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

REPLY BRIEF AND APPENDIX OF THE DEFENDANT/APPELLANT

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REPLY ARGUMENT

The State and Mr. Egerson agree the case should be remanded to the circuit court for further proceedings.

A. Even Under The State's Understanding Of The Law, The Case Should Be Remanded To The Circuit Court.

The State concedes that the trial court erred if Mr. Egerson clearly and unequivocally expressed his desire to represent himself and did nothing in response. Response, p. 11. Specifically, the State, citing *Klessig,* wrote,

> When a defendant does clearly and unequivocally invoke the right to self-representation, **the trial court must engage the defendant in a colloquy** to ensure that he or she has validly waived counsel and is competent to proceed *pro se*.

Response, p. 11 ***(bold emphasis added)***.

Mr. Egerson agrees with that. Twice Mr. Egerson stated to the court, "Let me represent myself…" and neither time afterward did the court engage Mr. Egerson in a colloquy regarding the invocation of that right.

The State does not contest that the definition of the word equivocal (Brief, p. 19) means that a statement is "subject to two or more interpretations and usually used to mislead or confuse."

The State never explains what the various interpretations of "Let me represent myself and have no counsel.", are in its brief, or how the trial court was "confused" by those words. Instead, the State argues that while the words are unequivocal, "circumstances support a reasonable inference that the request did not reflect a clear choice to forgo counsel and proceed pro se for the duration of the proceedings." Response, p. 12.

The reason, however (according to the State's own understanding of Wisconsin law), that "the trial court must

engage the defendant in a colloquy" after "clearly and unequivocally invoke[ing] the right to self-representation" is "to ensure that he or she has validly waived counsel and is competent to proceed *pro se*." Response, p. 11.

The question unanswered by the State and the trial court is simple:

> What could possibly be a clearer and more unequivocal invocation of the right to self-representation than the statement, "Let me represent myself."?

The State agrees that Mr. Egerson's words, on their face, are unequivocal, and that the trial court did not engage Mr. Egerson in a colloquy, as it was required to do.

Thus, both Mr. Egerson and the State agree that the case should be remanded.

B. Mr. Egerson's Invocations Of His Right To Self-Representation Are Properly Based In Reality, Not An Imaginary "Context"

Neither the State, the trial court in its post-conviction decision, nor Mr. Egerson alleges that the trial court engaged in the colloquy. The State, in its Statement Regarding Publication, tries to argue that this court should develop a new test, namely that

> When a defendant clearly and unequivocally invokes the right to self-representation, the trial court must engage the defendant in a colloquy to ensure that he or she has validly waived counsel and is competent to proceed *pro se,* after first determining if the context in which the clear and unequivocal invocation is made is one where the court believes that it should engage in the colloquy.

See Response, p. 1.

After introducing this argument at that point in its response, the State then tries to argue that the statement, "Let me represent myself ....", has more than one meaning if it is viewed through the lens of the context of being made at a hearing on Mr. Egerson's motion to have his counsel withdraw, at which time there were some pre-trial motions ruled on by the court in favor of the State.

This is exactly the situation in the *Imani* case.

> After the court denied the motion, Imani invoked his right to represent himself. He said he was not satisfied with his lawyer.

Imani v. Pollard, 826 F.3d 939, 942 (7th Cir., 2016).

But the State presents a "context" in its Response that has little or no bearing to the facts in this case.

In the State's Statement on Oral Argument and Publication, the State ponders the question of "whether context is relevant to whether a self-representation request is unequivocal". Response, p. 1. As part of inventing a "context" the State asserts (without reference to the Record), "At a hearing on his lawyer's motion to withdraw, Egerson complained about the lawyer's performance but did not ask to represent himself." Response, p.2.

In reality, the "context" of the statements made at the hearing (R60 (Transcript of Motion to Withdraw Dated October 26, 2015)) take place twelve days after "Mr. Terrance Egerson, by his Attorneys, The Singleton Law Firm, LLC, Attorney Justin L. Singleton, ... on the request of Mr. Egerson" moved the court for an order allowing for his counsel to withdraw. R:18, p. 1.(*Motion To Withdraw As Counsel Date October 14, 2015*).

In that Motion, counsel, on behalf of Mr. Egerson, explained to the court:

> Mr. Egerson has more faith in his own ability to represent himself than he does in his current representation ***and will likely chose to represent himself if the current representation is not***

> ***withdrawn. Mr. Egerson recognizes that such a decision may well result in the undersigned being kept in a position as stand-by counsel,*** however, the undersigned does not believe that there is a salvageable relationship which would allow the undersigned to be effective in even that reduced role.

R18, pp. 2-3 ***(emphasis added)***.

While the State references the Motion in its Statement of the Case four times, (Response, p. 3), it inexplicably neglects to reference this key passage, which undermines any argument that that Mr. Egerson's invocation of his right to self-representation "was a reflexive response to the court's refusal to hear his arguments on a discovery issue." Response, p. 7.

