STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2017AP000797 - CR
Lower Court Case No. 2015CF001075

Terrance L. Egerson,

Defendant-Appellant

Appeal Of A Judgment Of Conviction Dated May 2, 2016 (Amended September 1, 2016), And An Order Denying A Post-Conviction Motion To Vacate The Judgment Dated March 30, 2017, Milwaukee County Circuit Court Branch 36, The Honorable Jeffrey A. Kremers, Presiding

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BRIEF AND APPENDIX OF THE DEFENDANT/APPELLANT

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ISSUES PRESENTED

Did the trial court err as a matter of law when it ignored the requests by Mr. Egerson to represent himself?

Trial court: No.

Did the trial court error when it denied Mr. Egerson's post-conviction motion to vacate the judgment of conviction because it ignored the invocation of Mr. Egerson's right to represent himself?

Trial court: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is appropriate in this matter. This case only requires the application well established legal principles.

STATEMENT OF THE CASE

Mr. Egerson brings this case before this court praying that the trial court's ruling on his post-conviction motion to vacate his judgment of conviction because he was denied his 6th Amendment right to represent himself be reversed, the judgment vacated, and the case remanded to the circuit court for further proceedings.

On March 10, 2015, a three count complaint was filed in the circuit court for Milwaukee County charging Terrence Egerson with Knowingly Violate A Domestic Abuse Injunction, Domestic Abuse Assessments, Repeater, Domestic Abuse Repeater, in violation of §§813.12(4) and (8)(a), 973.055(1), 939.62(1)(a), 939.62(1)(b) and (2) Wis. Stats., Intentionally Contact Victim, Witness Or Co-Actor After Court Order For A Felony Conviction, Repeater, Domestic Abuse Repeater, Domestic Abuse Assessment, in violation of §§941.39(1),

939.50(3)(h), 939.62(1)(b), 939.621(1)(b) and (2), 973.055(1) Wis. Stats., and, Stalking - Previous Conviction W/In 7 Years, Repeater, Domestic Abuse Repeater, Domestic Abuse Assessments in violation of §§940.32(2m)(b), 939.50(3)(h), 939.62(1)(b), 939.621 (1)(b) and (2), 973.055(1) Wis. Stats.. R2, pp. 1-3.

At the initial appearance, the court commissioner dismissed Count 3, Stalking, because the State failed to include, in the probable cause section of the complaint, the basis to sustain the element that there was a threat of bodily harm or against the safety of the alleged victim. R52, pp. 2-5. At the time of the preliminary hearing, an amended complaint was filed correcting that error. R53, pp. 3-5.

Regarding Count 1, the State alleged that, on December 11, 2014, after a restraining order had been granted to Mr. Egerson's wife prohibiting him from having contact with her, she

> received a letter at her address at 2321 North 58th Street, in the City of Milwaukee, Milwaukee County, Wisconsin from the defendant. The return address listed the defendant being in Dodge Correctional institution, and had his name on the envelope and was directly address to [her]. Also the letter inside was handwritten and [she] identified the handwriting as the defendant's. The letter asks her to drop the restraining order in 13FA1617 which ... has been served upon the defendant.

R6, pp. 7-8.

Regarding Count 2, the State alleged that the above referenced letter was sent after Mr. Egerson had been convicted

> of Bail Jumping - Felony in case 13CF3152, among other crimes in 13CF1401, 13CF1860, 13CF3435, and 14CF189 the defendant was

> sentenced to prison and to have no contact with [his wife] as an order of that sentence which [was] still in effect.

R6, pp. 7-8.

Regarding the third count of the amended complaint, the State alleged Mr. Egerson sent additional letters to his wife on December 19, 2014, January 7, 2015, January 15, 2015, and February 9, 2015 which caused his wife to lose sleep, increase her therapy, screen her telephone calls and be worried about what is coming in the mail. R6, pp. 7-8.

Following the preliminary hearing, the court commissioner found probable cause to believe that a felony had been committed by Mr. Egerson within the jurisdiction of the court and bound him over trial. R53, p.18.

Mr. Egerson entered pleas of not guilty to the same three counts contained in the information that the State filed. R7; R57, pp. 2-4.

