IN THE SUPREME COURT OF FLORIDA

ASKARI ABDULLAH MUHAMMAD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,343

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

ASKARI ABDULLAH MUHAMMAD is the defendant/appellant in this case. References to the record will be indicated by the letter "R," and references to the various transcripts will be indicated by the letter "T."

II STATEMENT OF THE CASE

An indictment filed in Bradford County on October 24, 1980, charged Thomas Knight, who later changed his name to Askari Abdullah Muhammad, with first degree murder (R-1-2). The court appointed Joseph Forbes and Susan Carey to represent Muhammad (R-4), and they filed several motions on his behalf. Of particular relevance to this appeal was a motion for appointment of a psychiatric expert to aid the defense (R-13-19). The court granted that motion (R-34-35), and then appointed a Dr. Jamal Amin to aid and examine Muhammad in preparation of his defense (R-34-35).

Within two months, Forbes moved to withdraw from the case, which the court granted (R-37-38). Carey remained as counsel of record until December 31, 1980 (R-39). The court appointed Stephen Bernstein to represent Muhammad after Forbes withdrew (R-39). On January 14, 1981, Muhammad, in proper person, filed motions to dismiss counsel (R-179-180), to represent himself (R-59-60), for the assistance of counsel (R-181-182) and to appoint an investigator (R-181-182). The previous day, Bernstein had filed a motion to withdraw (R-173). The court denied all of Muhammad's motions and Bernstein's motion to withdraw (R-62-65). In denying these motions, Judge Green, the trial judge, said:

> Counsel previously filed a suggestion of insanity and a psychiatric examination has been ordered by the Court.
>
> The Court is faced with an obviously intelligent man who exhibits symptoms consistent with extreme paranoia. Defendant's now relieved counsel has

> suggested Defendant's present incompetence and legal insanity. The Motion further described, or reported the Defendant as having ". . . a severely disabling mental illness" . . . "a major psychiatric illness" and has been committed to the state hospital as "incompetent."
>
> (From the foregoing it is apparent that present competency to stand trial is in issue -- especially if the allegation of a previous adjudication of incompetence is substantiated and a later restoration of competency is not proved.)
>
> At issue here is the Defendant's ability to waive representation of counsel (See Faretta v. California, __US__) versus his right to the assistance of (representation of) counsel. (See Powell v. Alabama, __US__).
>
> Under Faretta, ability to represent oneself is required before counsel may be waived.
>
> In the instant case this Defendant is not so able either due to the particular factual circumstances of the case (death row incarceration/in-prison occurrence) OR alleged mental defects (incompetence, mental illness, insanity) or both.

(R-63-64). Subsequently, the court denied Bernstein's petition for a rehearing on his motion to withdraw (R-177-178,203). On January 21, 1981, Judge Green recused himself (R-66), and Judge Carlisle replaced him (R-172).

Muhammad proceeded to trial on May 24, 1982,[1] but the

[1] Judge Carlisle determined that Muhammad was competent to stand trial at an unrecorded hearing on May 20, 1982. At a hearing immediately before trial on May 24, he again found Muhammad competent to stand trial.

court declared a mistrial on May 25, 1982 (see R-375). The next day, Judge Carlisle recused himself (R-373), and Judge Chance was assigned to the case (R-386).

Muhammad apparently filed another motion to represent himself (see R-371), and Bernstein filed a motion to be relieved as standby counsel to Muhammad (R-380) (The court had earlier relieved Bernstein as counsel for Muhammad, but kept him on as standby counsel (R-380)). The state also filed a "Motion Requesting Court to Conduct Inquiry to Faretta v. California, Ausby v. State, Costello v. Carlisle" (R-377-379).

Judge Chance heard the motions and found Muhammad not only competent to stand trial (R-389), but he also found him competent to represent himself (R-388). Muhammad, however, filed a motion for assistance of counsel (R-396-397) which the court denied (R-404). Moreover, the court granted Bernstein's motion to be relieved as standby counsel (R-417). The court, nevertheless, appointed the Public Defender's Office to act as standby counsel (R-417).

Almost from the inception of this prosecution, counsel had raised the issue of Muhammad's sanity or competency to stand trial. As mentioned earlier, they filed (R-13-19) and the court granted (R-34-35) a motion for appointment of psychiatric expert to aid the defense. Subsequently, counsel filed a notice of intent to claim the defense of insanity and defendant's reciprocal discovery (R-215), statement of particulars of defense of insanity (R-253-254),

and a motion for appointment of experts under the Florida Rules of Criminal Procedure 3.216(d)(e) (R-255-256).

Accordingly, the court appointed two psychiatrists, Drs. Barnard and Carrera, to examine Muhammad as to his "present mental condition and his mental condition at the time of the alleged offense..." (R-258). Muhammad twice refused to be examined (R-274,284) by these psychiatrists, and the state after each attempt filed a "Motion to Exclude Defendant's Notice of Insanity and any Evidence Sought to be Introduced Regarding the Defense of Insanity." (R-275-276,292-293).

On May 10, 1982, counsel filed a "Motion for Court to Determine the Competency of the Defendant to Stand Trial" (R-313-315) and submitted a "Written Proffer of Evidence for Trial" detailing Muhammad's history of mental problems (R-316-317).

