IN THE SUPREME COURT OF FLORIDA

PAUL JENNINGS HILL :

Appellant, :

V. : CASE NO: 84,838

STATE OF FLORIDA :

Appellee :

CORRECTED

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Because the trial court failed to comply with the requirements established and articulated by the United States Supreme Court in Faretta v. California and reflected in the Fla. R. Crim. P. 3.111(d) (2) and (3), the present appeal must be sustained and a new trial ordered.

The failure is evident through every phase of the proceedings, and, respectfully, the State has failed to counter the Appellant's arguments put forth in the initial brief.

Moreover, the inability of the Appellant to give a "knowing and intelligent waiver" so that he could present "a defense as we know it" is obvious. The State seeks to gloss over the obvious. Simply stated, Paul Hill did not know what he did not know.

Because there was no "knowing and intelligent waiver," Paul Jennings Hill cannot be found to have understood the intricacies of presenting his defense. The prosecutor, in addition to filing a Motion in Limine, extracted a promise from Appellant to abide by any directives issued by the trial judge particularly in the context of the Justification Defense. The State now seeks to use that promise to its advantage, citing Appellant's inability to lay a factual predicate for the only defense that Appellant sought to present.

Further, the Record is abundantly clear that Appellant sought to retain two attorneys for assistance in the trial. Citing the complexity of the legal issues and the Appellant's need to have "counsel well versed in Florida capital law," the court denied

Appellant his counsel of choice. This did not, however, prevent the judge from allowing Hill to represent himself. Yet this Court held that the State has a compelling interest in justice being done and referenced the immeasurable benefits of the adversary system that work toward that end. If that ruling is to mean anything, those goals and that system must be recognized at every level.

To hold otherwise is manifestly unfair and works toward a miscarriage of justice. To hold otherwise allows a defendant at trial--either intentionally or as the result of unfamiliarity--to provide no basis for any appeal. This is especially critical in the present situation of a mandatory appeal to comply with Supreme Court precedent and constitutional requirements.

Because in the proceedings below, the failure to comply with the constitutional requirements resulted in a trial that did not work justice, the present appeal must be sustained and a new trial granted.

ISSUE I

FARETTA V. CALIFORNIA, 422 U.S. 806 (1978) AND FLA. R. CRIM. P. 3111(d) (2) AND (3) WERE NOT COMPLIED WITH BY THE TRIAL COURT. THAT NON-COMPLIANCE IS VIRTUALLY ADMITTED BY THE STATE'S SILENCE IN ITS REPLY BRIEF.

Florida Rules of Criminal Procedure, 311(d)(2) states:

> 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. [Emphasis added]

***

Subsection (3) states:

> No waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of the ...the nature and complexity of the case....[Emphasis added].

Nowhere in its Brief does the State respond to the Appellant's argument that the complexity of the case was never the subject of the trial court's inquiry of Hill's comprehension of what had to be done to prepare and offer his defense. Faretta, Id., 815 holds that a defendant may only waive counsel if there is an intelligent and knowing waiver--the exercise of free and intelligent choice competently and intelligently made--understanding the necessity of skilled, experienced representation by counsel and understanding the complexity of the case, as do the Florida statutes and the cases. Only then may a defendant waive his right to counsel.

At page 819 the Court specifies what a defendant must always be afforded: "In short, the amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it." The Court further articulates, Id. 820, N. 15 "We do not suggest

that this right arises mechanically from a defendants power to waive the right to the assistance of counsel."

The Appellant cited Capetta v. State, Fla. 204 So. 2d 913, 918:

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

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 such complexity that in the interest of justice, legal representation is necessary. [Emphasis added]

The State has not commented upon that citation which analyzes the statute and Faretta. The case is not even mentioned by the State. Nor has the State commented upon Reilly v. State, Dept. of Corrections, 847 F. Supp. 951, 960 (MD. Fla. 1994), which discusses Faretta, and Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986), and Rule 3.111 (d). Reilly specifically approves the requirement that the complexity of the case must be considered. The State does not discuss, although it mentions, Johnston, supra, 868, where the Court specifically held that self representation "...is not absolute", and the Court required the assistance of counsel.

Reilly, supra, is particularly appropriate to the instant proceeding. Despite the fact that Reilly had read numerous law books and statutes, the Court held he was not able to apply the law to the facts, and therefore Reilly was not permitted to proceed without a lawyer. Reilly was far better prepared than Hill, yet Reilly was required to have a lawyer. So must Paul Hill.

