

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,368

ANTONIO MICHAEL CARTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
Chief Assistant CCR
Florida Bar No. 0899641

**OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE**
1444 Biscayne Boulevard
suite 202
Miami, FL 33132
(305) 377-7580

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the interlocutory appeal of the circuit court's announcement of a standard to determine whether a capital postconviction defendant is competent to proceed with his postconviction motion, as well as the lower court's determination that, if the defendant is found to be incompetent, a guardian would be appointed and the postconviction motion proceed in the absence of the incompetent defendant. The interlocutory appeal arises from a pending motion brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on instant interlocutory 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Carter has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture, particularly where the case presents an issue of first impression, as does the instant case. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Carter, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

	<u>Page</u>	
PRELIMINARY STATEMENT	i	
REQUEST FOR ORAL ARGUMENT*	i	
TABLE OF CONTENTS	ii	
TABLE OF AUTHORITIES	iii	
STATEMENT OF THE CASE AND THE FACTS	1	
SUMMARY OF ARGUMENT	8	
ARGUMENT I		
THE LOWER COURT'S ANNOUNCED STANDARD FOR COMPETENCY TO PROCEED IN POSTCONVICTION VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND <i>DUSKY V.</i> <i>UNITED STATES</i> AND ITS PROGENY		10
A. INTRODUCTION	10	
B. STANDARD FOR PRE-TRIAL COMPETENCY	12	
C. STANDARD FOR POSTCONVICTION COMPETENCY	13	
ARGUMENT II		
THE LOWER COURT ERRED IN DETERMINING THAT, IN ACCORDANCE WITH <i>WHITMORE V. ARKANSAS</i> , MR. CARTER'S POSTCONVICTION PROCEEDINGS WOULD PROCEED IN HIS INVOLUNTARY ABSENCE IF HE IS RULED INCOMPETENT		20
CONCLUSION	23	

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Carter v. State</i> , 576 So. 2d 1291 (Fla. 1989), <i>cert. denied</i> , 112 S. Ct. 225 (1991)	1
<i>Cooper v. Oklahoma</i> , 116 S. Ct. 1373 (1996)	12
<i>Demosthenes v. Baal</i> , 495 U.S. 731 (1990)*	15
<i>Drope v. Mississippi</i> , 420 U.S. 162 (1975)	12
<i>Durocher v. Singletary</i> , 623 So. 2d 482 (Ha. 1993)	14
<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	10, 12
<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	*
<i>Huff v. State</i> , 622 So. 2d 982 (Fla. 1993)	19
<i>Jackson v. State</i> , 452 So. 2d 533 (Fla. 1984)	7, 11, 18
<i>Johnson v. Single tary</i> , 647 So. 2d 106 (Fla. 1995)	19
<i>Lafferty v. Cook</i> , 949 F. 2d 1546 (10th Cir. 1991).	16
<i>Lonchar v. Zant</i> , 978 F.2d 637 (11th Cir. 1992)	15
<i>Maharaj v. State</i> , 21 Fla. L. WeeklyS387 (Fla. Sept. 19, 1996)	19
<i>Pridgen v. State</i> , 531 So. 2d 951 (Fla. 1988)	18

<i>Rees v. Peyton</i> , 384 U.S. 312 (1966)	15
<i>Riggins v. Nevada</i> , 112 S.Ct. 1810 (1992)	17, 20
<i>Rose v. State</i> , 601 So. 2d 1181 (Fla. 1992)	19
<i>Scott v. State</i> , 464So. 2d 1171 (Fla. 1985)	2, 15
<i>Spalding v. Dugger</i> , 526 So. 2d 71 (Fla. 1986)	19
<i>Spaziano v. State</i> , 660 So. 2d 1363 (Fla. 1995)	19
<i>State v. Debra A. E.</i> , 188 Wis.2d 111 N.W.2d 727 (1994)	13
<i>Teffe teller v. Dugger</i> , 676 So. 2d 369 (Fla. 1996)	18, 19
<i>Whitmore v. Arkansas</i> , 110 S. Ct. 1717 (1990)	8, 15, 20

STATEMENT OF THE CASE AND THE FACTS

Antonio Michael Carter was convicted of two counts of first-degree murder. The sentencing jury recommended death for one count, and life imprisonment for the other, and the lower court sentenced Mr. Carter in accordance with the jury's recommendations. This Court affirmed Mr. Carter's convictions and sentence of death on direct appeal. *Carter v. State*, 576 So. 2d 1291 (Fla. 1989), *cert. denied*, 112 S. Ct. 225 (1991).

In November, 1992, eleven (11) months in advance of the two (2) year deadline, Mr. Carter filed an initial Rule 3.850 motion (PC-R. 2). On December 22, 1992, the State filed a motion to dismiss because the motion was not sworn to as required under Rule 3.850 and "therefore is facially deficient" (PC-R. 52). On March 3, 1993, the lower court dismissed Mr. Carter's Rule 3.850 motion (Attachment A).'

Mr. Carter thereafter filed an amended Rule 3.850 motion on October 7, 1993 (PC.R. 67-286). Attached to the motion was a verification signed by counsel, alleging that Mr. Carter was incompetent (PC-R. 286).²

'This order was not included in the record prepared for this appeal, and is attached to the brief for the Court's review.

'Counsel's verification consisted of the following:

BEFORE ME, the undersigned authority, this day personally appeared TODD G. SCHER, counsel for ANTONIO M. CARTER, an incompetent client, who, being first duly sworn, says that he is counsel for the Defendant in the above-styled cause, that he has read the foregoing Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend and for Evidentiary Hearing, and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

(PC-R. 286).

On November 1, 1993, the State moved to dismiss the amended motion because it was an “improper motion” not “adequately sworn to as required by the Rule. *Scott v. State*, 464 So. 2d 1171 ([F]la. 1985); Fla. R. Crim. P. 3987 [sic]” (PC-R. 287). Judge R. Michael Hutcheson deferred ruling on the motion to dismiss and referred the case to Judge S. James Foxman, who had been the trial judge and who was reassuming his criminal docket duties as of January 1, 1994 (PC-R. 295).

