IN THE SUPREME COURT OF FLORIDA

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PAUL JENNINGS HILL :

Appellant, :

v. : CASE NO: 84,838

STATE OF FLORIDA, :

Appellee :

______________________________/

CORRECTED

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STATEMENT OF THE CASE AND FACTS

The defendant Paul Jennings Hill (hereinafter "Hill") was charged in a superceding grand jury indictment with premeditated design to effect the death of John Bayard Britton and James Herman Barrett, in violation of Sections 782.04 and 775.07, Florida statutes, and unlawfully and knowingly attempting to form a premeditated design to affect the death of June Griffith Barrett, in violation of Sections 777.04, 782.04, and 775.087, no Florida statutes, and in unlawfully, wantonly, or maliciously shooting at or into an occupied vehicle, in violation of Section 790.19, Florida statutes, said crimes allegedly taking place on June 29, 1994, the superceding indictment dated August 9, 1994 (R 4,5).

On September 26, 1994 a motion for a Faretta hearing and motion to withdraw were filed, (R 15,16). After hearing, both motions were granted on September 30, 1994 (R 96). On October 13, 1994 a "supplemental" Faretta hearing took place (R 100-103).

The State filed a motion in limine to preclude the justification defense on October 14, 1994 (R 14). Hill filed a memorandum in opposition (R 117-200). The State filed a reply memorandum (R 201-216). Hill was not allowed to offer any evidence in support of his motion. The Faretta hearings reveal Hill was not advised that his legal defense required a factual predicate, despite the State knowing that Hill was relying upon the justification defense (TR 221; R 109).

When the State filed its memorandum on October 24, 1994, and argued it the same morning, Hill asked the Court (R 218-220, A 101-

103):

> I'd like to ask the Court to allow an out-of-state attorney, Mr. Vince Heuser, to speak to this incident motion against the State's Motion in Limine. And if you grant that, I'd like for him to be appointed standby counsel for me during my trial... I'm sure if you'd be willing to consider his credentials, I'm sure you'd find them in order...I'm sure the Court's interested in hearing as much argumentation from the defense as possible.

Attorney Heuser filed a motion to appear pro hac vice to argue the justification defense and a motion to file an Amicus Curiae Brief (R 232-237). Both were opposed by the State (R 220-226). Hill was denied the counsel of his choice and did not argue the motion (R 234). He then stated he would rest on the memorandum (R 227). Without the benefit of oral argument by Hill, the Court granted the State's motion in limine on October 26, 1994 (R 234). Voir dire selection immediately commenced.

The trial court's failure to comply with either Faretta or the Florida Rules of Criminal Procedure resulted in an unfair trial of constitutional magnitude. This is abundantly clear through each phase of the trial.

Hill asked no questions of any veniremen; he objected to no questions the State asked the veniremen; he made no opening statement; he asked no questions on cross-examination; he objected to no exhibits; he attempted to state to the Court that he wanted to present the justification defense (TR 566). Hill could not understand, nor was he told, why he was not permitted to do so.

In response to the Court's critical question (TR 568), Hill

rested without offering any evidence. Indeed, Hill's entire defense filled less than one page of that transcript. Hill filed no requests concerning the charge; he took no exceptions to the charge (TR 634); he waived his opening argument in the closing argument of both portions of the case; so, too, he waived his rebuttal argument to the jury during the guilt phase of the trial (TR 598).

Hill's only substantive comment to the jury-and this was after an objection which was sustained and later reversed-consisted of sixty seven words (TR 725). Without a factual foundation, these words were meaningless. Further, there was no evidence to support what Hill said. His "sound bite" had to make the jury wonder if Hill was even talking about the case. It was a logical statement to Hill, but fatally prejudicial before the jury.

The jury deliberated less than an hour on the guilt phase of the trial, (TR 598) and an extremely short time on the penalty phase of the case. Hill was found guilty of two counts of first degree murder, guilty of attempted first degree murder with a firearm, and guilty of shooting into an occupied vehicle, as charged in the indictment (R 258-261). The death sentences are consecutive to the federal life sentences imposed the previous week (R 331).

SUMMARY OF THE ARGUMENT

Faretta v. California, 422 U.S. 806 (1978), establishes the scrutiny that a trial court must apply before allowing a defendant to represent himself. The court is obligated to conduct an inquiry

that would support a knowing, intelligent, and voluntary waiver of counsel, taken in light of the complexity of the charges and severity of the possible punishment.

The failure to comply with the Faretta requirements resulted in a violation of the constitutional rights of Hill. Specifically, the Fifth and Sixth Amendments to the United States Constitution and Article I of the Florida Constitution provide that a defendant be able to provide a defense "as we know it." Because the Faretta requirements were not satisfied, the trial was plagued with a series of fatal errors.

Florida Statutes provide that one may use force, even deadly force, to protect himself or another from an imminent, serious harm. Hill attempted to use this statutory defense; however, the State filed a motion in limine which was granted by the trial court without the benefit of any oral argument. As a direct result of the inadequate Faretta inquiry, Hill failed to provide the necessary factual predicate for the defense that he sought to offer.

From voir dire to receiving their instructions from the judge, the jury was improperly influenced. Improper, irrelevant, and highly prejudicial questions were asked of the veniremen. Hill offered no objections or questions of his own. Although Hill was denied access to his statutory defense, the jury was instructed on that law. Hill offered no objections or instructions of his own. Because Hill was prevented from offering this defense, there was no evidence in the Record to coincide with this disconnected

instruction.

Because the errors committed below violate the constitutional rights of Paul Hill, the appeal must be sustained and the case remanded for a new trial.

ARGUMENT

I. ISSUE I

> THE TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS SET FORTH BY THE UNITED STATES SUPREME COURT IN FARETTA V. CALIFORNIA, U.S. CONSTITUTION, THE FLORIDA CONSTITUTION AND FLORIDA RULES OF CRIMINAL PROCEDURE. ACCORDINGLY, THIS APPEAL MUST BE SUSTAINED AND THE CASE REMANDED FOR A NEW TRIAL.

The Sixth Amendment safeguards the rights of the criminal defendant.

> [B]y an imparital jury . . . and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; **and to have the assistance of counsel for his defense.**

U.S. CONST. amend. VI (emphasis added)

Although the U.S. Constitution provides the minimum levels of protection that the State must provide, the Florida Constitution further provides:

> In all criminal prosecutions the accused shall . . .have the right. . . to confront at trial adverse witnesses, to be heard in person, by counsel or both. . . .

FLORIDA CONSTITUTION, art. I, §16(a).

It has long been understood that constitutions lack the prolixity of statutes, Marbury v. Madison, 5 U.S. 137 (1803). Particular application of constitutional provisions fall within the purview

of statutes, rules, and case law.

Of particular relevance to the present appeal are the Florida Rules of Criminal Procedure:

> A defendant shall not be deemed to have waived the assistance of counsel until. . .a thorough inquiry has been made into both the accused's comprehension and understanding waiver.
>
> ***
>
> No waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of. . .the nature and complexity of the case....

Fla. R. Crim. P. 3.111(d)(2)(3)(emphasis added).

Whether a defendant may represent himself is a matter of constitutional magnitude and, as in the present case, a question of life and death. Fortunately, the United States Supreme Court has provided direction on this difficult question. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed 2d 562 (1978), articulates the duty of the trial court when confronted by the pro se defendant.

A. THE TRIAL COURT'S FAILURE TO FOLLOW FARETTA V. CALIFORNIA RESULTED IN A PATENTLY UNFAIR TRIAL. THE APPEAL MUST, THEREFORE, BE SUSTAINED AND A NEW TRIAL ORDERED.

The appeal must be sustained because Hill did not have the capacity to make an intelligent and understanding waiver due to the nature and complexity of the justification defense.

Faretta, Id., speaks of competent waiver and Cappetta v. State, Fla. 204 So. 2d 913, 918 uses it as a determining factor:

> "...or in any case, where the complexity of the crime was such that in the interest of justice legal representation was necessary". [Emphasis added]

And further on that page:

> In short, the defendant would not fall into that category of persons who would be deprived of a fair trial if allowed to conduct their own defense, nor is the crime of which the defendant was accused of <u>such complexity</u> that in the interest of justice, legal representation is necessary. [Emphasis added]

The justification defense is "of such complexity" it requires that the defendant be represented by counsel.

<u>Johnston v. State</u>, 497 So. 2d 863, 868 is also instructive. The trial court in that case held "[t]hat Johnston would not receive a fair trial without assistance of counsel". The Court approvingly cites <u>Cappetta</u>, supra, and the analysis of Fla. R. Crim. P 3.111 (d) (3). This is the precise issue in the instant proceeding.

The complexity of Hill's justification defense is beyond the knowledge of a well-educated law student; even further beyond one, like Hill, who is completely untrained in legal matters. Although law books were available in the prison, the intricacies of his defense require skilled legal research, preparation, planning, and compulsory attendance of witnesses and exhibits. Hill had none of those things.

<u>Reilly v. State, Dept. of Corrections</u>, 847 F. Supp. 951 (MD. Fla. 1994), 960, commenting upon <u>Faretta</u>, <u>supra</u>, cites <u>Johnston v. State</u>, 497 So. 2d 863, 868 (Fla. 1986), and in applying Fla. R. Crim. P. Rule 3.111 (d), approvingly adopts the "experience, the nature and <u>complexity</u> of the case, and a defendant's knowledge and experience in criminal proceedings" (emphasis added) as major factors in the issue of self representation.

Judge Kovachevich stated in commenting on Reilly that Reilly had read numerous law books and statutes, but Reilly was unable to apply the law to the facts. Id. 960. Reilly was far better prepared than Hill.