The State has not responded to the Appellant's citation of U.S. v. Berkowitz, 927 F. 2d 1376 (7th Cir. 1991). Berkowitz participated in discovery, represented himself in prior civil actions, had prior experiences with judicial proceedings, demonstrated a fairly sophisticated understanding of the judicial process, knew enough to object to certain matters offered in evidence, and he was able to cross examine some of the government witnesses. This background notwithstanding, the trial court indicated that had Berkowitz objected--because of the complexity of his case--the case probably would have been reversed.

Even more telling is the failure of the State to respond to the citation of U.S. v. Harrison, 451 F. 2d 1013 (2d Cir. 1971), which holds that even a lawyer who is not familiar with criminal law cannot intelligently and knowingly waive that essential constitutional right to the lawyer, particularly in a complex case.

Neither has the State responded to Carnley v. Cochran, 369 U.S. 506, 510-511:

> 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. [Emphasis added]

In Carnley, there was no examination of perspective jurors on voir dire; no requested jury instructions; no objections were taken during the whole trial; no opportunity to gather factual material or investigate the facts because of incarceration; no challenge to perspective veniremen, all of which are viewed adversely in the

concurring opinion. Although this is identical to the instant case, the State is silent.

That silence is an admission by the State that there was no compliance with Fla. R. Crim P. 311(d)(2) and (3) and Faretta. Accordingly, reversal of the trial court is required.

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 (plurality opinion of Black, J.) ("To be valid such waiver must be made with an apprehension of the nature of the charges...possible defenses to the charges and circumstances in mitigation thereof. [Emphasis added]

Because Appellant did not know that the law requires that he lay a factual foundation in order to present his justification defense, he could not know that he was giving up the only defense he had. Without the ability to present the requisite factual basis to lay out that defense--including the discovery process, the investigatory process, the legal research, the compulsory process to obtain the necessary factual predicate for the defense, how to plan that defense in order to convince a jury--Faretta, supra, and Fla. R. Crim. P. 3.111 (d) (3) can not satisfied.

There is no evidence that the Appellant validly waived his constitutional right to the assistance of counsel, so that he might "make a defense as we know it". Most importantly, 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 constitutional right. The State cannot meet that burden. By its failure to respond to the Appellant's

citation, the State concedes that it cannot show that Faretta and Fla. R. Crim. P. 3.111 (d) (2) and (3) were satisfied, Durocher v. Singeltary, 623 So. 2d 482, 485 is in accord.

On page 34 of the its brief, the State asserts that Hill never requested the assistance of counsel. That is not true. Hill did request the assistance of counsel, and that clearly is brought out at pages 232 and 233 of the Record, where Attorney Heuser actually filed a motion to be admitted pro hac vice, which motion was denied because the State opposed it. That clearly shows that Hill wanted a lawyer.

Subsequent to that, Hill requested both Attorneys Heuser and Hirsh to represent him (TR 661-664; A 121-124). The Record 364-369, indicates a motion by Attorneys Hirsh and Heuser to file an Amicus Curiae Brief, and Hill's request is shown in the Record (218-220). Appendix 121-124, transcript 661-664, clearly indicates that the defendant had thought that although his public defenders were competent lawyers, but, because "they just philosophically and theologically just don't agree with me", Hill wanted to substitute Hirsh and Heuser for them.

Appellant's request of the trial court for other counsel requires in depth inquiry by the Court to find out if the philosophical and theological differences with the public defender resulted in Hill not being able to establish the foundation for his justification defense. From the Record, the indication is that Hill wanted to present the justification defense, but, philosophically and theologically that presented a problem for his

lawyers. For that reason he requested, clearly, and without dispute, both Attorneys Heuser and Hirsh to represent him. For the State to assert the contrary simply is not correct. The State asserts on page 12 of its Brief "any contention that Hill desired or requested, representation by counsel is squarely refuted by the Record". Yet the State refutes its own claim by admitting on pages 3, 4, 12, 24, 25, (4 instances) 26, 34, 35, and 36 that Hill wanted legal representation. As shown on TR 664, 665 Hill asked that Hirsh and Heuser be substituted for the public defenders.

And on October 24, 1994 (R 207), the date the parties appeared in open court (R 217-220), Attorney Heuser filed a motion for appearance pro hac vice (R 232-237) which was objected to by the State; Heuser was not permitted to help Hill despite Hill wanting him to do so. To say that Hill didn't want counsel simply is not correct. As a result Hill stated, appendix A 109, 110:

> No, sir. Since you've disallowed the attorney to speak for me, I'll just let my brief speak for itself.

