ORIGINAL

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

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CLERK, SUPREME COURT
By ____________
Deputy Clerk

NOLLIE LEE MARTIN, Appellant, -v- STATE OF FLORIDA, Appellee.	No. 71,410

BRIEF FOR APPELLANT

LARRY HELM SPALDING
MARK E. OLIVE
Office of the Capital
Collateral Representative
225 West Jefferson Street
Tallahassee, Florida 32301
(904) 487-4376

JULIUS L. CHAMBERS
RICHARD H. BURR, III
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

Counsel for Appellant

Table of Contents

Table of Authorities ii

Statement of the Issues Presented 2

Statement of the Case 2

Argument 6

I. Mr. Martin Was Not Provided Constitutionally Adequate Notice of the Evidentiary Hearing Upon Which the Circuit Court Based Its Determination of Competency 6

II. Mr. Martin Was Denied the Opportunity to Be Heard When the Circuit Court Called the State's Expert as a Witness, Despite Mr. Martin's Inability to Present Witnesses Due to Lack of Notice 13

III. The Circuit Court's failure to Distinguish Between a Factual and a Rational Understanding of Why the Death Sentence Is to Be Carried Out Deprived Mr. Martin of a Fair Determination of his Competency 31

Conclusion 35

Table of Authorities

Armstrong v. Manzo, 380 U.S. 545 (1965). 10

Dusky v. United States, 362 U.S. 402 (1960). 33

Ford v. Wainwright, ___ U.S. ___, 91 L.Ed.2d
335 (1986). 2, 3, 14, 34

Grannis v. Ordean, 234 U.S. 385 (1914). 10

In re Gault, 387 U.S. 1 (1967). 10, 11

Martin v. Dugger, ___So.2d___, 12 F.L.W. 542
(Fla. Oct. 28, 1987). 3, 6

Martin v. State, 420 So.2d 583 (Fla. 1982). 2

Milliken v. Meyer, 311 U.S. 457 (1940). 10

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950). 6, 10

Statement of the Issues Presented

1. Whether Mr. Martin's due process rights to notice and an opportunity to be heard were violated when the trial court determining competency failed to inform his counsel that an appearance scheduled by the court would not be an argument on the merits of the issue or an argument on whether an evidentiary hearing should be granted under Rule 3.811, but would itself be the evidentiary hearing.

2. Whether, in proceeding to take evidence from the state's expert, despite Mr. Martin's inability to present witnesses due to lack of notice, Mr. Martin was denied the very opportunity to be heard which Ford v. Wainwright guaranteed to him.

3. Whether a condemned prisoner's understanding of why the death penalty is to be imposed must be both rational and factual, not simply factual, for the prisoner to be deemed competent to be executed under the Eighth Amendment.

Statement of the Case

Mr. Martin was convicted in April, 1978 in the Palm Beach Circuit Court for his role in the first degree murder, robbery, kidnapping, and sexual battery of Patricia Greenfield. Sentences including a death sentence, were imposed in November, 1978. This Court thereafter upheld the convictions and sentences on direct appeal. Martin v. State, 420 So.2d 583 (Fla. 1982). In the intervening years between 1982 and 1987, Mr. Martin pursued state and federal post-conviction remedies, none of which is material to the present proceeding.

On August 3, 1987, Governor Martinez signed Executive Order No. 87-118, appointing a commission of three psychiatrists pursuant to Fla. Stat. § 922.07 to examine Mr. Martin's competence to be executed. Counsel refused to allow Mr. Martin to be examined by these psychiatrists on the ground that Florida's procedure for determining competence to be executed, under § 922.07 and Rule 3.811, Fla. R. Crim. P., was still unconstitutional under Ford v. Wainwright, ____ U.S. ____, 91 L.Ed.2d 335 (1986).

In proceedings brought by Mr. Martin challenging the § 922.07/Rule 3.811 procedures before the Circuit Court for the Eighth Judicial Circuit and this Court, this Court ultimately upheld the constitutionality of the procedures, but construed Rule 3.811 so as to preclude consideration of the governor's competency determination in the 3.811 judicial proceeding for the determination of competency. See Martin v. Dugger, ___So.2d___, 12 F.L.W. 542, 543 (Fla. Oct. 28, 1987). The Court then requested that the governor make available another § 922.07 proceeding to Mr. Martin to permit him another opportunity to pursue the full Rule 3.811 procedure. With part of the unconstitutionality of the 3.811 procedure cured by this Court's construction of Rule 3.811 as permitting no judicial consideration of the governor's competency determination, counsel for Mr. Martin agreed to let Mr. Martin participate in the new § 922.07/Rule 3.811 proceeding.

On November 1, 1987, a new commission of psychiatrists

evaluated Mr. Martin pursuant to the provisions of § 922.07. On the same day, the commission provided a five-sentence written report to the governor concluding that Mr. Martin was competent to be executed under the criteria of § 922.07. See Appendix A to the Motion for Determination of Competence To Be Executed [hereafter, the "Rule 3.811 Motion"] filed in the court below on November 5, 1987. On November 2, 1987, Governor Martinez issued Executive Order No. 87-176 accepting the commission's report as his determination that Mr. Martin was competent.[1]

On November 4, 1987, prior to Mr. Martin's filing of his Rule 3.811, Judge Fagan advised the parties through the attorney general that he would hear counsel on the Rule 3.811 motion at 11:00 a.m. on November 6, 1987. Judge Fagan did not advise counsel that he would hear evidence at this proceeding.

Thereafter, at approximately noon on November 5, 1987, counsel for Mr. Martin filed his Rule 3.811 motion. A copy was provided to Judge Fagan personally at the same time. The motion prayed for alternative remedies. It sought a determination that Mr. Martin was incompetent on the basis of the papers filed,

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[1] Governor Martinez made no independent determination that Mr. Martin was competent. The only reference to Mr. Martin's competency in Ex. Order No. 87-176 is as follows:

> WHEREAS, the Commission has completed its examination of the said NOLLIE LEE MARTIN, and based upon its report to the Governor, NOLLIE LEE MARTIN, understands the nature and effect of the death penalty and why it is to be imposed upon him....