On February 11 , 1994, collateral counsel, on behalf of Mr. Carter, filed an Emergency Motion for Mental Health Evaluation (PC-R. 304), writing that “due to a diagnosis of chronic schizophrenia, refusal of medication, and bizarre behavior, the Department of Corrections medical staff has recommended that Mr. Carter be seen by independent mental health experts for a competency evaluation (PC-R. 304).³ Judge Foxman thereafter entered an order for an Emergency Mental Health Examination (PC-R. 308-09). The experts were asked to evaluate Mr. Carter “for the purpose of determining Mr. Carter’s competency to proceed with pending judicial proceedings as well as the need for appropriate treatment to restore Mr. Carter’s competence to proceed” and that “the

³The motion detailed that medical personnel reported that Mr. Carter was “emaciated,” “marginally adequate” to perform activities of daily living, exhibited “poverty of thought,*” and that he “picks at lint almost continually” (PC-R. 305). The motion further detailed that on January 28, 1994, Captain Anderson of the Department of Corrections referred Mr. Carter for a psychiatric evaluation “because of refusal of attorney visit” (PC-R. 305). The psychological specialist who evaluated Mr. Carter observed “bizarre behavior,” “compulsive lint picking,” “very thin,” “pacing in cell,” “borderline personal hygiene,” “refusal of callouts,” “poverty of thought,” “easily agitated,” and “required ‘coaching’ on part of security staff to keep self and cell clean” (PC-R. 305). The motion further reported that, on February 4, 1994, the jail psychologist reported “poverty of thought,” “overall adjustment: unsatisfactory,” and “refer to attorney for possible competency evaluation” (PC-R. 305).

evaluations be conducted pursuant to guidelines which are consistent with Florida law” (PC-R. 308).⁴

Dr. Umesh Mhatre evaluated Mr. Carter on February 27, 1994, and, after conducting his evaluation, reviewing the entire medical file, interviewing various correctional staff, and observing Mr. Carter’s cell (PC-R. 314-15), determined that Mr. Carter was incompetent to proceed (PC-R. 316).⁵

Dr. Harry Krop evaluated Mr. Carter on February 16, 1994. Dr. Krop wrote that Mr. Carter “had a rudimentary understanding of pending proceedings but could not provide any detail regarding the specific nature of these proceedings” (PC-R. 311), and could not explain “to what degree he would be involved” in his postconviction proceedings (PC-R. 312). Based only on his interview of Mr. Carter, Dr. Krop found Mr. Carter to be Competent, noting however that “Mr. Carter tends to decompensate rather easily and, consequently, his competency status may change in the near future” (*Id.*).

Dr. Krop conducted a follow-up evaluation of Mr. Carter on March 31, 1994, in order to evaluate how Mr. Carter interacted with his collateral counsel. Dr. Krop noted that, in his February evaluation, his “major concern was whether Mr. Carter had the capacity to relate information to his attorneys[,] information which would assist in their

⁴Dr. Mhatre and Dr. Harry Krop were the experts ordered by the Court to conduct the evaluations (PC-R. 308). These experts were appointed because they were involved in Mr. Carter’s case during the trial stage and were therefore familiar with Mr. Carter’s history. During the pre-trial competency proceedings, Dr. Mhatre believed Mr. Carter to be competent, whereas Dr. Krop found Mr. Carter to be incompetent and requiring hospitalization.

⁵Dr. Mhatre observed that Mr. Carter “is incapable of cooperating with his attorney in his defense. Neither is he capable of challenging prosecutor’s witnesses. He also is incapable of exhibiting proper courtroom behavior and he is not capable of understanding the adversary nature of the legal system” (PC-R. 316). Dr. Mhatre further found that Mr. Carter “definitely meets the criteria for involuntary hospitalization” (PC-R. 316).

representation of him” (PC-R, 319). Dr. Krop therefore observed Mr. Carter “in a meeting with his attorneys” and “had the opportunity to review Mr. Carter’s medical records at UCI” (PC-R. 319). Dr. Krop observed that during his interaction with his attorneys, Mr. Carter was “highly distractible and at times totally nonresponsive. During his long response latency, it was difficult to assess whether Mr. Carter was thinking about his response or responding to internal stimulation” (PC-R. 319). Dr. Krop noted that Mr. Carter “was able to answer simple questions pertaining to his legal case, but became confused easily and also provided erroneous information at times” (PC-R. 319). Dr. Krop also wrote that Mr. Carter “was unable to assist his attorneys in their attempts to obtain information pertaining to family members and other matters related to his family background” (PC-R. 319-20), exhibited “significant poverty of thought” and “limited insight” into his illness, and “displayed some unusual motor movements which could be related to his anxiety level and/or response to internal cues” (PC-R. 319). Based on his reevaluation, Dr. Krop opined that Mr. Carter was incompetent to proceed “as he is incapable of assisting his attorneys in preparing a defense in his best interest” (PC-R. 320). Because “his medical records reveal a history of auditory hallucinations and [Mr. Carter] has continued to resist attempts to medicate him, . . . he meets the criteria for involuntary hospitalization as he has clearly decompensated since he stopped taking his medication” (PC-R. 320).

At a status hearing, counsel noted that “I don’t think this has ever arisen in a post-conviction case” and was therefore “call[ing] this up to Your Honor’s attention so we could sort of all get together and see where we stand and what the next step should be” (PC-R. 327). Judge Foxman questioned whether he had jurisdiction over the matter at all, suggesting that a *Baker Act* proceeding in Union County would be more appropriate

because that was where Mr. Carter was incarcerated (PC-R. 327-28). The State's response was to reassert its complaint about the lack of a sworn verification from Mr. Carter:

We have a pending motion to dismiss. The only person that's ever signed this motion for post-conviction relief, which was once dismissed by Judge Briese because it wasn't sworn to, is defense counsel.