Clearly, Hill wanted, but was not given, a lawyer. Of course Hill wanted his own lawyers, but what he needed, and what Faretta, supra, and Fla. R. Crim. P. 311(d) (2) and (3) require is someone explain to him that he was not able to put on "a defense as we have come to know it", without a lawyer. The factual predicate and the legal procedural issues that are necessary to establish that basic foundation in order to attempt to convince the judge as a matter of fact, as a mixed matter of fact and law, or as a matter of law, that his defense is valid and requires a lawyer. Without a lawyer

he could not understand what he had to do. The failure of the Court to properly instruct him deprived him of his constitutional rights.

This aforesaid points out the very weakness, and really the concession by the State, that reversal is required. On page 13 of its Brief, the State says "No proffer was made below as to the evidence which supported such a defense, thus waiving the point,..."

Because Hill did not understand the complexity of the defense and could not make the required factual foundation to meet the justification defense, solely because he was not represented by counsel. By arguing that Hill waived the point, the State concedes the validity of Hill's argument that Faretta, supra, and Fla. R. Crim. P. 311(d) (2) and (3) were not satisfied, and a new trial must be ordered. The State's assertion on pages 13 (2), 19, 22, 23, 32, 37 and 39 of its Brief that no proffer was made, merely proves the point that Hill needed a lawyer.

Further, on page 13 the State asserts that Hill was afforded the opportunity to present evidence, but he did not do so. That again, is a proof that Faretta, and Fla. R. Crim. P. 311(d) (2) and (3) are not satisfied. On pages 16 and 17 the State admits the complexity of the defense that Hill wanted to assert, but could not. Again, at pages 22 and 23 of its Brief the State quotes the trial court when it concluded Hill could represent himself. That summary mandates the conclusion that in this complex case, Hill did not validly waive his right to a lawyer.

On page 24 of its Brief the State admits that Hill initially requested out of state counsel, Attorney Heuser, to argue for him. The State further makes that concession on page 25 of its brief. The State assert's on page 26, that no attempts were made by an attorney to represent Hill. That is not so as shown by Record 232-233, and it must be understood that Hill did not want "Hybrid" representation, but rather he asked that Attorneys Heuser and Hirsh be substituted as counsel, as stated in the transcript 665-666.

Throughout its brief [pages 39, 40, 41, 53 (twice), 45 (the mannequin), 47, 53 (three times), 55], the State admits the absolute necessity that Hill be represented by counsel, because there was no timely, adequate protection of the Record. Indeed, because Hill was incapable of doing that in this complex case, the State inadvertently admits Hill should not have been permitted to try this case without a lawyer.

The entire issue of Hill's failure to prepare the factual foundation which the State attacks in the latter portion of its brief--because Hill would not know, nor would any layperson--how to present that foundation so that issue may be raised is a concession that Faretta and Fla. R. Crim. P. 311(d) (2) and (3) were not satisfied.

The State has commented that Attorney Loveless did not speak to the guilt phase of the trial. Respectfully, A 147, TR 688, Attorney Loveless who performed spectacularly under terribly trying circumstances stated:

> Your Honor, I need the Court to understand that I also have a duty to the Court as an officer of the

> Court, and the source of my frustration at this point and time is not what has gone on necessarily in the guilt phase.

Further, at page A 151, TR 692, Attorney France states:

> and I think our concern, we have talked about this throughout this trial, is that Mr. Hill has a right to represent himself...that does not give the adversary the right to run roughshod....

This shows that the public defenders absolutely were upset over the opening statement by the State, jury selection, and the failure to put on a defense as we know it. The public defenders made that distress known to the trial court.

The mannequin is, again, a Faretta issue. It is simply unfair. No lawyer would permit a mannequin, not introduced into evidence, with rods indicating course of the pellets that hit the body to be left in court in the jury's full view immediately adjacent to the jury room door where jurors had to pass and repass simply is improper and indicates the necessity of counsel.

ISSUE II

In response to Point Two raised in the State's Brief as to the errors in jury selection, the appellant will rest upon his brief, pages 27 - 40, as, respectfully, the appellants jury selection claims have not been rebutted.

