COURT OF APPEALS, STATE OF COLORADO 101 W. Colfax Ave., Suite 800 Denver, Colorado 80202 _____ Douglas District County Court Honorable Nancy Hopf, Judge Case No. [redacted]	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. [redacted] Defendant-Appellant.	Δ **COURT USE ONLY** Δ _____ Case No.: [redacted]
Attorney for the Defendant-Appellant: Robert P. Borquez, # 19577 Alternate Defense Counsel 1175 Osage St., Suite 200 Denver, Colorado 80204 Phone: 303-350-1550 Fax: 303-350-1555 E-mail: BBorquez@aol.com	

DEFENDANT-APPELLANT'S REPLY BRIEF

The defendant-appellant, [redacted] by his undersigned attorney, Robert P. Borquez, pursuant to C.A.R. 28, respectfully submits the following reply brief:

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

_____ It contains _____ words.

__X__ It does not exceed 18 pages.

The brief complies with C.A.R. 28(k).

__X__ For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. ____, p. ____), not to an entire document, where the issue was raised and ruled on.

_____ For the party responding to the issue:
It contains, under a separate hearing, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Robert P. Borquez

_____

Robert P. Borquez,
Attorney for Defendant-Appellant,
[redacted]

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PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to address factual claims and legal arguments put forth in the People's answer brief.

I. REPLY TO PEOPLE'S STATEMENT OF THE FACT

Pages two through nine of the People's answer brief consists of a lengthy recitation of the early history of [redacted] relationship with the victim, K.D., and is irrelevant to either of the two issues raised in this appeal. The recitation notes that [redacted] efforts to communicate with K.D. affected her psychologically and emotionally.[1]

While perhaps relevant at a sentencing hearing under Article II, Section 16a of the Colorado Constitution, the effects of [redacted] letters and telephone on K.D. have nothing to do with whether the trial court erred in allowing [redacted] to fire his lawyer and proceed to trial *pro se,* or whether the court erred in failing to enter a plea of not guilty by reason of insanity (hereinafter referred to as "NGRI") over [redacted] objection as his attorney was seeking to do when he sought to fire her.

C.A.R. 28(b) incorporates, and makes applicable to the appellee's answer brief, the requirements of C.A.R.(a)(1) through (a)(6). C.A.R. 28(a)(3) requires,

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[1] The People also point out in their answer brief that the victim is concerned for her safety. To the extent that the victim's concerns for safety are relevant in this appeal, a retrial which results in a jury finding that [redacted] was not guilty by reason of insanity will still result in [redacted] being confined indefinitely in a secure psychiatric facility until such time as his condition has been effectively treated.

"[t]here shall follow a statement of facts relevant to the issues presented for review, with appropriate references to the record." None of the evidence summarized on pages two through nine of the People's answer brief is relevant to the issues presented for review.

The only conceivable purpose served by references to the impact upon the victim is to generate sympathy for her which is inappropriate. As such, the Court of Appeals should disregard this section of the People's answer brief.

In the event that this Court considers the lengthy history of [redacted] efforts to communicate with K.D. which preceded this case, the Court should then also take into consideration [redacted] lengthy history of psychiatric treatment, including the fact that he was charged with harassment of K.D. (by conduct which was virtually identical to the conduct alleged in the case at bar), his trial counsel entered a NGRI plea over his objection, and a Douglas County District Court jury found that [redacted] was in fact not guilty by reason of insanity. (Case captioned: *The People of the State of Colorado v.* [redacted] [redacted] Douglas District Court Case No. 98-CR-188).[2]

[2] In his report dated November 19, 1999, Dr. Matthew Goodwin concluded that while competent to proceed to trial in his 1999 cases, [redacted] "was so diseased or defective of mind at the time of the commission of the alleged acts as to be incapable of distinguishing right from wrong with respect to those acts." [Envelope 9, p. 9]

The Court of Appeals subsequently concluded that the trial court improperly overruled [redacted] objection to the NGRI plea based on *People v. Hendricks*, 10 P.3d 1231 (Colo. 2000) which was decided while the appeal was pending. (Case captioned: *The People of the State of Colorado v.* [redacted] [redacted] Court of Appeals Case No. 99-CA-2357, unpublished decision issued on 5/10/01.)

In sum, [redacted] mental condition is real, has a long documented history, and is not something which suddenly manifested itself shortly before he was charged in the instant cases.

