ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35249

Appeal from A Judgment of Conviction
Second Judicial District Court of the State of Nevada
The Honorable Connie Steinheimer, District Judge

APPELLANT'S REPLY BRIEF

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AT ITS HEART, THE RULE EXPOUNDED BY THE SUPREME COURT IN *FARETTA* IS A RULE PROTECTING INDIVIDUAL AUTONOMY AND WHERE, AS HERE, THE RECORD DOES NOT FACTUALLY SUPPORT A DENIAL OF THE RIGHT TO SELF-REPRESENTATION, THIS COURT MUST REVERSE THE CONVICTIONS BELOW AND REMAND FOR A NEW TRIAL.

"At its heart, the rule expounded by the Supreme Court in *Faretta* is a rule protecting individual autonomy." *Bribiesca v. Galaza*, 215 F.3d 1015, 1020 (9th Cir. 2000). In *Faretta* the United States Supreme Court observed:

> [i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. *Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."*

Faretta v. California, 422 U.S. 806, 834 (1975) (emphasis added, citation omitted). Thus, in deciding "whether a defendant has knowingly and intelligently decided to represent himself, the trial court is to look not to the quality of his representation, but rather to the quality of his decision." *Bribiesca v. Galaza, supra*, 215 F.3d at 1020.

In *Tanksley v. State*, 113 Nev. 997, 946 P.2d 148 (1997), this Court noted that a defendant "has an 'unqualified right' to represent himself so long as the his waiver of counsel is intelligent and voluntary." 113 Nev. at 1000 (citations omitted). In assessing a waiver the question before the district court is not

> whether the defendant can competently represent himself, but whether he can knowingly and voluntarily waive his right to counsel. "[T]he defendant's technical knowledge is not the relevant inquiry. In order for a defendant's waiver of counsel to withstand constitutional scrutiny, the judge need only be convinced that the defendant made his decision with a clear comprehension of the attendant risks." Furthermore, "a request for self-representation may *not* be denied solely because the court considers the defendant to lack reasonable *legal* skills or because of the inherent inconvenience often caused by *pro se* litigants."

113 Nev. at 1001 (emphasis in the original, citations omitted); and see *Furbay v. State*, 116 Nev. ____, 998 P.2d 553, 556 (2000).

This Court, in *Tanksley*, did note five situations where the right of self representation *may* be denied: (1) where the request is untimely; (2) where the request is equivocal; (3) where the request is made solely for the purpose of delay; (4) where the defendant abuses his right by [presently] disputing the judicial process; and (5) where the defendant is incompetent to waive his right to counsel. 113 Nev. at 1001. As noted in the Opening Brief -- and for the reasons stated therein -- none of these five situations exist in the instant case. Thus, when Judge Steinheimer denied Mr. Vanisi's motion for self-representation it was "*per se* harmful." *Harris v. State*, 113 Nev. 799, 803, 942 P.2d 151 (1997).[1]

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[1] Compare the recent case of *Furbay v. State*, 116 Nev. ____, 998 P.2d 553 (2000). In *Furbay*, this Court found that the district court's denial of the motion for self-representation in that case was based on the district court's determination that Furbay "was not aware that he might face the death penalty if convicted." 998 P.2d at 556. However, this Court determined that it need not consider whether Furbay was unconstitutionally denied the right

Nonetheless, notwithstanding the prosecution's assessment at the trial level that Mr. Vanisi successfully passed the district court's Rule 253 canvass, the prosecution now, on appeal, contends that Judge Steinheimer's ruling should be affirmed[2] -- largely by trying to fit this case into one or more of the five situations noted above. The State's efforts must fail, and here's why.[3]

The State first acknowledges that a defendant enjoys an "unqualified" right to self-representation. Respondent's Answering Brief at 7 (hereinafter "RAB at ____"). But then notes that a judge may "*terminate* self-representation by a defendant who deliberately engages in serious and obstructionist conduct." RAB at 7-8 (citation omitted). Clearly, in such an instance the unqualified right would first have to be granted before it could be taken away due to subsequent "serious and obstructionist conduct." Similarly, the State writes that the right of self-representation "is not a right to abuse the dignity of the courtroom [nor] is it a license not to comply with relevant rules of procedure and substantive law." RAB at 8 (citation omitted). Again, the unqualified right would first have to be honored before such conduct would justify a

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to represent himself because Furbay later "waived his right to self representation." Id. In the present case, the record reveals that Mr. Vanisi not only clearly understood that he faced the death penalty if convicted, [ROA, Vol. 5 at 1637], but also, the fact that Mr. Vanisi never waived his right to self representation. See ROA, Vol. 25 at 969-970.

