SUPREME COURT OF FLORIDA

RIGOBERTO SANCHEZ-VELASCO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 89,511

Circuit Court No. F86-37102
(Dade)

ON APPEAL FROM TEE CIRCUIT COURT FOR DADE COUNTY
THE HONORABLE VICTORIA PLATZER, CIRCUIT COURT JUDGE PRESIDING

INITIAL BRIEF OF APPELLANT RIGOBERTO SANCHEZ-VELASCO

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APPELLANT'S BRIEF

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* * * * * * * * * * * * * * * * * *

QUESTIONS PRESENTED

In determining, **after denial** of movant's request to replace post-conviction counsel, that movant was competent to discharge his counsel and withdraw his Rule 3.850 motion, did the trial court err by:

(a) Relying heavily upon a mental evaluation that failed to address facts highly **relevant to** movant's competence? and

(b) Failing to conduct an evidentiary hearing?

STATEMENT OF THE CASE AND FACTS

Nature of the Case and Proceedings Below

This is a Rule 3.850 motion for post-conviction relief, brought here on direct appeal from the Dade County Circuit court. (R.27, 28; R.1554)

Movant-appellant Rigoberto Sanchez-Velascowas convictedof first degree murder in the Dade County Circuit Court. (R.29; TR.233-36)[1] The jury voted 8 to 4 in favor of the death penalty, which the trial court then imposed. (R.29) This Court affirmed the conviction and sentence, and the United States Supreme Court refused to review that decision. (R.29-30)

Movant filed a Rule 3.850 motion for post-conviction relief, challenging his sentence on sixteen grounds. (R.27-284) When it finally responded to the motion -- more than two-and-one-half years after it was filed -- the State contended that all of these challenges were insufficient as a matter of law. (R.799-837)

Ultimately, the trial court accepted the State's position as to thirteen of those specific challenges, which the trial

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[1] References to the appellate record in this proceeding are designated "R. " with identification of the relevant sequentially numbered pages in the record. References to the record in the original prosecution (which are limited to those portions indicated in materials of record on this appeal), are designated "TR. ", followed by specification of the relevant sequentially numbered page numbers from the record of that proceeding.

court summarily denied (R.891-94); and rejected that position with respect to the remaining two specific challenges, as to which the trial court ordered an evidentiary hearing (R.1552-53).[2] The two challenges that survived the State's insufficiency contention were:

(1) That assistance of counsel with respect to the penalty phase of the trial had been ineffective because (according to movant's allegations) the private investigator employed by trial counsel had refused to gather readily available evidence relevant to mitigation of the penalty appropriate for the crime that movant was convicted of committing; and

(2) That the mental health professionals who opined about movant's mental fitness for trial had been unaware of key information relevant to their examinations, including critical aspects of his personal andmedical background and the fact that while in the State's custody and at the State's direction movant had been medicated with psychotropic drugs both before and during trial. (R.1552-53)

The trial court scheduled the required evidentiary hearing for December 10, 1996. (R.1552) That hearing, however, never took place, because movant's professed desire to discharge his

[2]The sixteenth challenge, upon which the trial court did not specifically rule, asserted that the cumulative impact of the error alleged in the specific challenges deprivedmovant of a fair trial.

post-conviction counsel and withdraw his Rule 3.850 motion intervened.

The two post-conviction counsel who had worked most closely with movant on a personal basis were forced to withdraw from that representation when funding for their agency was cut off and they had to seek other employment. (R.884-85, 887) They sought leave to withdraw in late August, 1996. (R.885) The written order allowing them to withdraw was signed on September 27, 1996. (R.887)

The following month, movant expressed the desire to discharge the remaining post-conviction counsel representing him, with whom movant had had extremely limited contact. (See Oct. 24, 1996 Trans. pp. 3-4, 9-10.)[3] Counsel advised the trial court of counsel's view that movant was not mentally competent to exercise judgment in that area. (Id., p. 26)

On October 24, 1996, the trial court conducted a colloquy with movant, and heard counsel, on movant's request to discharge post-conviction counsel. At that colloquy movant argued that post-conviction counsel lacked the background and experience necessary to represent movant adequately in "a capital case, which is life or death." (Oct. 24, 1996 Trans., p. 9)[4] Movant

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[3]The appellate docket index indicates that this transcript is separately bound, rather than being included in the sequentially paginated record.