II. REPLY TO PEOPLE'S ARGUMENTS

A. The Trial Court Erred in its Order Permitting [redacted] to Discharge his Attorney and to Proceed to Trial Representing Himself.

1. Preservation of Issue of the Validity of [redacted] Waiver of Counsel and Request to Proceed *Pro Se*:

The People argue that [redacted] failed to "identify a particular ruling on his competency to proceed *pro se* or to explain how the court erred in making such a ruling." [People's Answer Brief at p. 52] [redacted] identified the court's ruling on his request to proceed *pro se* although admittedly much of the extensive procedural history was included in the "Preservation of Issue" in his opening brief.

The Court of Appeals can and should look at all of the citations in the opening brief which [redacted] submits established preservation of these issues.

[Opening Brief at p. 24] However, by way of emphasis and not limitation, the court can focus on the two hearing which took place on June 15, 2007, and February 27, 2008, for identification of the particular ruling permitting to proceed *pro se.* The June 15 hearing was the *Hendricks* hearing. The February 27 hearing took place shortly before second trial began.

At the June 15, 2007, hearing, defense counsel was attempting to enter a plea of NGRI when sought to discharge her in middle of the hearing. [T., 6/15/07, p. 26, l. 5-16] The trial court deferred ruling on request to proceed *pro se* until the completion of the *Hendricks* hearing. [T., 6/15/07, p. 27, l. 14-21]

After the court finished taking evidence on the *Hendricks* issue, the court addressed the issue of request to proceed *pro se*. [T., 6/15/07, p. 52, l. 9-11] After questioning about his request and discussing the risks of self-representation, the court allowed to proceed *pro se*. [T., 6/15/07, p. 86, l. 20-25] This is one of the orders permitting to proceed *pro se* from which he takes this appeal.

The hearing on February 27, 2008, also makes clear that this issue was preserved for review. The trial court was taking up latest motion to withdraw his NGRI plea and to proceed *pro se.*

The deputy district attorney attempted to clear up the record as to why [redacted] wanted to proceed *pro se*. [redacted] was asked whether he wanted to proceed *pro se* voluntarily or because he felt compelled to do so because his attorney was insisting on pursuing a plea of NGRI. [T., 2/27/08, p. 28] The defendant's response was ambiguous at best:

THE DEFENDANT: No, I want to proceed *pro se*. I want to have a face-to-face interview with Kathy, whatever her last name is.

THE COURT: Well, do you have any other reasons why you want to go *pro se* other than that?

THE DEFENDANT: Yes. Because Juliet [Miner, his attorney] and I have a fundamental difference on the way we should proceed. The primary --- despite all of this, all of the sleep deprivation, the messages, being forced to write to Kathy under duress, I love the girl and I want the chance to tell her that.

DEFENSE COUNSEL: Your Honor, may I interject for purposes of the record? It is not my choice --- I could want something or not something. I've been doing this for many years and I know that the Court directs me. Maybe perhaps I could reject an appointment or not, but it's not what I want.

At the time --- Mr. [redacted] and I have had many conversations. At the time he preferred to go pro se when I filed this, but I want it to be clear today what it is he really wants.

I have told him in the past if he takes away the mental health defense. I think there is a serious

> likelihood he will be convicted, that I have no defense and that I will not ask certain questions that he wants me to ask, and as the attorney, I am the captain of the ship.

[T., 2/27/08, p. 28-30]

The defendant again expressed his concern about the "media" learning of his mental status by reviewing his mental health records unless the court suppressed them. [T., 2/27/08, p. 36-37] While a defendant has the right to waive counsel and proceed *pro se,* such a decision may only be made if done knowingly, intelligently, and voluntarily. In this case, the most that can be said is that [redacted] decision to forego counsel was fueled by his desire --- driven by his delusional thinking --- to forego a NGRI plea which Miner was insisting on seeking to introduce along with his desire to tell the victim that he loved her (which is totally irrelevant to any rationally-based defense [redacted] could raise). The ruling which [redacted] seeks review of is the court's decision to allow him to proceed *pro se* [T., 2/27/08, p. 48, l. 4-9] where his delusional thinking precluded the decision from being made knowingly, intelligently and voluntarily.

2. Alternate Grounds Upon Which the Court of Appeals Could Review [redacted] Claim That his Waiver of Counsel Was Invalid Due to his Mental Illness:

Even assuming for the sake of argument that this issue was not preserved in the optimum way possible, under Crim.P. 52(b), the Court of Appeals may notice

under the plain error rule any errors or defects affecting the substantial rights of the defendant even though they were not brought to the trial court's attention.

