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LAW OFFICE OF

PUBLIC DEFENDER

SEVENTH JUDICIAL CIRCUIT
FLAGLER, PUTNAM, ST. JOHNS & VOLUSIA COUNTIES

JAMES S. PURDY
PUBLIC DEFENDER

CRAIG S. DYER
CHIEF ASSISTANT

February 20, 2008

Mr. John Dobbs
Inmate # C00618, K1-1202
Santa Rosa Correctional Institution
5850 East Milton Road
Milton, Florida 32583-7914

Re: Our File No. 07-567; DCA Case No. 5D07-1057

Dear Mr. Dobbs:

I plan to respond, before the deadline of February 28, 2008, to the District Court with (1) a reply brief to the State's argument ([redacted] enclosed) and (2) to your request to dismiss me as counsel. This letter restates my positions previously stated to you, Celeste Dobbs and Edward Dobbs. It is your future, however, the second point I raised in our brief has the best opportunity on appeal to get a new trial.

This letter addresses two issues (1) your ability to proceed pro se and (2) discussion of issues you wish to see raised in the initial brief and why they were not presented. If the District Court does not permit you to proceed pro se and we were not successful in the appeal, you may challenge the alleged ineffectiveness by me through a habeas corpus motion, after the appeal. One issue you wanted raised, unsigned filed, information has been discussed in person with our elected public defender, Mr. James Purdy, who is in agreement that such an unpreserved error can not be raised in the direct appeal. We both believe that such a claim could be raised in a post conviction motion, if that becomes necessary.

Addressing your right to proceed pro-se, the Florida Supreme Court in *Johnson v. State*, 33 Fla. L. Weekly S58 (Fla. January 28, 2008), held that under the US or Florida Constitution, a defendant who was represented by court-appointed counsel in pending appeal from sentence did not have right to seek relief pro se. Years earlier, the United State Supreme Court clarified that a convicted defendant does not have a federal constitutional right of self-representation on an

Counsel's performance is identifiably deficient 469

initial appeal of right. *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000). At issue in *Martinez* was a California appellate court's denial of appellant Martinez's pro se motion to discharge his appellate counsel and proceed pro se. *See id.* at 155. The Court affirmed the California court, explaining that the rationale underlying the *Faretta* decisions, and hence the Sixth Amendment itself, did not apply to appellate proceedings. The Court in *Martinez* left to the States the ability to find a right of self-representation on appeal under the state constitution.

In regards to the existence of such a state constitutional right, the Florida Supreme Court in *Davis v. State*, 789 So. 2d 978 (Fla. 2001), held that in Florida there is no state constitutional right to proceed pro se in direct appeals in capital cases. If appellate counsel's performance is identifiably deficient, the defendant has a remedy by way of habeas corpus proceedings. An appellant has a right to effective assistance of appellate counsel in a direct appeal of a capital case and has an opportunity to present claims of appellate counsel's ineffectiveness in state habeas corpus proceedings. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) Where a criminal defendant is represented by the public defender or other counsel, it is left to the attorney's judgment which issues to present. However, the constitutional right to effective counsel does not require that defendant be allowed to serve as co-counsel. *Logan v. State,* 846 So. 2d 472 (Fla. 2003); *Goode v. State*, 365 So. 2d 381 (Fla. 1978), *cer. denied*, 441 U.S. 967 (1979). If appellate counsel's performance is identifiably deficient, the defendant has a remedy by way of habeas corpus. *Johnson v. Wainright,* 463 So. 2d 207 (Fla. 1985)

This is to address claims you want raised as fundamental error:

(1) Unsigned information(s); As stated previously, no objection was made below to the unsigned information and this error is not deemed fundamental. The Florida Supreme Court adopted the last sentence of rule 3.140(g), of Florida Rules of Criminal Procedure, which states, no objection to an information on the ground that it was not signed or verified, as herein provided, shall be entertained after the defendant pleads to the merits. In *Gerlaugh v. Florida Parole Comm'n*, 139 So. 2d 888 (Fla. 1962), the Florida Supreme Court wrote that the validity of an information not signed by the state attorney may only be attacked upon a timely objection. The District Courts have consistently followed the Florida Supreme Court's ruling that a defendant waives a defect in the information if he fails to object before pleading to the substantive charges. The objection, made for the first time on appeal, is untimely. *Holt v. State*, (Fla. 3d DCA 1987); *Colson v. State*, 717 So. 2d 554 (Fla. 4th DCA 1998); *Montanez v. State*, 630 So. 2d 1163 (Fla. 3d DCA 1994).

(2) Insufficient evidence - As stated in your brief, appellate courts do not consider weight of the evidence arguments as that is for a determination by the jury. However, this argument was

made in point I of the initial and reply brief (to be filed) that the State did not present sufficient evidence to rebut your self-defense claim and the trial judge erred to deny the judgment of acquittal motion.