On April 28, 2015, the defense filed a Motion To Dismiss Count 3 For Violation Of The 1st Amendment, the gravamen being that the stalking statute, as applied, was overly broad, and thus unconstitutional. R11. The Department of Justice was notified of the motion pursuant to Wis. Stat. § 806.04(11), and informed the court in writing that it would not address the issue unless it came before the Court of Appeals. R13. The State filed a Response to the Motion (R15) to which the defense filed a Reply Brief (R16).

On August 21, 2015, the Hon. Jeffery Kremers heard additional arguments of counsel on the matter and ruled on the motion in favor of the State. R59, pp. 28-29.

> THE COURT; Okay. I am satisfied that this Statute is constitutionally on its face and as applied. I don't think the statement of defense has met its burden in challenging it from either

> perspective think if that, and I'm not convinced that there is a unanimity issue. But if there is, or there is an issue with respect to the definition of true threat, those are all things that can be addressed in the jury instructions and are more properly addressed once we know exactly what evidence has been proffered by the state, admitted into evidence and is available for consideration by the fact finder, whether that is a jury or the court. So, I'm going to deny the defendant's motion.

R59, pp. 28-29.

Judge Kremers also denied defense counsel's motion to withdraw as counsel for Mr. Egerson; counsel, not Mr. Egerson, initiated the motion over a disagreement as to whether the ADA handling the case needed to be disqualified because he was the sole witness to some of the behavior alleged in the Amended Complaint. R59, pp. 2-8.

Immediately after Judge Kremers denied Mr. Egerson's motion to dismiss the case on constitutional grounds, the State filed an amended information which increased the number of charges from three to eleven. R17; R59, p. 29. The new charges were based on fingerprint verification regarding the letters referenced in the criminal complaint, with additional charges of intentionally contacting the victim with regard to each letter that was sent. R17; R59, p.29. (The Information would be amended twice more before the case went to trial. R25; R26.)

On October 14, 2015, counsel for Mr. Egerson filed a motion to withdraw from the case. R18. That motion was heard by the court on October 26, 2015. R60.

> ATTORNEY SINGLETON: Thank you, Your Honor. The plain way that I see this case at this point is that our attorney/client relationship has been irreparably destroyed. I don't think there's

anything left of it to this point and there are various reasons why I can point to that. But the facts are, remain that it is so frustrated at this point that I do not believe that I can effectively discharge or safeguard Mr. Egerson's Sixth Amendment right to counsel.

I don't believe he has sufficient faith in my efforts or in my abilities to do so, and the consequence to that is that he's made my--my attempts I think at this point are frustrating his rights. He now takes my communications to him and he has been sharing them at least with the Office of Lawyer Regulation, which is fine, it's his right. However, that does create a problem with me now when I put something in writing that I'm cognizant of the fact it is going to be outside of the third--of the privilege of a--of my client.

He is communicating with the media against my agreement. He is allegedly preparing motions that he wishes to file on his own behalf because he doesn't believe that I am adequately capable of safeguarding his interest. He believes that I'm working in concert with the District Attorney's Office as opposed to representing his rights. Whether these things are accurate, obviously I don't believe that they are, they are his unyielding beliefs at this point as to my representation of him, and that are causing him to act in ways that are against his own interests. And so at this point my own actions I feel are dilatory to his case at this point because my staying on as counsel causes him to act against his own interests.

And so that is a problem. It is a problem that that there is a--once I've been OLR'd that I'm--there's a perception that I may be acting in my own

> interests rather than his interests, which creates a--a perception that there is a conflict of interest. I'm not saying there is. I'm still attempting to, you know, even by this motion, advance his interests in this case.
>
> This isn't dilatory, we have asked for absolutely no adjournments in this case. Every adjustment that has occurred there have been failures to get Mr. Egerson to court. The prior court wished to move a motion out of this court's calendar so the court that was overseeing the case could hear it. However, we haven't attempted to adjourn at all. And I have not been able to adequately meet with him to prepare for trial because of these ongoing issues.
>
> You know, there--as the State notes, there is, you know, a new conduct now that apparently needs to be investigated, so I think the State would be seeking an adjournment anyway on those grounds. We would be seeking an adjournment because I don't believe that I have been able to communicate with him sufficiently. And there's-- the State apparently has an apparent conflict next week with next week's trial date anyway. And so I think it's not likely to create an undue, you know, delay in this case even at this point, as there are other reasons that this case should be delayed.