. . . [R]ight now there is not even a pending proper motion for postconviction relief. So what I will ask at the status conference is that if we're going to have a hearing on the motion to dismiss -- although I don't feel it's necessary, it's pretty obvious on its face that there's no sworn motion -- that we set that here.

All I'm asking is that the Court follow the rules. and right now there is no sworn motion [].

(PC-R. 331). Judge Foxman thereupon requested that counsel initiate *Baker Act* proceedings in Union County (PC-R. 334). adding that "if they refuse up there after a bona fide attempt, then maybe I'll have to do it" (PC-R. 338). An order to that effect was thereafter entered (PC-R. 35 1-52).

A Petition for Involuntary Commitment was filed on behalf of Mr. Carter in Union County, Florida (PC-R. 1579-86),⁶ and was granted after the Department of Corrections joined in the request to have Mr. Carter hospitalized (PC-R. 1896). Mr. Carter was

⁶The commitment proceedings are styled *In Re: Antonio Michael Carter; Petition for Involuntary Commitment*, Union County, Florida, Case No. 94-029 CP. The Public Defender's Office was appointed to represent Mr. Carter during these proceedings. Mr. Carter was also represented by the Public Defender's Office when CMHI petitioned a Gadsden County circuit court for an order to involuntarily medicate Mr. Carter (PC-R. 1880 *et. seq*). These proceedings are styled *In Re: Carter, Antonio (DC # 068 6011, Gadsden County, Florida, Case No. 94-272-MHA)*.

thereafter committed to the Corrections Mental Health Institution (CMHI),⁷ where he remained until October, 1994 (PC-R. 1536).⁸

After his discharge from CMHI,⁹ the case proceeded again to Judge Foxman. Collateral counsel informed Judge Foxman that since Mr. Carter's discharge, Mr. Carter had to be placed in the Crisis Stabilization Unit at Union Correctional Institution (PC-R. 402), but that he had apparently been stabilized with a different type of medication (PC-R. 402-03). The State took the position that Mr. Carter was delaying his case due to "assertions by counsel of Mr. Carter's mental health problems," and that "the Defense has

⁷The CMHI records reveal that, on admission, Mr. Carter was experiencing abnormal psychomotor agitation "in the form of pacing . . . and rocking and fidgeting in the interviewing process" (PC-R. 1538). Mr. Carter also "displayed a tic-like grimaces well as oral air sucking behavior" (*Id.*). During his admission interview, Mr. Carter was "distracted by some sort of stimuli with only fair eye contact," "partially oriented to time and person and seemed only loosely oriented to place and context," and his insight was "nil" (*Id.*). The staff noted that Mr. Carter's memory was "impaired" and he was "obviously a poor historian" (*Id.*). Mr. Carter's thought process "appeared to retain the suicidal ideation associated with command hallucinations," his speech was "impoverished in quantity and content," "rate and flow of conversation were slowed," and "cognitively he impressed as functioning at a borderline intellectual range with obvious concrete expression" (*Id.*). The records further detail that Mr. Carter had been experiencing psychiatric problems since the age of 12, and that his IQ was 60 (PC-R. 1562).

⁸On discharge, the CMHI diagnosed Mr. Carter with Chronic Undifferentiated Schizophrenia and Severe Head Injury Resulting in Right Parietal Skull Fracture (PC-R. 1536). CMHI also reported that because Mr. Carter was being medicinally compliant, "[t]he constant pacing, the hissing behavior, the reclusiveness, and the ongoing response to auditory hallucinations as well as suicidal ruminations all of which were so obvious on admission are in current remission" (PC-R. 1540).

⁹During Mr. Carter's commitment, collateral counsel provided periodic updates to the lower court and the State as to Mr. Carter's status. See PC-R. 367; 372; 379. Further, it was during Mr. Carter's commitment at CMHI when appellate proceedings in this Court were pending regarding the issue of clemency counsel's conflict of interest. Mr. Carter would ask that the Court take judicial notice of the proceedings in that case, styled *Carter v. State*, 82,293, wherein the Court initially stayed the pending appeal during Mr. Carter's commitment. Thereafter, the Court indefinitely stayed the appeal pending a judicial determination of Mr. Carter's competency and final resolution of Mr. Carter's postconviction proceedings.

been asserting this shield of mental incompetence to prevent going forward with the 3.850” (PC-R. 41 I-I 2). The State then agreed that “[i]f in fact Mr. Carter is incompetent, we need to do everything in our power to see that he gets the medications necessary, if possible, to become competent, so that we can then proceed forward with the 3.850” (PC-R. 414). Judge Foxman then questioned counsel about whether the standard for competency to proceed in a 3.850 proceeding was the same as the trial level (PC-R. 416). After noting that the issues of competency in 3.850 proceedings were “not as clear as I think we’d all like it to be,” the court requested further briefing on the issue (PC-R. 2025).

After the briefs were submitted,” argument was conducted before Judge Foxman (PC-R. 2066-87). Mr. Carter’s counsel argued that the *Dusky* standard should apply to the postconviction setting as it does in the trial setting, The State recognized that “it’s a difficult question” (PC-R. 2070), but argued that “[t]here is no specific authority in the state of Florida finding that at the postconviction stage of proceedings there is any requirement of a finding of competency to go forward” (PC-R. 2069). After initially observing that the issue is “confusing” and there was “[n]ot a lot of guidance out there for what we should do” (PC-R. 2076), the court first ruled that “there is a right to a [competency] determination” in the context of postconviction proceedings (PC-R. 2081),¹¹ and announced that the standard, gleaned from a special concurrence authored by Justice Overton in *Jackson v. State*, 452 So. 2d 533 (Fla. 1984), was “whether the defendant has a present ability to consult and communicate with postconviction counsel

¹⁰Mr. Carter’s brief is at PC-R. 2026-58; the State’s brief is at PC-R. 2062-65.

