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

REPLY BRIEF OF APPELLANT

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RESPONSE TO STATEMENT REGARDING ORAL ARGUMENT

The State argues that oral argument is not necessary because, in the State's view, there is a "clear lack of merit" to Mr. Carter's claims (Answer Brief at 1). The personal opinions of counsel should not determine whether oral argument is conducted in a capital case.

The Appellee also argues that this appeal is somehow unauthorized and therefore unworthy of oral argument (*Id.*). However, Appellee ignores that this Court denied the State's motion to dismiss, establishing that this appeal is properly brought before this Court. The Court's denial of the State's motion to dismiss further establishes that the issues presented by Mr. Carter are worthy of oral argument.

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ARGUMENT I

I. PROCEDURAL DEFAULT.

The Appellee's brief primarily argues that there is no right to a competency evaluation. However, Appellee has procedurally defaulted this issue, and is barred and/or estopped from challenging the lower court's determination that Mr. Carter has the "right" to be competent in order to prosecute his collateral proceeding.

In the lower court, the State argued that there was no right to a competency determination in postconviction proceedings (PC-R, 2069). Judge Foxman specifically rejected the State's argument that there was no right to a competency finding in postconviction:

> THE COURT: I think that competency is an issue. **And I think there is a right to a determination.**

(PC-R. 2081) (emphasis added). Judge Foxman again reiterated his ruling that there was a right to a competency determination:

> [THE COURT] Let me ask you something here, too. I think this case is going to take a while to litigate. Does anybody want to take -- anybody feel they have grounds for appeal as to what the standard is7 I encourage you if you want to appeal it. I'd like the Florida Supreme Court to say if we're even in the ballpark. We might as well do it. It's going to happen sooner or later. We might as well do it. So I'd encourage somebody to take an appeal if they want to do it.
>
> MR. SCHER[]: I certainly **-- the Court has agreed with me that Mr. Carter has the right to be competent --**
>
> THE COURT: **I make that initial determination, yeah.**
>
> MR. SCHER[]: **Whether the state wants to take an appeal, I don't know. Certainly --**
>
> MR. DALY: **We don't intend to appeal.**

(PC-R. 2083) (emphasis added).

Because the State in fact never appealed Judge Foxman's ruling it now challenges on appeal, it is cannot now argue that Judge Foxman erred, as it does repeatedly throughout its Brief. See, e.g. Answer Brief at 5 ("to the extent that the lower court purported to adopt the special concurrence [in ***Jackson v. State,452 So.*** 2d 533 (Fla. 1984)] as controlling, that decision was error"). The State decided not to appeal Judge Foxman's order. A mechanism clearly existed for the State to appeal Judge Foxman's ruling, or initiate a cross-appeal on questions of law it deemed erroneously decided by Judge Foxman. See Fla. R. App. P. 9.140 (c)(l)(H); ***State*** v. ***Sireci,*** 502 So. 2d 1221 (Fla. ***1987); State v. Kokal,*** 562 So. 2d 324 (Fla. ***1990); State v. Lewis,*** 656 So. 2d 1248 (Fla. 1994).

It is well-settled that arguments not raised on appeal cannot be argued for the first time on appeal and are deemed abandoned by the non-appealing party, even when that party is the State of Florida. ***Cannady v. State,*** 620 So. 2d 165, 170 (Fla. 1993) (because "the State did not file a cross-appeal on this issue . . . this issue has not been preserved for appeal. Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State"). The State of Florida chose not to appeal Judge Foxman's order determining that Mr. Carter has a right to be competent, and therefore the argument cannot be raised for the first time on appeal.'

II. THE MERITS.

The State's entire argument is premised on the notion that Mr. Carter has no right

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'The State urges the Court not to adopt Mr. Carter's "restricted concept of what is and what is not presented for review" (Answer **Brief at 5 n.3). The State provides no authority for this Court to overlook a clear procedural default under these circumstances.**

to effective assistance of counsel -- in fact, according to the State, he has no right to counsel at all in postconviction. **See Answer Brief at 4 (No 'right to counsel' attaches** after the conclusion of the direct appeal proceedings, and there is no constitutional right to effective assistance of counsel on collateral review"). The State goes on to conclude that **"[b]ecause Carter has no constitutional right to collateral review or to counsel during such** review, his competence is simply not an issue" (Answer Brief at 4).[2]