Hill could not prepare the legal case, and therefore could not lay the requisite evidence before the Court to proceed on the justification defense. Reilly, supra, approvingly cites Cappetta, supra, on the holding that the complexity of the case weighs heavily on the waiver issue.

Hill's case is far more damaging and complex, both legally and factually than Reilly. Accordingly, the trial court must be reversed.

Powell v. Alabama, 287 US 45, 53 S. Ct. 55, 77 L. Ed. 158, emphasizes that the right to prepare for trial is essential. Hill had no opportunity to prepare his complex defense. Hill had no lawyer. Hill was in jail. Hill could not research his case. He could not investigate the case. He had no one to tell him how to utilize compulsory process. Hill obtained no medical, scientific, actuarial, psychiatric or lay witnesses to establish the factual predicate of the only defense that he wanted to introduce.

As the Faretta hearings clearly demonstrate, Hill was not made cognizant of what he could or should do. This is not a case in which "...the right in an adversary criminal trial to make a defense as we know it" was afforded. He was denied that right because both the Faretta and Fla. R. Crim. P. 3.111(d) requirements were violated.

U.S. v. Berkowitz, 927 F 2d 1376 (7th Circ. 1991) is also instructive because of the skill that Berkowitz possessed. Berkowitz actively participated in discovery; he represented himself in prior civil actions; he had prior experiences with judicial proceedings. His trial conduct demonstrated a fairly sophisticated understanding of the judicial process, as demonstrated by several evidential objections made by Berkowitz that were sustained. In addition, he was able to cross-examine the government's witnesses on the subtleties of the best evidence rule. None of those positive attributes of Berkowitz are present in Hill.

The pitfalls of going alone resulted in Hill, in essence, entering an extended plea of nolo contendere. He was denied both the knowledge to and the right to present a defense, and "..the right in an adversary criminal trial to make a defense as we know it," as articulated by Faretta.

U.S. v. Harrison, 451 F. 2d 1013 (2d Cir. 1971) comments on the fact that even a lawyer who is not familiar with criminal law cannot intelligently and knowingly waive that essential constitutional right to a lawyer, particularly when the case was so complex.

Clearly, Hill lacked the training and ability to prepare and defend his case as Hill was incarcerated from July 29, 1994 through the date of trial. Hill was unable to legally or factually prepare his case. Reading cases does not a lawyer make. Hill could not know what facts are required by law to establish the basis for his

justification defense.

The complexity of Hill's defense mandated that the trial court require counsel. Hill had two attorneys in Court who wanted to try the case, and that was made known to the Court (TR 661-664). Certainly, Chestnut v. State, 578 So. 2d 27 (Fla. App. 5 Dist. 1991); Jones v. State, 584 So. 2d 120 (Fla. App. 4 Dist. 1991); Taylor v. State, 605 So. 2d 958 (Fla. Dist. Ct. App. 1992); Stermer v. State, 609 So. 2d 80 (Fla. App. 5 Dist. 1992); Pall v. State, 632 So. 2d 1084 (Fla. Dist. Ct. App. 1994); all stand for the proposition that both Faretta and Fla. R. Crim. P 3.111 (d) require that the waiver be "knowingly and intelligently" made, and that the defendant have the requisite "comprehension" to have the capacity to enter into a valid waiver. It is not a mechanical waiver.

Johnston, supra, articulates the ultimate conclusion: the trial court correctly concluded that Johnston would not receive a fair trial without the assistance of counsel. Neither did Hill.

B. THE TRIAL COURT'S ERROR IS OF CONSTITUTIONAL PROPORTIONS

"In short the Sixth Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it." Faretta at 820 [Emphasis added]. In short, Paul Hill was unable to make that defense.

A person is permitted to proceed pro se because:

> In all criminal prosecutions the accused shall ...have the right...to confront at trial adverse witnesses, to be heard in person, by counsel or both...,

Art. 1 §16 Fla CONST(a), which has been codified and qualified by Fla R. Crim. P. 3.111 (d). The trial court violated the Florida

Constitution because it would not let Hill argue. Because there was an inadequate Faretta inquiry, the trial court violated Hill's inherent right to counsel of his choice. Faretta requires the waiver must be made with comprehension and with an intelligent and understanding choice and an understanding of the nature and complexity of the case. Hill did not "voluntarily and intelligently" elect to proceed without counsel, as Faretta requires supra, 808.

The trial court violated the conditions set forth in Faretta, Id., by permitting Hill to proceed without counsel. Hill did not "voluntarily and intelligently" elect to proceed without counsel, Id. 808. Hill did not make "..an intelligent and knowing waiver of his right to the assistance of counsel..", Id. 810, 836. Hill did not "...competently and intelligently waive his Constitutional right to assistance of counsel.."; Id. 815. Hill was not permitted: "to make...full Defense, by counsel learned in the law." Id. 825; Hill did not "knowingly and intelligently" forego those benefits; Id., 836.

In short, the foregoing resulted in the loss by Hill of his Sixth Amendment right "In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it", Id. 819.

State v. Cappetta, supra, 918, in language that foreshadowed the presentation of the justification defense in the instant case, requires counsel for Hill:

> In short, the defendant would not fall into that category of persons who would be deprived

> of a fair trial if allowed to conduct their own defense, in short...nor is the crime of which the defendant was accused of such complexity that in the interest of justice, legal representation is necessary.

Paul Hill was charged with four felonies, including two murder charges. He is under a sentence of death. Obviously, the case requires legal representation because the crime of which Hill is accused is "the complexity of the crime was such that in the interest of justice, legal representation was necessary." Capetta, 918.

Carnley v. Cochran, 369 U.S., 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962) involved the prosecution of a defendant under a statute which was subject to a complex constitutional question. Referring to the trial judge, the Carnley Court held that such a complex issue does not permit a person to be tried without defense counsel:

> He did not fully apprise the petitioner of vital procedural rights of which layman could not be expected to know but to which defense counsel doubtless would have called attention. The omissions are significant.

Carnley, at 510-511. (Emphasis added)

In Carnley, supra, 511, there was no examination of perspective jurors on voir dire; no requested jury instructions; no objections were taken during the whole trial; there was no opportunity to gather factual material or even to investigate the facts because of Carnley's incarceration; and Carnley failed to challenge perspective veniremen, all of which is commented upon adversely in the concurring opinion.

Hill was unable: 1) to question on voir dire concerning

publicity; 2) to explore the need for change of venue; 3) to effectively question the veniremen with all the attendant benefits of that questioning; or 4) effectively evaluate whether to take the stand. Further, Hill was precluded from an effective legal presentation of his defense; from obtaining evidence by legal process to protect the record; and inquiring about defending himself. Hill's shortcoming are shown by his inability to object the State's questioning of veniremen, his inability to follow up responses elicited by the State, his failure to probe individual veniremen's knowledge of this heavily media covered event, his inability to both study and emit body language from and to veniremen, to plan a defense, to prepare the defense with witnesses and process, to object to questions by the State concerning church attendance and abortion, and he failed to peremptorily challenge jurors nos. 618, 630, 312, 441, 575, 552, 239, 146 and probe juror 362.

These transgressions in Carnley, supra, pale in comparison to the present case. As the criteria in Carnley were not satisfied, neither are they satisfied in the instant case.

Although Carnley, Id., predates Faretta, the logic in Carnley taken in light of the Faretta mandate, shows the complete failure of Faretta compliance. There was no "intelligent, knowing waiver of his right" supra, 810; no "competently and intelligently" exercised waiver, supra, 815.

U.S. v. McDowell, 814 F. 2d 245 (6th Cir. 1987), approvingly cites Carnley, supra and, comments upon the guidelines for district

judges from the Benchbook for United States District Judges, a portion of which is reproduced in the appendix. (A 10, 11). Significantly, McDowell holds:

> There was thus no occasion in Faretta to lay down detail guidelines concerning what test or lines of inquiry a trial judge is required to conduct in order to determine whether a defendant has 'knowingly and intelligently' chosen to forego the benefits of counsel.

Id. 249. McDowell was not reversed. A defendant must waive "with his eyes wide open". Because Hill did not make a "knowingly and intelligently" choice to forego the benefit of the only defense which he intended to prove, his waiver was invalid.

Accordingly, Faretta admonishes:

> For it is surely true that the basic thesis of those decisions is that the help of the lawyer is essential to assure the defendant a fair trial.

Faretta, at 820. Further, a mechanical waiver of the right to counsel does not waive Art. I, §16, Fla. CONST(a); Fla. R. Crim. P. 3.111(d); and the Faretta requirements:

> We do not suggest that this right arises mechanically from a defendants power and to waive the right to the assistance of counsel.

Faretta, 820, n. 15. Because there is no satisfactory waiver of the constitutional requirements, Hill's case must be remanded for a new trial.

C. THE TRIAL COURT FAILED TO OBTAIN A VALID WAIVER OF THE RIGHT TO COUNSEL

Faretta is not satisfied. That is the critical constitutional shortcoming in the instant case. U.S. v. Berkowitz, 927 F. 2d. 1376 (7th Cir. 1991), 1383 knowingly predicted:

> The appeal will almost inevitably revolve around whether or not the defendant was fully aware of his right to counsel and the benefits he receives because of that right and the pitfalls of going alone.

U.S. v. Welty, 674 F.2d. 185, (3rd Cir. 1982), articulates that if no reason is given for the defendant's dissatisfaction with his lawyer, or if the defendant wanted to proceed pro se, the Court has a duty to inquire into the basis for the defendant's action. The waiver cannot be mechanically applied. In Welty the criteria was mechanically applied and the conviction was reversed, despite the fact that Welty had tried two cases pro se, had been a defendant in two cases in which he was represented by counsel, and he had taken part in other proceedings.