The court apparently granted the defense motion to determine Muhammad's competency and again appointed Drs. Barnard and Carrera to examine Muhammad. The court, however, also appointed Dr. Jamal Amin to also conduct an examination to determine Muhammad's competency to stand trial and to determine his sanity at the time of the offense For the third time, Muhammad refused to be examined by Barnard or Carrera. Amin, on the other hand, was able to conduct his examination, and he found Muhammad competent to stand trial (R-369-370).

Based upon Amin's report and Muhammad's refusal to be examined, the court found Muhammad competent to stand trial (R-388). Moreover, the court granted the state's "Motion to Strike Defense of Insanity"(R-292-293, page 4 of May 24th hearing) and also ruled that, due to Muhammad's refusal to cooperate with Barnard and Carrera, the defense could not present "any evidence relevant to the issue of his sanity" (page 7 of May 24, 1982, hearing).

Muhammad proceeded to trial on October 19, 1982, and the jury found him guilty as charged (R-442).

Muhammad waived his right to a jury recommendation, and the court adjudged him guilty of the murder and sentenced him to death (R-455-464). In aggravation, the court found:

> 1. That Muhammad was under a sentence of imprisonment when he committed the murder.
>
> 2. That Muhammad had previously been convicted of another capital felony or a felony involving the use of or the threat of violence to another person.
>
> 3. That the murder of which Muhammad had been convicted was especially heinous, atrocious or cruel.

(R-455-464).

The court found nothing in mitigation.

At the appellate level, appellate counsel filed a motion with this Court asking it to relinquish its jurisdiction to the trial court so it could reconstruct the record of an unreported hearing held on May 20, 1984. This Court granted the motion, and pursuant to Rule 9.200, Florida Rules of

Criminal Procedure, the hearing was reconstructed as best as possible and sent to this Court. This appeal follows.

III STATEMENT OF THE FACTS

About 9:45 a.m. on October 12, 1980, a guard at the Florida State Prison told Askari Muhammad (formerly known as Thomas Knight), a death row inmate, that he had a visitor (T-1280). The guard told him, however, that he would have to comply with the prison rules and regulations before he could see the visitor. This meant that he would have to shave (T-1281). Muhammad replied that he could not shave because of medical problems, and in fact, he had, at other times, been excused from shaving by the prison medical department (T-1283). Nevertheless, on October 12 Muhammad evidently did not have this pass, having surrendered it to a clerk who said he no longer needed it (T-1293).

As the guard left, he and another guard heard Muhammad say, "Well, it looks like I will have to start sticking people." (T-1283,1303).

About 5:40 that afternoon, Officer Burke was escorting death row inmates to the shower cell one at a time (T-1003). Another officer, Brown, was at the control panel opening and closing the doors to the various cells (T-1009). He had just opened the door to Muhammad's cell and was tying a tag to the knob controlling the door to his cell when he heard Burke screaming (T-1016). Muhammad had grabbed Burke

by the shirt and was stabbing him with a homemade knife (T-1016). While Burke tried to avoid Muhammad, Brown summoned help (T-1021). Within seconds Sergeant Owens and Brewer were at the door to "R" wing and were let in by Brown.

By that time Burke was lying on his back trying to fend off Muhammad's blows (T-1024). Owens told Muhammad to back off and he did, holding the knife behind his back (T-1025-1026). While the guards worked on Burke, Muhammad paced back and forth with a calm expression on his face (T-1177-1178). At sometime, he discarded his weapon (T-1181).

Burke suffered several stab wounds and his death was caused by a stab wound to the heart (T-1336).

IV ARGUMENT

ISSUE I

THE COURT ERRED IN FINDING MUHAMMAD COMPETENT TO STAND TRIAL AS IT HAD INSUFFICIENT FACTS UPON WHICH TO FIND HIM COMPETENT.

Muhammad's trial counsel, before the court found Muhammad competent to represent himself (R-388), filed a motion to determine his competency to stand trial (R-313-315). Accordingly, the court appointed two psychiatrists to conduct the examination, but Muhammad refused to see them. The psychiatrists tried three times to see him, but Muhammad refused to see them each time (R-368). The court appointed a third psychiatrist, Jamil Amin, a psychiatrist originally appointed to assist defense counsel under Rule 3.216(e), Florida Rules of Criminal Procedure (R-34-35), to examine Muhammad to determine his competency to stand trial (page 58 of the hearing held on May 17, 1982). After examining Muhammad, Amin found him competent to stand trial (R-368-369).

The court, based upon Amin's report and Muhammad's refusal to cooperate with the other psychiatrists, found Muhammad competent to stand trial (R-388)[1]. In doing so, the court ignored Rules 3.210 and 3.211, Florida Rules of Criminal Procedure and placed unfounded weight upon Amin's

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[1] See also page 7 of reconstructed record submitted to this Court on April 6, 1984.

finding of Muhammad's competency to stand trial.[2]

Of course, in order to stand trial, Muhammad must be competent to do so, and the standard Florida follows to determine such competency was articulated in Dusky v. United States, 362 U.S. 402, 4 L.Ed.2d 824, 80 S.Ct. 788 (1960):

> ...the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."

§916.12(1), Fla.Stat. (1982); Rule 3.211(a), Florida Rules of Criminal Procedure, Lane v. State, supra. Moreover, despite a trial attorney's failure to raise the issue of his client's competency, the trial court has the independent responsibility of doing so at any time if he believes a defendant is incompetent. Drope v. Missouri, 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975); Rule 3.210(b), Fla.R. Crim.P. The court in this case, although ordering the required examination, erred in several ways in finding Muhammad competent to stand trial.