There is no other "finding" or "conclusion" as to Mr. Martin's competency anywhere within the governor's order.

arguing that a finding of incompetence was fairly supported by the written submissions of the parties but that a finding of competence was not. In the event that the court was disinclined to grant this relief, the motion requested in the alternative that the court schedule an evidentiary hearing and provide funds for expert witness fees and expenses. <u>See</u> Rule 3.811 Motion, at 30-31.

At the hearing on November 6, 1987, Judge Fagan announced at the outset that he would allow the parties to present any witnesses they wished to present. Counsel for Mr. Martin advised Judge Fagan that he did not know he would be allowed to present witnesses and that, accordingly, he had made no arrangements to have witnesses present. Further, he objected to the lack of notice that the court would hear witnesses and asserted that he was not waiving his request for an evidentiary hearing. Judge Fagan then heard argument on the merits of the Rule 3.811 motion from counsel for Mr. Martin and counsel for the state. At the close of argument, Judge Fagan called Dr. Umesh Mhatre, one of the psychiatrists appointed by the governor to evaluate Mr. Martin, to the witness stand. He was examined by counsel for the state and cross-examined by counsel for Mr. Martin. At the close of his testimony, Judge Fagan dictated oral findings, then entered a written order determining that Mr. Martin was competent under the criteria set forth in Fla. Stat. § 922.07 and Rule 3.811. A notice of appeal was immediately filed, shortly after which this Court scheduled oral argument for 9:00 a.m. on

November 9, 1987.

Argument

I.

MR. MARTIN WAS NOT PROVIDED CONSTITUTIONALLY ADEQUATE NOTICE OF THE EVIDENTIARY HEARING UPON WHICH THE CIRCUIT COURT BASED ITS DETERMINATION OF COMPETENCY

Whether or not Mr. Martin was constitutionally entitled to an evidentiary hearing in the circuit court under Rule 3.811,[2] the circuit court nevertheless decided to hold an evidentiary hearing on his Rule 3.811 motion. The court failed to communicate this decision to counsel for Mr. Martin, however, until the commencement of the very hearing at which the court intended to receive evidence. This hearing had been scheduled for 11:00 a.m. on November 6, 1987, but when notice of the hearing was given on November 4, 1987, the notice did not inform counsel for Mr. Martin that evidence could be presented. Nor was notice given during a subsequent communication between counsel and the court on November 5. Because the notice given to Mr. Martin was not "reasonably calculated, under all the circumstances, to apprise interested parties of the [nature of the proceeding]," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), he was not afforded due process.

The facts are not in dispute. Within moments of the commencement of the hearing on November 6, Judge Fagan announced

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[2] Mr. Martin has consistently argued that he is so entitled, but this Court has rejected his position. See Martin v. Dugger, 12 F.L.W. at 543.

the following, at the conclusion of his opening remarks:

> The rule [3.811] prescribes that the Court is not required to hold an evidentiary hearing, but I nonetheless am going to permit counsel to present such evidence and argument at this time as you care to, to cross-examine witnesses that are present, and I will not delay this hearing or postpone it. I intend to stay with this matter until we conclude it.

CT 7.[3]

Thereafter counsel for Mr. Martin advised the court that he would not be able to present witnesses despite the offer by the court to hear them:

> MR. BURR: .... Your Honor, I have to say at the outset that I have no witnesses today. And the reason for this is quite simple: The notification to me about this hearing did not specify that we were being permitted to present evidence.
>
> THE COURT: Nor was I even aware, when I first set it, what you would be asking.
>
> MR. BURR: Well, obviously, under the rule, the presumption is there will be no evidence taken. The Court has the discretion to permit the evidence to be taken, but the rule says the Court is not required to take evidence.
>
> THE COURT: Dr. Mhatre is here; I know that because he came in my office and asked me about another matter. Would you care to cross-examine him?
>
> MR. BURR: I have no interest - I'll cross-examine him if the State cares to put him on.
>
> But I'm not waiving the right to present witnesses; I simply did not have any notice

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[3] "CT" refers to the transcript of the Rule 3.811 proceeding before Judge Fagan on November 6, 1987.

> that I needed to have witnesses here today, neither notice directly from the Court nor from the rule.
>
> In fact, the notice provided by the rule is to the contrary; that an initial appearance is presumptively not an evidentiary hearing. So I certainly reserve my client's rights and I stand by the request we've made for an evidentiary hearing. But I'm not prepared to present any witnesses on Mr. Martin's behalf today.
>
> I did come prepared to make argument, and I'll be happy to make that.

CT 9 - 10.

After the court reiterated its willingness to hear from witnesses, the following colloquy occurred respecting the nature of the notice provided for the November 6 proceeding:

> MR. BURR: .... with respect to the lack of notice that I needed to have witnesses here today, I simply want the record -
>
> THE COURT: Sir, now wait a minute; let's correct the record now. I didn't say you need to or didn't need to; that's a decision for you to make.
>
> MR. BURR: Your Honor, in any court of law that I've ever been a part of, parties are given notice as to the nature of the proceeding.
>
> Now, your Honor, I believe you agreed-did not say that this would be an evidentiary hearing. Concededly, you did not say it would not be an evidentiary hearing; you simply said nothing.
>
> THE COURT: There was nothing pending before me. And I had no request presented to me, and tried to comply with the law. It says I shall set a hearing. And I assumed that you would, within the three-day period that's prescribed by law, file something.
>
> MR. BURR: Yes, sir.

THE COURT: And I set this hearing for that purpose.

MR. BURR: Your Honor -

THE COURT: In your pleadings you asked for an evidentiary hearing. I assume that that was done with the knowledge that I was going to have a hearing today and that you wanted to present evidence.