“Judge Foxman later reiterated that he was making the initial determination that Mr. Carter has the right to be competent in postconviction (PC-R. 2083). The State below indicated that it did not intend to appeal the Court’s finding (PC-R. 2083), and in fact has not done so. This issue is therefore not before the Court.

regarding factual matters at issue in this post conviction proceedings” (PC-R. 2082). After entering a written order announcing the new standard (PC-R. 2090-91), Judge Foxman issued orders for additional evaluation adopting his announced standard, specifically noting that Mr. Carter “need not have any rational or factual understanding of the pending postconviction proceedings” (PC-R. 2088) (emphasis in original). Judge Foxman also ruled if Mr. Carter was determined to be incompetent, the postconviction motion would proceed with an appointed guardian in accordance with *Whitmore v. Arkansas*, 110 S. Ct. 17 17 (1990).

A timely rehearing was filed by Mr. Carter seeking clarification of the standard as well as the guardianship appointment aspect of the court’s order (PC-R. 2099). Rehearing was denied (PC-R. 2103), and this appeal follows.

SUMMARY OF ARGUMENT

1. The lower court’s announced standard for competency to proceed in postconviction proceedings fails to comport with minimal due process protections and the Eighth Amendment. The lower court’s standard violates *Dusky v. United States* and its progeny, for it fails to provide for any assessment of whether the defendant has the ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a factual and rational understanding of the proceedings. Because it fails to contemplate the issues which are inherent in the *Dusky* standard, the lower court’s standard is insufficient to protect against erroneous competency determinations. Further, the lower court’s reliance on language in Justice Overton’s special concurrence in *Jackson v. State* was misplaced. Because Mr. Carter is required to verify under oath that the allegations are contained in his postconviction motion are true and correct, Mr. Carter must possess the requisite mental capacity to rationally understand the proceedings and

understand the contents of the motion. Mr. Carter cannot be sworn and subject himself to perjury if he does not have a rational and factual understanding of what he is doing. Moreover, without an ability to consult with counsel with a reasonable degree of rational understanding, counsel cannot provide effective representation.

2. The lower court erred in ruling that, if Mr. Carter were found incompetent to proceed, a guardian would be appointed and the proceedings would not be halted despite Mr. Carter's involuntary absence. The lower court's reliance on *Whitmore v. Arkansas* was misplaced, for *Whitmore* addressed a situation where a habeas petitioner voluntarily waived his right to seek postconviction relief. Here, there is no waiver, but rather a client who is incompetent to proceed. Moreover, the lower court determined that there were factual issues to be addressed during Mr. Carter's postconviction proceedings. Mr. Carter should not be proceeded against while he is involuntarily absent due to incompetency. Further, once he is restored to competency, Mr. Carter should be allowed a reasonable time to amend his Rule 3.850 motion with issues that could not have been raised at an earlier time due to his incompetency.

ARGUMENT I

THE LOWER COURT'S ANNOUNCED STANDARD FOR COMPETENCY TO PROCEED IN POSTCONVICTION VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *DUSKY V. UNITED STATES AND ITS PROGENY.*

A. INTRODUCTION.

The lower court determined that, although Mr. Carter clearly had the right to be competent during his postconviction proceedings,¹² Mr. Carter “need not have any rational or factual understanding of the pending postconviction proceedings” (PC-R. 2090). In doing so, the lower court specifically rejected the well-settled standard enunciated by the United States Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960), see PC-R. 2090 n.1, in favor of a lesser standard of competency:

The standard of competency to proceed in postconviction is whether the Defendant has the present ability to consult and communicate with postconviction counsel regarding factual matters at issue in his postconviction proceedings. The Defendant need not have any rational or factual understanding of the pending postconviction proceedings.

(PC-R. 2090). Because the lower court found that “there are factual matters to be determined in the Defendant’s postconviction proceedings” (PC-R. 2090), the court ordered that Mr. Carter be evaluated for competency.¹³

¹²See PC-R. 2081. The issue of whether Mr. Carter has a right to be competent in his postconviction proceedings is not before the Court in this appeal. The State of Florida did not cross-appeal Judge Foxman’s order.

¹³The experts were specifically notified that they were not to consider whether Mr. Carter met the *Dusky* standard:

3. In determining whether or not the Defendant is competent to proceed without the assistance of a guardian in his postconviction proceedings, the Doctors shall consider:

In support of the new standard, the lower court relied on *Jackson v. State*, 452 So. 2d 533 (Fla. 1984). In *Jackson*, this Court addressed the issue of whether a defendant's request under § 916.11 and § 916.12, Florida Statutes (1983), and Florida Rule of Criminal Procedure 3.210, for a judicial determination of competency to understand the nature of and assist his counsel in post-conviction proceedings, should have been granted. *Jackson*, 452 So. 2d at 536. The Court ruled § 916.11 -12 and Rule 3.210 "both address the issue of a judicial determination of competency related to criminal trial proceedings," and did not "apply to a 3.850 motion" and therefore Jackson was "not entitled to a judicial determination of his competency to assist counsel either in preparing a 3.850 motion." *Id.* at 537. In a special concurring opinion, Justice Overton noted that the competency of a post-conviction litigant is "significant [] when there are factual matters in issue that must be determined." *Id.* at 537 (Overton, J., specially concurring). If there are factual matters, Justice Overton recognized that a hearing regarding the defendant's "competency to aid counsel in a post-conviction relief proceeding" should be mandated. *Id.* It is the language of Justice Overton's special concurrence from which the lower court formulated the competency standard at issue (PC-R. 2090).