Where the defendant does not preserve trial error by objecting, the plain error standard applies; reversal under this standard requires (1) error, (2) that is plain, (3) that affects the substantial rights of the defendant. *People v. Boykins*, 140 P.3d 87 (Colo. App. 2005).

Plain error is both obvious and substantial. *People v. Juarez*, 2011 WL 1586471 (Colo. App. 2011). To meet the obviousness requirement, the error must be so clear that a district court judge should be able to avoid it without benefit of an objection. *Id.*

The denial of the right to counsel --- which results when a defendant does not knowingly, intelligently and voluntarily waive the right --- constitutes structural error. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *People v. Campbell*, 58 P.3d 1148 (Colo. App. 2002). Unpreserved structural error is subject to plain error review. *People v. Greer*, 262 P.3d 920, 935 (Colo. App. 2011) (J. Jones, J., concurring), citing *People v. Miller*, 113 P.3d 743, 748-750 (Colo. 2005).

The right to counsel under the Sixth Amendment to the U.S. Constitution and Article II, Section 16 of the Colorado Constitution obviously implicates one of

[redacted] substantial rights. The extensive procedural history of this case provides an adequate record upon which review of this issue can be made even if the issue was not adequately preserved. Underscoring the propriety of granting review of this claim is the fact that the defendant --- who clearly suffered throughout these proceedings from a lengthy and debilitating mental illness --- did everything he could to frustrate his attorney's attempts to provide him with an appropriate and viable defense. He --- acting in accordance with some of his delusional thought --- ultimately prevailed. Consequently, after [redacted] discharged his attorney, there was no one in the courtroom who was in a position to perfect the record on this claim to the extent that a trial lawyer would have been able to do so.

3. [redacted] Delusional Thinking Contaminated his Decision-Making Process in Electing to Proceed *Pro Se* Under *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) and *People v. Arguello,* 772 P.2d 87 (Colo. 1989).

[redacted] *pro se* defense strategy initially was based in large part upon his belief that K.D. would be testifying in his favor. He continued to believe that she would do so when he elected to proceed *pro se* in February 2008 despite the facts that: (a) K.D. had made abundantly clear to him that she wanted nothing to do with him by refusing to take his phone calls or respond to his letters, (b) K.D. had initiated protection order proceedings, (c) K.D. sought enforcement of the protection order by reporting contact to law enforcement agencies, (d) K.D. assisted the district attorney

in prosecuting [redacted] in the '98 and '01 cases against him, and (e) K.D. testified adversely to [redacted] at the aborted first trial in this case. Indeed, [redacted] professed to be surprised that K.D. did not testify as he believed she would. [T., 2/27/08, p. 27, 10-14]

On the eve of the second trial, [redacted] gave other reasons for wishing to proceed *pro se*. These too were tainted by the thought patterns which were the result of his illness. For example, he still believed that he and his case were instruments by which the U.S. Supreme Court would ultimately declare Colorado's stalking statute to be unconstitutional. [T., 2/27/08, p. 19, l. 17-25, p. 20, l. 1-20]

The People claim that "defendant demonstrated a sophisticated understanding of the available (and unavailable) defenses, including an insanity defense, a *Hendershott* defense, and a not guilty defense." [See People's Answer Brief at p. 58] While [redacted] did discuss some of these (and other) legal issues, he also discussed issues --- like the conspiracies, his sleep deprivation, his belief that he is supposed to go to trial on a straight not guilty plea because upon conviction, he will take an appeal all the way to the U.S. Supreme Court which will declare Colorado's stalking statute to be unconstitutional. The People and the District Court simply focused on isolated, lucid observations [redacted] made during the course of this

case while overlooking or minimizing some of his more bizarre comments, statements, and conduct.[3]

4. Application of the Court of Appeals Decisions in *People v. Wilson* and *People v. Davis:*

Since [redacted] filed his opening brief, the Court of Appeals issues its decisions in *People v. Wilson*, --- P.3d --- , 2011WL2474295 (Colo. App. 2011), *certiorari* petition pending, and *People v. Davis*, --- P.3d --- , 2012WL19373 (Colo. App. 2012). The People cite both of these cases in their answer brief. Both address the effects which *Indiana v. Edward,* 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008), has on prior case law regarding the standard which should be applied in determining a defendant's competency to proceed *pro se.*