As to the "right to counsel" argument, the State materially misrepresents the law. The State argues that "there is no State [] right to counsel at the collateral attack stage," and cites *Lambrix* v. State, 21 Fla. L. Weekly S365 (Fla. Sept. 12, 1996), for the proposition that Mr. Carter has "no constitutional right to effective assistance of counsel **on collateral review" (Answer Brief at 4). The State then argues that, in essence, *Lambrix* overruled *Spalding v. Dugger*, 526 So. 2d 7 1 (Fla. 1986), and *Spaziano v. State, 660 So. 2d 1363* (Fla. 1995) (Answer Brief at 4 n.2). Nowhere in the State's brief does it address that the Mr. Carter is *statutorily* entitled to the representation of counsel. See § 27.702** (1), Florida Statutes (1996) (the Office of the Capital Collateral Representative shall represent "each person convicted and sentence to death[] for the purpose of instituting

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[2]The State's argument on appeal that Mr. Carter's competency is "simply not an issue" is a **complete about-face to the assertions** of the State Attorney below, who argued 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). Further, the State's appellate assertions that Mr. Carter's competency is "simply not an issue" should be contrasted to this Court's action in staying the appeal that Mr. Carter perfected to this Court regarding clemency counsel issues when the Court was alerted to the fact that Mr. Carter had been committed to the Corrections Mental Health Institution. This Court went on to indefinitely stay that appeal pending the outcome of the postconviction proceedings and "until such time as Antonio Michael Carter is judicially determined to be competent" (Order, ***Carter v. State,*** Case No. 82,293). This Court would not have stayed the appeal if Mr. Carter's competency was "simply not an issue."

and prosecuting collateral action"). In ***Spalding v. Dugger,*** this Court defined the nature and scope of the collateral representation authorized by Florida law:

> We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings. This statutory right was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings. Although the United States Supreme Court, in ***Pennsylvania v. Finley,*** __ U.S. __, 107 S. Ct. 1990, 95 L.Ed.2d 539 (1987), and ***Ross v. Moffitt,*** 417 US. 600, 94 S. Ct. 2437, 41 L.Ed.2d 341 (1974), held there is no absolute constitutional right to counsel in collateral relief proceedings, it did recognize that the circumstances of a particular case might require appointment of counsel. *Id.* ***Accord Graham v. State,*** 372 So. 2d 1363 (Fla. 1979).

Spalding, 526 So. 2d at ***72. Compare Spaziano v. State,*** 660 So. 2d 1363 (Fla. 1995) (discussing defendant Spaziano's "need for effective counsel" during collateral proceedings).

Contrary to the assertions of the State, this Court did not overrule or otherwise recede from ***Spalding*** and ***Spaziano*** in its opinion in ***Lambrix v. State.*** In ***Lambrix,*** the issue was whether a postconviction litigant could claim ineffective assistance of postconviction counsel to excuse the lateness of a successive Rule 3.850 motion. ***Lambrix,*** 21 Fla. L. Weekly at S365. This Court held that "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief" under those circumstances. *Id.* Nowhere in ***Lambrix*** does this Court even cite, much less overrule or recede from, ***Spalding*** and ***Spaziano. Lambnx*** simply stands for the proposition that ineffectiveness of postconviction counsel would not serve as a basis to excuse a time bar in Mr. Lambrix's case.

Mr. Carter is not asserting that "there is a Federal constitutional 'right' to competency" (Answer Brief at 4). Rather, Mr. Carter is arguing that because he has the right to counsel, and the right to effective counsel, and the right to be competent, as the

lower court found, the standard of competency should comport with the Eighth and Fourteenth Amendments. See Initial Brief of Appellant at 1 1 ("Mr. Carter submits that the standard announced by the lower court does not comport with minimal due process and Eight Amendment principles, principles which apply to Mr. Carter's postconviction proceedings").

As to the State's arguments regarding this Court's opinion in *Jackson v. State, 452* So. 2d 533 (Fla. 1984), the State complains that the lower court erred in adopting language from the special concurrence (Answer Brief at 5). However, as explained above, the State never cross-appealed the lower court's finding either as to the right to a determination or to the standard adopted by Judge Foxman. This issue is not preserved for appeal.