For the reasons set forth below, Mr. Carter submits that the standard announced by the lower court does not comport with minimal due process and Eighth Amendment principles, principles which apply to Mr. Carter's postconviction proceedings. Mr. Carter

(a) Whether the Defendant meets the standard for competency to proceed in post-conviction, that is, whether the Defendant has the present ability to consult and communicate with post-conviction counsel regarding factual matters at issue in his post-conviction proceedings. The Defendant need not have any rational or factual understanding of the pending post-conviction proceedings.

(PC-R. 2088) (emphasis in original).

will also explain that the lower court's reliance on *Jackson* was misplaced. Mr. Carter urges the Court to adopt the *Dusky* standard as the standard to be applied in the postconviction setting. The *Dusky* standard is a common, known standard firmly embodied in our law that has proven to effectively protect the fundamental right of a criminal defendant not to undergo legal proceedings while incompetent. *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1383 (1996) (rejecting a clear and convincing evidence standard for proving competency because of the "dire" consequences of an erroneous determination of competency).

B. STANDARD FOR PRE-TRIAL COMPETENCY.

The United States Supreme Court has long held that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." *Drope v. Mississippi*, 420 U.S. 162, 171 (1975). Florida has adopted the oft-cited standard found in the Supreme Court decision of *Dusky v. United States*, 362 U.S. 402 (1960) (*per curiam*), namely, that a defendant may not be tried unless he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . , [and] a rational as well as factual understanding of the proceedings against him." *Id.* See Fla. R. Crim. P. 3.211 (a)(1) (1996).

In addition to incorporating the *Dusky* standard, Florida Rule of Criminal Procedure 3.221 offers various considerations to be appraised when evaluating a defendant's competency to be tried. These considerations include a defendant's capacity to appreciate the charges or allegations against him as well as the range and nature of possible penalties, to understand the adversary nature of the legal process, to disclose to counsel

facts pertinent to the proceedings at issue, manifest appropriate courtroom behavior, and testify relevantly. Fla. R. Crim. P. 3.21 1 (2)(A)(i-vi).

While some of these considerations are applicable to post-conviction proceedings, some are not, and, as explained further below, the nature of postconviction proceedings necessitates that additional considerations be weighed in evaluating Mr. Carter's competency at this time. However, whatever specific considerations are applicable, Mr. Carter submits that the Eighth and Fourteenth Amendments require, at a minimum, that Mr. Carter have a sufficient present ability to consult with collateral counsel with a reasonable degree of rational understanding and possess a rational and factual understanding of the proceedings against him. See *Dusky*.

C. STANDARD FOR POSTCONVICTION COMPETENCY.

Because Mr. Carter has the right to be competent during his postconviction proceedings, he must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope*, 420 U.S. at 171, as well as have a "rational, as well as a factual, understanding of the pending proceedings." *Dusky*, 362 U.S. at 402. What exactly these concepts mean in relation to postconviction proceedings is a matter of first impression in this State.

The Supreme Court of Wisconsin has recently provided some guidance in this area. In *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994). the Court addressed this very issue, first noting that "[c]ompetency is a contextualized concept; the meaning of competency in the context of legal proceedings changes according to the purpose for which the competency determination is made." *Debra A. E.*, 188 Wis.2d at 124, 523 N.W.2d at 732. Because a defendant seeking postconviction relief is required to make numerous decisions and undertake various tasks, including "the decision to proceed with

or forego relief," "whether to file an appeal and what objectives to pursue, although counsel may decide what issues to raise once an appeal is filed," and "assist[ing] counsel in raising new issues and developing a factual foundation for appellate review," *id.*, the Supreme Court of Wisconsin held that, in accordance with *Dusky*, "a defendant is incompetent to pursue postconviction relief . . . when he or she is unable to assist counsel or make decisions committed by law to the defendant with a reasonable degree of rational understanding." *Id.* at 126, 523 N.W.2d at 732.

Mr. Carter submits that the approach undertaken by the Supreme Court of Wisconsin should be adopted by this Court, and that the Court should adopt the *Dusky* standard to the postconviction setting. As with Wisconsin's postconviction scheme, a postconviction litigant in Florida must undertake a number of tasks which require rational and factual understanding of the proceedings and an ability to communicate with counsel with a reasonable degree of rational understanding. For example, a Florida defendant has the right to proceed or forego postconviction proceedings altogether. This Court has held that a *competent* postconviction defendant can waive collateral counsel. *Durocher v. Singletary*, 623 So. 2d 482, 483-85 (Fla. 1993). If a defendant must possess the requisite mental state to make a knowing, intelligent, and voluntary waiver in order to waive postconviction proceedings, a lesser standard of mental competency should not apply in order for a defendant to *initiate and prosecute* postconviction proceedings. ****Safeguards to ensure that due process is followed,**** *Durocher*, 623 So. 2d at 485 (Barkett, C.J., specially concurring), surely apply not only in a *Durocher-type* scenario, but also when there is a bona fide question of a defendant's competency to proceed with a

postconviction motion, as there is in this case, See PC-R. 2081 (lower court determines that “I think that competency is an issue”).¹⁴

Florida law also states that a postconviction litigant “must be able to affirmatively say that his allegation [contained in the Rule 3.850 motion] is true and correct.” *Scott v. State*, 464 So. 2d 1 171 (Fla. 1985). This verification must be under oath and subjects the litigant to a penalty of perjury. *Scott*, 464 So. 2d at 1172 (inclusion of “to the best of my knowledge” qualifying language in sworn verification not sufficient because “a defendant could file a motion for post-conviction relief based upon a false allegation of fact without fear of conviction for perjury”). In *Gorham v. State*, 494 So. 2d 21 1 (Fla. 1986), this Court emphasized that counsel for collateral defendants “must draft such motions with adequate specificity . . . in order for their client to review the allegations and verify the motion in accordance with the rule 3.987 oath.” *Gorham*, 494 So. 2d at 212. In *Anderson v. State*, 627 So. 2d 1170 (Fla. 1993), a represented postconviction appellant argued that the oath/verification requirement was unnecessary when collateral litigants were represented by counsel. *Id.* at 1171. This Court, however, disagreed, and stressed