Welty, supra, 187 requires:

> Since the decision to proceed pro se involves a waiver of the defendant's sixth amendment right to counsel, the district court then has the responsibility of insuring that any decision by the defendant who represents himself is intelligently and competently made. (Emphasis added)

U.S. v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988), 732 states:

> The Supreme Court has not yet defined precisely the extent of the Faretta inquiry. But cf. Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S.Ct. 316, 324, 92 L.Ed. 309 (1948) (plurality opinion of Black, J.) ("To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.") (Emphasis added).

The trial court's inquiry was insufficient and does not satisfy the

Faretta requirements. As Moya-Gomez explains:

> Whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. Johnson v. Zerbet, 304 U.S. 458...

As the Record clearly shows the waiver requirement is not satisfied.

Black's Law Dictionary-5th Ed defines voluntary as "elects to do so, done freely without compulsion, controlled by will." Intelligently is defined as "having or shown intellect, which is the power of knowing, the capacity for knowledge, the ability to learn."

To satisfy these two requirements, Hill would have had to know what it was that he was waiving. He would have to know: 1) there is a legally cognizant defense; 2) that a factual basis would have to be laid for that defense to be made; 3) that facts and law had to be investigated, prepared, marshalled, and prosecuted; 4) the availability of compulsory process to obtain witnesses and documents; 5) what kind of jurors he wanted; and, 6) how to plan the presentation of that defense to convince a jury. Only after that "intelligent" requirement is satisfied, may Hill voluntarily "waive". Because there is no evidence of the "intelligently" requirement, "voluntary" cannot be satisfied.

If one doesn't know what one is going to waive, the act of waiver cannot be voluntary. Implicit in the word "waiver" are the concepts of doing something freely, without compulsion, and controlled by the will. An unknowing waiver is no waiver at all. It cannot be "intelligent." It is not "voluntary." Therefore,

neither prong of Faretta is satisfied.

This is what the Faretta Court had in mind when it combined "intelligent" with "knowingly." Id. 836. Black's, supra, defines the "knowingly" with knowledge; conscientiously; intelligently; wilfully; intentionally." It is inconceivable that one could "knowingly" waive anything about which he has no knowledge. In the instant case that Hill had no knowledge of how to present the justification defense, nor was he asked by the Court if he intended to present this or any other defense.

Statements by Hill cannot constitute a valid waiver because the required Faretta criteria is not present in the Record. Hill could not "knowingly and intelligently" waive. He had neither the "comprehension" nor the "capacity" to make an intelligent and understanding waiver "because of the nature or complexity of the case." The waiver is not valid because Hill was not told, nor did he know, the factual predicates necessary to assert the justification defense. The Court made it clear: Faretta means what it says. The right to waive does not arise mechanically, Faretta, n. 15. There is no waiver in the instant case.

Jones v. State, supra, 121-122 in dicta permits the State to inquire into Faretta issues (as was done in the instant case). The State then assumed the duty to delve into the Faretta requirements and to undertake them in a reasonable and fair manner consistent with a prosecutor's oath to seek the truth.

The State knew that Hill was relying on that defense (R 221) and successfully sought to preclude that defense. The State,

however, did not alert Hill to the requirement that he had to present a factual basis for the defense. Therefore, there was neither a "voluntary and intelligent" exercise of a waiver by Hill, nor was there a relinquishment of that right. The Faretta requirement, supra, 815 that Hill "...competently and intelligently waive his constitutional right to assistance of counsel" is not satisfied either.

Competent means "duly qualified; answering all requirements; having sufficient ability or authority;..." None of the requirements as to the defense Hill should have proffered have been satisfied. It can hardly be suggested that he "answered all waiver requirements." Similarly, if he does not know, nor was he asked, what defense, if any, he was going to offer, or wanted to offer, then one cannot say that Hill had sufficient ability to put on that defense. Certainly, in the instant case, Hill did not have the ability to put on that defense, to question veniremen, and suffered from other shortcomings of a pro se defendant.

The voluntary, knowing, intelligent, requirement of Faretta, the Art. I, §16, Fla. CONST(a), and Fla. R. Crim. P 3.111(d) have been violated. In addition to the catastrophic inability "..to make a defense as we know it".

In Faretta, Id. 837, the trial judge warned Faretta that it was a mistake not to accept the assistance of counsel and that Faretta would be required to follow all the ground rules of trial procedure:

> We need make no assessment of how well or poorly Faretta had mastered the intricacies

> of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to the assessment of his knowing exercise of the right to defend himself. (Emphasis added)

These technical comments have no bearing on the instant case. The reason that Faretta was not satisfied in the case at bar is that Hill's fundamental right, the constitutional right "...to make a defense as we know it" and emphasized by the Fla. R. Crim. P. 3.111(d), was violated.

The failure in the instant case is not because of the intricacies of the hearsay rule or the code provisions which govern challenges to voir dire. Rather, the failure to tell Hill that if he had a fundamental defense that he wanted to articulate, then he had to prepare the factual basis to introduce it.

Hill was not apprised of the hazards of self representation. The trial court had a duty to explain to Hill that he would have to marshall the facts to apply to the law to present his legal theory. In addition, the court should have told Hill that his incarceration would make it impossible, to accomplish what he wanted. That failure by the court is fatal.

In short, the trial court's failure to comply with Faretta requirements caused exactly the situation that Faretta intended to prevent. As a result, Hill's appeal for a new trial must be granted.

The Record demonstrates that Paul Hill did not knowingly, voluntarily, and intelligently waive his right to counsel.

Further, the Record proves that he did not have a comprehension of the nature or complexity of the case. There is no evidence of Hill's valid waiver of his constitutional right to the assistance of counsel, so that he might "make a defense as we know it." Clearly, United States v. Morgan, 346 U.S. 502, 98 L. Ed. 248, 74 S. Ct. 247, places the burden of proof upon the State to prove an intentional relinquishment of that right. The State cannot show it because it is not there.

In response to the Court's inquiry (R 50-55), Hill acknowledges that both Attorney Loveless and Attorney Murray are experienced qualified advocates. In further response to the Court's inquiry, Hill states that there are a variety of reasons which Hill does not want to go into. Despite his fear and trepidation, he wants to pursue the direction of self-representation. Unbelievably the Court states (R 53): "I don't want you to be specific, because obviously you don't want to be specific with me." The trial court had an affirmative duty to be specific.

Except to say that his purpose is to glorify God, Hill states that he knows the legal system is very complex and that he has no pretense of understanding American jurisprudence. Hill also admits that his experience is limited to a church trial, so he could muddle around. Hill acknowledges that he is inhibited by trying to prepare the case in jail (R 58-60); that he knew a few Latin phrases; that he is a poor typist, (R 71); and that he knew there was a library in the jail but had never used it (R 72).

Indeed, the State followed up the statement (R 52) that Hill did not want to discuss why he did not want the public defender to represent him. The prosecutor asked that if Hill wanted a lawyer, would he be comfortable with Attorneys Loveless and France. Interestingly, the answer by Hill was cut off by the State. That answer is "with the reservations they have expressed that..." and the State never permits, nor does the Court, Hill to finish his response, except, (R 82) Hill states in response to the question of whether there is some other lawyer that could better represent you, Hill states "It's entirely possible." The Court should have inquired of Hill as to what he meant. Both Faretta and the Rule require that inquiry.

In contravention to the federal rule, the judge urged, and the State questioned, Hill. Particularly, Hill was asked whether he knew how to lay a foundation for questions and how objections were made and sustained. When Hill said that he understood, he was instructed that he would be treated as any other litigant. This does not satisfy Faretta. This does not constitute a valid waiver of counsel.

Two weeks prior to the instant case, Hill was convicted for the same incidents in the federal court where the justification defense commented on by Judge Vincent (A 1-9). The State and the trial court had complete knowledge of that trial and the preclusion of the justification defense. Yet, not a question was posed to the veniremen if they had any knowledge of the federal court trial which took place in the same area immediately before

the instant case. The State and the court had first hand knowledge that Hill intended to rely upon the justification defense. The Court had a duty to obtain a meaningful, voluntary, knowing, intelligent, and comprehensive waiver of Hill's right to counsel and to explain to Hill the fundamentals of providing a factual basis to present a legal defense. Hill was not informed, neither did he understand that he must introduce facts in order to provide the foundation to utilize his legal concepts. Nowhere in the Record is Faretta satisfied.

1. **HILL WANTED TO BE REPRESENTED BY COUNSEL**

That Hill wanted counsel is proven by Hill's request to the court to have Attorney Heuser represent him (R 248); at a later time, that Attorneys Heuser and Hirsh represent him, (TR 661-664; A 121 - 124), the motion by Attorney Heuser to appear pro hac vice, (R 232, 233) the motion by Attorneys Hirsh and Heuser to file an Amicus Curiae Brief (R 368, 369), and the request by Hill (TR 661-664; R 218-220; A 121 - 124) that those attorneys represent him in the case. Hill stated, that he did not want to proceed without counsel and counsel had been present in Court the entire time (TR 661-664; A 121-124). Clearly, Faretta is not satisfied.

Additionally, in the Faretta hearing before the Honorable Elzie S. Sanders, Circuit Judge, on May 16, 1995, page 13 of that transcript, Judge Sanders inquired whether an appellate lawyer should represent Hill to allow the Court to discharge its constitutional obligation to see that the death penalty is carried

out fairly and pursuant to law. Hill responds that he will not be permitted to argue that before this Honorable Court.

Although Judge Sanders' offered comments about the disadvantages of self-representation, that generic inquiry does not raise the issues required by Faretta. Hill did not understand because he is not skilled in the technicalities of trial. He cannot present the defense that he wants to present, indeed, the defense he firmly believes God wants him to present. It must be spelled out to Hill. It was not. Thus, there can be no compliance with Faretta and Fla. R. Crim. P. 3.111(d).