The State then goes on to argue that the creation of CCR does not affect the continued viability of *Jackson* because "the decisions of this Court and the United States Supreme Court . . . are clear that there is no right to collateral counsel" (Answer Brief at 6). The State cites to no decision from this Court that holds that there is no right to collateral counsel for postconviction litigants. In fact, all the authority establishes otherwise -- that Mr. Carter is statutorily entitled to effective counsel.

As this Court has held on numerous occasions, the statutory right to counsel in postconviction contemplates that a litigant receive effective assistance of counsel, *Spaziano; Spa/ding,* and that due process and other fundamental constitutional rights attach during postconviction proceedings. See, *e.g., Teffeteller v. Dugger, 676 So.* 2d 369 (Fla. 1996); *Huff v. State,* 622 So. 2d 982 (Fla. 1993). When the State establishes a right to counsel, "this statutory right necessarily carries with it the right to have effective assistance of counsel." *Remeta v. State, 559 So.* 2d 1132, 1135 (Fla. 1990). "The

appointment of counsel in any setting would be meaningless without some assurance that counsel give effective representation." *Id.* (emphasis in original). See also ***Easter v. Endell,*** 37 F. 3d 1343, 1345 (8th Cir. 1994) ("once such a [state statutory right to counsel] is granted by the state, its operation must conform to the due process requirements of the 14th Amendment").

The State relegates its response to Mr. Carter's argument about the verification requirement to a mere footnote, arguing simply that Mr. Carter's position "is not a valid one" (Answer Brief at 10 n.5). The State fails to explain how an incompetent defendant can be forced to sign a sworn verification and subjected to a possible perjury prosecution. If Mr. Carter does not have a rational or factual understanding of the proceedings, and is unable to communicate with counsel with a reasonable degree of rational understanding, how can Mr. Carter verify the truth of any facts alleged in a Rule 3.850 motion, as he is required to do.

Apparently the State believes that a verification is nothing more than a meaningless piece of paper. This is not the case. Mr. Carter is required to "review the allegations and verify the motion in accordance with the rule 3.987 oath." *Gorham v. State, 494 So.* 2d 211, 212 (Fla. 1986). It is the "fear of conviction of perjury" that serves as the basis for requiring verifications, ***Scott v. State,*** 464 So. 2d 1 171, 1172 (Fla. 1985), even when the defendant is represented by counsel. ***Anderson v. State,*** 627 So. 2d 1 170 (Fla. 1993). The State does not discuss this line of cases in its brief.

The State also argues that "the 'relevant facts' within the defendant's knowledge are sharply limited to legal rather than factual issues" and so therefore Mr. Carter need not be competent (Answer Brief at 8). This argument fails to accept the lower court's finding that "there are factual matters to be determined in the Defendant's postconviction

proceedings" (PC-R. 2090). This argument further fails to acknowledge that Mr. Carter is required to verify the entire Rule 3.850 motion, not on a claim by claim basis. If indeed the "principal focus of collateral proceedings" is "legal rather than factual issues" (Answer Brief at 8), then why is a defendant required to verify that the "facts" contained in the postconviction motion are true and correct? The State's argument is unavailing.

In conclusion, based on the foregoing arguments and those contained in his Initial Brief, Mr. Carter submits that the lower court's order regarding the proper standard should be quashed and the cause remanded with instructions to adopt the standard of competency announced in *Dusky v. United States, 362* U.S. 402 (1960), and its progeny.

ARGUMENT II

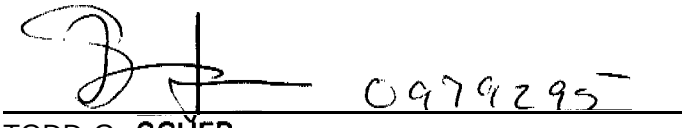
The State never meaningfully addresses the guardianship argument: "[t]his is a non-issue because . . . there is no competency issue at the collateral attack stage" (Answer Brief at 1 1). However, as explained above, the State's arguments are unavailing on this point.

Mr. Carter relies on the arguments set forth in his Initial Brief to address the guardianship issue.

CONCLUSION

Based on the foregoing discussions, as well as those contained in his Initial Brief, 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,* as well as the fundamental due process principles that govern postconviction proceedings.

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 21, 1997.



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