(1) Failure to follow Rule 3.210, Florida Rules of Criminal Procedure

Rule 3.210, Florida Rules of Criminal Procedure establishes

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[2]Muhammad's failure to cooperate is not a legitimate reason to find him competent to stand trial. Lane v. State, 388 So.2d 1022, 1026 (Fla. 1980).

the procedure for raising the competency issue, and significantly requires that at least two experts examine a defendant before a hearing on a defendant's competency is held:

> (b) If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing.

The rule requires at least two experts because psychology and psychiatry, unlike the physical sciences, remains an inexact science in which different experts can legitimately reach widely varying conclusions based upon the same data:

> There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Drope at 180.

Nevertheless, the more certain a psychiatrist may be in his opinion and the stronger the facts supporting that

conclusion, the two expert rule requirement may be waived. Ross v. State, 386 So.2d 1191 (Fla. 1980). For example, in Ross, the expert unequivocally said that Ross met the Dusky standard. Moreover he also said that further testing was unnecessary to determine Ross' competency. Id. at 1196. Amin's report is not so unequivocal, and another psychiatrist' report was essential to help the court reach a proper determination of Muhammad's competency.

Here, the summary of Amin's proffered testimony severely underlines the conclusion that Muhammad was competent to stand trial. For example, Amin said he typically exhibited:

> 1. Alterations in mood from depression to euphoria.
> 2. Insomnia and irritability.
> 3. Inability to sustain interest and energy.
> 4. Impairment of mental concentration.
> 5. Looseness of association, incoherency, and blocking in his speech pattern.
> 6. Drug experimentation, abuse and addiction.
> 7. Delucions of grandeur and persecution.
> 8. Auditory hallucinations.
> 9. Paranoia and an inability to form close relationships (schizoid personality).
>
> It is the opinion of Dr. Amin that MR. KNIGHT has been a latent schizophrenic for many years and decompensated under environmental stress and/or toxic effects of drugs. It appeared to Dr. Amin that THOMAS KNIGHT had always had an underlying paranoid personality pattern which manifested itself in episodic symptoms or behavioral disorders.
>
> Because certain forms of epilepsy can be confused with schizophrenia, Dr.

> Amin recommends a neurological examination and appropriate laboratory tests to rule out the possibility of temporal lobe or psychomotor epilepsy which can manifest in the extremes of behavior from violent outbursts to staring into space. These are seizure-like states with the patient typically being unable to recall events during such a seizure.

(R-321).

In light of this statement, Amin's finding of competency hardly is unequivocal, and the court should have insisted upon more information before it summarily found Muhammad competent to stand trial.

(2) Deficiencies in the manner in which Amin examined Muhammad.

Before discussing the substantive portion of Amin's report, several problems arise with the manner in which Amin examined Muhammad. First, Muhammad was unaware that when Amin examined him that it was for the purpose of determining his competency to stand trial (T-77 of June 7, 1982, hearing). Apparently, neither Muhammad's counsel or Amin told Muhammad the purpose of Amin's visit because Muhammad thought Amin came to see him as the psychiatrist appointed to assist counsel pursuant to Rule 3.216(e), Florida Rules of Criminal Procedure. Id. In fact, had Muhammad known Amin's actual purpose for visiting him, he probably would not have agreed to see him. Id. Although no case law directly on point has been found, the absence of any notice to Muhammad violates standard 7-3.6 of the recently adopted ABA Criminal Justice Mental Health Standards.

STANDARD 7-3.6. PROCEDURES FOR CONDUCTING MENTAL EVALUATIONS.

* * *

(b) Duties of defense attorney and evaluator to explain nature of evaluation to defendant. In any evaluation, whether initiated by the court, prosecution or defense, the defendant's attorney and the mental health or mental retardation professional conducting the evaluation have independent obligations to explain to defendant and to assure that defendant understands to the extent possible:

(i) The purpose and nature of the evaluation;

(ii) The potential uses of any disclosures made during the evaluation;

(iii) The conditions under which the prosecutor will have access to information obtained and reports prepared; and,

(iv) The consequences of defendant's refusal to cooperate in the evaluation as provided for in standard 7-3.4(c) and 7-4.6(b).

Moreover the underlying philosophy of Estelle v. Smith, 451 U.S. 454, 68 L.Ed. 359, 101 S.Ct. 1866 (1981) is that an examination conducted for one purpose generally cannot be used for other purposes without some warning to the person examined that the examination might be used for such other purposes. Also, because Muhammad thought that Amin saw him as part of his defense effort (T-77 of June 7, 1982, hearing), publishing the reports of Amin's examination violated the attorney-client privilege, Section 90.502, Florida Statutes (1982) and possibly the psychotherapist-

patient privilege, Section 90.503, Florida Statutes (1983).[3]

Second, Amin's report makes no mention of the techniques Amin used to determine Muhammad's competence to stand trial. C.f. 3.216(e), Fla.R.Crim.P. From the report it appears that Amin and Muhammad had a rambling conversation concerning mainly religion, and the clear inference exists that unless one is familiar with the Muslim religion, Muhammad was incoherent. Whether this "rap" session was a medically accepted examination technique is not stated, or if some other techniques were also used, they also were not presented in Amin's report. In any event, we simply do not know how Amin gathered his "impressions," and without such a knowledge, his conclusions are suspect. For example Amin's finding of competency is strange in light of the fact that one of the factors Amin should have used to evaluate Muhammad's competency was his ability to relate to his attorney. Rule 3.211(a)(1)(v), Fla.R.Crim.P. Yet, unless one is familiar with the Muslim religion, Muhammad would be incoherent.