ISSUE III

In response to Point Four of the States Brief, pages 47 - 49, Hill responds by stating the failure of the trial court to be bound by Faretta, supra and by Fla. R. Crim. P. 3.111(d) (2) and (3) is magnified in Hill's attempt to make his final argument. Those 67 words which Hill uttered to the jury were far worse than no

argument at all. They made no sense to the jury because there was no evidence presented by Hill which covered the 67 word comment. The judge had the absolute duty to instruct the jury that they could draw no inference from Hill's failure to take the stand. This the judge failed to.

When coupled with the State's argument to the jury the error is exacerbated:

> 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.
>
> ***
>
> Bear in mind that the case has been presented to you and all the evidence of the testimony that's come to you, it is unrebutted, it's overwhelming and is conclusive. (TR 584)
>
> ***
>
> Ladies and gentlemen, everybody in this courtroom, in this community, in the State of Florida is depending upon you to go back into the 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) [Emphasis added].

However, the most egregious comment which is a violation of Hill's constitutional guarantees, and impermissible comment on Hill's failure to testify, (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... [Emphasis added]

That alone requires a new trial because of an unconstitutional argument. Further, another impermissible comment on the silence of Hill.

Clearly, the State's comments meant to the jury that Hill had been sitting there for three days and hadn't gotten on the stand to give the jury one word of explanation as to what he did. This is an impermissible, illegal, unconstitutional argument against a defendant who has an absolute right not to take the stand, and the absolute right to have no comments made by the State as to his failure to testify. This alone requires reversal.

ISSUE IV

THE STATE'S COMMENTS ON THE SILENCE OF THE DEFENDANT REQUIRE REVERSAL

The aforesaid comments by the State on the failure to take the stand are not "invited responses" as set forth in Dufour v. State, 495 So. 2d 154, 160-1 (Fla. 1986). Nor are the comments by the State limited to the uncontradicted or uncontroverted nature of evidence, because they specifically comment upon the defendant, to quote the State:

> 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 a clear comment on the failure of the defendant to take the stand. It requires reversal, unlike the holding in White v. State, 377 So. 2d 1149. So too the comment in Smith v. State, 378 So. 2d 313 where the State commented that there was a failure for the explanation of the defendant's fingerprints at the scene is not a

comment on the failure to take the stand. In the instant case, as aforesaid, the direct comment that the defendant:

> ..seated right over there at that table there, you have been looking at him for three days, is the person...

clearly asks the jury why was Hill sitting at the table and why did Hill not take the stand. That, respectfully, is a comment that runs afoul of Melton v. State, 638 So. 2d 927 (Fla. 1994) wherein it is held that the prosecutor cannot make a comment before the jury that is fairly susceptible as being interpreted as violating the defendant's right to not testify and remain silent.

So too, SGROI, Appellant v. State of Florida, 634 So. 2d 280, 282 (Fla. Dist. Ct. App. 1994) states that a prosecutor may not impermissibly comment on the defendant's failure to testify. Certainly under the circumstances in the instant case the comment clearly is that by sitting at that table for three days the jury is drawn the illegal conclusion that the defendant did not take the stand and testify. This violates his constitutional rights and requires reversal.

The defense in this case is so flagrant that one does not have to discuss the nuances as set forth in State v. DiGuilio, 491 So. 2d 1129, (Fla. 1986) because cleary there is a constitutional violation when the State commented "...seated right over there at that table there, you have been looking at him for three days, is the person..." [inferentially, Hill did not testify]. It is such an egregious comment that it requires this Honorable Court to hold that it is not harmless error, but rather it is the type of error

that requires the matter to be reversed. It denies the accused a fair trial and is subject therefore to reversal, or whether one calls it per se reversal, or whether one determines that in the instant case it requires reversal. The fact remains the matter must be reversed.

ISSUE V

CONJECTURE CANNOT SERVE AS THE BASIS FOR EXECUTING PAUL JENNINGS HILL. ACCORDINGLY, THE APPEAL MUST BE SUSTAINED AND A NEW TRIAL ORDERED.

The State reminds this Court that "reversible error cannot be predicated on conjecture." Lucas v. State, 568 So. 2d 18,2 (Fla. 1990); State's brief at 53. Yet the State conjectures as to Appellant's motives, intent, and substance of the very defense that Hill sought to present in his trial. Specifically, the State surmises that "Hill's goal was presumably to prevent abortions from occurring"; "It is difficult to see..."; "this would presumably authorize him..." State's brief at 59; and that the Justification Defense is "unprecedented and obviously unworkable" Id. at 13. Whether it is 'unworkable' is the ultimate question.