R60, pp. 4-7.

After listening to counsel and Mr. Egerson regarding their respective positions on the motion, the following exchange took place.

> THE COURT: I'm going to let you have another lawyer. You think you know so much more about trial strategy and how to prepare a case and

how to get ready for trial, we'll see how you do with your next lawyer. But here's the thing, Mr. Egerson. You're heading down a slope, based on this record, where you're going to find yourself have a--find yourself in a position were a court says you're waiving your right to counsel and you're going to be representing yourself, which would be the biggest mistake of your life. So--

THE DEFENDANT: I understand.

....

THE DEFENDANT: There is a lot of discovery that I received in my first cases, which if you're going to show a course of conduct on the stalking charge, there's discovery that the State hasn't turned over to--

THE COURT: Mr. Egerson, you're not the lawyer of record in this case. I'm not interested in--

THE DEFENDANT: Well, you know what, Your Honor, let me represent myself and have co-counsel then.

THE COURT: No.

THE DEFENDANT: It seems like every time I try to do something that's benefiting me, every time there's a problem he--he's--I've been having a problem with [ADA] Nick Heitman ever since, I've been charged with 24 counts, man.

THE COURT: Mr. Egerson--

THE DEFENDANT: Let me represent myself and have no counsel.

T'HE COURT: Better think about that one.

THE DEFENDANT: I'm sick of him, man. I'm tired of Mr. Heitman charging me with hard charges. He's just continuing to charge me. I'm doing six years for bail jumping.

THE CLERK: November 6th.

THE COURT: November 6th for new counsel.

ATTORNEY HEITMAN: Thank you.

(End of proceedings.)

R60, pp. 9-11 *(bold emphasis added).*

Following that hearing, and prior to the appointment of new counsel, Mr. Egerson filed a Motion to Dismiss Counts 4 thru 11, Due to Violation of Due Process Clause and Prosecutorial Vindictiveness, which was received by the court on November 2, 2015. R19.

At the next hearing, after informing the State and Mr. Egerson's new attorney of the motion, the court concluded that it would order that Mr. Egerson would be produced for all future hearings and that the court would not consider the pro se motion unless counsel decided to pursue it. R61, p. 3.

On December 16, 2015, the court received a letter from Mr. Egerson expressing dissatisfaction with his new counsel, Attorney Gary Rosenthal; and asking that he again be appointed new counsel. R20.

The case proceeded to trial on April 4, 2016. R84. At that time, the State filed its final Amended Information. R26. The amended information charged Mr. Egerson with six counts, 1, 3,4, 5, and 6 were separate counts of Knowingly Violate a Domestic Abuse Order, Domestic Abuse Assessments, Repeater, Domestic Abuse Repeater, in violation of §§

813.12(8)(a), 973.055(1), 939.62(1)(a), Wis. Stats., and count 2 charged Mr. Egerson with Stalking - Previous Conviction within 7 Yrs, Repeater, Domestic Abuse Assessments, Domestic Abuse Repeater, in violation of §§ 940.32(2m)(b), 939.62(1)(b), 939.621(1)(b)&(2), and 973.055(1), Wis. Stats. R20. Mr. Egerson entered pleas of "Not guilty" to those charges, and the trial began. R63, pp. 5-6.

The trial concluded on April 6, 2016, with the jury finding Mr. Egerson guilty on all six counts. R67: pp. 3-10. The Honorable Jeffrey A. Kremers sentenced Mr. Egerson on April 26, 2016. R36. That judgment was amended on September 1, 2016, following the receipt of a letter from the Department of Corrections by the court with some concerns about the judgment as written. R40; R38.