The report also does not relate what facts Amin used to find Muhammad competent or how he resolved the conflicts

[3]The psychotherapist-patient privilege is not applicable "for communications made in the course of a court ordered examination of the mental or emotional condition of the patient." 90.503(4)(a), Florida Statutes (1982). Despite this exception, Muhammad argues that his communications with Amin were privileged because he was unaware of the purpose of the examination, and as mentioned, he believed that Amin was there to assist his defense.

that exist in the report. In his report, Amin says that Muhammad is a "latent schizophrenic complete with hospitalizations, who could and did decompensate under extreme environmental and/or the toxic effects of drugs." (R-369). Nowhere in his report, however, does Amin discuss how this lurking illness might affect his competency to stand trial. A discussion of this problem would have been especially helpful to the trial court in evaluating Muhammad's competency during the penalty phase of the trial where the possibility of a death sentence is a much stronger likelihood. Under such pressure Muhammad could "decompensate," and by reading his sentencing argument (T-1558-1572), it is evident that he did so. Amin's failure to discuss to any extent the impact of Muhammad's schizophrenia is a glaring deficiency of his report.

Further, the report does not resolve the conflict between Muhammad's lack of event thought disorder with his inappropriate concern about labels implying insanity, and his latent schizophrenia (R-369). This resolution should have been particularly important because in determining Muhammad's competency to stand trial, the focus is on Muhammad's <u>functional</u> competence and not his <u>medical</u> competence. Even though Muhammad may, in fact, know right from wrong (R-369), he may nevertheless, under <u>Dusky</u>, have been incompetent to stand trial. See Commentary to Standard

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schizophrenia affected his perception of a legal process or what conditions might trigger its return. That Muhammad had a significant appreciation for his present legal predicament and could appreciate the seriousness of the situation are conclusions without facts to support them and are, in any event, nothing more than statements that Muhammad knew he was in big trouble.

b. The defendant should have the capacity to maintain the attorney-client relationship. (factors (v),(vi),(x)). Amin's report does not mention this area although it does say Muhammad can assist in his defense (R-370). Yet Muhammad also insisted on representing himself (R-369). Apparently Muhammad could assist in his defense only if he conducted it himself as Muhammad had not talked to his attorney for several months (page 10 of hearing held on May 17, 1982). Moreover, it is hard to believe that he would have any motivation to help himself, plan his defense, or take advice from counsel if he was inappropriately concerned about any labels implying insanity (R-369) where insanity was his only defense.

Moreover, in a summary of Amin's proffered testimony, Amin said Muhammad characteristically lacked the ability to sustain interest and energy had an impaired mental concentration (R-321). He also suffered from delucions of grandeur and persecution (R-321). Amin's report, however, makes no mention of this or in any way attempts to reconcile

Amin's findings of competency with his other findings.

c. The defendant should be able to relate factual information. (factor vii). Amin's report makes no mention of Muhammad's recall capability. The fact that Muhammad suffered auditory hallucinations, looseness of association, incoherency, and blocking in his speech pattern (R-321) conflicts with his report where he said Muhammad was well oriented to time, place, person, and situation (R-369). Moreover, finding him well oriented is insufficient to sustain a competency finding. Lane v. State, 388 So.2d 1022, 1026 (Fla. 1980). In short, the trial court could only speculate about Muhammad's ability to recall factual details.

d. The defendant should have the ability to testify. (factor ix). Again, this factor is not mentioned in Amin's report.

e. The defendant's ability should be assessed in light of the particular charge, the extent of participation required and the complexity of the case. Muhammad is an extremely smart man (R-347). Nevertheless, this is a capital case in which Muhammad's sanity should have been the major issue. The pressures on defense counsel in a capital case, in general, are very great, but upon Muhammad they must have been even greater. During the penalty phase Muhammad's mind is dissected looking for aggravating and mitigating factors, and consequently his greatest cooperation is required. Yet it is on just such issue that Muhammad has

balked. Moreover, Muhammad's desires to represent himself in this capital case was reported by Amin, but not analyzed. Yet such desires would support Amin's proffered testimony that Muhammad suffered delusions of grandeur (R-321).

Amin's report concludes that Muhammad is competent to stand trial, but that finding is either not supported or at odds with the facts, and in any event, it gave no support to the court's finding that Muhammad was functionally and competent to stand trial.

This Court therefore should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN ALLOWING MUHAMMAD TO REPRESENT HIMSELF AT TRIAL WITHOUT FIRST DETERMINING HIS COMPETENCE TO WAIVE ASSISTANCE OF COUNSEL AND TO REPRESENT HIMSELF.

After the court ruled that Muhammad was competent to stand trial (T-388), Muhammad asked to represent himself (T-389). The court, without questioning Muhammad's competence to represent himself conducted the hearing dictated by Faretta v. California, 422 U.S. 806 (1975). Accordingly, it found that Muhammad knowingly and voluntarily waived his right to counsel and desired to represent himself (T-389). What the court failed to question, however, was Muhammad's competence to make such a decision,

and the court's earlier determination of his competence to stand trial did not resolve the issue of his competency to represent himself.[4]

In Dusky v. United States, 362 U.S. 402, 4 L.Ed.2d 824, 80 S.Ct. (1960), the Supreme Court articulated the standard that defendant must meet to be competent to stand trial:

> ...[T]he "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.