[4]At the trial court's direction, movant spoke in Spanish. (Oct. 24, 1996 Trans., p. 4) The comments of movant included in the transcript reflect a simultaneous oral translation of his Spanish comments into English.

challenged the competence of post-conviction counsel on several grounds:

(1) Counsel is not a member of the Florida bar and is not familiar with Florida law and procedure (id.);

(2) Counsel's experience is limited primarily to civil matters and he has never practiced regularly in the criminal law area (id. at 9-10);

(3) Counsel practices in a state that does not have capital punishment and therefore does not have the ability and knowledge required for a capital case (id. at 10-11);

(4) Counsel had not kept movant informed about developments in the case and had not maintained contact with movant, his relatives, or witnesses (id. at 9); and

(5) Counsel had "a conflict or a personal interest", because (in movant's view) nothing else could explain counsel's "com[ing] from another state and [sic] work here in Florida for free." (Id. at 12-13)

The trial court asked movant to confer privately with counsel (id., p. 19), but movant emphatically refused:

> THE DEFENDANT: . . . . I suggest to Your Honor as the -- you represent the law, that man is my enemy. I don't want that man two feet away from me. I consider that man my enemy. I ask Your Honor to order him to stay away from me before a misfortune could take place. I don't want an enemy of mine that I consider in my heart an enemy, I don't want him to come near me or approach me.

(Id., p. 28)

After the colloquy, the trial court refused to appoint another attorney to represent movant. (Id., p. 18) Movant thereupon insisted that, "I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for any other attorney." (Id., p. 19) The trial court then ordered "a full screening concerning competency", and scheduled another hearing the following day to inquire into movant's request to withdraw his Rule 3.850 challenge. (Id., p. 28)

Movant's counsel asked that the person conducting the evaluation be provided with a summary of movant's comments during the hearing, specifically including the "enemy" colloquy. (Id., pp. 29-30) The trial court responded:

> THE COURT: I'm wondering. I wonder if we can have the doctor here. It may be that the doctor contacts you, Mr. Bowen [movant's counsel]. , . . Maybe we can put on the order a number that you can be reached at by the doctor in order to discuss the issues . . , .

(Id., p. 30)

The evaluation took place the following morning. (See Oct. 25, 1996 Evaluation Report Prepared by Sonia Ruiz ("Ruiz Rep.".)" That evaluation resulted in a six-page written opinion

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[5]The Ruiz Report was designated by movant's counsel for inclusion in the appellate record, but appears to have been omitted from the record assembled by the Dade County Clerk of Circuit Court. A copy of the report is included in movant's appendix, and movant has moved herewith to supplement the record by addition of the report.

concluding that movant **was** free of any "major mental disorder . . . . thought disorder , . . [or] major mood disorder", and was "fully competent to proceed with legal matters." (Ruiz Rep., p. 5)

The Ruiz Report does not suggest, and it is not the fact, that Dr. Ruiz contacted movant's counsel for any information in connection with the evaluation. (See Ruiz Report, pp. 1-6.) Nor does it suggest that Dr. Ruiz obtained from any other source any information about movant's paranoid outburst during the colloquy on the previous day, or about the basic inconsistency between the positions he took, or that she took any aspect of his behavior into account in arriving at her conclusions. (Id.)

The trial court proceeded on the afternoon of October 25th with the further colloquy scheduled the previous day. (See Oct. 25, 1996 Trans.) The colloquy was not an evidentiary hearing. (Id.) Dr. Ruiz did not appear at that colloquy, and was not otherwise available for cross-examination about or other inquiry into her report or its conclusions. (Id.)