On February 21, 2017, a post-conviction motion was filed moving for an order vacating the judgment and resetting the matter for trial based on the failure of the court to allow Mr. Egerson to proceed *pro se* when he requested to do so. R41. Following briefing by the State and defense counsel, the court denied the motion on March 30, 2017, in a written opinion, stating

> [T]he court finds that Egerson's statements were indeed qualified, not unequivocal, and were made in the context of the discussion being had with the court at the time about his ability (or inability) to obtain the discovery in his case (see full record). His statements were not sufficiently clear and unequivocal to require the court to advise him of the right to self-representation which would have triggered its duty to make findings that the defendant knowingly, intelligently and voluntarily waived his right to counsel and that he was competent to represent himself at trial. The defendant was merely expressing dissatisfaction with his lawyer and trying to remedy what he believed his lawyer was not doing for him.

...

> The fact that Egerson accepted new counsel and never requested to represent himself again supports the court's findings in this regard. The court agrees with the State that the defendant's request to proceed on his own is not akin to the clear and unequivocal requests made in *Imani v. Pollard,* 826 F. 2rd 939 (7th Cir. 2016)1 or in *United States v. Joseph Banks*, 14-3461 (7th Cir. 7/8/16).

R46, pp. 3-4.

Mr. Egerson now appeals the judgment of conviction and the order denying him post-conviction relief.

ARGUMENT

The trial court erred as a matter of law in ignoring Mr. Egeson's motion to represent himself and is therefore entitled to have the judgment of conviction vacated and the case remanded to the circuit court for further proceedings.

A. Mr. Egerson Has A Fundamental Sixth Amendment Right To Self-representation

In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975), the Supreme Court established that the Sixth Amendment—by its text, structure, and history—guarantees to every criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so." 422 U.S. 806, 807 (1975). The Court has repeatedly emphasized that "respect for the individual . . . is the lifeblood" of our Constitution. E.g., *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), *(Brennan, J., concurring).*

Thus, even though in most criminal cases a defendant would be better served with the assistance of counsel "than by [his] own unskilled efforts," an individual's choice to represent himself generally "must be honored out of 'that respect for the individual.'" *Faretta,* 422 U.S. at 834 (*quoting Allen*, 397 U.S. at 350-51).

When a defendant knows the risks of forgoing counsel and voluntarily elects to assume those risks, the principle of individual liberty—enshrined in the Constitution—commands that his decision be respected, in order that he may present his defense. Even to his detriment, a criminal defendant remains the captain of his own fate.

The facts of *Faretta* were simple. Weeks before trial, Mr. Faretta requested to represent himself because he "believed that the [public defender's] office was 'very loaded down with . . . a heavy case load.'" *Id. (ellipses in original).* The trial court warned that "it was a mistake not to accept the assistance of counsel," that "Faretta would be required to follow all the 'ground rules' of trial procedure," and that there were legal rules and procedures that Mr. Faretta likely would not comprehend, even with a high-school education, because he was not trained in the law. *Id.* at 808 n.2, 835-36. After preliminarily allowing Mr. Faretta to represent himself, the court sua sponte denied Mr. Faretta's request after questioning him on evidentiary and procedural rules and not being satisfied with his answers or demeanor. *Id.* at 808- 10.

The Supreme Court reversed. As the Court explained, both the text and the structure of the Sixth Amendment endow a criminal defendant with a constitutional right to self-representation at trial.

The amendment "does not provide merely that a defense shall be made for the accused; *it grants to the accused personally the right to make his defense.*" *Id.* at 819 *(emphasis added).*

Since *Faretta*, the Supreme Court has reaffirmed that the "core of the *Faretta* right" is the defendant's ability to have "actual

control over the case[ ] . . . present[ed] to the jury." *McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). He must "be given the right to challenge the State's case against him using the arguments he sees fit." *Indiana v. Edwards*, 554 U.S. 164, 184, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) *(Scalia, J., dissenting) (emphasis in original) (discussing Faretta).* And he must either have consented to counsel's representation or be allowed to represent himself pro se. Otherwise, "the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Faretta,* 422 U.S. at 821 *(emphasis added).*

To ensure that a defendant "truly wants" to represent himself, *id.* at 817, the Supreme Court has drawn a few specific and narrow limits around the fundamental right to self-representation. The defendant must timely and unequivocally request self-representation, and his decision to waive the right to counsel must be voluntary, knowing and intelligent, competent, and not for obstructionist purposes. *Id.* at 834- 36 & n.46.

