERK: Thank you.

13 DIRECT EXAMINATION

14 BY THE COURT:

15 Q. All right. Dr. Danziger, would you -- did you
16 have an opportunity to see Mr. Hope today?

17 A. Yes, at about 12:00 over at the jail.

18 Q. Okay. He's sitting here banging his head against
19 the back of the chair, making noises. What did you find
20 when you examined him?

21 A. What I found was a muscular man who presented
22 himself in a very dramatic and almost certainly exaggerated
23 fashion not consistent with genuine mental illness. My
24 understanding is, is that the defendant has no previous
25 history of mental illness. That he was behaving

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1 appropriately and rationally earlier that same day.

2 Mental illness usually doesn't go from zero to
3 100 miles an hour. Usually it's something that comes on
4 gradually, not instantly like the snap of a finger.

5 He was doing something often seen in people
6 exaggerating mental illness, in that he presented himself
7 as -- in a very dramatic fashion to draw attention to
8 himself. He kept saying "There's voices. The voices are
9 telling me everything's bad. Make it stop." And he kept
10 repeating that over and over. That sort of very dramatic
11 presentation is suspicious.

12 The other thing that he did that is commonly seen
13 in people feigning or faking mental illness is that in
14 addition to faking that they're hearing voices, they also
15 fake that they're cognitively impaired or unaware of their
16 surroundings.

17 So, when I asked him where he was, he looked
18 around and says "I don't know where I am. I've never been
19 here," instead of the obvious, which is that he's in a
20 jail.

21 I asked him what city he was in and he didn't
22 know.

23 And then I did something I sometimes do. I take
24 a very common object. I pulled a dollar bill out of my
25 wallet, which everyone knows what that is. I asked him if

1 he knew what that was. He just sort of looked at it and
2 didn't answer.

3 So, putting this all together, we have someone
4 with no prior history of mental illness, who is acting
5 perfectly normally that morning, is my understanding from
6 the corrections officers, all of a sudden acting in this
7 very dramatic fashion, drawing attention to himself, not
8 only claiming extreme symptoms of mental illness but
9 avoiding my questions and claiming to not even know where
10 he was.

11 And then this was all in the context of someone
12 who, to my understanding, is potentially facing life in
13 prison.

14 So, putting all of that together, in my opinion,
15 this is more likely feigned and exaggerated and not genuine
16 mental illness.

17 **THE DEFENDANT:** Somebody just talk, please.
18 Somebody please talk, please. Please, somebody, just
19 talk, please.

20 **THE COURT:** All right. Doctor --
21 State, do you have any questions?

22 **MS. HICKS:** No, Your Honor.

23 **THE COURT:** Counsel?

24 **MS. CRAG-CHADERTON:** No, Your Honor.

25 **THE DEFENDANT:** Please, somebody talk.

1 (Defendant continuing with outburst.)
2 **THE COURT:** Okay. Mr. Hope. Mr. Hope, I'm gonna
3 talk to you.
4 **THE DEFENDANT:** Please talk. Please talk.
5 **THE COURT:** Mr. Hope, I'm gonna talk to you.
6 Mr. Hope, do you -- do you want to behave yourself and
7 continue with your trial or do you want me to remove
8 you from the courtroom?
9 **THE DEFENDANT:** (Unintelligible.) Take me back.
10 **THE COURT:** Okay. Based on -- based on the
11 doctor's testimony, State, do you have any argument?
12 **MS. HICKS:** Judge, it's the State's position the
13 defendant is competent to proceed.
14 **THE COURT:** Okay. As his standby counsel, do you
15 have any statements?
16 **MS. CRAG-CHADERTON:** No, Your Honor.
17 **THE COURT:** Okay. What we're gonna do is, it is
18 apparent that he isn't going to behave himself in the
19 courtroom.
20 Mr. Hope, are you gonna -- do you want to
21 participate in the rest of your trial?
22 **THE DEFENDANT:** Oh, God. Oh, God.
23 (Unintelligible) taking me back. Oh, God.
24 **THE COURT:** All right. I'm not hearing -- he's
25 not responding to my question. He was, for the

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1 record, perfectly fine yesterday. Did you see that,
2 State?

3 MS. HICKS: Yes, Your Honor.

4 THE COURT: Did he cross-examine witnesses?

5 MS. HICKS: Very well, Your Honor.

6 THE COURT: And when he left here yesterday,
7 Corrections Officer Johnson, was he in any sort of
8 mental State?

9 THE COURT DEPUTY: No, sir. Not at all.

10 THE COURT: Okay. And it's my understanding that
11 he was fine until -- are you the officers who brought
12 him over this morning?