Wilson came before the Court of Appeals following the denial by the District Court of the defendant's motion for postconviction relief under Crim.P. 35(c). The Court of Appeals rejected Wilson's claim that *Indiana v. Edwards, supra*, required that state trial courts use a particular test to determine defendant's competency to

[3] At one point shortly before the defendant's aborted first trial, the court and [redacted] were involved in a colloquy during which the court asked [redacted] about the theories of defense he would pursue if he did not proceed under NGRI plea. In addition to his freedom of speech and freedom of religion defenses, [redacted] told the court that another theory of defense was that he "suffered from wanting to be loved" by K.D. The court told him that that was not really a defense but may be a mitigating factor. [T., 6/20/07, p. 66, l. 8-25, p. 67, l. 1-25, p. 68, l. 1-22]

waive counsel and represent himself or herself at trial, and instead held that the trial court only had to apply the standards enunciated in in *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). *Wilson, supra*, at 1. The Division of the Court of Appeals reached this conclusion by rejecting cases from other jurisdictions and by distinguishing the language in *Arguello* which spoke of "the degree of competency required to waive counsel [as being] 'vaguely higher' than the competency required to stand trial." *Wilson, supra*, at 8, quoting from *Arguello, supra*, at 96.

The Court of Appeals stated that since *Godinez* was decided after *Arguello, Godinez* clarified that "the Constitution does not require a different standard." *Wilson, supra*, at 8. However, the Court of Appeals ignored the fact that *Edwards* was issued after *Arguello* and *Godinez,* and *Edwards* allows state courts to set a different and higher standard which is what our Supreme Court did when it spoke of the "vaguely higher" standard in *Arguello*.

In *Davis*, a different division of this Court reach the opposite conclusion. In a detailed, well-reasoned opinion, Judge Bernard went through the historical development of the law governing "the intersection of mental illness and the right of defendants in criminal cases to represent themselves in trials." *Davis, supra*, at 1.

After noting that *Edwards* "establishes that, although competency to waive the right of counsel must be subjected to the same standard as competency to stand trial under *Godinez*, competency to represent oneself at trial may be evaluated under a heightened standard." *Davis, supra*, at 6.

The *Davis* court went on to discuss three reasons for this conclusion. The first was precedent, going back to language in *Faretta* which held that "the right to self-representation may be limited by a defendant's mental competency," citing *Faretta* at 174-175.

The second reason involved the nature of the problem:

> "the nature of the problem before [the Supreme Court] cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself. Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. . . . In certain instances an individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without help of counsel."

Davis, supra, at 6, quoting from *Indiana v. Edwards, supra*, at 175-76.

The third reason was the underlying public policy consideration in not permitting mentally ill defendants to represent themselves. "Self representation does not affirm their dignity. Rather, 'the spectacle that could well result . . . is at

least as likely to provide humiliating as ennobling' for them. *Id.*, at 176, 128 S. Ct. 2379." *Davis, supra*, at 7.

The second and third factors discussed by Judge Bernard in *Davis* are particularly relevant to consideration in [redacted] The length of time over which [redacted] suffered from his condition as well as the fact that he seemed to have "good days" and "bad days" clearly demonstrates that mental illness is not a "unitary concept" and that it does indeed vary. At time, [redacted] sounded lucid. At other times, he was not. Indeed, on one of his worse days during trial, [redacted] was so distressed and unable to control his conduct in the courtroom that the trial court had to recess proceedings for the day. [T., 3/12/08, p. 2, l. 11-25, p. 3, l. 1-10]

The manner in which [redacted] conducted his defense did nothing to ennoble himself and was nothing short of humiliating. The "Statement of Facts" set forth in the defendant's opening brief details much of what [redacted] presented before the jury. Indeed, at one point during jury selection, venire panel members expressed concern about [redacted] courtroom conduct. [T., 3/11/08, p. 143]

While *Edwards* does not ***require*** that state trial courts apply a heightened standard in evaluating claims of competency to represent oneself at trial, it does permit states to do so. In *Arguello*, the Colorado Supreme Court has placed

Colorado amongst those states which apply as vaguely higher standard. In *Davis,* this Court simply and correctly applied *Edwards* and *Arguello*.

B. The Trial Court Erred in Failing to Enter a Plea of Not Guilty by Reason of Insanity over the Defendant's Objection Where such a Plea Was Necessary for a Just Determination of the Charges against [redacted] and Where [redacted] Objections to Such a Plea Were Not Rationally Based.