Any tension that existed in Wisconsin caselaw and the Constitution was recently resolved in a series of cases involving a defendant named Rashaad Imani. *See State v. Imani*, 771 N.W.2d 379, 2009 WI App 98, 320 Wis. 2d 505 (Wis. App., 2009), *State v. Imani,* 2010 WI 66, 326 Wis.2d 179, 786 N.W.2d 40 (Wis., 2010), *Imani v. Pollard* (W.D. Wis., 2014) [1] , and *Imani v. Pollard,* 826 F.3d 939 (7th Cir., 2016).

The relevant procedural history for this case was succinctly set forth by the Seventh Circuit thusly:

> ...Rashaad Imani tried to exercise his right to represent himself in a criminal prosecution in the Wisconsin state courts. The trial judge prevented

[1] A true and correct copy of the slip opinion from Western District of Wisconsin, although cited only as part of the procedural history of Mr. Imani's case, is included in the Appendix to this Brief.

> him from doing so. Imani was convicted at a trial in which he was represented by a lawyer he did not want. A divided Wisconsin Supreme Court affirmed his conviction, finding that Imani was not competent to represent himself and had not made a sufficiently knowing and voluntary choice to do so. That decision was an error. Further, it was contrary to and an unreasonable application of clearly established federal law as determined by United States Supreme Court decisions....

Imani v. Pollard, 826 F.3d 939, 941-42, (7th Cir., 2016).

Prior to his jury trial, Imani expressed to the court that he was dissatisfied with his current counsel, and that for a variety of reasons Imani believed that he would rather represent himself, even though he had only a 10th grade education, and that the case involved several complex legal issues including an identification suppression motion. 826 F.3d. at 942. In acknowledging to the trial court that he was not as " 'eloquent in speech' " as his attorney, Imani told the court he wanted to represent himself because, " 'ain't nobody going to represent myself better than me.' " 826 F.3d. at 942.

The judge said Imani could not represent himself, treating the matter as a request that required the judge's permission. The judge said that Imani did not have a "sufficiently rational basis" to justify his decision. He described Imani's decision as "a flippant short term or immature decision" that should not be given effect, and he described Imani's reasons for wanting to represent himself as "episodic driven," stemming from his loss of the suppression motion. The judge also cited the need to keep the trial on schedule and the increased difficulty of preparing for what he then expected to be a two-defendant trial. At that time, however, there were still four weeks until the trial was scheduled to begin, and Imani said that he had no problem with the trial date. The judge said that, upon a further request, he would reconsider Imani's motion. There was no further request.

826 F.3d. at 942.

Imani was represented by counsel at his trial, and following his conviction, he appealed, and the Court of Appeals reversed his conviction, focusing on the sufficiency of the trial court's "colloquy required by *State v. Klessig*, 564 N.W.2d 716, 721 (Wis. 1997)." 826 F.3d. at 943.

After the State's petition for review to the Wisconsin Supreme Court was granted and the case litigated there, the Wisconsin Supreme Court reversed the Court of Appeals, explaining that

> the trial court had properly determined that Imani "did not make a deliberate choice to proceed without counsel" and "was unaware of the difficulties and disadvantages of self-representation." State v. Imani, 786 N.W.2d 40, 44-45 (Wis. 2010). The Wisconsin Supreme Court also concluded that "the circuit court's determination that Imani was not competent to proceed pro se is supported by the facts in the record." Id. at 45. The court did not identify any mental illness or specific disability, and none is apparent from the trial court record. See id. at 54. Based on the conclusion that Imani could not have validly waived his right to counsel, the Wisconsin Supreme Court held that the trial court was required to refuse his attempt at representing himself.

826 F.3d. at 943.

Imani filed for a for a writ of habeas corpus in the Western District Court for Wisconsin, and that court found that while his right to represent himself was violated, it was ultimately the right decision by the trial court because Imani waiver was not knowingly and voluntarily made. 826 F.3d. at 943.