[2] The position taken by the State's appellant counsel is at odds with the position expressed by the State's trial counsel at, and following, the Rule 253 canvass. Thus, to the extent that the State's appeal argument is this Court can only review a "cold transcript" this Court should remember that the State's trial counsel was surely in a place to raise questions and/or objections when the hearing was taking place. He didn't. Moreover, the State's trial counsel said that the timeliness of the motion "is not an issue" that Mr. Vanisi has "been anything but disruptive" and that he hadn't seen anything "that would render Mr. Vanisi incapable pursuant to our guidelines of representing himself." Indeed, it was the State's trial counsel that pointed out that "if the record is looked at closely and the rule of law is followed, I believe Mr. Vanisi's right prevails. *And that is the State's position on the motion.*" (all quotes are from pages 16-17 of the Appellant's Opening Brief. In short, the State's new position should be taken with a grain of salt.

[3] As a preliminary matter the State's "invitation" to this Court to adopt the reasoning of Judge Reinhardt's specially concurring opinion in *United States v. Farhad*, 190 F.3d 1097 (9th Cir. 1999), and do away with the right of self-representation must be rejected since this Court is "compelled by the overwhelming weight of [precedent] to apply the law as it currently exists" and not as the State may have it. 190 F.3d at 1101 and at 1100

court's terminating the right of self-representation. Or, as in *Tanksley*, the district court judge would have to have a basis on the record to deny the request flat out. In *Tanksley*, the record showed that in a pretrial status hearing Tanksley "talked back to the judge and behaved so disrespectfully and contemptuously that the judge found him in contempt and was forced to tape Tanksley mouth shut for the remainder of the hearing." 113 Nev. at 1001-1002. Additionally, the district judge in *Tanksley* had previously presided over a different trial where Tanksley had represented himself. Id at 1002. The trial judge found that Tanksley's self-representation in that case was "disruptive." Id.

In the instant case, Judge Steinheimer did not grant or honor Mr. Vanisi's unqualified right of self-representation. But, unlike in *Tanksley*, there is no basis in the record relating to this case for a finding that Mr. Vanisi had been, is or would be disruptive if allowed to represent himself.[4] In sum, whereas in *Tanksley* the record provided factual support for the trial court's ruling, the instant record does not. And, as noted elsewhere, to the State's trial attorney Mr. Vanisi had been "anything but disruptive" in his many prior appearances before the district judge. As pointed out in Appellant's Opening Brief, the things Judge Steinheimer identified as indicators of future disruption -- taking time to answer questions, rocking motions, making statements under his breath, etc. -- were nothing of the kind; but rather, if relevant, were only indicative of the "inherent inconvenience often caused by *pro se* litigants" -

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(noting that both the Supreme Court and the Ninth Circuit have for many years recognized the right to self-representation [citations omitted]). The State's invitation is found at RAB at 7, n. 3.

[4] The State cites *Stewart v. Corbin*, 850 F.2d 492 (9th Cir. 1998), for the proposition that in custody pretrial behavior can be utilized to predict future disruptive behavior. RAB at 8. But in that case the defendant ***was*** allowed to represent himself. The issue in that case relating to self-representation was whether the defendant's right to self-representation was violated when he was required to be gagged due to his disruptive behavior *in* court. The appellate court found that the right was not violated because the defendant had stand by counsel. 850 P.2d at 506. It should also be noted that the defendant was allowed to represent himself even though, as the

- an "inconvenience" not enough to justify an unqualified right to self-representation. See *Tanksley*, 113 Nev. at 1001 (pretrial activity is relevant "*if* it affords a *strong indication* that the [defendant] will disrupt the proceedings in the courtroom." [emphasis added, citation omitted]); and 113 Nev. at 1006 (Rose, J. dissenting, [noting that behavior will be considered "disruptive" only if it is of an "extreme and aggravated nature."]). "Predictions" by a district judge (who apparently did not want to deal with the inconvenient *pro se* litigant) should not be sufficient to deny a defendant a fundamental and unqualified constitutional right.