1. Preservation of Issue for Review:

The People argue that "once defendant took over his representation, there was no defense dispute about what [sic] whether to pursue an NGRI defense." [See People's Answer Brief at p. 62] The People argue that the proceedings at the *Hendricks'* hearing conducted on June 15, 2007, became moot once [redacted] was permitted to fire his attorney and elect to withdraw the NGRI plea.

The People's argument is based upon a valid waiver of the right to counsel by [redacted] For the reasons set forth in his opening brief and in Part IV(A), *supra*, [redacted] waiver of counsel was not constitutionally valid. Consequently, this Court must review the trial court's determination at the conclusion of the *Hendricks*[4] hearing that even had [redacted] not discharged his attorney, the court would have

[4] *People v. Hendricks*, 10 P.3d 1231 (Colo. 2000).

found that entry of NGRI was not necessary for a just determination of the charges against [redacted].[5]

The People argue mootness because during the June 15, 2007, *Hendricks* hearing, [redacted] sought to, and was permitted to, discharge counsel; after counsel was discharged he was permitted to withdraw the request made by his counsel for a plea of NGRI; on September 21, 2007, [redacted] re-entered a plea of NGRI; and on February 27, 2008, he withdrew his NGRI plea. Rather than moot the issue raised at the June 15, 2007, *Hendricks* hearing, [redacted] erratic behavior in seeking to change his plea back and forth underscores the fact that his illness was an ongoing disability through the pretrial proceedings in this case, and tainted any decision he made to proceed without counsel and to forego a plea of NGRI.

2. The Trial Court Erred in Determining That Entry of NGRI Plea Over [redacted] Objection Was Not Necessary for a Just Determination of the Case.

Under *People v. Hendricks*, 10 P.3d 1231 (Colo. 2000), there are two interests which a trial court must balance in determining whether to enter a plea of NGRI put forth by defense counsel over a defendant's objection. "Just determination"

5 After defense counsel was discharged and the *Hendricks* hearing concluded, the court stated: "But I just want to make a supplemental finding under 16-8-103 because I failed to make a specific finding that the entry of the plea was not necessary for a just determination of the charge against the defendant. So I want to make that further finding." [T., 6/15/07, p. 94, l. 18-24]

inquiry, under the statutes allowing defense counsel to raise a defense of insanity or impaired mental capacity over a defendant's objection if the court determines, after conducting procedural steps outlined in statutes, that the defense is "necessary for a just determination of the charge against the defendant," requires the court to balance (1) the public interest in ensuring that a defendant who lacked the mental capacity to commit the crime is not wrongfully convicted against (2) the defendant's interest in conducting his own defense. *Hendricks, supra*, at 1241.

To address the public interest embodied in the statutes, the trial court must consider the viability of the mental status defense that defense counsel asks court to assert; this inquiry entails an assessment of the defendant's mental state at the time of the commission of the offense to determine whether there is substantial evidence that the defendant may not be guilty due to his mental status. *Hendricks, supra*, at 1241.

The People argue that the trial court properly decided the *Hendricks* issue because one evaluating doctor, Dr. Fukataki, opined that [redacted] was insane, while another, Dr. Hoffman, found him to be sane. The court found that Dr. Hoffman's evaluation was more persuasive. [People's Answer Brief at p. 67] The court did find Dr. Hoffman's report to be more persuasive than Dr. Fukataki's report. [T., 6/15/07, p. 91, l. 23-24]

However, the trial court judge does not determine whether one particular evaluator's opinion is more persuasive than another. If there is something more than a scintilla of evidence to support a conclusion that the defendant was insane at the time of the offense, he would be entitled to present that to a jury. *Hendricks, supra*, at 1241.

Finally, as to the People's contention that [redacted] articulated a rational basis for electing to forego a plea of NGRI, that issue is discussed fully in [redacted] opening brief.

III. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, and for the reasons set forth in his opening brief, [redacted] respectfully submits that the Court of Appeals erred in accepting his waiver of counsel and in refusing to enter a plea of NGRI over his objection.

Accordingly, [redacted] requests that the Court of Appeals vacate the judgment of conviction and sentence entered in this matter, and remand this case to the Douglas District Court for a new trial.

Dated this 10th day of September 2012.

/s/ Robert P. Borquez

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing has been mailed, first class postage prepaid, on this 11th day of September 2012, addressed to:

Matthew S. Holman, Esq.
First Assistant Attorney General
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/s/ Robert P. Borquez

Robert P. Borquez