13 CORPORAL CRUZ: Yes, sir.

14 CORPORAL ARMSTRONG: Yes, sir.

15 THE COURT: Tell me what you, once again, saw
16 this morning?

17 CORPORAL CRUZ: Your Honor, we picked him up this
18 morning. He followed simple instructions to get
19 dressed. He requested a size 3X top. We didn't have
20 one at the moment. We told him we would get it when
21 we arrived at the courthouse. He walked on his own
22 from the main facility fifth floor to the Booking and
23 Release Center transportation section where he entered
24 the van on his own.

25 When we were entering the South Street exit on

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1 I-4 is when he started displaying this same behavior
2 and started banging his head on the side of the van.
3 And he's been acting this way since.

4 THE COURT: He's been acting this way since about
5 a mile from the courthouse or so?

6 CORPORAL CRUZ: Yes.

7 THE COURT: Okay. All right. But there was no
8 problem up till that point with him at all?

9 CORPORAL CRUZ: Correct, Your Honor.

10 THE COURT: Okay. What is your name?

11 CORPORAL CRUZ: Corporal Nelson Cruz.

12 THE COURT: Okay. And is there any other officer
13 here who also viewed that?

14 CORPORAL CRUZ: Yes.

15 THE COURT: Or are you the only one?

16 CORPORAL CRUZ: Officer Stephen Grice was driving
17 the van that he was in.

18 THE COURT: You were driving the van?

19 CORPORAL GRICE: Yes, sir.

20 THE COURT: Okay. Did he cause any problem that
21 you saw until about you were close to the courthouse?

22 CORPORAL GRICE: He was perfectly fine until we
23 got off at the South Street exit, and that's when he
24 began hurting himself by hitting his head against the
25 sides of the van.

1 **THE COURT:** Okay. And did you see him loaded up
2 at the jail?

3 **CORPORAL GRICE:** Yes, sir. I assisted.

4 **THE COURT:** And how did he behave?

5 **CORPORAL GRICE:** He was fine.

6 **THE COURT:** Okay. Doctor, did you hear all that?

7 **THE WITNESS:** I did. And I was gonna ask His
8 Honor if he wanted me to do a written report or just
9 the sworn testimony?

10 **THE COURT:** When you get a chance, if you would
11 do a written report for the record, please.

12 **THE WITNESS:** Yes, sir.

13 **THE COURT:** Okay. Thank you very much, Doctor.

14 **THE WITNESS:** Okay. My pleasure to help,
15 Your Honor.

16 **THE COURT:** Mr. Hope, I'm gonna ask you one more
17 time, do you want to participate in your trial?

18 All right. He's refusing to talk to me. I'm
19 gonna find, based on the doctor's report, that he is
20 feigning this problem and this is all in an attempt to
21 stop this trial. And this is exactly, basically, what
22 he said yesterday, as I recall. Is that right, State?

23 **MS. HICKS:** Yes, Your Honor.

24 **THE COURT:** I believe he said the reason he was
25 acting up when he yelled out about this leg injury he

1 claims to have had yesterday, that he was doing
2 whatever he could to not have this trial go forward;
3 correct?

4 **MS. HICKS:** I don't personally recall hearing
5 that, Judge. (Unintelligible). I'm sorry.

6 **THE COURT REPORTER:** I'm sorry?

7 **MS. HICKS:** It was very hard to hear him when he
8 was yelling in the courtroom yesterday.

9 **THE COURT:** Okay. All right. I am not finding
10 that Mr. Hope is mentally ill nor incompetent but that
11 he is behaving in a fashion which is intended to stop
12 this trial. He fired his attorney yesterday. He did
13 a very adequate job of cross-examining five witnesses.
14 And all of a sudden when he's coming back this
15 morning, a man with no prior history of mental
16 illness, that we are aware of, decides he's going to
17 behave in an incredibly erratic fashion. And he's
18 not partic- -- he obviously is not gonna behave
19 himself or participate in this trial.

20 **THE DEFENDANT:** Please somebody talk to me, it
21 will be all right. Please, please, please somebody.

22 **THE COURT:** And let me ask his attorney.

23 Madam standby counsel.

24 **MS. CRAG-CHADERTON:** Yes, Your Honor.

25 **THE COURT:** State your name for us, please.

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1 MS. CRAG-CHADERTON: Rachael Crag-Chaderton,
2 Judge.

3 THE COURT: All right. Ms. Crag-Chaderton, how
4 long have you known Mr. Hope?

5 MS. CRAG-CHADERTON: A little less than a year,
6 Judge.

7 THE COURT: A little less than a year?

8 MS. CRAG-CHADERTON: Yes.

9 THE COURT: And during that time you've seen him
10 how many times?

11 MS. CRAG-CHADERTON: At least 10 times, Judge.

12 THE COURT: Okay. And at any time -- at any time
13 did you ever have any indication he was not mentally
14 stable?

15 MS. CRAG-CHADERTON: No, Your Honor.

16 THE COURT: Did he ever misbehave in front of
17 you?

18 MS. CRAG-CHADERTON: No, Judge.

19 THE COURT: Did he ever act like he was having
20 mental issues in front of you?

21 MS. CRAG-CHADERTON: No, he did not, Your Honor.

22 THE COURT: Okay. Did you have any reason to
23 believe he wasn't competent to proceed?

24 MS. CRAG-CHADERTON: No. I would have brought it
25 to the Court's attention.

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1 **THE COURT:** All right. Thank you.