MR. BURR: Your Honor, it was done with the knowledge that the Court had set 11:00 o'clock for an appearance by counsel. I inquired with the Attorney General who called me as to whether he knew witnesses would have to be available or not. He said he did not know.

THE COURT: Indeed he didn't, because I didn't know either. I had not received anything.

MR. BURR: My reading of the rule - and if I'm wrong, then I'm ineffective in representing Mr. Martin. My reading of the rule is that presumptively there will be no evidentiary hearing. This Court is not even required to have an appearance. All the Court is required to do is to receive papers and consider them. That's what the rule says.

Our being here today is utterly discretionary with you. If I had had even 24 hours' notice, I would have tried to get whatever witnesses here I could. Certainly after the papers were filed yesterday; it's been about 24 hours since they were filed. In light of my request, if the Court had given me notice, I would have tried to get witnesses here.

I have five expert witnesses, one of whom lives in Florida; the others of whom live in other states. I have four inmates I would like to have here, but certainly I can't get them here on my own; I have to have at least the cooperation of the state or subpoena power to get them.

> I have had absolutely no notice until about 15 or 20 minutes ago that this was going to be an opportunity to present evidence. So my position is that, without adequate notice, this is not a meaningful opportunity to present evidence.
>
> And I stand - At this point I simply would stand on my submissions. I do have argument to make about those submissions.
>
> THE COURT: I want to hear you. I'm offering one final time: Anybody that wants to present any evidence in this hearing, I'll be glad to consider it.

CT 14-16.

There can be no legitimate dispute that on the basis of these facts, Mr. Martin was deprived of a basic element of due process: "timely notice, in advance of the hearing, of the specific issues that [one] must meet." In re Gault, 387 U.S. 1, 34 (1967). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314. See also Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Milliken v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385, 394 (1914). The notice to Mr. Martin's counsel concerning the November 6 proceeding was not "reasonably calculated, under all the circumstances, to apprise" him of the opportunity to present witnesses at that proceeding.

There is no doubt that the notice given to Mr. Martin's

counsel did not specify that witnesses would be permitted to testify. The reason for this is that, at the time notice was given, Judge Fagan "didn't know" whether he would allow witnesses to testify. CT 15. In these circumstances alone, a notice which fails to specify the scope of the proceeding fails to satisfy due process. See In re Gault, 387 U.S. at 34 n. 54 ("one of the purposes of notice is to clarify the issues to be considered, and as our discussion of the facts ... shows, even the Juvenile Court Judge was uncertain as to the precise issues determined at the two hearings"). If the judge is uncertain as to whether witnesses will be allowed to testify, the parties cannot be expected to divine his intention from a general notice not addressing this matter. Additional circumstances, however, made it unreasonable for counsel to know that he should have witnesses available for November 6.

Rule 3.811 does not require the court to hear the testimony of witnesses. See Rule 3.811 (a) ("No evidentiary hearing shall be required"). For this very reason, counsel for Mr. Martin asked that the circuit grant an evidentiary hearing if the court did not find that the papers alone sufficiently demonstrated incompetency. In the event that the court did decide to hold an evidentiary hearing, Mr. Martin asked that, due to his indigency, he be provided sufficient funds to pay the fees and expenses of his expert witnesses. These requests were made in the Rule 3.811 motion that was provided to Judge Fagan personally on November 5, 1987, during "the late part of the morning." CT 4.

Thus, Judge Fagan knew, twenty-four hours before the scheduled proceeding, that Mr. Martin was requesting an evidentiary hearing -- in the alternative -- and that he needed funds to produce witnesses for such a hearing if there were to be one. Judge Fagan also knew that he had not advised counsel that the November 6 proceeding would be an evidentiary hearing. Under these circumstances Judge Fagan could not reasonably expect counsel to know -- nor could counsel reasonably have known-- that he would be permitted to present witnesses at the November 6 hearing.

Counsel for the state may argue that, upon the court's notice, she was prepared to present witnesses, and therefore, defense counsel should have been as well.[4] The attorney general's taking steps to be "prepared for all eventualities," however, does not mean that the court's notice was sufficient to have required defense counsel to do so. The burden of being "prepared for all eventualities," and the means to be so prepared, are extraordinarily different for the state and the defense. The defense carries the burden of production and proof in a Rule 3.811 proceeding. Thus, the defense is nearly certain to present more witnesses than the state. In Mr. Martin's case this was the case, for adequate proof of his mental state and adequate challenge to the state's experts required that he

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[4] "Your notice was that there would be a hearing, and we assumed that, because of the [warrant being active], that we should be prepared for all eventualities." CT 11 (remark by Ms. Shearer).

produce <u>five</u> expert witnesses. <u>See</u> Rule 3.811 Motion, at 9-14, 17-30.

Moreover, unlike the state, which has funds at its disposal, Mr. Martin has no money at all. In order to get his witnesses to Starke, therefore, he needed some assurance from the court that his experts' fees and expenses would be provided by the court. In these circumstances, where Mr. Martin asked the court for funds for experts' fees and expenses and where both he and the state were urging the court in the first place to decide the competency issue -- albeit differently -- on the papers, it was reasonable for Mr. Martin's counsel not to have witnesses available. Moreover, it would have been unreasonable to have his witnesses available. He would have taken the risk that the court would not have heard the witnesses and would not have ordered funds for their fees and expenses. Indigent defendants do not have the luxury in these circumstances to be prepared for all eventualities. For this very reason, indigent defendants like Mr. Martin must be accorded the right of notice to which they are entitled under the Constitution. To be sandbagged instead -- and that is precisely what occurred here -- is intolerable.

II.