¹⁴In the federal habeas context, the Supreme Court has held that in order for a habeas petitioner to waive postconviction litigation, it must be established “whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.” *Rees v. Peyton*, 384 U.S. 312, 314 (1966). See *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Demosthenes v. Baal*, 495 U.S. 731, 733 (1990). In *Lonchar v. Zant*, 978 F.2d 637, 641 (11 th Cir. 1992). the Eleventh Circuit held that due process required that the test to determine competency to waive postconviction relief had to consider “whether a mental disease, disorder, or defect prevents that person from understanding his legal position and the options available to him” and “whether a mental disease, disorder, or defect prevents that person from making a rational choice among his options.” *Id.* As these cases suggest, a finding that a defendant has a rational understanding and is not suffering from a mental disease that precludes rational thought or decisionmaking is required in order for a litigant to be able to make rational choices.

the importance of the oath/verification requirement “to alleviate our concern about the use of false allegations in motions for postconviction relief.” *Id.*

Clearly, the oath and verification requirements apply to Mr. Carter. In fact, the State has filed a motion to dismiss Mr. Carter’s 3.850 motion because it does not contain a verification signed by Mr. Carter himself (PC-R. 287). However, Mr. Carter is not competent to swear to the facts contained in the motion. Moreover, even if experts were to determine that Mr. Carter has “a present ability to consult and communicate with postconviction counsel,” Mr. Carter would still not be competent to swear to the facts in the motion, as he is required to do under *Scott*, *Gorham*, and *Anderson*, without a rational understanding of the proceedings and an ability to consult with counsel with a reasonable degree of rational understanding, Mr. Carter could have a “present ability to communicate with collateral counsel,” yet what he communicates to counsel is simply the product of his hallucination-driven thought process. For example, during a visit between Mr. Carter and counsel, Mr. Carter said that a Susan Cary had represented him at trial, when in fact he had been represented by Raymond Cass (PC-R. 306). During Dr. Mhatre’s evaluation, Mr. Carter said that his father lives in Houston, Texas, and plays football for the New York Giants (PC-R. 315). In reality, Mr. Carter never knew who his father was because he was conceived after his mother was raped by a stranger (PC-R. 224). These examples highlight the difficulty in requiring only that Mr. Carter be “able” to communicate with counsel. Mr. Carter should not be subjected to perjury in the absence of a finding that he is competent under the *Dusky* standard.” See *Lafferty v. Cook*, 949 F. 2d 1546 (10th Cir. 1991) (“the view that factual understanding alone is sufficient . . . is totally contrary

¹⁵See *a/so* Report of Dr. Umesh Mhatre (PC-R. 314), and Report of Dr. Harry Krop (PC-R. 319), who explain Mr. Carter’s inability to consult with counsel with a reasonable degree of rational understanding.

to the circumstances of *Dusky* itself and [] has been rejected by the cases applying the *Dusky* test”).

Because of the significant role of the defendant in postconviction proceedings, the due process safeguards of the *Dusky* test must apply in the postconviction setting. First and most obvious, a defendant must be able to effectively communicate with his counsel with a reasonable degree of rational understanding. “A defendant’s right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. . . . The defendant must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf.” *Riggins v. Nevada*, 112 S.Ct. 1810, 1820 (1992) (Kennedy, J., concurring in judgment). See *a/so Lafferty v. Cook*, 949 F. 2d at 1554-55 (rejecting the notion that “a finding of competency made under the view that a defendant who is unable to accurately perceive reality due to a paranoid delusional system need only act consistently with his paranoid delusion to be considered competent”).

The defendant’s participation is essential in order to properly investigate the case and determine what issue may be present. Collateral counsel was not present at the trial, nor privy to any decisionmaking sessions regarding trial strategy, if such occurred. The client’s recollection of the trial, the relationship with trial counsel, and any discussions that took place with trial counsel are critical to providing effective assistance in postconviction. If witnesses were available at trial that would have provided helpful testimony and the client wanted that testimony presented at trial, collateral counsel must be able to obtain that information from the client in order to conduct the necessary investigation. If a defendant does not have the capacity to remember the trial, or any witnesses who testified at the trial, or other essential aspects of the trial or the investigation, or provide

any information about potential avenues of investigation, then the defendant cannot be said to have the capacity to “consult with counsel with a reasonable degree of rational understanding” and the postconviction proceedings are rendered illusory. *Cf. Pridgen v. State*, 531 So. 2d 951, 955 (Fla. 1988) (“[i]f Pridgen was incompetent during the penalty phase of the trial, the tactical decisions made by him to offer no defense to the state’s recommendations of death cannot stand”)

A postconviction defendant must also possess the capacity “to understand the nature and object of the proceedings against him.” *Drope*, 420 U.S. at 171. Strategies and decisions that are made for postconviction proceedings are different than those for trial, and a defendant must have the capacity, both factual and rational, to at least understand the fundamental nature of the postconviction process in both state and federal court beyond simply knowing he wants a new trial. *Cf. Durocher v. Singletary*.

Further, a postconviction defendant must have the capacity to be present at and participate in an evidentiary hearing, listen to the testimony, and consult with counsel with a reasonable degree of rational and factual understanding about the testimony being presented. This Court had recognized that a postconviction defendant does not lose his right to fundamental constitutional guarantees during a postconviction evidentiary hearing. *Teffeteller v. Dugger*, 576 So. 2d 369 (Fla. 1996). *See also Evitts v. Lucey*, 469 U.S. 387, 401 (if a state provides a right, even if discretionary, “it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, the Due Process Clause”).