At that colloquy, movant indicated a lack of familiarity with the details and status of his Rule 3.850 challenge. (Oct. 25, 1996 Trans., p. 37) He recognized that withdrawing that challenge would subject him to execution. (Id., pp. 37-39) When he was then asked by the trial court, "Now, is that what you want to do?", however, he responded, "I don't have any other road." (Id., p. 39) To the trial court's admonition that he did, in fact, have alternatives, he responded as follows:

> THE DEFENDANT: As I explained to you yesterday, I have never had that man [movant's remaining post-conviction counsel] as an attorney. And by law, he is illegally representing me and has violated all my Rights [sic].
>
> And youI yesterday, clearly denied and specifically specified that you would not give me the Right [sic] to have an attorney -- competent attorney to represent me, and given [sic] me this man who has not represented me adequately, and who is my enemy to represent me in this court.
>
> I don't believe in the justice of this country, and it's not offensive to you or anyone. But I would like for them to have the opportunity to play their game completely. And in that fashion, well, I have the Right [sic] to die in peace.

(Id., p. 40)

As the colloquy continued, movant complained about the length of time his Rule 3.850 motion had been pending without action, and told the trial court, "I have never been informed of that motion. I had forgotten about that motion. I don't know what the motion is about now." (Id., p. 41) Told that dropping his motion would mean that he would be returned to death row, movant responded:

> THE DEFENDANT: I understand it perfectly. And as she told me, it's my desire. And I don't have any other -- like you said, I'm not competent to represent myself. And that's what you're asking me to do; to represent myself.
>
> I have not gone to the school [sic] in the United States. I do not know the laws of the United States. And I very barely understand the language. And if I'm not going to be represented by someone, and I cannot represent myself, why am I going to waste my time?

(Id., p. 42 (emphasis added))

At this point, movant's counsel requested that movant "be asked if he can have an attorney that he would be satisfied with, someone other than me, would he then wish to proceed with the 3.850 Motion?" (Id., p. 44) Over the demurrer of counsel, the trial court specifically refused to make that inquiry of movant. (Id., pp. 44-45) As the colloquy approached its conclusion, movant repeated his insistence that he was entitled to a competent attorney to represent him in connection with the Rule 3.850 motion:

> THE DEFENDANT: I know that Congress, the Federal Government was paying for my representation since that V.R.C. [Volunteer Lawyers Resource Center] was created. The Governor gives me the right that I be represented -- 3.850 Motion, post conviction [sic], be represented by an attorney competent in capital case [sic]. It's a law. And I have a right that the Governor gives me to create V.R.C. [sic].

(Id., p. 54) Following this series of exchanges and comments and a further statement by the trial court making it clear that movant would not be provided with new, separate counsel, movant said:

> THE DEFENDANT: It's my Right [sic] to represent myself and to withdraw my 3.850 Motion. And I hope that you grant it. It's my own will, and I'm competent to make my own decisions, and that I'm thankful for your consent, but it's my decision.

(Id., p. 56)

On the basis of the Ruiz Report, a 1995 evaluation of movant done in connection with a different case, and the further colloquy with movant, the trial court found movant competent to

waive counsel. (Oct. 25, 1996 Trans., pp. 55-56)[6] The trial court thereupon permitted movant to withdraw his Rule 3.850 challenge. (Id., pp. 56-57; R.1550-51)

This appeal followed. (R.1554)

Relevant Facts

As the description above indicates, there was never any final disposition of movant's Rule 3.850 motion on its merits. The legal and factual validity of the challenges spelled out in that motion are not before this Court on this appeal. The following statement of facts is limited to those facts bearing on the issue that is presented here, i.e., the procedural adequacy attending the determinations below that movant was mentally competent to waive counsel and withdraw his Rule 3.850 motion.

Movant **was** convicted of the brutal rape and murder of a young girl. (R.29; TR. 233-36) Despite the horrible nature of the crime and the overwhelming evidence of guilt, the trial jury voted only 8-4 for imposition of the death penalty. (R.29)

In his motion for post-conviction relief, movant presented substantial documentary and testimonial evidence of factors that could have made a difference on a penalty decision that (in the jury's mind, at least) was so close. These included the following:

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[6]The transcript of this hearing, like that of the hearing the previous day, was separately bound rather than sequentially paginated with the remainder of the appellate record.