Paul Hill was never afforded the opportunity to establish the factual basis to present the Justification Defense and to show just how workable it is. Further, it is speculated that the "legislature never contemplated...[this defense which] demonstrates that no 'imminent harm' existed which could serve to justify any of those defenses." Id. at 60, n. 7. The State does not offer any legislative history to substantiate this bald assertion of fact.

The State's analysis simply begs the question. Appellant's Justification Defense is premised on an act of the Florida legislature: §776.012. In this statutory section, the legislature envisioned that some homicides are, in fact, justified. At trial, Hill submitted a brief in opposition to the State's Motion in Limine. Although the trial judge refused to hear Appellant's attorney of choice on the matter, the memorandum (which is incorporated by reference in Appellant's initial brief) provides the legal and factual basis for presenting his defense to the jury. Moreover, the State's argument on whether the justification defense should be allowed is illogical, contains tacit admissions of the defense's applicability, and obvious misstatements.

A. THAT APPELLANT DID NOT MAKE AN EXHAUSTIVE PROFFER OF THE JUSTIFICATION DEFENSE IS PRIMA FACIE EVIDENCE THAT FARETTA WAS VIOLATED AND THAT HILL DID NOT MAKE A "KNOWING AND INTELLIGENT WAIVER" OF HIS RIGHT TO COUNSEL.

As made abundantly clear from the record, Paul Hill made numerous attempts to present the Justification Defense at his trial. Equally clear is the fact that he was rebuffed on every occasion. Although Hill was asked if he understood the pitfalls of self-representation, he could not, without more, give an intelligent and knowing waiver of his right to counsel. Indeed, the complexity was the very basis upon which the trial court denied Appellant's request to be represented by out of state counsel, warning Hill that he "would need someone well versed in Florida capital sentencing law." Transcript at 670; State's brief at 26. While the echo of this ominous advice still reverberated, the judge allowed Hill to continue on his fatal course.

The Faretta failures are self-evident. Consider, for instance, the question: Do you understand discovery? The layman, thinking this is the process by which one side gets information possessed by the other side, answers "Yeah, I understand that." This affirmative answer does not mean that he understands how to prepare written discovery, issue and serve a subpoena, or take a deposition. Although a lawyer and a layman may give the same answer to the question, the answer does not mean the same thing. Simply stated, Paul Hill did not know what he did not know.

The Justification Defense goes to the heart of Appellant's case and, as a result, the granting of the Motion in Limine is fundamentally unfair to the rights of the Appellant. Hill did not make an exhaustive proffer simply because he did not know that he had to--and the judge told him the defense would not be allowed. In any layman's mind, this was the end of the inquiry. Add to this analysis, the promise extracted by the prosecutor from Hill just prior to the trial:

> MR. MURRAY: In the event that you wanted to advance a proposition and there was an objection to that and the Judge sustained it, based upon his legal ruling, do you understand that you would have to abide by that ruling even though you may feel that it conflicts with your views of glorifying God?
>
> THE DEFENDANT: Yeah, I understand that.

State's brief at 22. The State extracted a promise from the Appellant to abide by any rulings that came from the bench, particularly concerning the Justification Defense. Now the State

finds fault with the layman/Appellant for not making an exhaustive offer of proof. The State cannot have it both ways.

This Court previously ruled that Appellant would not be allowed to represent himself in this appeal, Hill v. State, 656 So. 2d 1271 (Fla. 1995), citing the Court's compelling interest and the numerous benefits of the adversary system. If that ruling is to be anything more than sounding brass or tinkling cymbal, the "complete travesty" that took place at trial cannot now be ignored. Because there was not an intelligent and knowing waiver of the right to counsel, Paul Hill is entitled to a new trial.

B. THE STATE ADMITS THE APPLICABILITY OF THE JUSTIFICATION DEFENSE. ACCORDINGLY, A NEW TRIAL MUST BE ORDERED.

Hill's volunteered statement, cited in State's brief at 8, that "no innocent babies are going to be killed in that clinic today" clearly goes to Appellant's state of mind. Although the State used this statement liberally in both the guilt and sentencing phases of the trial, Paul Hill was prevented from using it at all. Without question, this statement and all that it implies goes to the Appellant's state of mind, not only to the guilt phase of the proceedings, but to the sentencing phase as well. At the very least, Hill showing that he reasonably believed that he was saving innocent human life would remove one of the aggravators upon which the State (and the trial court) so heavily rely.