Further, transcript 18, Judge Sanders speaks of the Supreme Court wanting assurance that the trial judge had the benefit of the adversarial process. There was no adversarial process before the trial judge. Judge Bell admitted that when he said: "Mr. Hill is doing everything that he can to make it nonadversarial." (TR 687; A 146)

Again, page 20, as late as May 16, 1995 Hill had not had any legal training on the justification defense. Most interestingly, at page 23, Judge Elzie S. Sanders said, referring to attorneys from other jurisdictions:

> You know, the location is not important, but do you routinely..or you have access to other attorneys that could counsel with you and advise you...

That is the issue. It is abundantly clear that Hill was incapable, because of the incomprehensible and overwhelming details of presenting the affirmative justification defense.

Judge Vincent (A 1-9) succinctly spells out that problem,

which is proof that one cannot satisfy Faretta or the Fla. R. Crim. P. 3.111(d), so as to constitute a valid waiver. Judge Vincent is not a layman. Paul Hill is. Paul Hill needed counsel. Paul Hill asked for counsel. Paul Hill did not get counsel.

2. THE TRIAL WAS A "COMPLETE TRAVESTY"

The trial court should not have allowed Hill to proceed pro se because the criteria articulated in Faretta, Art. I, §16, Fla. CONST(a), and Fla. R. Crim P. 3.111(d) were not satisfied. When the State filed its Memorandum in Support of its Motion in Limine, it cited Zall v. Steppe, 968 F. 2d, 924 (9th Cir. 1992), and it appended to its memorandum State v. Judith A. Madsen, Pinellas County Court Case number 89-15146 (R 208-216), both of which specifically permit, indeed require, evidence in support of the justification defense.

The Court states (R 228) that the Court received memoranda last week, but the State's brief was stamped in at 9:33 on October 24, 1994 (R 201) with the certification that it was hand delivered to the defendant on October 24, 1994 (R 207), the date the parties appeared in open Court (R 217). On that day Attorney Heuser filed a motion for appearance pro hac vice which was objected to by the State, Heuser was not permitted to help Hill, and in response to the Court's inquiry if he wants to respond, Hill states:

> No, sir. Since you've disallowed the attorney to speak for me, I'll just let my brief speak for itself. (R 226, 227; A 109, 110)

The aforesaid justification defense colloquy took place on the very date that the State's brief was filed (R 221, lines 15-19; A 104).

This unfair procedure is difficult enough for a seasoned lawyer, but is insurmountable for an unrepresented layman.

By not requiring Hill to have counsel, the Court permitted, as articulated by Attorney Loveless, the trial to be a "complete travesty" (TR 680-688; A 139-146). Indeed, the trial court admitted that if Hill were represented, there:

> I'm sure that there has been some things in the first stage of this proceeding that you might have objected to. And I would have been more than happy to hear arguments from both sides and make rulings (TR 684; A 143).

Further the court stated:

> and I understand that during the course of the trial, that I have looked over there and you have been paying attention and I know that there have been times when if you would have been trial counsel, that you would have been on your feet... (TR 686; A 145).

Within two days of the denial of Hill's request, the trial court granted the State's Motion in Limine without the benefit of oral argument. Again, an insurmountable problem for a pro se defendant. The same impediments present in the trial court are present in the hearing before Judge Sanders who took judicial notice of the Faretta material in the trial court. This is particularly so in view of lines 23 through 25 on page 13 of that transcript. In response to the inquiry by the judge of the constitutional obligation of the court to see that the conviction and the penalty are carried out fairly and pursuant to law, Hill states:

> If that were, in fact, an issue that needed to be addressed by myself, I'm certain I could address it, Your Honor.

Therein lies the problem: A layman representing himself was never told, and therefore did not understand, the factual predicate necessary for the complex and terribly technical aspects of the justification defense.

Illustrative of the non-compliance with the Faretta requirements is the question by the trial court: (A 1 - 9; A 115)

> ...Do you remember the questions that I asked you when we went through that Faretta hearing?

Response by the defendant:

> "In what sense do you mean, do I remember them."

It is not sufficient that the prophylactic statement "I hereby waive my right to counsel" was uttered. As Faretta, supra, 820, n. 15 states:

> "We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel."

Applying that statement to the instant case. The principle of Faretta has been violated--so have Hill's rights under the Sixth Amendment:

> "In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."

Faretta, 819.

This case fails to indicate the right in an adversary criminal trial to make a defense as we know it.

> "Even the intelligent and educated laymen has small and sometimes no skill in the science of law. If charged with a crime....He lacks both the skill and knowledge adequately to prepare his defense, even though he has a potential one...If in any case, civil or criminal, state or federal court was arbitrarily to refuse to hear a party

> by counsel...It reasonably may be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense", [Emphasis added]

Faretta, supra, (832) citing Powell, supra, (69; 64) (Emphasis added). That is precisely what's involved in the instant case.

Therefore, there has been no compliance with: "[T]he exercise of a free and intellectual choice." Faretta, Id. 814. The choice was not "competently and intelligently" made Id.; it was not "an intelligent and knowing" waiver [Id. 809]; it was not "a knowing and intelligent waiver" [Id. 812 N. 7]; it was not a situation in which a defendant "voluntarily and intelligently elects" [Id. 812 N. 7]; it was not an election "knowingly and intelligently" made [Id. 836]. Hill did not possess the requisite "comprehension" of "the nature or complexity of the case" so that he could not make an "intelligent and understanding waiver" [Fla. R. Crim. P. 3.111(d)] and, therefore "violating the Sixth Amendment right." "In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it". [Faretta, supra 818; 2533]. Therefore, if the admonition [Faretta, Id. 820; 2523 N. 15] "we do not suggest that this right arises mechanically from a defendant's power to waive the right of the assistance of counsel", the law as set forth in Faretta and by Fla. R. Crim. P. 3.111(d) has been violated."

II. THE ERRORS COMMITTED DURING SELECTION MANDATE A NEW JURY SELECTION

Voir dire is restricted to those questions which are pertinent and proper for testing the capacity and competency of the juror,

and which are neither designed nor likely to plant prejudicial matter in juror's minds. State v. Skipper, 228 Conn 610, 626 (1994). The State has violated this standard.

Certainly there would be no prohibition if either the State or the defendant inquired of the members of the panel if any of them had such strong beliefs, either in favor of, or against, abortion, that they could not fairly decide the case. For example, it would have been proper to ask a veniremen that if the evidence might indicate that the decedents exited their vehicle to go into the Ladies Center in order to perform abortions, would your belief concerning abortion be so great that you could not set that belief aside, and fairly decide the case solely upon the evidence presented at trial? This is not a case in which a religious belief is involved, it's a case in which a fair question would involve the ability of a perspective juror to set aside her or his beliefs on abortion to fairly decide the case. For that reason, it was improper to ask the question on church attendance. 95 ALR. 3rd 172, 179.

Jury selection is covered from pages 15 through 168 of the transcript. Jury selection commenced at 9:45 p.m. (TR 17) and terminated shortly before 3:00 p.m. (TR 168).

The local media coverage from the moment of the occurrence through the entire trial was intense, commencing with the underlying occurrence took place, and was still intense less than two months later when jury selection process commenced. The court instructed the media that perspective jurors will not be filmed,

but anything else in the proceeding could be recorded.

The State inquired if there is any member of the panel who has not heard about the case. Everyone (TR 45), except three people (TR 47) had. Despite this, not one question was asked concerning the nature and extent of that exposure, what conclusions had been reached, and whether those conclusions could be set aside, and the verdict limited to evidence presented in the courtroom.

The judge suggested jury selection to be a procedure that:

> What we could do and I'll be happy to receive any suggestions that anybody wants to make, as we could take the first 14, left, left or right, or right to left, row no. 1 or the last row, any way y'all wanted to do it. We can draw lots for red and go ahead and seat them over here in the jury box and let the voir dire begin as far as guessing is concerned. Does the State have any preference on this? (TR 24)

The State requested that the Judge keep the entire group of 75 persons there and suggested:

> that the first 14 jurors presumptably be the jury and then as each strike, if there are any strikes made---. (TR 24)

That was agreed to by Hill. The State had a seating chart and the questionnaires before it (TR 27) Hill had not seen the chart until moments before the voir dire began (TR 27). This tactic was manifestly unfair, as Hill should have exercised at least nine of the twelve jurors.

The State told the panel that:

> This is an extremely important case to the community, (TR 28),

and told the jury how important the jurors were because it was

their courthouse; and without them, the system would be stopped dead in its tracks; that it's the highest service other than service in wartime. The State admits that his comments sound: "a little bit like flag waving." (TR 29).

The State then comments to the entire panel: (TR 65)

> MR. MURRAY: Do all of you understand that the jury's only role is to determine the facts and apply them to the law and come back with a verdict, it is the Judge's decision to impose a decision of guilt or decision of punishment. That is the Judge's decision, it is not the jury's decision. Ok... (Emphasis added)

That is an improper, clearly erroneous, prejudicial misstatement which required a mistrial, as the law is clear that a jury must be told, in a capital case, that the jury is the only entity to determine whether a defendant is subject to the death penalty. It is essential that the jury not be:

> Led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Caldwell v. Mississippi, 472 US 320, 329, 105 S. Ct. 2633, 86 L. Ed. 2d 231. It is essential that the jury fully be instructed and understand that without the jury, and the jury alone, making the fatal determination, there can be no death penalty. The jury must understand that the death penalty cannot be imposed unless they say it should be imposed, and, as held in State v. Breton, 235 Conn 206, 249 (1995) and in commenting on the federal cases, the Court held:

> ...That the Court is bound to impose a sentence in accordance with the jury's finding on mitigating and aggravating factors

> and, consequently, <u>that the responsibility for deciding whether the defendant will receive a sentence of death or life imprisonment without the possibility of release rest with the jury</u>. (Emphasis added)

<u>Breton</u>, 235 Conn. at 249.