1. Failure of trial counsel to obtain and present readily available penalty-mitisation evidence. Movant's childhood in Cuba was strewn with traumatizing experiences that the jury could properly have taken into account in determining the penalty that should be imposed for the crime he committed. (R.300-329;346-53) His mother was verbally and physically abusive, calling him "dirty scum" and similar names and beating him for no disciplinary reason from his earliest years. (Id., (R.347-48 (Villazon Aff., ¶ 6))[7] His home was a vermin-infested hovel in Cuba without running water or basic hygiene. (R.348 (Villazon Aff., ¶ 7)) His mother frequently left him and his siblings alone, without food, water or money, sometimes for days at a time. (Id., ¶ 8) His sister described one incident in which he **was** so hungry that he gobbled down meat that he knew to be infested with cockroaches. (R.348-49 (Villazon Aff., ¶ 9))

When movant grew older, he **was** sent to boarding schools, schools for the mentally handicapped, and eventually a psychiatric hospital. (R.349 (id., ¶ 10); R.715 (Herrera Report, p. 5)) The treatment to which he was subjected at the psychiatric hospital included electroshock therapy. (R.312-13 (Garcia Aff., ¶ 4)[8]; R.715 (Herrera Report, p. 5))[9]

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[7]The Affidavit of Gloria Villazon is Tab 12 of Appendix I to movant's Rule 3.850 motion below. (R.285 et seq.).

[8]The Affidavit of Rolando Garcia is Tab 7 of Appendix I to movant's Rule 3.850 motion.

[9]The report of Dr. Jorge Herrera's neuropsychological evaluation of movant is Tab 20 of Appendix II to movant's Rule 3.850 motion.

After movant came to the United States as part of the Marie1 boatlift, his behavior suggested severe psychological disorder. He was described, for example, as sitting in the dirt in the backyard of the house where he lived, talking to a dog for hours at a time and failing to respond to relatives who **asked** him if he were all right. (R.328 (Reyes Aff., ¶ 5))[10] While in the United States, he suffered a cracked skull that "was never fixed", after which "[h]is behavior got even more strange." (Id., ¶ 6) Following the head injury he suffered post-traumatic amnesia, suggesting permanent brain damage, and persistent, severe and recurring headaches. (R.753 (White Evaluation, p. 5))[11]

Mr. Sanchez-Velasco's physically and psychologically traumatic background in Cuba was known to his relatives still living there. (R.346-53 (Villazon Aff.)) According to the evidence presented by movant, however, the private investigator sent to Cuba by trial counsel did not make even a perfunctory effort to obtain that evidence. (R. 347 (Villazon Aff., ¶ 5)) Instead, he told movant's sister in Cuba that movant was facing the death penalty in Florida and "that the only thing that would save her brother's life would be 'gold & silver' (money) ." (Id.) When movant's sister told the investigator that she had

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[10]The Affidavit of Rigoberto Reyes is Tab 10 of Appendix I to movant's Rule 3.850 motion.

[11]The written evaluation of Dr. Alec Whyte is Tab 26 of Appendix II to movant's Rule 3.850 motion.

no money to give him, he left, with no inquiry at all into movant's childhood, family life or behavior. (Id.)

As a result, the jury never heard facts that could never have excused the crime movant committed, but could have explained that crime as the act of a badly damaged human being rather than the cold reflex of a monster. In the **same way,** the mental health professionals who examined movant in an effort to determine his mental condition at the time of the crime, his competency to confess, and his fitness to stand trial were without this information.