MR. MARTIN WAS DENIED THE OPPORTUNITY TO BE HEARD WHEN THE CIRCUIT COURT CALLED THE STATE'S EXPERT AS A WITNESS, DESPITE MR. MARTIN'S INABILITY TO PRESENT WITNESSES DUE TO LACK OF NOTICE

Despite disagreement over the extent of procedural protection required by the Constitution, a seven-justice majority

in Ford v. Wainwright, ____U.S.____, 91 L.Ed.2d 335 (1986), held that the Constitution requires at a minimum that a condemned prisoner be afforded the opportunity to be heard when his or her competence to be executed is being determined. Id. at 349-50 (plurality opinion); id. at 355-56 (Powell, J., concurring); id. at 359 (O'Connor, J., joined by White, J., concurring in part and dissenting in part). Without affording the prisoner this opportunity, the Eighth and Fourteenth Amendments' demand for "sound, consistent judgments as to a defendant's sanity," id. at 357 (Powell, J., concurring), cannot be met. A procedure which permits the determination of competency to be made

> solely on the basis of the examinations performed by state-appointed psychiatrists .... invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

Id. at 356.

Whether the condemned prisoner's opportunity to be heard is cut off in a non-hearing procedure or in a hearing, the risk is the same: the factfinder is more likely to make arbitrary and erroneous decisions when the condemned prisoner is not given an equal opportunity to be heard. No better example of this could arise than Mr. Martin's case.

To appreciate how the deprivation of this right created a substantial risk of arbitrariness and error in Mr. Martin's case, the Court must first examine the reasoning by which Judge Fagan concluded that Mr. Martin was competent. Set forth in full, that

reasoning was as follows:

> I was prepared, as a result of my duty, unless persuaded otherwise, to conclude that the defendant does understand the nature and effect of the death penalty and why it is to be imposed upon him when I entered the courtroom this morning. But I wanted, of course, to hear whatever would be presented to me that might persuade me otherwise, because there is no further review once the defendant is executed.
>
> It's because of my understanding of the gravity of the decision that I have to make that I spent the time I did in reviewing everything that has been given me in this case. And some of it on several occasions.
>
> I am not sure that it's necessary for me to attempt to articulate what I believe Florida would do if asked to expressly state itself regarding the Dusky problem of so-called rational or factual understanding. I am sure that the defendant would equate rational explanation and rational understanding, and they are not the same. I don't find anything, as far as this record is concerned, that suggests to me that additional inquiry is necessary or appropriate.
>
> The interviews taken - that took place with the defendant at the prison by the three appointed doctors without conclusions reached or expressed by the doctors caused me to conclude - though I'm not an expert, I have been exposed to matters similar to this for a long, long time. A study and review of those interviews, even that one with Dr. Lewis, would cause me in my own lay opinion to conclude that the defendant indeed understands the nature and effect of the death penalty and why it is to be imposed upon him.
>
> I will state for the record that I discount considerably the conclusions reached by Dr. Lewis. I have never before in my life seen one who is supposed to be an objective observer, especially one examining one's mental state, who displayed more of an

> advocate's role than that displayed by her in that interview. Much of what she did was attempting to buttress conclusions that she had before she ever conducted it, to support decisions that she reached sometime ago. And she even was anxious to make sure that the record documented her observations in order that her partisan attitude would be supported when brought up for review.
>
> I see nothing other than a pure objectivity in the interview with the three experts appointed by the governor. The credentials presented here regarding the two that I don't know are quite adequate, and the one that I do know, who testified here today, are persuasive and convincing as far as I'm concerned.
>
> In addition to that, the presentation made today by Dr. Mhatre is even more persuasive, supporting the conclusion expressed by him and the one found by me, that the defendant indeed understands the nature and effect of the death penalty and why it is to be imposed.
>
> My reasons for calling Dr. Mhatre were as I have already expressed before asking him to take the witness stand. But an additional reason: As far as I'm concerned, I wanted to know if there were any loopholes in his conclusions. I wanted to know if there was something about what he concluded and why he concluded it that would raise some doubt in my mind.
>
> My own analysis is there is no reason that I should have a doubt, and I don't have one.

CT 88-90.

The judge's conclusions are seriously flawed both from a legal and psychiatric standpoint, but without the same opportunity to be heard that Judge Fagan gave the state, Mr. Martin could not demonstrate that all of the points relied upon by Judge Fagan were erroneous or subject to serious question.

Judge Fagan reported that his review of the papers provided by the parties had prepared him to conclude, before the hearing commenced, that Mr. Martin was competent to be executed. This view, he said, was derived primarily from a review of the two psychiatric interviews with Mr. Martin on November 1, 1987.[5] His predilection was given persuasive support, he claims, by Dr. Mhatre's in-court testimony on November 6. To understand Judge Fagan's reasoning, therefore, the Court must turn to these interviews and to Dr. Mhatre's testimony.

During the course of the interview with the governor's psychiatrists, Mr. Martin repeatedly talked about "satanic forces" and supernatural beings which "you can't see, but they're here." He frequently sees them on death row, where "they're so intense that you can actually feel their presence and I can feel them coming in my cell." Rule 3.811 Motion, App. B at 12. See also id. at 10 - 13, 22, 24, 29, 33 - 34, 52 - 53, 54, 57 - 58. These beings are powerful and have exerted a powerful influence on Mr. Martin for many years, from before the murder of Patricia Greenfield (the victim in Mr. Martin's case) to the present. Mr. Martin described their power during the period he was on parole, when the murder occurred, and in the present, in the following terms:

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[5] Two interviews were conducted with Mr. Martin on November 1: the first by Doctors Mutter, Mhatre and Miller, who were appointed by the governor; the second by Dr. Dorothy Lewis, who has been involved in the evaluation of Mr. Martin, at the request of his counsel, since 1983. Both were recorded and transcribed by a court reporter. See Apps. B & C to the Rule 3.811 Motion.

> During the time when I was on parole for two months, it was like I had been hit upside the head, not with any pain but addle-minded. And there were periods that a better portion of a whole day, or a whole day, or part of a night that I had absolutely no memory whatsoever of where I went or what I did or what I said or anything. And I have the same problem now sometimes for hours, and I just sit in my cell and try to -- actually try to figure out where I'm at. But eventually it but eventually it leaves. It's like being-- your mind is totally disoriented.
>
> And I know that is -- that's satanic beings.