2 All right. We are gonna continue with the trial.
3 I'm finding that he is, under federal and state law,
4 he is voluntarily absenting himself from this trial
5 because of his actions. He is, according to the
6 doctor's testimony, Dr. Danziger, a psychiatrist, he
7 is feigning this action to attempt to keep this trial
8 from going forward. And we're gonna have to remove
9 him from the courtroom.

10 And you need, unfortunately, to hold him
11 downstairs. And we're gonna continue the trial. All
12 right?

13 **MS. CRUZ:** Yes, Your Honor.

14 **THE COURT:** All right. It's very clear for the
15 record that he is not gonna respond to me or to anyone
16 else and he is speaking in gibberish.

17 (Defendant removed from courtroom.)

18 **THE COURT:** All right. Standby counsel, are
19 you -- do you have any request to come back on as his
20 general counsel --

21 **MS. CRAG-CHADERTON:** No, I don't.

22 **THE COURT:** -- since he fired you?

23 **MS. CRAG-CHADERTON:** No, I do not, Your Honor.

24 **THE COURT:** All right. He fired you -- he fired
25 you in the middle of the trial.

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1 **MS. CRAG-CHADERTON:** Yes, he did.

2 **THE COURT:** There is case law right on point that
3 the Court found yesterday saying that if you fire
4 somebody in the middle of the trial, you don't get a
5 continuance. He was begging for a continuance so he
6 could prepare. I said no, we're in middle of the
7 trial. The State's already rested its case, and he
8 wants a continuance. And I believe -- I firmly
9 believe for the record and for the Court of Appeal
10 when this gets up there, that this was all an act to
11 try to get this case either declared a mistrial or to
12 gain more time for him to either try and get another
13 lawyer.

14 I saw absolutely nothing wrong with him yesterday
15 or the day before that. He has behaved himself
16 perfectly well in this courtroom both days, except
17 when he screamed out about his ankle being injured.

18 **MS. CRAG-CHADERTON:** And just for the record,
19 even if -- he has not indicated that he wants me to
20 continue with the case, Judge. I do not have any
21 information or arguments to present to the Court in
22 terms of closing, nor do I know what he wants to
23 present. So, no, I'm not asking to be reappointed.

24 **THE COURT:** Okay. If you would just stand by.

25 **MS. CRAG-CHADERTON:** Yes, sir.

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1 **THE COURT:** All right. At this time there is --
2 he clearly is not going to participate in this trial
3 at this point.

4 State, are you ready to proceed?

5 **MS. HICKS:** Yes, Your Honor.

6 **THE COURT:** All right. I think that we can
7 proceed to closing.

8 **MS. HICKS:** Okay.

9 **THE COURT:** He was going to call two or three
10 witnesses he said yesterday. He told you the
11 witnesses' names. You have had those witnesses come
12 to court; correct?

13 **MS. HICKS:** Yes, Your Honor. There's three law
14 enforcement officers here; two at the request of the
15 defendant. And then I took it upon myself to bring
16 the officer who did the interview of the defendant.
17 And then the victims in this case, one is in custody,
18 I arranged for his transport. He is downstairs. And
19 the other victim is on call ready to be picked up by a
20 State Attorney investigator if she was needed in
21 court.

22 **THE COURT:** Okay. It doesn't appear as though
23 we're gonna need any of these witnesses. It's tragic
24 when somebody decides this is the way they want to
25 handle their trial. This young man is -- he is

1 certainly well acquainted with the system. He's been
2 to prison, I believe, four times already.

3 **MS. HICKS:** I confirmed over the lunch hour he's
4 a 14-time convicted felon, at least. Those are the
5 J&Ss that I have.

6 **THE COURT:** Fourteen?

7 **MS. HICKS:** Yes, sir. Those are just the J&Ss
8 that I have.

9 **THE COURT:** All right. Do you see, State or
10 standby counsel, any reason at this point that we
11 should not proceed with the trial?

12 **MS. HICKS:** It's a very unique situation, Judge,
13 but I don't know of no reason off the top of my head.
14 He absolutely has a Constitutional right to represent
15 himself. He has a Constitutional right to absent
16 himself from the courtroom. He has taken both of
17 those choices, and I believe the State can go forward
18 at this point.

19 **THE COURT:** Counsel, standby?

20 **MS. CRAG-CHADERTON:** Just for the record, Judge,
21 based on what's been exhibited, I would ask the Court
22 to consider entering a mistrial. And I know the
23 Court's prior ruling, but I'll just resubmit that
24 request on Mr. Hope's behalf.

25 **THE COURT:** I would -- if -- if I -- if I got