In a "through the looking glass view" of that hearing, the State asserts that it is credible to believe that twelve days after Mr. Egerson informed the trial court that he will likely chose to represent himself if the current representation is not withdrawn and that Mr. Egerson understood his attorney could be kept in a position as stand-by counsel, "Egerson's second statement [("Let me represent myself and have no counsel.")] was also equivocal when viewed in context." Response, p. 7.

The notification to the court that Mr. Egerson had contemplated, and was prepared to, represent himself, either with or without stand-by counsel, explains why the court, in comparing Mr. Egerson to his attorney, stated, "You think you know so much more about trial strategy and how to prepare a case and how to get ready for trial," Response, p. 5 (*quoting* R. 60:9). Why did the court think that Mr. Egerson knew more about trial strategy and preparing a case for trial? It was because it was aware that Mr. Egerson came into the courtroom that day ready to ***"represent himself if the current representation is not withdrawn"*** or with an attorney ***"in a position as stand-by counsel***."

Interestingly, the State writes, "Egerson—and, to be fair, the postconviction court— assume(d) that the trial court denied Egerson's request to represent himself.", as though there were two different Honorable Judge Jeffery Kremers involved in the

case: one who acted as the trial court judge and one who acted as the judge in the post-conviction proceedings. Response, p. 19. There was not.

In the decision on the post-conviction motion, the court does not explain that it did not understand what Mr. Egerson was stating. Indeed, the court never addressed the fact that it understood the first request so well that answered it with a simple, one-word answer, "No." See R. 46.

Although Mr. Egerson verbally uttered the word "co-counsel", the court, after receiving the motion which stated that Mr. Egerson was prepared to "represent himself if the current representation is not withdrawn" or with an attorney "in a position as stand-by counsel" did not need to question Mr. Egerson about that term used in court at the hearing, before being able to answer, "No." Nor did the court indicate in its written decision that it did not understand what Mr. Egerson was telling the court.

In fact, logically from the State's perspective, in the "context" of notifying the trial court of his preparedness to proceed by representing himself with an attorney "in a position as stand-by counsel", in writing, twelve days before the motion hearing, the misuse of the word "co-counsel" instead of "stand-by counsel" does nothing to confuse or mislead the court in understanding that Mr. Egerson was stating he wanted to represent himself.

C. Even If The Context Characterization Of The State Is Correct, It Has No Legal Significance.

Pretend for a moment that Mr. Egerson did not file a motion stating that he was prepared to represent himself with or without stand-by counsel, and assume that the first and only time the thought of representing himself came after the ruling on his suppression motion and was based on his dissatisfaction with counsel. That would put Mr. Egerson and the trial court in the same position as Mr. Imani and the trial court in his case.

> After the court denied the motion, Imani invoked his right to represent himself. He said he was not satisfied with his lawyer .... 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 … evidence against him.

Imani v. Pollard, 826 F.3d 939, 942 (7th Cir., 2016).

The Seventh Circuit explained the error of using such a "context" as a reason to excuse a trial court from acting when presented with a clear request to invoke the right to self-representation.

> The state trial court also denied Imani his right to represent himself because, it concluded, he was deciding without a "sufficiently rational basis," driven by his momentary frustration with counsel at the suppression hearing. The Wisconsin Supreme Court agreed that Imani had not made a "deliberate" choice to represent himself. *Imani* , 786 N.W.2d at 51. But denying a defendant his Sixth Amendment right to proceed pro se because his choice is foolish or rash is also contrary to *Faretta*.
>
> *Faretta* recognized a defendant's right to represent himself even though it is "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." 422 U.S. at 834, 95 S.Ct. 2525. The Supreme Court answered this concern by making clear that the defendant himself is free to make this choice: "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Id.*, quoting *Illinois v. Allen*, 397 U.S. 337,

> 350–51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring).
>
> Only in rare cases will a trial judge view a defendant's choice to represent himself as anything other than foolish or rash.

Imani v. Pollard, 826 F.3d 939, 945 (7th Cir., 2016).

Thus, even if the decision of Mr. Egerson to twice ask the court, "Let me represent myself…" was rash, or foolish, or stemmed from dissatisfaction with his attorney, or was the result of not getting discovery, the trial court still had no right to answer Mr. Egerson's request to be recognized as representing himself with the word, "No", or to ignore the request altogether.

D. That Mr. Egerson Did Not Renew His Motion To Proceed *Pro Se* Is Irrelevant.

The State argues that by not renewing his motion to proceed pro-se, Mr. Egerson waived his right to do so. Response, pp. 19-20. It takes the position that by abrogating its duty to engage Mr. Egerson in the mandated colloquy after he twice made the statement, "Let me represent myself…" the court was holding the ruling on the motion to proceed *pro se* in abeyance, and that by not making a third request, Mr. Egerson forfeited his right to self-representation. Response, p. 19.

The State then shows it is aware of the frivolousness of its argument as it then states:

> The State is not arguing here that a defendant must make a request to go pro se more than once to properly invoke the right. *See Imani*, 826 F.3d 939, 945 n.1 ("Nothing in *Faretta* or its progeny indicates a trial court may require a defendant to repeat his attempts to invoke his right to selfrepresentation.").