App. B at 13. Affidavits from prisoners housed near Mr. Martin on death row confirm the fact that he spends much of his time "addle-minded" or disoriented. <u>See</u> Apps. F through J.

With respect to his death sentence, Mr. Martin believes that these supernatural beings have controlled the entire process-- causing it to appear that he murdered Patricia Greenfield, causing him to be prosecuted and sentenced to death, and now attempting to have him put to death.

> [T]en years ago, if I actually killed anybody, it was Satan or demons or satanic forces that used my physical body to perform the act that they wanted to do themselves and didn't have the physical body so they could do it, that they took control of my spirit or soul or mind and used my body against my will, and the memory of that being blocked out consciously to where I didn't know what was going on, if it went on. And ever since then he has not given up because he's out-- he has a conspiracy against me for some reason, I don't understand why, to kill me.

App. B at 34.

> I believe that during the course of when they arrested me or from -- from the point actually that this happened, if it happened,

> and in fact I did do what they said I did--I've already explained that . . . but I believe as well at my trial whoever was there, the judge, the jury, and whoever else, I believe with all my heart they was manipulated by satanic beings to present evidence that didn't exist and incline other people and the jury and whoever to believe that it was real when it wasn't. It was all fabricated by these people. . . .
>
> [T]his whole thing is a charade that people that have the responsibility of understanding can't understand because it's so supernatural it's not within the realm of their comprehension of their natural mind because it's -- from the very beginning, it was planned, initiated, and carried out by people that most people can't see, but they exist at my trial and even here.

App. B at 22, 24.

Despite believing that he is on death row because of the activities of supernatural beings, Mr. Martin made clear that he understood that these beings had utilized the criminal justice system as the vehicle for their plot against him, and that he understood how the use of the criminal justice process had resulted in his being put on death row. Nevertheless, he maintained that the criminal justice system had been wholly controlled by these supernatural beings:

> I understand that I was arrested. I was convicted. I was sentenced to Death Row. But I know beyond any shadow of a doubt that I have not killed anybody. And I know that everything that was presented at my trial, during my arrest, it was -- every single bit was manipulated and fabricated by satanic beings to frame me.

App. B at 29.

At various other points in the interview with the governor's

psychiatrists, Mr. Martin mentioned matters associated with or related to his belief in these supernatural beings. When asked what he had done to try to get rid of the "demons and people who are bothering you," he responded, " I thought that if I became addicted or obsessed with the word of God they'd leave me alone, but it doesn't do any good." App. B at 54. When asked, "Does it ever happen when you're sitting alone you feel people are talking to you," Mr. Martin responded, "Yes . . . it's not just when I'm alone. It's been anguish that's drove me nuts for fifteen years trying to deal with this, seeing people that I know does not exist." App. B at 57 - 58.

Despite his irrational preoccupation with the "satanic beings," and despite the significant intrusions of these beings into his life -- through talking to him and appearing in his cell and through occasionally making him "addle-minded" for hours at a time -- Mr. Martin is rational in many other respects, as he demonstrated throughout the interview with the governor's psychiatrists. He is thoroughly familiar with many details of his life and his family's life; he is oriented to his surroundings; he understood why the psychiatrists were evaluating him ("to determine if I can be executed"); he understands how he came to be on death row, in a factual sense, i.e., that he was convicted of murder and sentenced to death, though not in a rational sense ("it was planned, initiated and carried out by people that most people can't see, but they exist at my trial and even here"); he can read, write, watch television, and order items from the

prison commissary -- in short, he can function in a fairly rational way on a daily basis.

In the opinion of Dr. Mhatre, it is Mr. Martin's ability to function rationally in so many respects that has led him to believe that Mr. Martin is competent. As he testified in his direct examination by the state attorney:

> A. ... Mr. Martin, he's a very rational individual. Whether he wants to apply his rationality to this particular issue or not is something he has to decide. But Mr. Martin is a very rational individual.
>
> Q. Why is it you feel that he has a rational understanding in this case?
>
> A. Well, throughout the interview that was conducted, there are several clues which clearly indicate that Mr. Martin is very rational in his day-to-day behavior; in his functioning; in his understanding of what is happening around him.

CT 54. When the state attorney asked him thereafter whether he agreed with Dr. Lewis' assessment that Mr. Martin's delusional system made him incompetent, he explained his analysis further:

> A. I would partially agree with Dr. Lewis. I think he has some symptoms that may warrant consideration of schizophrenia. But he definitely is not a full-blown, acutely psychotic person at the present time. And whatever fantasies he has at the present time, in my opinion, have not at all interfered with his thinking in day-to-day life.
>
> It's of interest that his delusions are almost kind of capsulized and they refer always to his convictions and these legal proceedings. But other materials that I have reviewed and talked, and later studies is written I have reviewed, really do not indicate that this particular fantasy about the Bible and the devil really affects any of

> his day-to-day functioning.
>
> He informed me that he watches television; he enjoys WILD KINGDOM and other shows, because he enjoys animals. And he doesn't like sports; he's not much interested in sports. And he basically functions as a fairly normal, adequate individual.
>
> Q. If a person is so psychotic that they cannot understand why they are to be executed, would you expect them to be able to sit through an hour-and-a-half interview such as the one that you had and not show symptoms to you of this condition?
>
> A. Well, I think Mr. Martin did exhibit some symptoms during the interview. But again, you know, he was fairly rational during the interview; he was fairly cooperative.
>
> And the degree of psychosis or the degree of loss of touch with reality he has is so minimal and affects only his thinking in terms of his conviction that occurred ten years ago. And it really doesn't affect his functioning in many other aspects of his life.

CT 54 - 55.