That standard, however, is only a threshhold requirement for the court to make when a defendant wants to represent himself. That is, before a defendant who is competent to stand trial can represent himself, the trial court must first determine that he is competent to do so.[5]

In Westbrook v. Arizona, 384 U.S. 150, 16 L.Ed.2d 429, 86 S.Ct. 1320 (1960) the Supreme Court recognized for the first time a distinction between a defendant's competency to

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[4] Judge Green had earlier refused to find Muhammad competent to represent himself (R-63-64).

[5] This is not to say that the court, in every case in which a defendant desires to represent himself, must conduct a competency hearing. Muhammad, however, argues that under the rationale of Drope v. Missouri, and Pate v. Robinson, the court must determine a defendant's competence to represent himself if it has a good faith or reasonable grounds to believe the defendant is not competent to represent himself.

stand trial and his competency to waive counsel and represent himself. In that case, three psychiatrists examined Westbrook and unanimously agreed that he was competent to stand trial. Later, upon Westbrook's insistence, the court permitted him to represent himself. On appeal to the Arizona Supreme Court, that Court said that Westbrook's claim that he was incompetent to waive counsel was without merit because the trial court was not required "to set a hearing to determine whether the defendant through insanity or mental deficiency was able to conduct his own defense." Westbrook v. State, 406 P.2d 388, 391 (Ariz. 1965).

Rejecting this holding, the U.S. Supreme Court ruled that the court should have conducted a hearing to determine Westbrook's competency to represent himself.

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 US 458, 465, 82 L ed 1461, 1467, 58 S Ct 1019, 146 ALR 357; Carnley v. Cochran, 369 US 506, 8 L ed 2d 70, 82 S Ct 884.

> From an independent examination of the record, we conclude that the question whether this "protecting duty" was fulfilled should be re-examined in light of our decision this Term in Pate v. Robinson, 383 US 375, 15 L ed 2d 815, 86 S Ct 836.

Consequently, although the court in Westbrook did not articulate a standard of competency a defendant must meet to represent himself, it is clear that such a standard exists and it is higher than that a defendant must meet in order to stand trial.

In Massey v. Moore, 348 U.S. 105, 99 L.Ed.135, 75 S.Ct. 145 (1954) the court, anticipating Westbrook, explained why a defendant must meet a higher standard of competency to represent himself:

> One might not be insane in the sense of being capable of standing trial and yet lack a capacity to stand trial without benefit of counsel.

Id. at 108. See also State v. Kolocontronis, 436 P.2d 774 (Wash. 1968).

In Government of the Virgin Islands v. Niles, 295 F.Supp. 266 (DC, Virgin Islands 1969), the court recognized this two step analysis:

> After listening to the testimony of the psychiatrists and the prison warden, the court believes that the defendant is competent to stand trial. The fact that he may be suffering from paranoia does not in this case mean that the defendant is unable to cooperate with counsel.
>
> As for defendant's competency to waive counsel, the court is of the

> opinion that one who may be suffering from paranoid delusions should not be entrusted with the sole conduct of his defense. Defendant is charged with first degree murder as well as other serious felonies, and in compliance with the court's protecting duty, the court will appoint counsel to defend the accused against these charges. (cites omitted.)

Likewise merely because a defendant is competent to stand trial does not mean he is competent to plead guilty. Sieling v. Eyman, 478 F.2d 211 (CA 9 1973); Chavez v. United States, 656 F.2d (CA 9 1981), see footnote 3.[6]

Competence, therefore, involves a variable standard, and generally the greater the participation required of a defendant, the higher the standard imposed to be found competent to proceed through that phase. Moreover, competence of whatever type is not determined once, then forgotten. When Westbrook and the cases following it are read in light of Drope v. Missouri, 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975) and Pate v. Robinson, 383 U.S. 375, 15 L.Ed. 815, 86 S.Ct. 836 (1966), it is clear that the trial court has a continuing duty to monitor the defendant's competency to stand trial, to represent himself, or to plead guilty. Lane v. State, 388 So.2d 1022 (Fla. 1980).

Westbrook, as mentioned, did not articulate the standard

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[6]The court in Sieling adopted Judge Hufstedler's formulation of a standard of competency to plead guilty articulated in Schoeller v. Dunbar, 423 F.2d 1183,1194 (CA 9 1970):

> "A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea."

a court must use to determine if a particular defendant is competent to represent himself. Moreover, Muhammad has found no Florida case which articulated this standard either. The American Bar Association in its recently adopted criminal justice mental health standards,[7] however, provided such a standard:

> STANDARD 7-5.3. COMPETENCE TO WAIVE COUNSEL AND TO PROCEED WITHOUT ASSISTANCE OF COUNSEL
>
> (a) A defendant who is mentally incompetent to waive counsel or to defend himself or herself at trial without the assistance of counsel should not be permitted to stand trial without the assistance of counsel.
>
> (b) The test for determining the competence to waive counsel and to represent oneself at trial should be whether the defendant has the present ability to knowingly, voluntarily and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to proceed without representation by counsel, to comprehend the nature of the charge and proceedings, the range of applicable punishments, and any additional matters essential to a general understanding of the case.
>
> (c) If, after explaining the availability of a lawyer and making sufficient inquiry of a defendant professing a desire to waive counsel and represent himself or herself, the trial judge has a good faith doubt of the mental competence of the defendant to waive counsel or

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[7] These standards were adopted by the ABA at its 1984 annual meeting held in Chicago, Illinois, on August 7-8, 1984.