2. Ignorance of potentially critical facts on the part of mental health professionals who examined movant before trial and opined about his mental competence. Movant submitted evidence that, while in jail awaiting trial, he was heavily medicated with Thorazine. (R.312 (Garcia Aff., ¶ 3); R.756-57 (Whyte Evaluation, pp. 8-9)) Doctor Alec Whyte explained that organically brain damaged persons "often react idiosyncratically to tranquilizers and become more agitated." (R.757 (Whyte Evaluation, p. 9)) None of the mental health practitioners who examined movant prior to trial was aware that he had been regularly medicated with Thorazine during his detention, and none performed a standard neuropsychological examination. (R.727 (Herrera Report, p. 17)) In the opinion of Dr. Jorge Herrera, a neuropsychologist, these gaps made the pretrial evaluations "seriously flawed and unreliable." (Id.)

Movant filed his motion for post-conviction relief and the material supporting it on May 13, 1993. (R.27 et seq.) During the thirty-one months that ensued before the State responded, movant on at least one occasion wrote to the Governor to request immediate execution. (R.775) After colloquy, Judge Glick denied this request upon a determination that "the defendant is not sincere in this request" and had in fact "made his choice and that is the choice that he wants to go forward with his legal proceedings in an attempt to overturn the death warrant or to halt the execution in this case." (Oct. 17, 1995 Trans., p. 20)[12]

SUMMARY OF ARGUMENT

The Ruiz Report, upon which the critical ruling below depended, was substantively deficient as a matter of law because it failed to take patently material data into account, including movant's simultaneous profession, immediately before the evaluation, of diametrically opposed wishes concerning his Rule 3.850 motion.

The trial court erred in failing to conduct an evidentiary hearing into movant's competence to represent himself and to withdraw his Rule 3.850 motion. Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991).

[12]Once again, this portion of the record was separately bound.

ARGUMENT

Introduction

The issue before the Court is not particularly complicated, either factually or legally. It is difficult to imagine how it be argued that a lucid individual fully competent to handle his affairs and make important decisions could simultaneously demand (1) a lawyer better equipped to press challenges to his death sentence and (2) an end to those very challenges. After colloquies on two consecutive days with movant, the trial court itself found it "hard to believe" that movant in fact wanted the literally fatal outcome that the position he was taking entailed. (Oct. 25, 1996 Trans., p. 55)

Assuming for the sake of discussion that such an argument could be made, however, the further contentions essential to the State's position here simply cannot be advanced with a straight face. The first of those contentions is that a mental health practitioner could properly determine this individual's competence without taking into account these simultaneous but diametrically opposed demands and the patently paranoid comments that accompanied movant's articulation of them; without reflecting in her report any awareness of the fact that the individual being evaluated had taken precisely opposed positions at virtually the same time on a matter that he himself described as life and death; and without even a pass at reconciling that stunning and inconvenient dissonance with the report's conclusion. The second is that the trial court could properly

reach a critical conclusion, explicitly based in material part on that evaluation, without an evidentiary hearing inquiring, at a minimum, into what might politely be called substantial gaps in the evaluation's analysis.

The issue in this case is not whether a condemned criminal's refusal to begin or continue challenges to a death sentence is inherently irrational and therefore conclusive proof that anyone wishing to adopt such a course is incompetent to decide to do so. This Court has decided that issue. The jurisprudence informing that decision, however, includes a firm insistence on appropriate procedural safeguards to ensure that any inmate making that awful decision is in fact competent to do so. See Durocher v. Singletary, 623 So. 2d 482, 486 (1993) (per curiam).

The practical question raised by this appeal is whether those safeguards are matters of pure form or have a meaningful substantive dimension. Even as a matter of form, the failure to conduct an evidentiary hearing makes the procedures followed below practically and Constitutionally deficient on the facts presented by this record.

If the procedural form here were sufficient, moreover -- if it were enough that the trial court had movant examined by a mental health practitioner who recited the appropriate buzz-words in a written report, and then interviewed movant on the record before accepting the report's conclusions -- that would not be end of the inquiry. This is so for the simple reason

that form cannot be all that matters. And if anything beyond form does matter, a problem of the most fundamental character presents itself; for on this record it is simply impossible to have any meaningful confidence in the substantive conclusion that was reached below.