The aforesaid erroneous comment by the State was such an egregious error that Judge Bell even called the State to the bench and commented: (TR 66)

> You asked the question about it's going to be the Judge's decision to impose punishment in this case and it's going to be your decision to determine whether or not--guilt or innocence. I don't want any individual jurors in this particular case to have the understanding that they don't have a major, major advisory role at the punishment stage.

To that, the State responded:

> I'll make that abundantly clear. You're correct Your Honor. (TR 67)

This illustrates the point that a mistrial should have been granted. At the very least the Court should have, in no uncertain terms, corrected that prejudicial, blatant misrepresentation of the law with appropriate sanctions.

Despite the admonition of the Court, panel member 84 who had raised her hand stated, returning to the State's explanation:

> Your explanation took care of it that you just gave us.

Followed by this question by the State:

> MR. MURRAY: Ok, you won't have any difficulties with that? (TR 67)

In a semblance of compliance with the Court's order, much later, the State commented to the panel that in a capital murder

case, if the jury finds the defendant of first degree murder:

> There is going to be a second proceeding. A second proceeding is not connected to the first proceeding except that is the same case... (TR 125)

With a comment concerning aggravating and mitigating circumstances, the State added:

> ...You're going to look at the mitigating circumstances and you're going to make a factual determination of whether one outweighs the other and if the aggravating circumstances outweigh the mitigating circumstances then the jury would come back with the recommendation of death.
>
> Now that's a harsh thing, that's a harsh thing, it's a harsh thing for anybody. If you found on the other hand that the mitigating... (TR 126)

Again, that does not satisfy the clear mandate of Caldwell, supra. The State then says: (TR 127)

> The advisory opinion that the jury comes back with carries great great weight with the Court, it is a very, very important aspect of this proceeding. It's not something that the Court takes lightly, the Court is required under our law to give great great weight to the jury's opinion in that particular regard.

That statement falls far short of the mandate that is the jury alone which can determine whether a defendant can be put to death or not. That is the law, and it is the question that must fairly and clearly be presented to the jury. The jury must understand that it is the jury, and the jury alone, which determines whether or not a defendant lives or dies. The lack of a defense counsel at this juncture of the proceedings was catastrophic.

The State, rather than obeying the order of Judge Bell to clear up its prejudicial misstatement as to the function of the

jury, proceeded to ask the panel:

> How many of them, attend church on a regular basis, meaning one or more times a week. (TR 68)

This question should have been objected to and stricken. In addition to disobeying Judge Bell, it has absolutely nothing to do with the ability of a person to sit as a juror. What it does do-and the clear intent of that question-is to flush out every person who responds affirmatively because that juror would be against Hill, because there is not a major religion which preaches the killing of an abortionist.

Whether a person attends church weekly or more than a weekly basis has nothing to do with that persons qualifications to sit as a juror. That question should have not been permitted. For example, People v. Velarde, (1980 Colo.) 616 P. 2d 104 prohibits that inquiry in a case where a person is prosecuted for aggravated robbery and conspiracy involving no religious issue. Neither does the instant case. Clearly, the State was seeking an unfair advantage against the pro se defendant by removing from the jury anyone who would in any way sympathize with Hill.

It is one thing to ask if a person has any religious beliefs which might impact on that persons ability to sit as a juror in a particular case, and depending on the response, to follow up those questions. It is quite another for the State to ascertain those persons with a religious belief contrary to Hill's (particularly in view of the granting of the State's Motion In Limine which prohibited the justification defense). The State's follow up

question (whether this case has been discussed) simply compounds the already fatal error.

The State also asked: (TR 92, 93)

> Do any of you, for those of you who are students of the Bible, do any of you feel that there is Biblical teachings that support the use of force or violence against another person with whom you disagree?

Again, that is not a permissible question. It has nothing to do with a person's ability to sit or not sit on a jury. The justification defense was not permitted in the case, and the State well knew that. It's motion was granted before the panel was interrogated by the State. Anyone who answers that question in the negative, is telling the State that there is never justification for killing. The question should have been objected to, not permitted, and a motion for mistrial should have been sustained. (TR 92)

The next question is:

> Do any of you think because somebody believes the Bible would support that, even though you don't agree with it but do any of you feel that because of some person's view of the Bible supports that, that that would excuse criminal conduct? (TR 93)

That was followed by:

> Would all of you agree with me what we're really talking about goes to the heart of our society and whether or not we agree to live by a system of laws and a constitution. Would all of you agree with me on that? (TR 94)

All of the perspective jurors nodded affirmatively. With that first question, followed by the subsequent two questions, the State effectively extracted the promise of jurors to find Hill guilty of

the crimes charged. The justification defense was stricken, and so was Hill's legal basis that he be found not guilty.

And the State premised its question on "criminal conduct" (TR 93). This is grounds for a mistrial, not able to be handled, however, by a pro se defendant.

The State further asked whether any member of the panel did "not have a firearm in your home". (TR 94) This has nothing to do with the ability to sit as a juror. It had everything to do with the State ferreting out any member of the panel who would be sympathetic with Hill. The State then inquired:

> Has anybody in here been touched, and when I say touched, I'm talking about yourself personally or your family, a close friend -- I'm not looking for any details, but have any of you folks been touched by the issue of abortion. (TR 78)

This is an objectionable question because anybody who has been "touched by abortion", is a person that would be sympathetic towards abortion and its performers, and antagonistic towards Hill. It is one thing to ask the panel that, if in the course of the trial, it becomes apparent that abortion plays a part in the case, would that fact, no matter which way one views abortion, preclude you from sitting objectively on the case and decide it only on the evidence presented in the court room. The latter is not what was done here, and what was asked on page 78, and is improper.

The State then commented to the jury that:

> A woman has a constitutional right, if she chooses to do so, to terminate a pregnancy within the first or second trimester. (TR 90)

Again, the justification defense have been ruled out by the court,

at the State's request. This comment by the State, therefore, is totally inappropriate as no such issue was presented in the case. It has absolutely nothing to do with the State's proof against Hill. The State knew that Hill was going to put on any justification defense because its motion had been granted. The statement was prejudicial and improper, should have been objected to, and never should have been asked.

The following page sets forth nine of the twelve jurors selected.

<u>Jury</u>

No. 618 TR 39 Knows Steve Banakas, Lt. with Pensacola P.D. No, it would not effect him, but he did have an interview with the Lt. Also went with his son to a courtroom and State's attorneys office caused him no concern. (TR 54)	No. 30 TR 69 Case mentioned in church. Goes to church one or more times per week; Pastor mentioned the case, no effect. (Would have no effect on juror)	No. 312 TR 100 Knows No. 448's daughter. TR 59; 448's daughter's house broken into, satisfied with sheriff. TR 79 448 has been touched by abortion - her daughter Same person No. 312 knows TR 127
No. 441 TR 101 Wife of 301 (TR 93), 301, although a Bible student, that does not justify killing	No. 575 TR 78 This woman has been touched by abortion but would have no difficulties	No. 552 TR 68 Attends church one or more times per week

sitting

No. 239	No. 362	No. 146
TR 40	TR 94	TR 75
Knows Lee Jennings an Officer with the Pensacola P.D. who was a close friend of nephew	Knows nothing about guns	Attends church once a week or more. Case has not come up.

As can be seen from the aforesaid nine jurors, No. 618 not only had an interview with Lt. Steve Banakas, but 618 also went with his son to a courtroom and was not caused any concern by the State Attorneys office. Certainly any lawyer representing a defendant would inquire exhaustively of No. 618, and most probably exercise a peremptory challenge.

Juror No. 30 falls into that category of people who go to church once a week or more, the pastor mentioned the case, and it would have no effect. Clearly, as with Juror Nos. 552 and 146 who attend church one or more times per week, no organized religion would state from the pulpit that one should shoot abortion providers, therefore these three jurors also were predisposed against Hill, and, again, no questions were asked by him of these jurors.

Juror No. 312 knows No. 448's daughter, and 448's daughter's house was broken into, satisfied with the sheriff, and 448 has been touched by abortion-her daughter, the same person that No. 312 knows. As with Juror No. 575 a person who has been touched by abortion, and would have no difficulty sitting, they are obviously pro-abortion people, and Hill had a duty to delve into that with them to see if it impacted on, indeed precluded, their ability to

sit. The State, by asking the improper questions as aforesaid, has taken unfair advantage of Hill. Juror No. 362 knows nothing about guns, not interrogated by Hill, and a pro prosecution person because of the shootings involved in this case. Juror No. 239 knows an officer with the Pensacola P. D., Lee Jennings, who was a witness in the case, and who is a close friend of the juror's nephew. Again, that had to be delved into by the defense, as the State never inquired as to that as were none of the aforesaid nine. For that reason, the lack of a Faretta hearings so tainted the panel and the jury that a fair trial was impossible.

Another proof that Hill's Faretta waiver is invalid is shown by Juror No. 546 who indicated that he knew a State's witness, Ms. Pinch, who is his co-worker. When asked by the State if that would make it more difficult for him to evaluate her testimony, 546 initially indicated it would. Because of that initial response, the State moved to strike 546 for cause, claiming that 546 could not fairly evaluate Ms. Pinch's testimony (TR 154).