While Dr. Mhatre's reasoning has some logical appeal, it also embodies serious flaws in diagnostic reasoning as well as factual inconsistencies. It is well-documented in the psychiatric literature that a person suffering from paranoid schizophrenia can be genrally functional on a day-to-day level and yet have a fixed delusional system that prevents the sufferer from perceiving reality as to a particular issue. Thus, a person may be intelligent and rational and go about his or her daily business within a certain range of normalcy, but have a delusion that they are someone else (e.g., John Lennon, the Pope, the

President) or that someone is trying to "get them" (the KGB, the CIA, or even Lyndon LaRouche's "nemesis", Margaret Thatcher). Thus, Dr. Mhatre's characterization of Mr. Martin's irrationality as "minimal" is unhelpful for diagnostic purposes, as well as inaccurate. It grossly understates the extent of Mr. Martin's problem. Mr. Martin is a man whose central focus in life is an ongoing battle with supernatural forces which continuously intrude into his consciousness. (See Apps. F though I corroborating Mr. Martin's statements regarding his struggles with the beings from another realm). Mr. Martin has tried to ignore these forces, but in response to Dr. Mhatre's own question about how he has tried to get rid of them, he said, "I thought if I became addicted or obsessed with the word of God, they'd leave me alone, but it doesn't do any good."

Dr. Mhatre said that Mr. Martin can think rationally about his death sentence when he wants to -- because he asserts his innocence and Dr. Mhatre sees that as a rational denial of responsibility -- but he ignores that Mr. Martin's belief in his innocence is rooted in his all-encompassing belief that he was framed and manipulated by supernatural beings, who either made it look like he committed the homicide though he did not or took over his body and used his body to commit the homicide. In either event, Mr. Martin's belief in his innocence is rooted in his delusion.

Dr. Mhatre says, on the one hand, that Mr. Martin's delusions and irrational thinking are confined to his legal

situation, and thus seem to be within his control and within the service of his self interest and are, accordingly, perhaps not real. Yet it makes perfect sense that the issue around which a death-sentenced paranoid schizophrenic's delusion would crystallize would be his impending execution and the forces that put him in such a position. Moreover, when cross-examined about the true breadth of Mr. Martin's delusions, about how they encompass far more in his life than his understanding of why he is on death row, and about his frequent experience of auditory and visual hallucinations, Dr. Mhatre said that this data would not affect his evaluation. See, e.g., CT 67 - 78. One must question the "neutrality" of a psychiatrist whose opinion of a man's competency would be unswayed by additional information concerning the exhibition of clearly psychotic symptoms.

Had Mr. Martin been given the opportunity to be heard through his own witnesses, he could have demonstrated not only these flaws in Dr. Mhatre's reasoning but many more as well.

For example, he could have shown, through the testimony of Dr. Seymour Halleck, one of the most respected psychiatrists and psychiatric educators in the country (see Rule 3.811 Motion, at 12 - 13 & App. E), that the way in which Dr. Mhatre and the other psychiatrists appointed by the governor gathered information about Mr. Martin was so far below acceptable standards for psychiatric evaluation that their evaluations had "no scientific validity." Rule 3.811 Motion, App. E. As Dr. Halleck explained, given the complexity of Mr. Martin as a patient, the format of

the interview by the governor's psychiatrists was highly unlikely to produce reliable evaluations. Further, the limitations were made worse by the psychiatrists' inattentiveness to Mr. Martin's seemingly severe psychopathology during the interview.

> 1) Mr. Martin is an extremely difficult patient to evaluate. He has been given a variety of different diagnoses by different doctors over the years and his condition has changed frequently. Even the most well-trained and highly skilled psychiatrist could not reliably evaluate Mr. Martin's current mental status unless the conditions of the examination were such as to allow an unhurried examination occurring in an atmosphere of comfort and privacy.
>
> 2) The format of having three psychiatrists interview Mr. Martin, more or less consecutively, for an hour and a half in the presence of non-psychiatric observers is so far removed from standards ordinarily employed in psychiatric evaluation as to question the reliability of the evaluation even with the most cooperative and easily diagnosed patient. With a complicated patient like Mr. Martin, that particular format makes the evaluation especially unreliable.
>
> 3) It is apparent from reviewing the transcripts of the proceedings that none of the psychiatrists were able to establish the kind of rapport with a patient that is customary in psychiatric evaluation. The format of the evaluation substantially limited the kind of communication that is desirable. Because of the lack of rapport and the urgency of questioning, Drs. Miller, Mutter and Mhatre deviated from acceptable standards of psychiatric evaluation. The most striking example of this was their repeated failure to follow up on statements by Mr. Martin which suggested severe psychopathology and which might be relevant to the question of his competency. Furthermore, the psychiatrists seemed at times to be argumentative or to be suggesting "proper responses" to Mr. Martin during their questioning. In some instances, the tenor of

> the doctors' questioning is legalistic rather than medical.

App. E, at 1 - 2.

By way of illustrating how the governor's doctors "fail[ed] to follow up on statements of Mr. Martin which suggested severe psychopathology," it is useful to compare how these doctors and Dr. Lewis responded to Mr. Martin's statements about hearing voices. The governor's doctors inquired as follows:

> DR. MHATRE: I have just a few more questions. I know it's been a long time, Nollie. Bear with me.
>
> Does it ever happen when you're sitting alone, you feel people are talking to you --
>
> MR. MARTIN: Yes.
>
> DR. MHATRE: What -- tell me more. You didn't let me finish the question.
>
> MR. MARTIN: I'm sorry.
>
> DR. MHATRE: You were going to say something. Go ahead, tell me. When you say--
>
> MR. MARTIN: You were asking me when I'm alone, it's not just when I'm alone. It's been anguish that's drove me nuts for fifteen years trying to deal with this, seeing people that I know does not exist.
>
> DR. MHATRE: But do you hear voices when nobody [sic] around?
>
> MR. MARTIN: Yes.
>
> DR. MHATRE: Did you hear any other voices besides me and Dr. Mutter?
>
> MR. MARTIN: Since I've been in here?
>
> DR. MHATRE: Yes.
>
> MR. MARTIN: No.

> DR. MHATRE: That's all I have. Nollie, do you have any questions for me?
>
> MR. MARTIN: I don't guess so.