I. THE EVALUATION OF MOVANT WAS FUNDAMENTALLY DEFECTIVE BECAUSE OF ITS FAILURE TO ADDRESS THE CONTRADICTION BETWEEN MOVANT'S OBJECTIONS TO HIS POST-CONVICTION COUNSEL AND HIS PROFESSED DESIRE TO ABANDON HIS MOTION FOR POST-CONVICTION RELIEF.

A. Legitimate Doubt About Competency Requires a Substantively Meaningful Inquiry, Including an Evidentiary Hearing.

The Constitutional standard governing a criminal defendant's competency to waive counsel is the same as the standard for competency to stand trial. Godinez v. Moran, 509 U.S. 389, 401-02 (1993). This limitation applies with as much force at the post-conviction stage as it does before trial:

> [T]here is no federal constitutional right to either direct appeals or post-conviction review. [citing cases] Nevertheless, once such a remedy is granted by the state, its operation must conform to the due process requirements of the 14th Amendment. [citing cases]

Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994).

Indeed, due process "requires a court to conduct a competency hearing on its own motion, before permitting a defendant to waive constitutional rights, whenever a reasonable judge would be expected to have a bona fide doubt as to the

defendant's competence." Moran v. Godinez, 57 F.3d 690, 695 (9th Cir. 1994) (emphasis added). This applies specifically to the decisions both to plead guilty and to waive counsel. See, e.g., United States v. Lewis, 991 F.2d 524, 527 (9th Cir.), cert. denied, 510 U.S. 878 (1993) (competence to plead guilty); and Harding v. Lewis, 834 F.2d 853, 856 (9th Cir. 1987), cert. denied, 488 U.S. 871 (1988) (competence to waive counsel).

Where competence is legitimately in doubt, moreover, a colloquy with the defendant is not enough. Neither is a colloquy plus a facially insufficient conclusion from a mental health practitioner, which is what the record here discloses. An evidentiary hearing is required.

In Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991), for example, the core issue was the defendant's competence to stand trial. Defendant had put his competence in issue by a pretrial motion. 935 F.2d at 927. The trial court had ordered a preliminary examination by mental health professionals, whose written report was inconclusive, noting a failure of the examiners to reach consensus about the defendant's condition. Id. at 927-28. This appeared to call for a more complete evaluation at the state mental hospital. When informed of this, however, the defendant complained of pain from withdrawal of medication and, against the advice of his counsel, withdrew his competency challenge. Id. at 928. The trial court conducted a colloquy with the defendant, and then permitted him to stand trial. Id.

The Eighth Circuit held that the state court had failed to comply with due process requirements by permitting the defendant "to withdraw his notice and motion regarding competency, without an evidentiary hearing." See 935 F.2d at 929. It explained that the state court had failed to "conduct[] a full, fair, and adequate hearing on the subject of Griffin's competency" because

> No witnesses were called; the only medical report on Griffin was the one paragraph letter from the mental health center; apparently no attempt was made to obtain a more complete report from the mental health center; and the trial court's questioning of Griffin was very limited. . . . Although the Arkansas Court of Appeals held that Griffin's "hearing" complied with due process, we conclude that it did not.

935 F.2d at 931.

The case law thus appears to admit no legitimate doubt that the same restraints apply to movant's literally fatal decision here to abandon his post-conviction challenge to his death sentence after he was not allowed to replace the counsel representing him at that stage. As the Griffin court explained in a different but clearly analogous procedural context:

> [A]lthough Griffin's decision to withdraw his motion and notice (against his attorney's advice) presented a slight twist to the usual events before a trial court, it did not remove the doubt about Griffin's competency. If Griffin was incompetent at the time, his decision may not have been knowingly and intelligently made.

935 F.2d at 931. Hence, if a reasonable judge would have doubted movant's competence, an evidentiary hearing -- not merely a colloquy -- was required. See generally United States

v. Rodrisuez, 799 F.2d 649, 655 (11th Cir. 1986) ("As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents sufficient facts to create a 'real, substantial and legitimate doubt as to [his] mental capacity . . . . '").