As noted earlier, the lower court relied on language set forth in Justice Overton’s special concurring opinion in *Jackson v. State*, 452 So. 2d 533 (Fla. 1984). In *Jackson*, Justice Overton observed that “competency of the defendant [in post-conviction] is significant only when there are factual matters in issue that must be determined.” *Id. at*

537. While Mr. Carter agrees with the basic premise, he submits that a defendant's competency is also a prerequisite from the inception of the postconviction process, not only if there are "factual matters in issue that must be determined." As noted above, a defendant must sign under oath a sworn affidavit subjecting himself to perjury in order to even initiate a postconviction proceeding. The oath requirement is comes into play well before there is a determination that factual matters may be at issue in the motion itself. The issue is not solely Mr. Carter ability to "aid counsel in a post-conviction relief proceeding," *id.*, as Justice Overton and the lower court recognized, but must also include competency to proceed in the first instance, implicating by necessity the oath and verification requirement. If Mr. Carter cannot properly verify under Scott, *Gorham*, and *Anderson*, his motion will be dismissed, a penalty the State has in fact sought against Mr. Carter.

Further, *Jackson* was decided prior to the creation of the statutory right to collateral counsel. Following the creation of the Office of the Capital Collateral Representative in 1985, this Court in *Spa/ding v. Dugger*, 526 So. 2d 71 (Fla. 1986), held that collateral defendants were entitled to effective representation by CCR. Since *Spa/ding*, the Court has consistently affirmed that due process principles apply to a variety of aspects of collateral proceedings. See *Maharaj v. State*, 21 Fla. L. Weekly S387 (Fla. Sept. 19, 1996); *Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996); *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995); *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1995); *Huff v. State*, 622 So. 2d 982 (Fla. 1993); *Rose v. State*, 601 So. 2d 1181 (Fla. 1992). Inherent in due process and the right to effective representation is the requisite mental capacity of the defendant to proceed. "A defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. . . The defendant

must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf.” *Riggins v. Nevada*, 112 S.Ct. 1810, 1820 (1992) (Kennedy, J., concurring in judgment). Given that Mr. Carter has these rights, including the right to counsel, he must not be proceeded against while he is not competent under the United States Constitution.

In conclusion, Mr. Carter requests that the lower court’s order be quashed, and the case remanded with instructions that the competency evaluation of Mr. Carter include an assessment of Mr. Carter’s mental condition consistent with the principles set forth above. To allow a postconviction defendant to proceed under a lesser standard of competency than required in the pre-trial setting, for example, is too risky given the “myriad” of decisions a litigant must make during the course of these proceedings. *Cooper v. Oklahoma*, 116 S. Ct. at 1382. “The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a ‘fundamental component of our criminal justice system’ -- the basic fairness of the [proceeding] itself.” *Id.* (footnote omitted).

ARGUMENT II

THE LOWER COURT ERRED IN DETERMINING THAT, IN ACCORDANCE WITH *WHITMORE V. ARKANSAS*, MR. CARTER’S POSTCONVICTION PROCEEDINGS WOULD PROCEED IN HIS INVOLUNTARY ABSENCE IF HE IS RULED INCOMPETENT.

The lower court ruled that, if Mr. Carter was found to be incompetent to proceed, it would not halt the proceedings, but instead “appoint a guardian to act on behalf of the defendant during his incompetency in a manner to the extent recognized by the United States Supreme Court in *Whitmore v. Arkansas*, 495 U.S. ___, 110 S. Ct. 1717, 109 L.Ed.2d 135 (1990)” (PC-R. 2091).

The guardianship issues discussed in *Whitmore* have no direct applicability to the instant situation. In *Whitmore*, the issue was “whether a third party has standing to challenge to validity of a death sentence imposed on a capital defendant who has elected to forego his right of appeal.” *Whitmore*, 110 S. Ct. at 1721. In Mr. Carter’s case, Mr. Carter is represented by counsel, and there is no issue of waiver. Mr. Carter, if found incompetent, will not have “elected” to forego postconviction litigation. Therefore, he should not be forced to litigate this case *in absentia*.

Further, the lower court’s ruling cannot be squared with its finding that “there are factual matters to be determined in the Defendant’s postconviction proceedings” (PC-R. 2090). This being the case, it is difficult to imagine how those factual matters can be addressed in Mr. Carter’s involuntary absence. Mr. Carter has not forfeited his rights to due process, to be present and to confront witnesses, and to a fair and impartial determination of the “factual matters” in his case because he is incompetent.

Further, *Whitmore* does not address what would happen once a guardian or “next friend” is appointed and an evidentiary hearing is ordered. If Mr. Carter’s case were to proceed to an evidentiary hearing (and the lower court has in essence determined that there will be a hearing (PC-R. 2090)), will the guardian be present instead of Mr. Carter? Clearly the guardian would not possess the ability to assist counsel during the hearing and confront the witnesses as a competent Mr. Carter could, and clearly has the right to. *Teffeteller v. Dugger*. Permitting the postconviction motion to proceed to the evidentiary stage with only a guardian for Mr. Carter is no better than having Mr. Carter forced to proceed while legally incompetent.

Further, the appointment of a guardian does not resolve the verification requirement. The State has taken the position that Mr. Carter's motion must be dismissed because it is not personally verified by Mr. Carter. If a guardian is appointed, the guardian is not in any different position than postconviction counsel was in terms of the verification, and the State will assuredly take the position that a guardian's signature on the verification is equally unavailing under *Scott*, *Gorham*, and *Anderson*.

Mr. Carter should not be punished because he is incompetent, nor deprived of his rights during these proceedings because of his mental illness. If Mr. Carter is found incompetent, due process and equal protection, as well as the oath/verification requirement, demand that the proceedings be stayed until such time as Mr. Carter is rendered competent to proceed." Moreover, once Mr. Carter is restored to competency, he should be given a reasonable time to amend his postconviction motions with any facts which, due to his incompetency, he was incapable of relating to counsel and/or which counsel was unable to obtain from Mr. Carter due to his incompetency. See *State v. Debra A.E.*, 188 Wis.2d at 134, 523 N.W.2d at 735-36 ("Defendants who are incompetent at the time they seek postconviction relief should, after regaining competency, be allowed to raise issues at a later proceeding that could not have been raised earlier because of incompetency").