Rule 3.811 Motion, App. B at 57 - 58.

In contrast, Dr. Lewis probed Mr. Martin's hearing of voices much more, simply by asking non-directive follow-up questions. In the course of her questioning, much more was learned about the pervasiveness of these hallucinations in Mr. Martin's life, as well as their fit within Mr. Martin's delusional system:

> DR. LEWIS: Nollie, do they -- do they [the satanic beings] communicate with you in any way?
>
> MR. MARTIN: Periodically.
>
> DR. LEWIS: Could you tell me about that?
>
> MR. MARTIN: Well, most of the time when I'll be reading the Bible it's not every time that I will see anyone, but I will hear voices cursing at me because I'm reading the Bible. And what I'm reading they'll tell me it's not so. And they'll tell me that it's the deception and that it won't have any effect in things --
>
> DR. LEWIS: Oh, really?
>
> MR. MARTIN: -- that I'm trying to accomplish by maybe finding some knowledge somewhere in the Bible that will help me understand something. They tell me you're not going to find it there, that it's a lie, that it's a deception, to stop reading it. And I've even had them threaten that they -- when I go to sleep that they'll kill me or that they'll take control of my body and force me to cut myself, or take some overdose of drugs or hang myself or something.
>
> DR. LEWIS: Have they ever made you do that?
>
> MR. MARTIN: On two or three occasions.

Every time I've hurt myself -- the last time I was on Death Watch, I wrestled all night long with voices telling me to do this, to cut myself, and voices telling me not to cut myself, and I could never make up my mind. And finally after wrestling with this all night, that morning I cut my wrist. And a couple of years before when I took a bunch of pills and cut both my wrists, the same thing occurred. And --

DR. LEWIS: Tell me what do they sound like?

MR. MARTIN: They sound nothing like you or I or anyone else but it's sort of like a record that is not on the right speed. Sometimes they're too fast and sometimes it's will real slow. You'd really have to concentrate.

DR. LEWIS: Are they men's or women's voices or --

MR. MARTIN: Most of them are men.

DR. LEWIS: Most are men. How many are there?

MR. MARTIN: There's no way I can guess, so many. Probably -- I've probably encountered hundreds during the past fifteen years of different ones.

DR. LEWIS: There's no special one that talks to you or any special ones?

MR. MARTIN: I think there are -- I think there are five or six that are out as more or less they engineer the participation of the other ones that are involved in my life, which consist of three people that died in North Carolina. And they are under the impression that I intentionally killed them, and they don't understand now what happened then. And Patricia, the girl that I was supposed to have killed, and Allen Wayne Tucker who hung himself here about three years ago.

DR. LEWIS: Why does his -- his voice talks to you?

> MR. MARTIN: I think he is -- yes. And I'm convinced over the past year so that he is also in the league with the rest of these that are in the authoritative position to try to cause me to hurt myself or kill myself or confuse my mind or deceive me on what I read in the Bible and not believe it, and cause me to have hallucinations that otherwise wouldn't exist that torment me and cause me frustration and confusion and disorientation in my mind to where I can't think straight.
>
> It causes me to have periods of maybe an hour sometime, two or three hours worth that I honestly feel as if I have been hit side of my head without any pain, just being totally disoriented, addle-minded to where I can't think. And I -- during these times, I usually look at my watch and I can't even tell what time it is. I can't figure out where I'm at.

Rule 3.811 Motion, App. C at 8 - 11.[6]

Had he been given a meaningful opportunity to be heard, Mr. Martin could in addition have demonstrated two very significant

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[6] This passage is typical of the entire interview conducted by Dr. Lewis. All of her questions were open-ended and encouraging of Mr. Martin to divulge information, without suggesting to him what the content of the information should be. Given this, it is difficult to explain how Judge Fagan, upon reading this interview, could have concluded, "I have never before in my life seen one who is supposed to be an objective observer, especially one examining one's mental state, who displayed more of an advocate's role than that displayed by her in that interview." CT 89. He particularly chided Dr. Lewis for placing her observations on the record. Upon observing scars on Mr. Martin, Dr. Lewis did describe them "for the record" because she was conscious of a record being made and wanted the reader to know what she was observing. This can hardly be characterized as "partisan advocacy."

Given that Dr. Lewis' probing of Mr. Martin's psychopathology -- which is apparently what Judge Fagan has mistaken for "advocacy" -- is the very kind of questioning Dr. Halleck concluded that Dr. Mhatre and the others should have undertaken, Judge Fagan has mistaken competent psychiatric interviewing for "partisanship."

truths about his illness. On the basis of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorder (3d ed. 1980), the psychopathology from which he suffers quite clearly warrants a diagnosis of paranoid schizophrenia. See Appendix hereto (setting forth the diagnostic criteria for schizophrenia). In addition, people who suffer paranoid schizophrenia, like Mr. Martin, are generally able to function rationally and fairly well, despite their delusional thinking and the episodic experience of hallucinations. Nevertheless, the delusions are quite real and are not just forms of denial.[7] As the Diagnostic and Statistical Manual of Mental Disorders explains, for persons suffering paranoid schizophrenia, "[t]he impairment may be minimal if the delusional material is not acted upon, since gross disorganization of behavior is relatively rare. Similarly, affective responsiveness may be preserved. Often a stilted, formal quality, or extreme intensity in interpersonal interactions is noted." Id. at 191. Accordingly, Mr. Martin could have shown that Dr. Mhatre's suggestion that Mr. Martin's delusional system is not genuine, but instead subject to his control -- because he is rational in most other respects-- is not accurate.

As this discussion demonstrates, Judge Fagan's failure to

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[7] A delusion is "[a] false personal belief based on incorrect inference about external reality and firmly sustained in spite of what almost everyone else believes and in spite of what constitutes incontrovertible and obvious proof or evidence to the contrary." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders at 356.

give Mr. Martin a meaningful opportunity to be heard had substantial consequences for the fairness and soundness of his determination of Mr. Martin's competency. There was at least a contrary set of impressions to those gained by Judge Fagan's reading of the papers and a contrary set of medical facts to those testified to by Dr. Mhatre. Judge Fagan's cutting off Mr. Martin's opportunity to be heard on these matters "invite[d] arbitrariness and error" in the competency determination. It requires, under Ford, a new competency proceeding.