> to represent himself or herself the judge should order a pretrial mental evaluation of the defendant according to the procedures set forth in part IV of this chapter.
>
> (d) After obtaining the report of the evaluators, the court should hold a hearing on the issues raised according to the procedures set forth in part IV of this chapter.
>
> * * *
>
> (iii) If, after hearing, the court should determine that the defendant is competent to stand trial but is incompetent to waive counsel and to proceed without assistance of counsel, the court should appoint counsel to represent the defendant and should proceed to trial of the case.

Thus, the narrow question presented to this Court is whether the trial court, despite its earlier ruling that Muhammad was competent to stand trial, should have inquired further into his competency to represent himself. In other words, did the court have a good faith belief that Muhammad was competent to knowingly, voluntarily, and intelligently waive his right to counsel.[8]

Perhaps the strongest factor suggesting Muhammad's

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[8] If a trial court has reasonable grounds to believe a defendant is incompetent to stand trial, he must hold a competency hearing. Lane v. State, 388 So.2d 1022 (Fla. 1980). Whatever distinction exists between "reasonable grounds" and a "good faith" belief is largely academic because in practical terms the facts which support a good faith belief will also be reasonable grounds to hold such a hearing.

incompetence to waive counsel and represent himself was his refusal to consider insanity as a possible defense (R-369-370, page 22 of hearing held on May 17, 1982). Muhammad had been diagnosed as schizophrenic (R-369) or paranoid schizophrenic (R-319) and had been hospitalized for several years (R-369). He was, in short, a man with a "major psychiatric problem." (R-320). In fact, Muhammad admitted that he "[did] not know if it was in [his] best interest to present an insanity defense" (T-79). This admission, by itself, should have alerted the court to the possibility of Muhammad's incompetence to justify further inquiry. In fact, Muhammad requested such a hearing:

> MR. MUHAMMAD: As a matter of law, Your Honor, I should be examined to determine whether I am competent to proceed to trial. This is not to say that I am incompetent to proceed to trial, but I am only saying as a matter of law, I believe that the Court has a duty to determine my competency to proceed to trial.[9]

The court, however, abruptly ended its competency inquiry into Muhammad's mental status and shifted its focus to the prison conditions which might affect his ability to prepare his defense (T-79-107).

Muhammad's incompetence also manifested itself in the penalty phase of the trial at which he also represented

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[9] It is strange that Judge Chance should have asked Muhammad if there was any question about his mental competency to stand trial. How many crazy people admit they are crazy?

himself. Muhammad did not present any evidence in mitigation to support a plausible argument that his mental balance was so precarious that being denied a visit from his mother upset it (R-318). State v. Kolocotronis, 436 P.2d 774, 781 (Wash. 1968).

Other matters before and during trial suggest Muhammad's incompetency to waive counsel and represent himself. Throughout the entire proceedings, Muhammad repeatedly insisted upon being referred to as Askari Abdullah Muhammad rather than as Thomas Knight or insisted upon wearing a beard (R-41). Judge Green approved the name change, but Judge Carlisle refused to accept it, and Judge Chance bent to Muhammad's desires. Nevertheless, at almost every hearing in which Muhammad speaks, the subject of his name arise. While names are important, surely with his life at stake, Muhammad had more important issues to be concerned about, and his insistence upon using his new name is about as important as straightening the deck chairs on the Titanic.

Muhammad's answers to questions also were exceedingly long and often digressed from the point (page 75,80,81 of June 17, 1982, hearing), and repeatedly judges had to stop Muhammad's ramblings. Id.

His closing argument during the guilt phase of the trial also goes on and on, focusing on minute details (T-1552-1558) and reaching "paralogical" (R-360-361) conclusions:

> Remember, consistency is truth. Togetherness is truth. If one witness is not together with another witness, that's not truth. One of those witness is not giving true testimony. One of those witnesses is a very false witness.

Reading such an argument is extremely difficult, and the trial court, listening to Muhammad's ramblings was either bored or lost in his logic because it stopped his argument for lunch (T-1473), and after lunch, the court limited Muhammad's closing (T-1473).

Although other examples exist, Muhammad's argument to the jury during the sentencing phase of the trial illustrates Muhammad's point: the argument is rambling, bizarre, gibberish.[10] It is a tossed salad of words.

> Nowhere in the record does the record state that the deceased knew that he was going to die, that he knew something was going to happen to him. I submit it this Court upon thorough examination of the record which has been made in this Court, in no instance or occasion has it been shown the defendant, on the premeditation contemplated the taking of the life of the deceased or anyone else.
>
> The State has represented to this Court in some seven and a half hours lapsed from the time this defendant made the statement until the defendant acted. I submit to this Court, under our laws, we

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[10] Significantly, Dr. Amin's report mentioned the fact that under extreme environmental stress Muhammad could and did "decompensate." (R-369). Muhammad can think of nothing more stressful than to have to argue for his life, and his closing argument, in fact, is a good example of decompensation.

> have no set time to formulate a decision regarding whether we are to act or whether we are not to act.
>
> I offered to the jury during the guilt and innocence phase of these proceedings that testimony and evidence presented before this Court would not, could not show the defendant had committed the offense of murder in the first degree. I made that statement based upon the requirements under our law.
>
> * * *
>
> It is one of the founding pillars of the society which we live in that we are to have freedom of individuality. It is for this reason that we are a sovereign state. The sister states of these United States, they act in individual capacities to an act and enforce laws felt by the residents of those individual states to be according to the will of the people.
>
> I submit to this Court, that any act committed by any individual, it cannot be judged by one, and only one, standard. But I submit to this Court that any and every act must be dealt with on a case by case basis.