The State, on appeal, next argues that Mr. Vanisi's motion for self-representation could have been made for the purpose of delay. RAB at 10-12. But as noted elsewhere, the State's trial attorney was satisfied that delay was "not in issue." Moreover, as noted in Appellant's Opening Brief, Mr. Vanisi repeatedly stated he did not want to delay the trial and would be ready on the date previously set by the court for the trial to begin. On appeal the State now writes: "no rule of law requires the court to take the defendant's protestations that he will be ready on the designated date at face value." RAB at 10. But it is equally true that there is no rule (of law, or culture or psychology) that says a criminal defendant's word is not as good as another's. When Mr. Vanisi filed his motion for self-representation he did not accompany that motion with a written request for a continuance. Nor did he request a continuance while before Judge Steinheimer at the 253 hearing. Furthermore, although Judge Steinheimer was not obligated to appoint standby or advisory counsel [*Harris*, 113 Nev. at 804], such an appointment would have been a less restrictive means of addressing her concerns than the flat out denial of a fundamental and unqualified constitutional right.

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appellate court noted, he "was a violent, disruptive, dangerous and contumacious individual who was a very high escape risk and who also presented a distinct risk of physical assault to courtroom personnel." 850 F.2d at 494.

Finally, the State argues that the district court finding that this case was too complex was in and of itself sufficient to deny Mr. Vanisi's request. RAB at 12-15.[5] One could repeatedly proclaim the sky to be green, but that would not make it true. This Court need only review the facts and record of this case to quickly appreciate the straightforward manner in which the State presented its case. That is to say, despite Judge Steinheimer characterization of this case as being "complex" it was anything but. To be sure, a death penalty case requires careful scrutiny, but a death penalty case is not immune to Sixth Amendment considerations. See *Godinez v. Moran*, 509 U.S. 389, 399-400 (1993)(death penalty case where Court extended *Faretta* to those who are mentally impaired so long as they are found to be competent).[6]

The record in this case does not provide any factual support for Judge Steinheimer's ruling as a whole or for any of the "reasons" she cited. As such, her ruling violated Mr. Vanisi's unqualified and fundamental constitution right of self-representation. To quote from *United States v. Farhad*, 190 F.3d 1097, Mr. Vanisi:

> was clearly appraised of the nature of the charges against him, the possible penalties he faced if convicted, and the dangers and disadvantages of undertaking his own *representation.* Nevertheless, he repeatedly expressed his wish to represent himself, and reiterated his sincere, if misguided and unrealistic, belief that he would offer a "more effective" defense than appointed counsel.

190 F.3d at 1100. Under the applicable precedents, his waiver was constitutionally sound. By denying his request, the district court violated a fundamental constitutional right that was

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[5] In making this finding Judge Steinheimer relied on the case of *Meegan v. State*, 114 Nev. 1150, 968 P.2d 292 (1998). See ROA, Vol. 5 at 1293. But, as this Court noted, any discussion of the trial court's order in that case denying the right to self-representation was made moot by the defendant's subsequent abandonment of his request for self-representation. 114 Nev. at 1154.

personal to Mr. Vanisi; namely, the individual autonomy that the rule announced in *Faretta* protects. Accordingly, this case must be reversed and remanded for a new trial. The error requiring reversal rests squarely on the shoulders of the district court judge. This Court can reverse confident that it has fulfilled its constitutional duty.

CONCLUSION

For the reasons and authorities set forth above and as set forth in the Opening Brief it is restfully submitted that Mr. Vanisi's convictions and sentences must be reversed and this matter remanded to the district court so that Mr. Vanisi can conduct his own defense as mandated by the Sixth Amendment to the United States Constitution; that is, the trial court's ruling denying Mt. Vanisi's request for self-representation is not supported by the factual record in this case and, furthermore, was contrary to established federal law as set forth in *Faretta* and its progeny.

DATED this 21st day of October 2000.

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[6] Presumably, in *Furbay v. State*, *supra*, note 1, the defendant would have been allowed to represent himself in that death penalty case if he had renewed his request and if he had satisfied the district court that he knew he faced the death penalty (and what that meant) if convicted.

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 31st day of October, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document addressed to:

GARY HATLESTAD
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DATED this 31st day of October, 2000.

Amy Peterson