(3) Prosecutorial Misconduct - In the initial brief, we argued the prosecutor committed fundamental error with her comments in closing argument. To review, there were no claims made in the trial court that knowing, perjured testimony was presented by the State. I do not believe such a claim exists or can ethically be presented to the trial court. In their theme, the prosecution asserted two positions (1) John Dobbs drove vehicle through lot, parked near Blanco's Chrysler, exited vehicle and attacked Blanco with knife; or (2) Dobbs was at his own car in Doll house parking lot and after Blanco approached Dobbs, Dobbs exited his own vehicle and began to use a knife on Blanco and his companions. Both versions are supported by testimonial evidence by state witnesses. The prosecutor is free to argue to the jury any theory of a crime that is reasonably supported by evidence. *Villella v. State*, 833 So. 2d 192 (Fla. 5th DCA 2002) The alternative theories presented is not an automatic finding the prosecution presented knowing perjured testimony in their case. There is no evidence, in the record, of a recantation of a witnesses version of event or testimony completely contradicted by a witnesses own prior statements.

(4) Jury Instruction - Point II in the initial brief addresses what I believe is the best chance to find error in the jury instruction and remand your case for a new trial. The point you would like me to argue, regarding the issuance of the necessity instruction, is to be raised in a post conviction motion. In a 3.850 motion, an evidentiary hearing could be conducted to ask why counsel requested the necessity instruction. Don't believe the district court would find ineffectiveness on the record without a hearing on this instruction. The trial counsel requested this necessity instruction, which Judge Munyon issued to the jurors. Without any objection at trial, to try and advance the argument that the court committed fundamental error by doing what was requested is simply an attempt to put Judge Munyon in a no win position. These "invited errors" are not something that the courts have found fundamental or addressed on appeal.

(5) Weight of the evidence - As stated by the Florida Supreme Court, which was quoted in the initial brief, the weight of the evidence argument is not the realm of the appellate courts and is something for jurors consideration. However, it is asserted and argued in the second amended brief that the state must present, competent, substantial evidence to support the verdict. (Initial Brief, Page 15) While some state witnesses provided testimony that supported your self-defense claim (that Blanco walked over and threw punches at you by your vehicle), these different accounts of who walked where in the parking lot or even where the first punch was thrown does not tell who made the first contact with the other or what weapon, if any, was used in the initial contact. The location of the physical confrontation supports your version of events, but does not guarantee a not guilty. If they walked over to your vehicle, the jury could still choose to believe

Blanco or Westfall's testimony that you threw the first punch or made a stabbing motion first. In addition, jurors could have also found your use of the pocket knife was not reasonable, but excessive and an excessive use is not justified under the claim of self-defense.

(6) Shackles - I have enclosed the transcript of your trial attorneys oral request, made just before jury selection, for you to be unshackled. Counsel did not file a written motion, and Judge Munyon stated she would usually require an evidentiary hearing to examine and study the issue, but it is difficult to conduct a hearing and obtain disciplinary reports once the trial has begun. According to the record on pages 7-10, it appears the court agreed to give you the bandit device to be worn on your leg. This is the last and only mention of shackles anywhere in the record. Without time to obtain reports and conduct an evidentiary hearing on the flight risk, the court took reasonable steps to ensure jurors did not observe the shackles under the table skirt and provided a reasonable solution by outfitting you in a bandit device. In *Bello v. State*, 547 So. 2d 914 (Fla. 1989), the holding is that a *hearing* on the necessity of restraint devices *must "precede the decision to shackle if a defendant timely objects* and requests an inquiry into the necessity for the restraints. The problems facing the court was an untimely objection by counsel to have the shackle removed and no mention that the court's orders to outfit you with the bandit under your clothes was not followed. It does appear, on the record, that the court took steps to consider a procedure to reduce the prejudice of having you restrained. *See Miller v. State*, 852 So. 2d 904 (Fla. 4th DCA 2003)

(7) Ineffective Assistance of counsel - This argument is raised at the tail end of point II in the second amended initial brief. As previously stated, this issue is not? best raised in a post conviction motion, if necessary. The ineffectiveness claim argued in your pro se brief relies on many facts outside the court record. When these pieces of relevant information or items outside the record are to be included or considered in determining whether counsel is ineffective, this is best advanced in a post conviction motion alleging ineffective assistance of counsel. Many of the "facts" you rely on are facts or items that are not part of your record on appeal and therefore, cannot be considered on direct appeal.

(8) One issue to consider in your post conviction motion or evidence to be submitted in the new trial is the case of *Smith v. State*, 606 So. 2d 641 (Fla. 1st DCA 1992); *Dwyer v. State*, 743 So. 2d 46 (Fla. 5th DCA 1999), which holds the evidence of the victim's reputation is admissible to disclose propensity for violence and likelihood that victim was the aggressor.

I have entertained and reviewed every argument sent to me by you and your father. I stand behind my brief submitted to the District Court. If I am dismissed, I wish you luck in your continued appeal.

Sincerely,

Kevin R. Holtz
Assistant Public Defender

KRH/mll

Enclosures

cc: Edward Dobbs
Celeste Dobbs