In further response to the State's question if 546 would give Pinch's testimony greater or lesser weight because of knowing her, 546's response is "no, sir" (TR 35). At a bench conference, when 546 changed his answer, because he said he was nervous, and said that he would be able to evaluate her testimony, and it would not be a problem for him, and, in response to the State's question:

> Do you have a view of whether or not Ms. Pinch is an honest or truthful person?

The response was:

> Yes, sir, she's truthful. (TR 155, 156)

The Court asked Hill if he had any questions and he said he did not. The State (TR 157) withdrew its challenge for cause, obviously because of the affirmative response that it got. Hill said that he would not exercise a challenge on her (TR 157, 158). That simply is not fair and proves that Faretta was not satisfied.

During the entire 150 pages of jury selection, Hill asked no questions. He did not even know enough to ask the court to strike Juror No. 65. whose daughter works for the State's Attorney Office. [V. 1 P. 150 - 154]. Hill did not exercise any peremptory challenges. [V. 1 P. 164] It is clear that Hill had an absolute duty to closely interrogate the nine jurors seated, and he should have exercised his challenges for cause and or exercised a peremptory challenge so that those nine would not have sat on the case.

Like the defendant in Powell v. Alabama, 187 U.S. 45, 69 (1932), Hill:

> ...lacks both the skill and knowledge adequately to prepare his defense, even though we have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

This is not a claim by the undersigned that a skilled lawyer has the ability to read body language; a knowing meeting or non-meeting of eyes; the ability to start selling one's case from the addressing of the panel to the final argument in the case; the nuances of ingratiating oneself to a juror; selling, by implication, of the client to the panel; the hesitancy in a

perspective jurors response; the age factor; the gender factor; the race factor; and the like. The shortcoming here is basic. There has been no meaningful effort to provide a defense as we know it, and the lack of a meaningful Faretta hearing requires reversal.

Further impacting on the pro se representation in the instant case is Zal v. Steppe, Warden, 968 Fd. 2d. 924, 933, citing Griffith v. Florida, 548 So. 2d. 244 (1989) and Gilbert v. Florida, 487 So. 2d. 1185 (Fla. App. 4th Dist. 1986), in which a motive was permitted to be articulated by a defendant even if not a lawful defense. This holding is important both in the guilt and penalty phase of the trial. So, too, the technicalities presented to Hill, which he could not understand unless he were a lawyer.

That which might otherwise be criminal conduct, if committed for the purpose of preventing an imminent greater harm, is a viable defense. No factual foundation was presented by Hill, because the Faretta hearings are silent as to the necessity of that foundation, and therefore, his mental process never came into being, and it should have. By the same token, the comment by the State that the law of the land is that a woman may obtain an abortion through the termination of the second trimester, simply is something made without evidence, without expectation of evidence, and unsupportable by the record-and it is highly prejudicial to Hill.

The jury selection in this case is in violation of the Rule as set forth in Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1349 (1935), that the interest of the State in a criminal prosecution "is not that it shall win a case but that

justice shall be done". The State has violated that edict.

III. HILL'S NON-PARTICIPATION IN THE TRIAL OF THE CASE

This case involved 27 witnesses on the guilt phase of the trial (TR 199, 398), and 113 exhibits. Hill had no questions of any of the witnesses (TR 214, 222, 229, 237, 256, 260, 268, 279, 287, 327, 333, 350, 357, 367, 396, 406, 411, 419, 424, 428, 440, 451, 467, 471, 509, 549, and 563.)

There are several references in the transcript which, if Hill were represented, objections would have been made and sustained. For example, Vowels has stated that after Hill was up that he stated:

> At least there will be no more babies killed there today. (TR 287)

There is absolutely no question that Hill was handcuffed, under arrest, and there is no indication that he was given any Miranda warnings (TR 286, 287). Officer Holmes testified that he knew Hill from previous meetings, protests, and a prior (prejudicial) arrest of Mr. Hill on which they were involved he had seen Hill with signs and posters, introducing 25A into evidence in which it reads:

> "Execute, murderers, abortionists, accessories."

That was not anything that took place the day of the occurrence, and should have been objected to (TR 306-308). Similarly, because of no Miranda warning, Officer Holmes was permitted to testify as to the "no innocent babies are going to be killed in that clinic today" (TR 327). Officer Ordonia again, with no connection to the day in question, testified that he observed Hill more than a year

before walking with an empty gun holster, and Ordonia testified that Hill was an advocate of violence as far as abortion was concerned. So, too, he testified as to the "he stated no innocent babies will die in that clinic today", again in violation of Miranda (TR 330-332). The State utilized the signs used one year before to indicate "...one of these signs was prophetic in the sense that it was a glimpse of what was going to happen on July 29, 1994. You are going to see photographs of the defendant carrying the signs that say execute abortionists and accessories," (TR 179, 180), and the State articulates in its opening statement:

> On July 29, 1994 the defendant showed clearly what his views and beliefs were, and that's what the evidence is going to show.

However, the State successfully moved, in limine, to prohibit any such evidence to be offered by the defendant. Having excluded the justification defense, and knowing that the defendant did not even know how to proffer a factual basis for the introduction of such a defense. The State improperly introduced this issue in its opening statement. And, the State further articulated in its opening statement (TR 196):

> The defendant makes a statement at the time he's arrested [he had already been arrested]. He told the officers--it was overheard by a citizen also--I know one thing, there will be no babies killed in that clinic today, which ladies and gentlemen, is a confession to two murders, one attempted murder and one shooting into an occupied vehicle.

This improper, introductory statement is based upon evidence the State thinks is going to come in. The State's evidence never would have been admitted had Hill been afforded a lawyer because of the

Miranda failure to warn. The statement is grossly prejudicial because it sets the tone even before the evidence starts Hill did not make an opening statement.

A. THE JURY WAS IMPROPERLY INFLUENCED

The issue of the manikins which were left in the courtroom and placed adjacent to the jury room throughout the trial, with rods in them simulating the course of the bullets and pellets dominated the courtroom constantly impacting on the minds of the jury. The Court's attention is directed to the colloquy between the Court and the State (TR 635). The Court states:

> What we are going to do then is be in recess. I would like, as I indicated to the jury, I want every piece of paper out of this room except exhibits that have been introduced into evidence. Now, I might have missed it myself. I don't know whether I did or not. I think those manikins were not introduced into evidence. (Emphasis added).

"MR. MURRAY: That's correct, they have to go." (TR 635; 585; 587)

The manikins about which the Court and the State speak were never introduced into evidence, and, as aforesaid, stayed in the case, in front of the jury from beginning to end. In fact, they were next to the jury room door. During each recess each juror had to pass these life-sized manikins demonstrating the path of the bullets. That would not have happened if Hill had been afforded defense counsel, which he should have been because he did not validly waive the presence of counsel.

The situation of the examination of Bruce Barrett (TR 677-679), followed by Attorney Loveless's insightful colloquy (TR 679-694), indicate why this case never should have been permitted to

go forward without a lawyer. (A 121 - A 153)

The State's argument, and this was made after the State knew that Hill had waived his opening argument at the conclusion of the case, (TR 579) states an applicable part:

> On the evidence that you have before you in this case and ladies and gentlemen, your common sense should tell you that this is an air tight case, air tight, overwhelming, unrebutted case. (TR 595)
>
> ***
>
> Ladies and gentlemen, everybody in this courtroom, in this community, in the State of Florida is depending upon you to go back into that jury room and return a wise and just verdict according to the law that the Court is going to give you. Go back and return verdicts as charged in the indictment and let your verdict speak the truth, guilty, guilty, guilty, guilty. Thank you very much. (TR 597, 598)

This is an improper argument because, in an unrepresented case, it amounts to jury nullification. The issue is not that everybody in this courtroom, everybody in the community, everybody in the State of Florida is depending upon you to come back guilty. The issue is on the evidence presented in the courtroom you should find the defendant guilty. It amounts to jury nullification to threaten the jury with everyone in the courtroom, everyone in the community, and everyone in the State of Florida expecting guilt. Of course, Hill had nothing to say. (TR 598).

Significantly, the foreperson is number 552, who attends church once a week or more frequently. See page 34, ante.

B. THE JURY WAS IMPROPERLY CHARGED

The State wrongfully stressed the issue of abortion-claiming that anyone who has anti-abortion sentiments somehow violates the

United States Constitution. The State knew that abortion was not an issue because its motion had been granted. Yet the State permitted the trial court to charge:

> A killing that is excusable or was committed by the use of justifiable deadly force is lawful. If you find that John Bayard Britton and James Herman Barrett were killed by Paul Jennings Hill, you will then consider the circumstances surrounding the killing and deciding if the killing was murder in the first degree or was murder in the second degree or was murder in the third degree or was manslaughter <u>or whether the killing was excusable or resulted from justifiable use of deadly force. The killing of a human being is justifiable homicide, and lawful if necessarily done while resisting an attempt to murder or to commit a felony upon the defendant or to commit a felony in any dwelling house in which the defendant was at the time of the killing</u>. (Emphasis added)
>
> The killing of a human being is excusable, and, therefore, lawful under any one of the following three circumstances. No. 1 when the killing is committed by accident and misfortune in doing any lawful act by lawful means with the usual ordinary caution without any unlawful intent or No. 2 when the killing occurred by accident or misfortunately in a heat of passion upon any sudden and sufficient provaction or No. 3, when the killing is committed by accident and as fortunately resulting from a sudden combat. If a dangerous weapon is not used and the killing is not done in a cruel or unusual manner. (TR 600, 601)

Because the justification defense was precluded and because the <u>Faretta</u> hearings had not yielded a knowing, voluntary, and intelligently waiver, the charge by the court was <u>without any basis in evidence</u>. This proved to be tragically detrimental to Hill. The jury had to wonder why Hill, if this were the law, did not offer any evidence of it.