B. Legitimate Doubt About Competency Was Shown Here.

The record here compels the predicating doubt that the law requires. Simultaneously believing two propositions that cannot possibly both be true is not a strong indication of mental competence. Movant at bar had already been diagnosed by Drs. Herrera and Whyte as suffering from severe mental disorders that included delusional elements. (R.719-22; 752-53) He had behaved at trial in a bizarre fashion, insisting, for example, on making a long, rambling, garbled, and severely prejudicial statement to the jury. (R.159-60; Tr. 2705-38) And the occasion for the October, 1996 evaluation at issue here **was** his simultaneous insistence that he wanted to abandon his post-conviction motion and to have the benefit of counsel who could press that motion more effectively -- indeed, that he wanted to abandon that motion because he could not have counsel who (in his judgment) would press it competently.

These positions are in diametric contradiction. Movant did not say that he objected to post-conviction counsel because counsel disobeyed an instruction to abandon the motion. The

thrust of his objections was in exactly the opposite direction: counsel (in movant's view) lacked familiarity with Florida law and procedure, had little experience with criminal work in general, was not licensed to practice in Florida, and had had little contact with movant; and with his very life on the line, movant said, he deserved better counsel than that. Movant was thus saying in virtually the same breath that he wanted to abandon his motion and to have that motion pressed more effectively.

Constitutionally sufficient doubt about competence has been found on facts far less compelling than these. See Drope v. Missouri, 420 U.S. 162, 180 (1975) (factors to be considered in determining whether legitimate doubt has been raised include irrational behavior by the accused, demeanor of the accused at trial, and prior medical opinions); see, e.g., Blazak v. Ricketts, 1 F.3d 891, 894-97 (9th Cir. 1993) (opinion explaining affirmance by equally divided court of district court order granting writ of habeas corpus) (documented history of mental illness and behavior characteristic of psychopaths sufficient to trigger competency hearing requirement) .

Significantly, the State's position below strongly reinforces this argument. The State did not interpret movant's position as a sincere, intelligent, and knowing bid to drop his Rule 3.850 challenge. The State viewed movant's request as an attempt to delay ultimate disposition of his motion by manipulating the system as (according to the State) he had done

before. (Oct. 25, 1996 Trans., pp. 49-51) With an evidentiary hearing on the merits of his motion in prospect, the State argued, movant was trying to gum up the works procedurally in an effort to force indefinite delay of that hearing.

A rather macabre irony infects the State's contention in this regard. The delays movant had supposedly achieved by the prior maneuvers the State refers to were trivial compared to the thirty-one months that post-conviction proceedings went nowhere while the State missed one deadline after another for responding to the motion on its merits. Indeed, the record strongly suggests that the remarkable delay caused by the State's repeated (though unsanctioned) defaults in this regard contributed powerfully to the confusion and frustration reflected in the contradictory positions taken by movant in October, 1996.

That irony aside, accepting the State's interpretation of events would virtually compel reversal of the decisions appealed from. If the State is right, movant neither prefers execution to normal completion of the post-conviction process, nor has an intelligent and genuine understanding of the consequences of abandoning that process. Movant, according to the State, has such limited and imperfect understanding of his rights and of the systemic context in which those rights must be exercised that he believes he will delay his execution by purportedly asking to expedite it.

If that contention were accepted, then movant's withdrawal of his Rule 3.850 petition might be many things; but it would not and could not possibly be a knowing and intelligent surrender of a known right. If the State is correct, then movant has no more business representing himself in this matter than an eight-year old child would.

C. The Ruiz Report Was Substantially Deficient on its Face.

The Ruiz Report passes in discreet silence over these facts. It makes no mention of them. Its evaluation displays no awareness of them. And its conclusion is not reconciled with them.

Analytically and empirically, the Ruiz Report is limited to an assurance that movant knows withdrawal of the motion will mean his execution and wants such execution. It simply does not address his impassioned plea, less than twenty-four hours before, for more effective help in avoiding that execution. While assuring readers that no evidence of major mental disorders appeared, moreover, the report does not mention movant's insistence that his own counsel was his "enemy" and his warning that physical proximity to counsel might result in "misfortune".

