

**FILED**

IN THE SUPREME COURT OF FLORIDA

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FEB 8 1996

CLERK, SUPREME COURT

By \_\_\_\_\_

Chief Deputy Clerk

TIMOTHY CARLTON VISAGE,

Petitioner,

v.

CASE NO. 86,999

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

TIMOTHY CARLTON VISAGE, :  
Petitioner, :  
v. : CASE NO. 86,999  
STATE OF FLORIDA, :  
Respondent. :  
\_\_\_\_\_ :

PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Timothy Carlton Visage, was the defendant in the trial court and the appellant in the district court. He will be referred to in this brief as petitioner or by his proper name. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the district court. Respondent will be referred to herein as the state.

The record on appeal will be referred to by use of the symbol "R," the transcripts of court proceedings by use of the symbol "T," and respondent's brief on the merits by use of the symbol "BM," each followed by the appropriate page number.

All emphasis is supplied unless the contrary is indicated.

## ARGUMENT

### ISSUE PRESENTED

WHETHER A DEFENDANT MAY BE MENTALLY COMPETENT TO STAND TRIAL YET LACK THE ABILITY TO MAKE AN INTELLIGENT AND UNDERSTANDING CHOICE TO PROCEED WITHOUT COUNSEL UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(d)(3)?

Despite the state's prayer to the contrary, this Court should take jurisdiction of this case because petitioner's constitutional right to self-representation was violated by the rulings of both of the lower courts. Consequently, this Court should reverse petitioner's conviction, vacate the sentence imposed, and grant him a new trial.

The state and petitioner agree on the principles of law applicable to this case. The state, however, has clearly misunderstood the the ruling of the trial court at pages R 21-22 of the trial transcript. As a result, respondent, albeit unintentionally, has misstated the material facts of the case (BM 12-17).

Respondent argues that the trial court properly found petitioner lacked the ability to make a knowing and intelligent waiver of counsel due to his mental condition (BM 12-17). The trial court neither found petitioner mentally incapable of waiving counsel, nor denied his motion on that basis (T 21-22).<sup>1</sup>

The trial court initially denied petitioner's motion to proceed in pro se on the basis that appointed counsel was "a well qualified attorney," and that he had "done... an adequate and appropriate job for Mr. Visage" (T-16).

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<sup>1</sup> Petitioner asserts that the state and district court both misread the record and reached an erroneous conclusion for the basis of the trial court's ruling. Petitioner believes this record confusion stems from the trial court having *considered his motion to discharge counsel before first ruling on the suggestion of incompetence*. Nevertheless, a close examination of the record reveals that the court addressed both matters as separate, discrete issues (R 21-22), and never mentioned appellant's mental status as a reason for denying his motion to proceed in pro se.

After the jury was selected, the court announced that there were "two matters which we need to address" (T-21). The court declared:

COURT: First, the issue of the court's findings that Mr. Visage could not represent himself, my denial of that motion this morning, implicit in that, just so the record will be clear, I find that he does not have sufficient training, sufficient nor the understanding sufficient to allow him to represent himself and that it would not be appropriate to allow such representation, given the potential 60 year sentence that he is facing.

(T-21).

The court then addressed the second matter, and the following was heard:

COURT: Secondly, there was a suggestion filed at one point and the medical report has now been received and we've all been aware of it. [Defense counsel], are you prepared to stipulate that your client is sane and is competent?

DEFENSE COUNSEL: Yes, Your Honor, I'd stipulate to Dr. Miller's report at this time.

COURT: And [prosecution]?

PROSECUTOR: The state would stipulate as well, Your Honor.

COURT: Thank you. We've got those two things in the record. Anything else before we recess?

(T 21-22).

Thus, despite the state's argument to the contrary, it is clear that the finder of fact never found petitioner incompetent to make a knowing and intelligent waiver of counsel. The court merely found that petitioner lacked sufficient legal training to proceed in pro se.

Therefore, pursuant to the argument in petitioner's initial brief, this Court should exercise its inherent power to grant petitioner relief even though that ruling would not necessarily be responsive to the certified question now before the Court.

To summarize that argument, the record does not support a conclusion that petitioner lacked the cognitive ability to make a knowing and intelligent waiver of

counsel.

Pursuant to the trial court's order, a competency evaluation was performed by Dr. Ernest C. Miller and Beth Sahdden at the Health and Science Center, Jacksonville College of Medicine (R 58-60). Their conclusions:

"The patient is a huskily built, white male who is alert, friendly and cooperative. He has an excellent use of words. He is goal directed in his speech. He is not hallucinated or delusional. He is not depressed or unduly anxious. His concentration and attention span are excellent. His orientation is good."

(R-59). Despite past mental health problems, they concluded: "On examination now, his cognitive facilities are intact. He is not dysphoric" (R-60). The state's argument that petitioner's past history of mental problems was evidence of his present mental status (while at the same time ignoring his current evaluations) is self-serving, spurious, and disingenuous.

In short, petitioner had no existing mental infirmity that would prevent him from knowingly and intelligently waiving counsel. Cf. Cerkella v. State, 588 So. 2d 1058 (Fla. 3d DCA 1991). And, as discussed above, when he initially denied appellant's motion for self-representation, the trial judge, although expressly aware of the doctors' reports, did not mention the mental health issue as a basis for his decision (T-16, 21-22). Instead, the court based its decision exclusively on trial counsel's good work (T-16), and petitioner's lack of legal training (T 21-22).

In a nutshell, the trial court was aware of all the mental health factors argued by the state but, as finder of fact, did not rely on any of them in ruling on petitioner's motion.

As the state has argued in its brief, the court's ruling is subject to an abuse of discretion standard of review (BM-11). The trial court abused its discretion by forcing petitioner to stand trial with appointed counsel when petitioner was competent, literate,

and understood the case, Goode v. State, 365 So. 2d 381 (Fla. 1978); when he was competent to make a knowing and intelligent waiver of counsel, Muhammad v. State, 494 So. 2d 969 (Fla. 1986); and, when he understood the rights he was giving up by proceeding in pro se. Dorman v. Wainwright, 798 F. 2d 1358 (11th Cir. 1986).

Finally, the state's contention that petitioner received effective assistance of counsel, and therefore, the trial court did not err by denying his motion to proceed in pro se (BM-12), is inapposite to the issue at bar. The issue at bar concerns petitioner's desire and ability to waive counsel, not assigned counsel's performance.

For the reasons previously discussed, this Court should vacate petitioner's conviction and sentence, and remand to the circuit court for a new trial.



CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, this Court should assume jurisdiction of the instant case, and vacate petitioner's conviction and sentence because he was denied his right to self-representation at trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William J. Bakstran, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, TIMOTHY CARLTON VISAGE, on this 8<sup>th</sup> day of February, 1996.



PHIL PATTERSON