III.

THE CIRCUIT COURT'S FAILURE TO DISTINGUISH BETWEEN A FACTUAL AND RATIONAL UNDERSTANDING OF WHY THE DEATH SENTENCE IS TO BE CARRIED OUT DEPRIVED MR. MARTIN OF A FAIR DETERMINATION OF HIS COMPETENCY.

Rule 3.811 incorporates the criteria from Fla. Stat. sec. 922.07 used to determine competency, i.e., whether "the prisoner understands the nature and effect of the death penalty and why it is to be imposed upon [him]." Mr. Martin's case raises a question of fundamental importance concerning these criteria: whether the prisoner's understanding of why the death penalty is to be imposed must be both rational and factual for the prisoner to be deemed competent, or whether factual understanding alone is sufficient. The circuit court deemed it unnecessary to distinguish between these two forms of understanding. The Eighth Amendment, however, demands such a distinction.

Mr. Martin's case raises this question, because he has a

factual understanding but not a rational understanding of why he is to be executed. He understands that he is to be executed because he was convicted of a murder and sentenced to death. However, he has no rational understanding of why he is to be executed. He thinks he is to be executed because "satanic beings" conspired to make it appear that he committed a murder--by fabricating evidence of his involvement in the murder, producing witnesses who would present this evidence, making the jury and judge believe it was true, and forcing the governor to carry out the execution. Further, his irrationality is the product of mental illness and damage to his brain: it is the product of a fixed delusional system, which is a symptom of psychosis and organic brain syndrome. A mentally well person understands that he has been convicted and is being punished by a legal system controlled and operated by other human beings. Thus, even if he believes that he has been convicted and sentenced unjustly, he nevertheless attributes the error to other human beings, whether prosecutor, witnesses, jurors, or judge. By contrast, Mr. Martin believes that he has been convicted and is being punished by a legal system controlled and operated by supernatural beings, who can be seen and heard by no one but him. They may inhabit human beings, they may motivate human beings, but they are the actors. Mr. Martin cannot rationally understand why he is to be executed, because his delusional system prevents him from seeing the world as it is.

No court has decided whether, under the Eighth Amendment,

the condemned prisoner's understanding of why he is to be executed must be both factual and rational. Unquestionably, to be competent to stand trial, one must be able to understand the proceedings against him rationally, as well as factually. See Dusky v. United States, 362 U.S. 402 (1960)(one component of the test of trial competency is "whether [the accused] has a rational as well as factual understanding of the proceedings against him"). The American Bar Association has taken the position that competency to be executed should require the same dual components of understanding the proceedings against him. See, e.g., ABA, Criminal Justice Standards: Criminal Justice Mental Health Standards -- Competence and Capital Punishment, Standard 7-5.6.(b) & Commentary (August, 1987)("[t]he elements of this test have been selected to reflect the substantive concern that individuals should not be executed while they lack the capacity for rational understanding of the nature of the proceedings or of the penalty that is about to be imposed").

The Eighth Amendment underpinnings to the prohibition against executing the incompetent require that the condemned prisoner have a rational as well as a factual understanding of the "proceedings" against him at the time of execution. These foundations were described by the Ford plurality in the following terms:

> The various reasons put forth in support of the common-law restriction have no less logical, moral and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who

> has no comprehension of why he has been singled out and stripped of his fundamental right to life....Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation.

Ford v. Wainwright, 91 L.Ed.2d at 346. Common to all of these rationales is the notion that only fully capable, intellectually functioning, "whole" human beings who can experience punishment as meted out by society should be deemed fit to be executed. One who understands, in a concrete factual sense that he is to be executed because he was sentenced to death, but who believes that the sentence was orchestrated by supernatural beings whom only he can hear and see, is not such a fully functional human being. The Eighth Amendment would, therefore, forbid his execution.

Judge Fagan made no distinction between factual and rational understanding of why the death sentence was to be carried out. As he explained it,

> I am not sure that it's necessary for me to attempt to articulate what I believe Florida would do if asked to expressly state itself regarding the Dusky problem of so-called rational or factual understanding. I am sure that the defendant would equate rational explanation and rational understanding, and they are not the same. I don't find anything, as far as this record is concerned, that suggests to me that additional inquiry is necessary or appropriate.

CT 88 - 89. The psychiatric interview by the governor's psychiatrists, which served as the basis for Judge Fagan's readiness to conclude that Mr. Martin was competent even before

the hearing on November 6, 1987, see CT 88, focused entirely on Mr. Martin's factual competency, explicitly ignoring his irrational understanding of why the sentence had been imposed in the first place. See, e.g., Rule 3.811 Motion, App. B at 33 - 37. See also id., App. E at 2 (Dr. Halleck's report). Judge Fagan's determination that there was no necessity for distinguishing between factual and rational understanding is, accordingly, a clear indication that factual understanding is, in his opinion, enough.

Because such a determination misapplies the Eighth Amendment prohibition, a new competency determination is required.

Conclusion

For all the foregoing reasons, Mr. Martin prays this Court reverse the decision of the court below, and grant him a proceeding to determine competency that comports with the requirements of the Eighth and Fourteenth Amendments.

Respectfully submitted,

JULIUS L. CHAMBERS
RICHARD H. BURR, III
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

LARRY HELM SPALDING
MARK E. OLIVE
Office of the Capital
Collateral Representative
225 West Jefferson Street
Tallahassee, Florida 32301
(904) 487-4376

By Richard H Burr III

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, RICHARD H. BURR, III, certify that a copy hereof has been served upon counsel for respondent by delivering a copy personally to Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 9th day of November, 1987.

Richard H Burr III

Of Counsel