In overruling the decision of the Western District's decision, the Seventh Circuit stated:

> The Wisconsin Supreme Court decision was flatly contrary to *Faretta* and its progeny in three distinct ways. First, the state court in effect required Imani to persuade the trial judge that he was making a knowing and voluntary decision to waive the right to counsel when it was actually the judge's job to make sure that Imani's waiver would be knowing and voluntary. Second, the state court required Imani to persuade the trial judge that he had a good reason to choose self-representation. Under *Faretta*, however, a defendant's reason for choosing to represent himself is immaterial. Defending pro se will almost always be foolish, but the defendant has the right to make that choice, for better or worse. Third, the state court imposed a competence standard much more demanding than *Faretta* and its progeny allow, as if the issue were whether Imani was an experienced criminal defense lawyer. Imani's education and communication abilities are materially indistinguishable from those in *Faretta*, and the Wisconsin courts identified no mental illness or impairment that might have rendered Imani incompetent as allowed by *Indiana v. Edwards*, 554 U.S. 164 (2008).

826 F.3d. at 943-44.

The Seventh Circuit held that the denial of Imani's request to represent himself was a fundamental error, not subject to the harmless error standard, and ordered that Imani be promptly released or retried. 826 F.3d. at 947.

That the decision to elect self-representation in a jury trial results badly is not a reason to deny a defendant the right to represent himself. The Seventh Circuit made this clear, citing

Pollard, in *United States v. Banks*, 828 F.3d 609 (7th Cir., 2016)

In *Banks*, the defendant fired his counsel immediately prior to trial because he wanted to introduce a soverign citizen defense, that the court lacked jurisdiction over him, to the charge of bank robbery. 828 F.3d at 612-13.

> Banks's participation in the trial was minimal. He declined to object to the government's motions in limine, strike any jurors, present his own witnesses, cross-examine the government's witnesses, object to any of the government's questions, or comment on the jury instructions. Rather, his participation was often confined to stating that he was "captive" and would not be "partaking in this proceeding." in addition, he repeatedly asked (unsuccessfully) to be excused from attending the trial, and rebuffed the district judge's numerous suggestions that he permit his standby counsel to represent him. Banks did attempt, however, to make opening and closing statements, but when he failed to confine his remarks to trial evidence (expected or presented) the district judge cut him off. At the conclusion of the trial, the jury convicted him on all four counts.

828 F.3d at 613.

Banks was sentenced to 432 months in prison. 828 F.3d at 614.

Post-conviction, Banks argued that the trial court "erroneously concluded that he had knowingly and voluntarily waived his right to counsel before jury selection occurred, and that the court should have revoked his waiver when [he] refused to participate in the trial." 828 F.3d at 614.

The Seventh Circuit, citing *Faretta* and *Pollard*, upheld the conviction, finding that the court acted as required.

> The Constitution guarantees all defendants the right to counsel during a criminal trial. *Faretta v. California*, 422 U.S. 806, 807 (1975). it is equally well established, however, that a criminal defendant may waive that right and proceed pro se when he knowingly and voluntarily elects to do so. *Id.* at 834-35. **When such a waiver is timely made by a competent defendant, a trial court may not deny it.** *Imani v. Pollard*, No. 14-3407, 2016 WL 3434673, at *3 (7th Cir. June 22, 2016).

United States v. Banks, 828 F.3d at 614 *(bold emphasis added).*

B. The Trial Court Erred As A Matter Of Law In Denying Mr. Egerson's Invocation Of His 6th Amendment Right To Represent Himself.

The trial court's decision denying the post-conviction motion contains many legal errors.

First, the trial court created a new standard in Wisconsin's 6th Amendment jurisprudence that a defendant must invoke his right to self-representation on multiple occasions in order for the defendant to be taken seriously be the trial court. R46, pp. 2-3.

> The State points to the fact that the defendant never made another request to proceed on his own afterwards. ... The fact that Egerson accepted new counsel and never requested to represent himself again supports the court's findings in this regard.

R46, pp. 2-3.

Secondly the court believed that Mr. Egerson's decision was a rash reaction to discovery concerns and the not prevailing on his motion which had been heard by the court. R46, p. 3.

Both of these finding directly conflict with what 7th Circuit stated in *Imani*.