This is made more clear when the jury had a written question which the court declined to answer. The lack of a lawyer during this portion of the charge is fatal. Further, the justification defense also applies to the taking of a life to prevent a greater harm, and the Court failed to charge accordingly.

The same error in the charge is reiterated by the Court in commenting attempted first degree murder (TR 608, 609). Because he didn't understand the rules of evidence, Hill did not object to a charge on those statements which were inadmissible as to what he did. Of course, Hill had no objection to the charge (TR 634).

IV. THE ERRORS COMMITTED AT TRIAL RESULTED IN A VIOLATION OF HILL'S RIGHTS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION. THEREFORE, THE APPEAL MUST BE SUSTAINED AND A NEW TRIAL ORDERED

Hill did not take the stand. The first time that Hill was told that he had to make a legal decision on whether the court should charge the jury that it should not make any adverse inference from Hill's failure to testify, or whether the court should not comment at all on Hill's failure to testify was when the State (TR 474), commented to the court:

> These are the standard jury instructions. They do include the instruction pertaining to the defendant not testifying which, of course, are only given if that's the wish of the defendant and he can discuss that with his attorney.

The court then offers to give Hill the chance to take a break and talk to standby counsel to see what Hill's desire is. Twenty minutes later (TR 476, 477) Hill states:

> I think the safest thing to do would be to omit that entire section under defendant not testifying.

Standby counsel was put in an untenable situation. They could not plan the case, yet they had to give instant alternatives to a person who did not want those persons as counsel; again, Faretta has been violated in a critical portion of the trial.

This is particularly unfair because it immediately follows Hill's 67 word comment to the jury which, as hereinbefore stated, was terribly prejudicial to Hill. Most federal courts have generally held that giving the protective instruction, even over the defendant's objection, is not a constitutional violation. Lakeside v. Oregon, 435 U.S. 333, 336. Hill thought, up until jury selection, that he was going to testify and explain his justification defense. After learning that he was prohibited from so testifying about the justification defense Hill had to make the legal determination that the protective instruction should, or should not, be given to the jury. He had twenty minutes to determine this issue which is an insufficient time for a lawyer, let alone a layperson with no legal experience in this life and death issue. As held in Lakeside v. Oregon, Id., 341:

> In an adversary system of criminal justice there is no right more essential than the right to the assistance of counsel. But that right has never been understood to confer upon defense counsel the power to veto the holy permissible actions of the trial judge. It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial. (Emphasis added)

This case was not in an adversary system of criminal justice. Again, the failure to provide counsel for Hill is fatal. The comment in Carter v. Kentucky, 450 U.S. 288, 302:

> The penalty was exacted in Griffin by adverse comment on the defendant's silence: the penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. (Emphasis added)

Certainly, when combined with the inept performance of Hill, letting the jury roam does not afford a defense as we know it.

When this is combined with the State's comment, in commenting on Hill's mental state that he:

> Executed a person whom he did not agree with (TR 590); he disagreed with the position of those individuals (TR 93); and this is an airtight... unrebutted case (TR 95),

that is making comments which are "fairly susceptible" of being interpreted as comments on defendant's silence and are reversible unless the State can prove beyond a reasonable doubt that error did not contribute to the verdict. Dixon v. State, 627 So. 2d 19 (Fla. Dist. Ct. App. 1993). Further, (TR 180) the opening argument of the State commenting about Hill's activities one year before the accident impermissibly comments on his state of mind, thereby being "fairly susceptible" as a comment on the defendant's silence. When the State commented in its opening statement "that the defendant made a statement at the time he was arrested", followed by that statement is a "confession to two murders, one attempted murder, and one shooting into an unoccupied vehicle". (TR 196) That statement is a comment on the defendant's silence, and is reversible error. When the State comments, in its closing argument (TR 582):

> Dr. John Britton is dead. There is nothing contesting that fact, that's a proven hardrock solid fact and the same thing with Col. Barrett. They are both dead. No. 2, the death was caused by the criminal act of Paul J. Hill. Overwhelming evidence has come in to you over the past three days as to who is responsible for the carnage that was rendered...the evidence conclusively shows that this act was reflected upon and thought about, planned...

is another impermissible comment on the silence of Hill. On the comment (TR 584) "bear in mind that the case has been presented to you and all the evidence and all the testimony that's come to you, is unrebutted, it's overwhelming and is conclusive." Again, impermissible comments on the silence of Hill, followed by (TR 585):

> Overwhelming, conclusive proof that the defendant in this case, seated right over at that table there, you have been looking at him for three days, is the person...

is another example of the impermissible comment on the failure to testify. When added to "there will be no more babies killed there today" (TR 287, 327, 330-332), the rights against self-incrimination have been violated.

V. FLORIDA STATUTES PROVIDE THAT ONE MAY USE FORCE, EVEN DEADLY FORCE, IN DEFENSE OF ANOTHER. THE REFUSAL OF THE TRIAL COURT TO ALLOW THIS DEFENSE CONSTITUTES A FATAL ERROR THAT MANDATES A NEW TRIAL.

> A person..is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another.

Fla. Stat. Ann. §772.012. See also Jack Lowery, Jr., A Statutory Study of Self-Defense and Defense of Others as an Excuse for Homicide. 5 U. Fla. L. Rev. 58 (1952).

Others as an Excuse for Homicide, 5 U. Fla. L. Rev. 58 (1952).

That "Defense of Another" is a lawful defense is self-evident. The trial court should not have precluded its presentation. Even under the most convoluted logic, Hill still should have been allowed to offer it. Indeed, the defendant must be permitted to fully articulate his motive even if it does not constitute a lawful defense, Zal v. Steppe, Warden, 968 F.2d 924, 933, citing Griffith v. Florida, 548 So.2d 244 (1989) and Gilbert v. Florida, 487 So.2d 1185 (Fla. App. 4th Dist. 1986).

Hill sought at every reasonable opportunity to present this statutory defense (e.g., Tr. 566, 665, 720-725). Hill's Memorandum in Opposition to the State's Motion in Limine (at R. 117-200) is incorporated here by reference. Although the State precluded Hill from presenting any evidence of his own state of mind, the government's arguments were fraught with mischaracterizations of Hill's mental state (e.g., "execute[d] a person whom he did not agree with," Tr. 590; "he disagreed with the position of those three individuals," Tr. 593; "this is an airtight...unrebutted case." Tr. 595). Whether Hill's actions were, in fact, reasonable is a question for the jury. Throughout the trial, however, the jury was only allowed to hear one side of the argument; from that, they were unfairly prejudiced from the outset.

The statute provides that one may use deadly force to protect himself or "another." Fla. Stat. Ann. §776.012. The statute does not, however, define who is included by that term. Clearly the word "another" is susceptible to multiple constructions. Florida

law provides that "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Fla. Stat. Ann. §775.021 (1). "Another" must be construed in a manner most favorable to Hill. The trial court had an obligation to allow Hill to present this as his defense.

By denying Hill access to this statutory defense, the trial court invaded the province of the jury. Long ago, this Honorable Court held that it is the province of the court to state what the rule of law is as to the facts, and the province of the jury to determine whether such facts exist in the particular case. Gladden v. State, 12 Fla. 562, 576 (1869). More recently, the Florida Court of Appeals held that a trial court fundamentally erred in omitting elements of defense of others in a self-defense instruction. In an startlingly applicable holding, the appellate court reached this conclusion even though the defense (as in Hill's case) offered no objection to the charge as given **because the error went to the "essence and entirety of the defense."** Dawson v. State, 597 So. 2d 924, 925 (Fla. Dist. Ct. App. 1992) (emphasis added). As Hill presented to the trial court:

> The thread between Gladden and Dawson is clear, continuous and often repeated.
> In a prosecution for murder, the jury must determine if the accused is free from fault in bringing on the difficulty; if reasonable grounds for the killing exist; if the harm is imminent; and whether the homicide is justified. Although what constitutes justifiable homicide is a matter of law, the jury determines the existence of the facts in a particular case. The trier of fact is to decide the question of defense of another in a murder prosecution. The jury is the last line of defense against tyranny. Because the

> facts of Paul Hill's case satisfy this threshold, he must be allowed to present his defense to the jury.

Transcript of Record on Appeal at 141 (internal citations omitted).

Neither can it be correctly asserted that allowing Hill to present this defense to the jury would violate the Constitution as articulated in Roe v. Wade, 410 U.S. 113 (1973), or Planned Parenthood of Southeastern Pennsylvania v. Casey, _____ U.S. _____, 112 S. Ct. 2791 (1992). Despite the state's assertions during voir dire (Tr. 90-93) and closing arguments (Tr. 590) to the contrary, the thrust of these cases is that the states may not enact regulations that directly create an "undue burden" on a woman's access to abortion.

Hill is not a state actor. The Florida statutory provision for an affirmative defense is not a regulation at all. Regulations are intended to restrain individual conduct. An affirmative defense is a restraint on the state. The purpose of the self-defense statute is to protect defendants, like Hill, from an unjust prosecution.

Allowing Hill to use the defense to which he is statutorily entitled does not conflict with either of these cases, because neither case is implicated by this case. Denying him access to the protection of the law does, however, violates his rights under both the U.S. and Florida State Constitutions.

Obviously, Hill's inability to provide a factual predicate for this defense arises directly from an inadequate Faretta inquiry. Notwithstanding this fatal error, the granting of the State's

motion precluding his statutory defense denies Hill his basic constitutional rights. This alone provides an adequate basis for sustaining the appeal and remanding the case for a new trial.