Surely, the court should have stopped the proceedings and at least questioned Muhammad's competency. In light of his argument here and the totality of what Muhammad did throughout this entire proceeding, the court certainly had reasonable grounds to believe Muhammad was incompetent to represent himself. That the court nowhere questioned Muhammad's competency to represent himself is reversible error.

ISSUE III

THE COURT ERRED IN EXCLUDING MUHAMMAD FROM PRESENTING ANY EVIDENCE OF HIS INSANITY AT TRIAL BECAUSE HE REFUSED TO BE EXAMINED BY COURT APPOINTED PSYCHIATRISTS IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The basic problem of this case was Muhammad's unwillingness to consider the possibility that he was insane when he committed this homicide. Of the three psychiatrists appointed to examine him only Amin saw him, and he never determined whether Muhammad was insane at the time of the offense (R-369-370). That omission, however, was insignificant. Counsel filed a notice of intent to rely upon the defense of insanity (R-213), but the court, at the state's request (R-229-230,275-276), refused to let the defense present any testimony, lay or expert, to support his claim that Muhammad was insane at the time of the homicide:

> THE COURT: In view of the prior proceedings and the occurrences in the course of those proceedings, it is the order and judgment of the Court that under the authority of Wilford Bannister v. the State at 358 So.2d 1182 a decision of the Second District Court of Appeal of Florida on May 24th of 1978, the Defendant will not be permitted to offer any evidence relative to the issue of his sanity.
>
> MR. BERNSTEIN: Any evidence at all, Your Honor?
>
> THE COURT: Any evidence at all.
>
> MR. BERNSTEIN: Or any experts? This would include lay witnesses?
>
> THE COURT: Yes, when I say any evidence, I say all-inclusive.

MR. BERNSTEIN: Your Honor, will the Court permit the argument as to the question of sanity if that can be properly demonstrated either through cross examination or the analysis of the facts as they become involved in the testimony in this case? I want to make clear my understanding of the Court's ruling.

THE COURT: I am not sure I am following your question.

MR. BERNSTEIN: I had anticipated the Court to exclude the use of any experts' testimony such as appeared in the proffer. In addition to the expert testimony, I intended to call lay witnesses who would give their lay opinion as to the sanity of the Defendant at the time of this incident. The State also has a number of witnesses, lay witnesses, that they had at least given me notice of that they would call to go to the same issue.

THE COURT: Am I correct that if the issue of sanity were permitted to be offered, then these witnesses would be in addition to the expert in the written proffer?

MR. BERNSTEIN: Yes, sir.

THE COURT: Both by the defense and the State?

MR. ELWELL: That is correct.

THE COURT: My ruling is that the Defendant's total uncooperation with the Court-appointed psychiatrists precludes the defense offering any evidence through any witness going to the issue of sanity.

(pages 6-8 of hearing held on May 24, 1982).

The court, however, had misread Bannister and by ruling as it did, it denied Muhammad his constitutional right to

present a defense.

The issue in Bannister involved an order to tax the costs of a psychiatrist to Bannister after he refused to be examined. Although the state had styled its motion as one to tax costs, the District Court of Appeal said that it was really one to impose sanctions. Consequently, by way of dicta the court said that where a defendant refuses to be examined by court appointed experts, the state is not hurt because:

> ...The court may properly refuse to admit any evidence propounded by the defendant relevant to the issue of his sanity. McMunn v. State, 264 So.2d 868 (Fla. 1st DCA 1972). (emphasis supplied)

Significantly, the Bannister court's concern focused upon the issue of what to do with a defendant who refuses to cooperate with any court appointed experts. The court did not address the issue presented by this case: Can all testimony, lay or expert, be excluded because Muhammad refused to cooperate with the court appointed experts? The Bannister court thus excluded "any evidence" because the only evidence involved in that case was expert testimony.

This point is made clearer in the cited case of McMunn v. State, supra:

> It is well settled in Florida that a defendant who relies on the defense of insanity must cooperate with court-appointed experts by answering questions propounded to him, or in the alternative be precluded from offering his independent expert testimony upon the subject. (footnote omitted)

Accord Parkin v. State, 222 So.2d 457 (Fla. 1969).

Consequently, because Muhammad refused to cooperate with the court appointed psychiatrists, the appropriate sanction the court should have imposed was to exclude his expert witnesses. It should not have also excluded Muhammad's lay witnesses or prevented his cross-examination of any state witness.

By excluding any evidence Muhammad may have offered as to his intent to commit this homicide, the court has in effect, precluded Muhammad from presenting a defense in this case. Washington v. Texas, 388 U.S. 14, 19, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967). That is, the only issue in this case was the state of Muhammad's mind when he killed the guard. There is absolutely no doubt that Muhammad committed this homicide. There is, however, considerable doubt of whether he was sane at the time of the crime. By precluding any evidence of Muhammad's mental state, the court denied Muhammad the right to present a viable defense.

The court not only ruled that Muhammad could present no defense through his own witnesses, it also said he could not cross-examine any of the state witnesses regarding his behavior on the day of the homicide. But see Coco v. State, 62 So.2d 892 (Fla. 1953); Coxwell v. State, 361 So.2d 148 (Fla. 1978). Such a ruling denied him his constitutional right to confront his accusers, to conduct a

full cross-examination, and to present his defense. Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974).