> After denying Imani's invocation of his right, the trial judge said, "Now, I'm willing to hear the motion again. It may at some point be permitted, but it is going to have to be in a context where I know the trial date is not going to be jeopardized." **The state argues that Imani's failure to act on the trial court's invitation to renew his motion indicates that his initial decision was rash and hasty.** The decision might have been rash, hasty, or foolish as a matter of fact, but that makes no difference as a matter of law. **A court may not deny a defendant his right to represent himself because the choice is rash, hasty, or foolish.** In the end, the choice is the defendant's, no matter how foolish it is. *Faretta* , 422 U.S. at 834, 95 S.Ct. 2525. The trial judge's offer to consider a renewed motion in the future, and perhaps to grant it "in a context where I know the trial date is not going to be jeopardized," did nothing to cure the judge's error in denying the motion. A denial is a denial, even with an offer to reconsider in certain circumstances. **Nothing in *Faretta* or its progeny indicates a trial court may require a defendant to repeat his attempts to invoke his right of self-representation.**

Imani v. Pollard, 826 F.3d 939, 945 *fn 1* (7th Cir., 2016)(*bold emphasis added*).

Thirdly, the court erroneously found Mr. Egerson's statements were "qualified" and "not unequivocal". R46, p. 3.

> Although defendant's suggestive request in the instant case was somewhat clearer than the

> implied suggestions made by the defendant in *Darby*, the court finds that Egerson's statements were indeed qualified, not unequivocal, and were made in the context of the discussion being had with the court at the time about his ability (or inability) to obtain the discovery in his case (see full record).

R46, p. 3.

The fact is, however, that Mr. Egerson's requests were not qualified or equivocal, and were made under identical circumstances to those at issue in *Imani.*

Equivocal, however, means that the statement is "subject to two or more interpretations and usually used to mislead or confuse". *See Meriam Webster's definition at https://www.merriam-webster.com/dictionary/equivocal.* What are the various interpretations of Mr. Egersons's requests? The court, upon hearing the first request did not have any confusion about what Mr. Egerson was asking for, based on its ability to shortly and succinctly address the request with a single word, "No." R60, p. 11.

Nor is Mr. Egerson's second statement subject to two or more interpretations, or misleading, or confusing, "Let me represent myself and have no counsel." R60, p. 11.

Compare those two statements to the statements by the defendant in *Darby*, which the court relied upon. "I would very much appreciate if I could please have an atty. for legal assistance and the opportunity to prepare my case ... properly in my [behalf] for the court on this matter." and "I think I should have the legal right to properly prepare my case for the courts and in my behalf, and so far at this point, this is the fifth contact I have had with this attorney." *State v. Darby*, 2009 WI App 50, 317 Wis. 2d 478, 766 N.W.2d 770.

Is Darby complaining about his lawyer, asking for a new one, or asking to represent himself?

Can either of those statements by Darby be answered with a simple, "No."?

No.

Moreover, in *Imani*, the request to invoke the right of self-representation came after a decision in a pre-trial motion hearing went against Mr. Imani and he expressed dissatisfaction with his attorney. *Imani v. Pollard*, 826 F.3d 939, 942 (7th Cir., 2016)

> After the court denied the motion, Imani invoked his right to represent himself. He said he was not satisfied with his lawyer, who had not shown a recording of the television news report to the driver at the suppression hearing. Imani said his lawyer's representation of him at the hearing gave him doubts about the lawyer's ability to represent him "well enough" at trial. Imani also said he was not satisfied with his lawyer's efforts to investigate the fingerprint evidence against him. Imani acknowledged that he might not be as "eloquent in speech" as his lawyer, but he said he had "been dealing with this case for over a year now" and knew how to express himself well. Imani added, "ain't nobody going to represent myself better than me."

826 F.3d at 942.

In the instant case, after having a pretrial motion ruling go against him, Mr. Egerson expressed dissatisfaction with this attorney and told the court he wished to represent himself. R59, pp. 28-29; R60, pp. 9-11.

> THE DEFENDANT: Your Honor, I just basically feel that the representation that Mr. Singleton has been giving me has been totally deficient. You know, he's--he hasn't consulted

> with me in reference to trial preparation if we're going to trial. He hasn't sat down and talked to me in reference to trial strategy or our witness list that we've sat down and prepared. There has been a total breakdown as far as communication is concerned.
>
> ...
>
> THE DEFENDANT: Well, you know what, Your Honor, let me represent myself and have co-counsel then.
>
> THE COURT: No.
>
> ...
>
> THE DEFENDANT: Let me represent myself and have no counsel.