The State also makes several blanket assertions that are without foundation. First, the State contends that no **viable**

Justification Defense existed. This is exactly the point. The State asserts:

> It would appear that this is the first appeal to reach a Florida court presenting the issue of whether the defense of "necessity" or "justification" can be utilized in regard to a homicide committed at an abortion clinic.

State's brief at 55. The State is incorrect because Appellant was never given the opportunity to lay the foundation so that the Justification Defense can be properly brought before this Court.

Second, at trial the prosecutor made extensive inquiry of veniremen concerning their religious beliefs and their opinions concerning the Justification Defense, even after the Motion in Limine had been granted and the promise extracted from Hill not to violate any of the trial court's orders. Now the State raises **viability** again, stating there is no basis for its existence.

Whether there is a factual basis for the Justification Defense is for the trier of fact. And Paul Hill should be allowed to present those facts to the jury, or to at least make a factual offer of proof to establish the record as to the **viability** of the Justification Defense. The State cannot have it both ways.

The State contends that the Justification Defense is an attempt "to encourage the jury to nullify the law." State's brief at 51. In fact, the opposite is the true. What disturbed the prosecutor at trial and disturbs counsel for the State now, **is the fact that Appellant seeks not to nullify the law but to apply the law.**

C. THE JUSTIFICATION DEFENSE IS SUPPORTED BY THE LAW OF THE CASE AND SHOULD HAVE BEEN ALLOWED AT TRIAL.

While the State attempts to alarm this Court with assertions of "invit[ing] anarchy," such is not the case. Specifically, the Florida legislature envisioned that some homicides are justified. As a result of this legislative deliberation Florida law provides:

> [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. §776.012(1993). It is the jury, when presented with the evidence, that must either convict, acquit, or convict on a lesser included offense. Despite this statute, the jury never had the opportunity. They should be given that opportunity now.

Appellant strongly disagrees with the State's characterization, State's brief at 55, n.5. Through this mis-characterization, the State introduces an entirely different framework from the statutory one that applies. In addition, the State disparagingly suggests an intolerance toward "those who disagree with the decisions and policies of the lawmaking branches of government," Id. at 58, and that this Court should not make "a negative political or policy judgment about the course of action." Id. Yet, that is precisely what the State now asks this Court to do. The State cannot have it both ways.

In any other context, the Appellant would be allowed to present his factual case to the jury. It is precisely because the State disagrees with the decisions of the lawmaking branch of government that it now seeks to have this Court make a political

and policy judgment by invoking the specious "invitation to anarchy" argument. It is not, as the State avers (at 51), a concern over the "morality of abortion," but that the overwhelming objective evidence of the reasonableness of the defense might show that the Justification Defense is indeed workable. But the State cannot have it both ways.

As Appellant articulated in his memorandum opposing the Motion in Limine, allowing the Justification Defense does not run counter to Roe v. Wade, 410 U.S. 113 (1973). The State contends that "since abortion was a constitutionally protected activity, there was no recognizable harm for abortions within the confines of the law." State's brief at 57. By merely substituting one word, the absurdity of the State's position becomes self evident: "since slavery was a constitutionally protected activity, there was no recognizable harm for slavery within the confines of the law." Justice Taney would be proud.

The Supreme Court in Roe v. Wade "left unanswered the difficult question of when human life begins." Roe, 410 U.S. at 159. As Appellant correctly observes in his trial memoranda:

> Technology and medicine have dramatically changed since Roe, causing Justice O'Connor to assert in City of Akron v. Akron Center for Reproductive Health, Inc., [462 U.S. 416 (1983),] that "[t]he Roe framework, then, is clearly on a collision course with itself...**The Roe framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues.**" [Id. at 458].

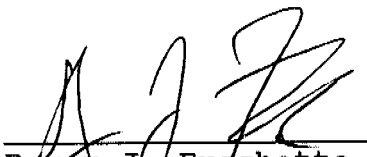
Defendant's Memorandum in Opposition to Motion in Limine at 27-28. (emphasis supplied).

Because Appellant's contention that the Justification Defense is supported by both the law and the facts of the case, reversible error resulted from the trial court's improvident granting of the State's Motion in Limine. Accordingly, the present appeal must be sustained and a new trial ordered.

CONCLUSION

For the reasons presented in this Reply 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 reply 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; Thomas A. Horkan, Jr., Esq., Post Office Box 1638, Tallahassee, Florida 32302; James Joseph Lynch, Esq., Post Office Box 336, Sacramento, California 95812-0336; 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.

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