Consequently, while the court could exclude any defense expert who would testify as to Muhammad's competency or sanity, it could not totally preclude the defense of insanity. Moreover, because this error affected the very fairness of Muhammad's trial, it was fundamental error to make a ruling excluding any evidence of Muhammad's insanity, and it is one which Judge Chance, upon assuming responsibility for the case, should have corrected. Because he did not, this Court must now reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN FINDING AS AGGRAVATING FACTORS THAT MUHAMMAD WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER AND THAT HE HAD A CONVICTION FOR A PRIOR FELONY.

There have been five cases in Florida in which a state prisoner has killed another prisoner and received the death penalty. In all five, the trial courts have found, and this Court has approved, the two aggravating circumstances of under sentence of imprisonment (Section 921.141(5)(a), Florida Statutes) and previous conviction for prior violent felony (Section 921.141(5)(b), Florida Statutes). In all five, this Court has affirmed the imposition of the death penalty. Agan v. State, 445 So.2d at 328; Lusk v. State, 446

So.2d 1038 (Fla. 1984); William v. State, 438 So.2d 781, 786 (Fla. 1983); Morgan v. State, 415 So.2d 6, 12 (Fla. 1982); and Demps v. State, 395 So.2d 501, 505-506 (Fla. 1981). Since the death penalty is presumed in Florida if one or more aggravating circumstances is found and approved, State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), the death penalty will always be imposed and upheld for any prison murder. This history of the Florida Supreme Court's treatment of prison murders leads to the inescapable conclusion that this sanctions an automatic death penalty, because of the presence of two aggravating circumstances. Automatic death sentences are, of course, unconstitutional. Roberts v. Louisiana, 429 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

This issue was rejected by this Court in Agan v. State, 445 So.2d 326 (Fla. 1984):

> His first argument is that the trial court improperly found as two separate aggravating circumstances that he was under sentence of imprisonment and that he had previously been convicted of a crime involving violence. However, where these two aggravating factors are not based on the same essential feature of the crime or of the offender's character, they can be given separate consideration. Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

The court's ruling, however, does not, as a matter of law, exclude the possibility of the doubling of these two aggravating factors, and Muhammad argues that the trial court

in this case, based its finding of each of these aggravating factors upon the same essential feature of the crime: Muhammad's April 21, 1975, conviction and sentence for first degree murder.

Of course, the state could argue that these two factors focus upon different features of the prior crime because of focuses upon the sentence given while the other focuses upon the conviction. Such a distinction, however, is much too fine to withstand scrutiny as a person certainly cannot be serving a prison sentence without also having been convicted of a crime. See Section 775.08, Florida Statutes (1983). Consequently the court not only impermissibly found both aggravating factors applicable, but also sentenced Muhammad to death based upon the fact of his prior conviction for murder.

ISSUE V

THE COURT ERRED IN FAILING TO CONSIDER IN MITIGATION EVIDENCE OF MUHAMMAD'S MENTAL STATUS.

At sentencing, the court found nothing to mitigate Muhammad's death sentence to life in prison (T-1585). In particular, it found that Muhammad was not under the influence of extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (R-460-461). The court

also found that no statutory mitigating factor existed (T-1586). The court, however, failed to consider the proffered evidence that would have explained or at least mitigated the harshness of the sentence given (R-316-367).

On the morning of the day of the murder, a guard (presumably male) refused to let Muhammad see his visitor because his shaving profile had expired and Muhammad would not shave (T-1281). Muhammad argued with the guard over whether or not he had to shave. Nevertheless, given his extreme close attachment to his mother, his extreme hatred of all males, and the prison environment he found himself in, his frenzied stabbing of the guard who by pure fortuity had duty that day to escort inmates to the shower is understandable, and it certainly tends to mitigate a death sentence (R-318).

The court in this case did not formally refuse to consider mitigation evidence as the court in Eddings v. Oklahoma, 454 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) did, nevertheless, the evidence was part of the record, and the court, to the same extent as the court in Eddings, refused to consider any evidence in mitigation of Muhammad's death sentence.

In Eddings the U.S. Supreme Court held that the trial court erred in refusing to consider as mitigating evidence Eddings' disturbed childhood:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the

> sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. Id. at 113-114. (emphasis in original.)

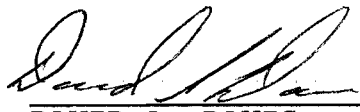
Here, the record is devoid of any indication that the trial court gave any consideration to Muhammad's mental condition on the day of the murder, despite the strong possibility that Muhammad may have been insane when he committed this offense. Pope v. State, 441 So.2d 1073 (Fla. 1983). Consequently, because the trial court failed to consider any evidence of Muhammad's mental condition when he committed this murder, this Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

V CONCLUSION

Based upon the arguments presented here, Askari Abdullah Muhammad asks this Honorable Court to reverse the trial court's judgment and sentence and remand for new trial or to reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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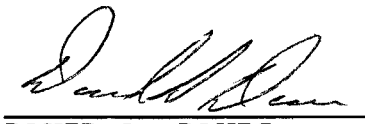
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by mail to Mr. Calvin L. Fox, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suit 820, Miami, Florida, 33125, to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, and to appellant, Mr. Askari Abdullah Muhammad, #017434, Post Office Box 747, Starke, Florida, 32091, this 1 day of October, 1984.



DAVID A. DAVIS