R60, pp. 8-11.

The circumstances under which the requests in both Imani and the instant case are nearly identical.

Finally, the trial court erred in placing a burden upon Mr. Egerson to persuade the court that it had to be persuaded by him to engage in a colloquy to determine if Mr. Egerson was competent to represent himself. R46, p. 3.

> His statements were not sufficiently clear and unequivocal to require the court to advise him of the right to self-representation which would have triggered its duty to make findings that the defendant knowingly, intelligently and voluntarily waived his right to counsel and that he was competent to represent himself at trial.

R60, p. 3.

As noted, the requests were "sufficiently clear and unequivocal" in that they are not subject to more than one meaning; however, the 7th Circuit rejected this burden shifting as well: it is the court's responsibility to act, not the defendant's responsibility to request the court do its job. *Imani,* 826 F.3d at 943-44.

> The Wisconsin Supreme Court decision was flatly contrary to Faretta and its progeny in three distinct ways. *First, the state court in effect required Imani to persuade the trial judge that he was making a knowing and voluntary decision to waive the right to counsel when it was actually the judge's job to make sure that Imani's waiver would be knowing and voluntary.* Second, the state court required Imani to persuade the trial judge that he had a good reason to choose self-representation. Under *Faretta*, however, a defendant's reason for choosing to represent himself is immaterial. Defending *pro se* will almost always be foolish, but the defendant has the right to make that choice, for better or worse. Third, the state court imposed a competence standard much more demanding than *Faretta* and its progeny allow, as if the issue were whether Imani was an experienced criminal defense lawyer.

826 F.3d 943-44.[2]

Thus, Mr. Egerson clearly and unequivocally to the court, "[L]et me represent myself and have co-counsel," a request the court immediately understood and rejected. Mr. Egerson then asked the court, "Let me represent myself and have no

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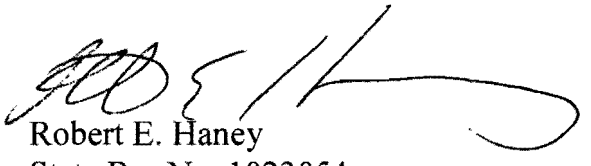
[2] Because of the errors the trial court made with regard to the first two items listed by the 7th Circuit, the third issue (the quality of the trial court's colloquy to determine competence) is never reached in this case. Had the trial court done its job and engaged in such a colloquy, Mr. Egerson might have changed his mind about invoking his right to self-representation (or he might not have).

counsel." The court committed fundamental error in not taking any further action on those statements.

CONCLUSION

Because the trial court erred as a matter of law in denying the post-conviction request for a new trial, this court should reverse the circuit court, vacate the judgment of conviction and remand this case to the circuit court for further proceedings.

Dated November 20, 2017



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6590 words.

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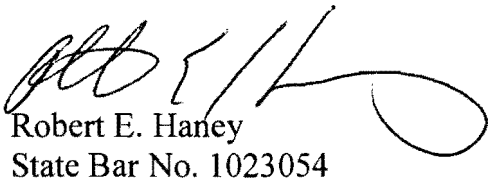

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the records have been so reproduced to preserve confidentiality and with appropriate references to the record.

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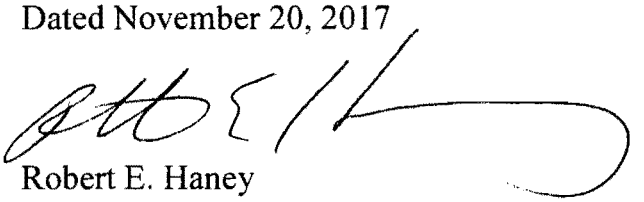

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I hereby certify that:

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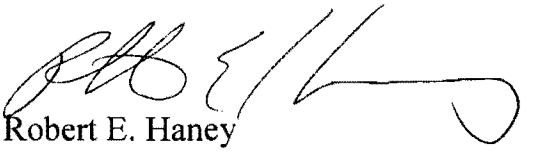

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APPENDIX

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