"This Court stayed Mr. Carter's appeal regarding the clemency counsel issue because Mr. Carter had been involuntarily committed, in apparent recognition of the significant due process concerns inherent in proceeding against an incompetent defendant, even when the disputed issues related to matters of law. Similarly, if Mr. Carter is found to be incompetent to proceed with his postconviction motion, the proceedings should be stayed pending Mr. Carter's restoration of competency.

CONCLUSION

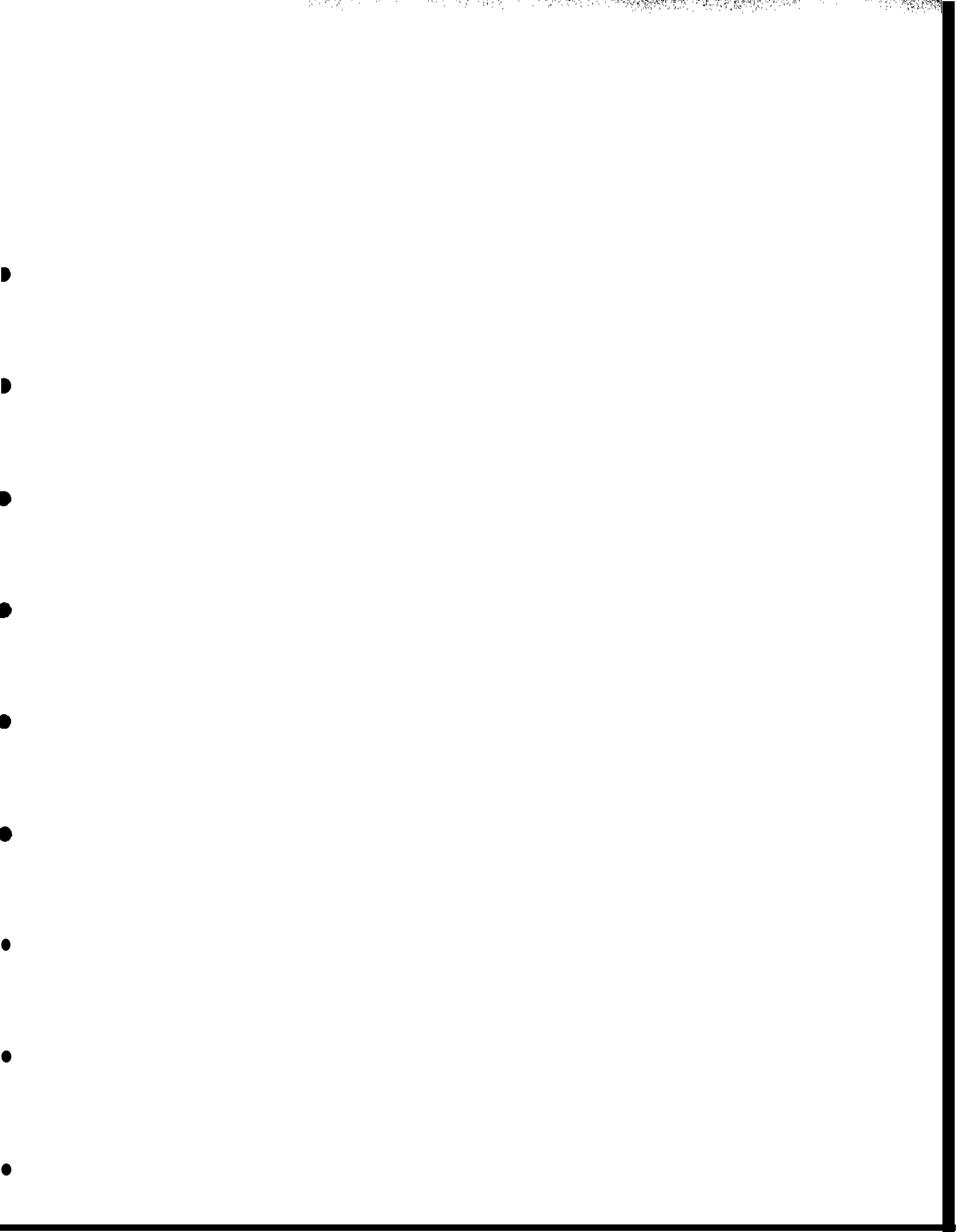
Based on the foregoing discussions, Mr. Carter requests that the Court quash the order below and remand this cause for further competency proceedings in accord with the standard set forth in *Dusky v. United States* and its progeny, as well as the fundamental due process principles that govern postconviction proceedings.

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 16, 1996.

for Neil S. Adelman Fla. Bar # 0841544
TODD G . SCHER
Florida Bar No. 0899641
Chief Assistant CCR
1444 Biscayne Boulevard
Suite 202
Miami, Florida 33132
(305) 377-7580
Attorney for Appellant

Copies furnished to:

Kenneth Nunnally
Assistant Attorney General
444 Seabreeze Blvd, 5th Floor
Daytona Beach, FL 32118



IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

VS.

CASE NO. 86-2212

ANTONIO M. CARTER,

Defendant.

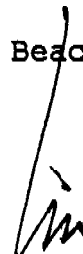
-----/

O R D E R

THIS MATTER having come before the Court on Defendant's Motion to Vacate Judgments of Conviction and Sentence, and the Court being more fully advised in the premises, it is hereby;

ORDERED and ADJUDGED that Defendant's Motion to Vacate Judgments of Conviction and Sentence is denied based on motion not being under oath. **Fla.R.Crim.P.** 3.850 and Ross v. State, 598 So.2d 148 Fla. 2d DCA 1993).

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida this 24 day of March, 1993.



SHAWN L. BRIESE
CIRCUIT JUDGE

copy to:
Judith J. Dougherty, Asst. CCR
Sean Daly, **Asst.** State Attorney