VI. BECAUSE OF THE ERRORS COMMITTED DURING THE GUILT PHASE OF THE TRIAL, THE DEATH PENALTY CANNOT BE LEGITIMATELY APPLIED.

Hill has been sentenced to death. As discussed, supra, the trail was fraught with constitutional error. Indeed, it was a "complete travesty."

Both the State and the trial court placed great reliance on the aggravating factor of "cold, calculated and premeditated remedy without pretense of moral and legal justification."

Mr. Hill's justification evidence is admissible under two, independent, free-standing theories. First, the evidence would have served as direct rebuttal to the prosecutor's argument to the jury, and the trial judge's ultimate finding, that the homicides in this case were "cold calculated and premeditated, without pretense of legal or moral justification." Second, exclusion of the evidence deprived Mr. Hill of his right to place before the sentencer relevant evidence in mitigation of punishment.

Skipper v. South Carolina cite, 476 U.S. 1 (1986), provides the bases for both propositions asserted by Mr. Hill. In Skipper, following the state's introduction of evidence in aggravation of the offense, petitioner presented as mitigating evidence his own testimony and that of his former wife, his mother, his sister, and his grandmother. He then sought to introduce testimony of two jailers and a "regular visitor" to the effect that he had made "a good adjustment" during the seven and a half months he had spent

in jail between his arrest and trial. The trial court ruled such evidence irrelevant, and the United States Supreme Court reversed on two grounds. First, the Court held that the trial court's exclusion from the sentencing hearing of the testimony of the jailers and the visitor denied Mr. Skipper his right to place before the sentencing jury all relevant evidence in mitigation of punishment under the principles of Lockett v. Ohio, 438 U.S. 586 and Eddings v. Oklahoma, 455 U.S. 104 (1982).

> The only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did. The state does not contest that the witnesses petitioner attempted to place on the stand would testify that petitioner had been a well behaved and well adjusted prisoner, nor does the state dispute that the jury could have found favorable inferences from his testimony regarding petitioner's character and his probable future conduct if he was sentenced to life in prison. Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, there is no question that such inferences would be mitigating in the sense that they might serve as a basis for sentence less than death.

The Skipper Court further noted in a footnote that "the relevance of evidence of proper future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on

a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett and Eddings that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." Skipper, 476 U.S. at 5 (quoting Gardner v. Florida, 430 U.S. 349, 369 (1977)).

One may disagree with Paul Hill. One may even conclude that what he did was reprehensible. As demonstrated by the memorandum of law that he filed (R 117-200), it cannot be said that he acted without legal justification. Neither can it be said that he had no moral justification.

> "The Bible over 40 times states that human life begins with conception."

M. OLASKY, ABORTION RIGHTS: A SOCIAL HISTORY OF ABORTION IN AMERICA, 33 (1993); SEE ALSO J. DAVIS, ABORTION AND THE CHRISTIAN (1984); H. Brown. What the Supreme Court Didn't Know, 1975 HUMAN LIFE REVIEW 5; J. Montgomery, The Fetus and Personhood, 1975 HUMAN LIFE REVIEW 41. His Holiness John Paul II writes that "For man, the right to life is a fundamental right. And yet, a part of contemporary culture has wanted to deny that right, turning it into an "uncomfortable" right, one that has to be defended. But there is no other right that so closely affects the very existence of the person! The right to life means the right to be born and then continue to live until one's natural end: 'as long as I live, I have the right to live.'" HIS HOLINESS JOHN PAUL II, CROSSING THE

THRESHOLD OF HOPE, 205 (1994).

Ronald Dworkin has written that "abortion, which means deliberately killing a person out of kindness, are both choices for death. The first chooses death before life in earnest has begun..." R. DWORKIN, LIFE'S DOMAIN: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM 3 (1993). The "war between anti-abortion groups and their opponents is America's new version of the terrible 17th century European civil wars of religion.

Opposing armies marched down streets or packed themselves into protests at abortion clinics, courthouses, and the White house, screaming at and spitting on and loathing one another. Abortion is tearing America apart. It is also distorting its politics, and confounding its constitutional law." Id. at 4. Reasonable sounding

> proposals that the abortion issue should somehow be resolved by compromise seen unrealistic. For the proposals do not challenge the standard view of the character of the abortion argument -- the standard view of what the argument is about -- according to which the issue turns on what answer is given to a polarizing question. Is a fetus a helpless unborn child with rights and interests of its own from the moment of conception? If so, then permitting abortion is permitting murder, and having abortion is worse than abandoning an inconvenient infant to die . . . . Self respecting people who give opposite answers to the question of whether a fetus is a person can no more compromise, or agree to live together allowing others to make their own decisions, than people can compromise about slavery or apartheid or rape. For someone who believes that abortion violates a person's most basic interest and most previous rights, the call for tolerance or compromise is like a call for people to make up their own minds about rape, or like a plea for second class citizenship, rather than full slavery or full equality, as a fair compromise to the racial issue.

Id. at 9-10.

There is a long tradition in American society of individuals and groups resisting enforcement of the state's law and asserting obedience to higher moral authority as the reason for their opposition. Such resistive activity is generally labeled "civil disobedience" and discussion has centered on whether or not it is "justifiable." See W. STRINGFELLO, FREE IN OBEDIENCE (1964); M.L. King, Letter From Birmingham City Jail, in A TESTAMENT OF HOPE-THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289 (J. Washington ed. 1986); H.D. Thoreau, Civil Disobedience, in WALDEN AND OTHER WRITINGS 85 (J. Kautch ed. 1962); SWORDS INTO PLOWSHARES: NONVIOLENT DIRECT ACTION FOR DISARMAMENT (A. Laffin & A. Montgomery ed. 1987) [hereinafter SWORDS INTO PLOWSHARES].

Hill believes that he has the spiritual obligation of witnessing to the absoluteness of God in a secular state which claims no higher power than its own aspiration. Civil resistance is then not only a morally acceptable form of witness, it may be required of the Christian community.

While resistance is permissible--and perhaps even required--the Christian community may be obliged to speak to the state, but it cannot speak for the state.

Because the Christian community is one which, when true to its own tradition, reasons differently from many secular communities, it may appear nontraditional and strange to those who are unfamiliar with that community. This particular community discerns what questions are important when it looks at the nature of obligation.

It is very difficult for the secular world to understand how religious communities themselves come to decisions. On the one hand, detractors of civil resistance often talk of the danger of anarchy and cannot fathom that the community is not seeking power, but merely to be faithful. Even among those who support the claim of resisting communities, there is often a grave misunderstanding of what the community is about. Many see the goal as replacing an existing order instead of transformation.

Most discussions begin by phrasing the issue as whether one has an obligation to obey the state's law. But then one must ask what is the law, the enforcement of which is being resisted? Those questions, in turn, require that consideration be given to the nature of the moral obligation which the resisting group asserts as the controlling authority of its life as a community. The resisting community's own requirement of obedience to moral precepts must be considered in light of the demand for obedience asserted by the state.

If, on the other hand, the inquiry begins with an assumption that the resisting group has an important internal obligation, then the next series of questions would be quite different. It would become necessary to articulate the nature of that internal obligation and to determine what obedience to the authority of the community entails. Finally, the resisting entity would have to confront the state and distinguish between those requirements for civil disobedience which honor the authority of the tradition and those which betray authority. Tom Shaffer, Jurisprudence in Light

of the Hebraic Faith, 1 NOTRE DAME J. OF L., ETHICS AND PUB. POL'Y 77, 86-87 (1984). How the analysis proceeds depends to a large extent on where one stands.

Paul Hill is part of a community which, in the course of the last two thousand years, has often found itself at odds with the official policies of the state. That community is the Christian church. He has spent a good deal of time with smaller groups of Christians who challenge state authority. He has friends who are members of self-described Christian communities of resistance to whom obedience means not to let other institutions (i.e., the law) claim our primary obligation and subvert that obligation to our neighbor. That means the Christian community must be respectful but wary of the claims of the law.

The major, and perhaps the only, justification for the law is to create those structures in which the obligation to love one's neighbor can be nourished. Opening our hearts to the neighbor begins the redemption of the world. The political and spiritual obligation of the Christian Church is to create a society where it is easy for people to be good. In the likely event that the law gets in the way of or compromises that obligation to the neighbor, then the Christian community needs to decide how and whether it will confront the law.

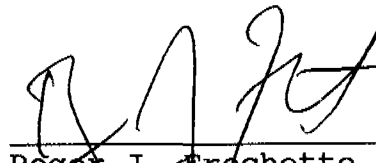
While Hill's narrative draws heavily on the experience of attempting to sort out what it means to be a neighbor in the pain and bitterness of abortion, the basic process of discernment is not limited to that situation. It is as old as the church itself.

Yet the law depends on the daily exercise of drawing lines. Whether shooting Dr. Britton and his escort was the right thing to do is not the question. The only legal question is whether Paul's deep and abiding beliefs--which are the sole basis for his acts--gave his actions at <u>minimum</u> a "pretense" of moral or legal justification.

CONCLUSION

For the reasons presented in this intial brief, Appellant, Paul Jennings Hill, asks this Court to sustain the appeal and remand this case to the trial court with an order for a new trial.

RESPECTFULLY SUBMITTED,



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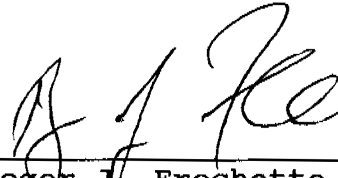
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief of Appellant has been furnished via U.S. Mail to Richard Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy mailed to Appellant, Mr. Paul J. Hill,#459364, Florida State Prison, P.O. Box 747, R-2-N-17, Starke, Florida 32091 on this 2nd day of May, 1996.

RESPECTFULLY SUBMITTED,



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