Conceptually, although not very plausibly, it might be possible to confront these facts candidly and reconcile them with a finding of mental competence. What is plainly impossible is to make a credible determination in that area while

disregarding those facts altogether. Indeed, the trial court itself seemed to anticipate attention to precisely these facts when it asked movant's counsel to make himself available for consultation with Dr. Ruiz, and further suggested the possibility that Dr. Ruiz would be in court for the post-evaluation colloquy. Dr. Ruiz, however, preferred to arrive at her conclusions without the intrusion of inconvenient (but highly relevant) data.

A substantive deficiency this gross and this fundamental should be too much for a legal regime that takes itself seriously to swallow. The contradiction in movant's position is patent. It lies at the very heart of the precise issue the practitioner was asked to examine.

To be unaware of that contradiction; to overlook it; to ignore it; to know about it and fail to appreciate its significance -- any of these faults should as a matter of law conclusively make the evaluation insufficient on its face. Shortcomings such as these do more than cast doubt on the legal credibility of the evaluation; they make it literally and irremediably incredible. A ruling depending on it, as those here do, cannot be sustained.

II. AT A MINIMUM, AN EVIDENTIARY HEARING PERMITTING MEANINGFUL INQUIRY INTO THE DEFICIENCIES IN THE RUIZ REPORT WAS REQUIRED UNDER THE CIRCUMSTANCES HERE.

Even if, in the teeth of these flaws, the Ruiz Report could conceivably be used as some part of the basis for a judicial

decision, it could not be so used without the elementary safeguard of an evidentiary hearing probing its deficiencies. Without such a hearing, the orders appealed from cannot survive the trial court's acknowledged reliance on the Ruiz Report.

Although the factual picture here is of course not identical to Griffin, the analogies are compelling and the application of the pertinent standard is clear.

* There was no evidentiary hearing, just as there was none in Griffin.

* The mental evaluation upon which the trial court chose to rely purported to reach a conclusion but, as discussed above, ignored such patently pertinent data that it should not be credited at all, much less given conclusive effect to the exclusion of the abundance of contrary opinions shown by the record. The federal courts have warned emphatically about the Constitutional pitfalls lurking in "[m]echanical application of a rule that considers only the most recent report" in this area, because such an approach "could lead to the exclusion of highly probative evidence of present incompetence that maybe contained in past reports." United States v. Caslan, 633 F.2d 534, 539 (9th Cir. 1980).

* The trial court's colloquy here was not as limited as the one in Griffin, but it left substantial doubt about movant's understanding of the nature of the

challenges still available for him to press or the potential consequences of pressing them successfully. Ultimately, in fact, movant said that he did not understand the Rule 3.850 motion that he was dropping, and insisted that he was not competent to represent himself.

It is submitted on this basis that the evaluation relied on by the lower court **was** inherently dubious, and that the lower court's failure to conduct an evidentiary hearing is fatal to the sustainability of its order allowing withdrawal of movant's post-conviction challenge. The disposition below was accordingly erroneous. The orders appealed from should be vacated, and the case remanded with instructions to inquire ab initio and with appropriate procedural safeguards into movant's professed intentions and competence.

CONCLUSION

For the reasons outlined above, it is respectfully requested on behalf of movant that the decisions and orders permitting him to discharge post-conviction counsel and represent himself, and dismissing his Rule 3.850 challenge to the death sentence imposed on him pursuant to his withdrawal of that challenge, be reversed; and that this matter be remanded to the trial court with instructions to proceed to an evidentiary hearing on the merits of the Rule 3.850 motion; or in the alternative, for a new evaluation of movant's competence to

waive counsel and withdraw his petition, conducted with appropriate procedural safeguards, including but not limited to use of a practitioner not previously involved in evaluation of movant, provision of an opportunity for one or more independent evaluations arranged for through movant's counsel, and a full evidentiary hearing.

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