Response, p. 20.

The issue of abeyance, however, was directly addressed by the Seventh Circuit in *Imani*, where the court noted that:

> The judge said that, upon a further request, he would reconsider Imani's motion. There was no further request.

Imani v. Pollard, 826 F.3d 939, 942-43 (7th Cir., 2016).

The Seventh Circuit dismissed the notion of "abeyance" as an appropriate response.

> 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).

E. That Mr. Egerson Was Subsequently Represented By Counsel After Twice Stating "Let Me Represent Myself" Is Not A Waiver Of The Right To Self-Representation.

The State argues that there was some type of waiver by Mr. Egerson because "[a]t the next two proceedings before trial, newly appointed counsel appeared on Egerson's behalf, and Egerson did not request a ruling on his October 2015 selfrepresentation request. Response, p. 20.

The Seventh Circuit has rejected this notion that this situation, accepting a trial court's decision regarding self-representation, constitutes a waiver of a defendant's 6th Amendment Right, in

Freeman v. Pierce, a recently released decision that has yet to be published.[1]

> The State's acquiescence and waiver argument is without merit; nothing in the record supports such a factual finding. In denying Freeman's request to proceed pro se, the trial court explicitly told Freeman that "I will not let you proceed pro se any further." Freeman was under no obligation to reassert his motion or continually object to the court's denial of his motion after the court had clearly denied his request. Once again, *Faretta* affirms why this is so. After Faretta's request was denied and he proceeded to trial with counsel, the Court did not find that Faretta acquiesced to representation by counsel, or that he waived the right to represent himself. *Faretta*, 422 U.S. at 810-11. Accordingly, every other circuit that has encountered such an argument has rejected it. *See Batchelor*, 682 F.3d at 412 (stating that a defendant "was not required, in order to avoid waiver, to add anything to the straightforward request that he had already made plain in writing"); *Buhl v. Cooksey*, 233 F.3d 783, 803 (3d Cir. 2000) (noting that defendant's failure to object to the denial of his request to proceed pro se was a "far cry from vacillation or waiver"); *Wilson v. Walker*, 204 F.3d 33, 37 (2d Cir. 2000) (stating that a defendant need not continually reassert his request to proceed pro se in order "to avoid waiver of a previously invoked right to self-representation"); *United States v. Arlt*, 41 F.3d 516, 523 (9th Cir. 1994) ("[O]nce a defendant has stated his request clearly and unequivocally and the judge has denied it in an equally clear and unequivocal fashion, the defendant is under no obligation to renew the motion.").

Freeman v. Pierce (7th Cir., 2017), Slip Opinion, No. 16-1229.

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[1] A true and correct copy of the Slip Opinion is included in the Appendix to this Reply.

In the instant case, the trial court clearly denied the request to proceed pro se.

The court said, "No."

F. The Proper Remedy Is A New Trial

The State argues that the remedy is a remand with hearing to determine if Mr. Egerson is competent to represent himself. Response, p. 21. That is not the remedy for a plain error violation of the 6th Amendment right to self-representation. *Imani v. Pollard*, 826 F.3d 939, 947 (7th Cir., 2016).

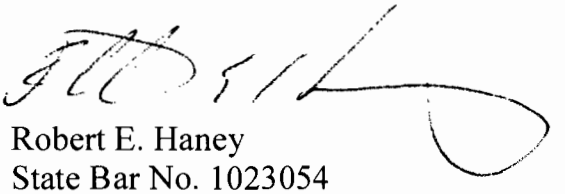
> Imani's conviction cannot stand because the Wisconsin state courts' denial of his Sixth Amendment right to represent himself was contrary to and an unreasonable application of binding Supreme Court precedent. The denial of that right is not subject to harmless error analysis. *McKaskle v. Wiggins* , 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

Id. [2]

CONCLUSION

Based on the trial court's failure to properly act when Mr. Egerson twice told it clearly and unequivocally that he wanted to represent himself, the judgment of conviction should be vacated, and the case remanded for further proceedings.

Dated March 7, 2018



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[2] This is the identical result reached in Freeman as well. *Freeman v. Pierce* (7th Cir., 2017), Slip Opinion, No. 16-1229, p. 18.

CERTIFICATION OF FORM AND LENGTH AND OF COMPLIANCE WITH WIS. STAT. §809.19(12) AND CERTIFICATION OF APPENDIX

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2872 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

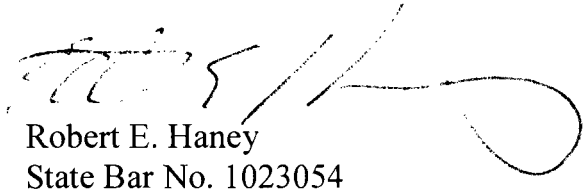
I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

I further certify a copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Regarding the Appendix to this Reply, 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) portions of the record essential to an understanding of the issues raised.

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.

Dated March 7, 2018



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