IN THE SUPREME COURT OF FLORIDA

CASE NO.

PEDRO MEDINA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Litigation Director
Florida Bar No. 0754773

JENNIFER M. COREY
Assistant CCR
Florida Bar No. 0999717

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Medina's motion for relief pursuant to Fla. R. Crim. P. 3.811.

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 January, 1997, 3.850 appeal to this Court from Orange County;

"PC-R2" -- record on January, 1997 3.811 appeal to this Court from Bradford County;

"PC-R3" -- record on appeal after February 1997 evidentiary hearing;

"11/7/89 T." -- transcript of proceedings conducted 11/7/89 (one volume numbered pages 1-41);

"Def. Ex." -- exhibits submitted at the 1988 evidentiary hearing;

"PC-R3. Ex." -- exhibits submitted at the 1997 evidentiary hearing;

"App." -- appendix to the 1987 Rule 3.850 motion;

"H." -- Transcript of 1988 evidentiary hearing testimony;

"H2." -- Transcript of 1997 evidentiary hearing testimony.

INTRODUCTION

Mr. Medina was afforded an evidentiary hearing on whether he is competent to be executed. During the hearing, Mr. Medina ate feces, talked to himself, in various languages, growled, sang to himself, faced the wall with his back to his counsel, slept, and was completely oblivious to the proceedings. However, the evidentiary hearing did not comport with Ford v. Wainwright, the Fifth, Eighth and Fourteenth Amendments, or the Ex Post Facto Clause.

In Ford v. Wainwright, 477 U.S. 399 (1986), a somewhat fractured United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane. Justice Marshall writing for four justices specifically found executing the insane violated the Eighth Amendment. He further discussed the procedural safeguards necessary to protect the rights of the insane under sentence of death. Justice Powell wrote separately and provided a fifth and deciding vote for the holding that the Eighth Amendment prohibited the execution of the insane. Justice Powell, however, did not agree with Justice Marshall as to procedural safeguards necessary to protect the recognized right. In finding the execution of insane people unusual in Anglo-American law, Justice Powell found two justifications for finding it cruel: executing the insane has for centuries been considered "such a miserable spectacle . . . of extreme inhumanity and cruelty that it can be no example to others," and it goes against

common religious and cultural mores to send someone to his death "when he is not of a capacity to fit himself for it." Ford, at 421 (Powell, J., concurring) (internal citations and quotation marks omitted). Given that a majority of the United States Supreme Court has held the Eighth Amendment prohibits judicial execution of the insane, principles of due process must be applied to protect a condemned man's very great interest in not being executed at a time when he suffers from mental illness that prevents him from "comprehending the reasons for the penalty or its implications." Id., at 417 (plurality opinion of Marshall, J.).

Consideration must also be given to the separate opinion of Justice O'Connor concurring in part and dissenting in part.[1] Justice O'Connor did not agree that the Eighth Amendment precluded the execution of the insane, but instead found that the State of Florida "has created a protected liberty interest in avoiding execution while incompetent." Id. at 427. As a result, the state-created entitlement "trigger[ed] the demands of the Due Process Clause." Id. at 429.

In Mr. Medina's case, the issue is whether the procedural protections adopted by the State of Florida after the decision in Ford have run afoul of the Eighth Amendment principles recognized in the opinions of Justices Marshall and Powell or the due process principles recognized in the opinion of Justice O'Connor. This is the first time since the adoption of the permanent rule

---

[1]Justice White joined this opinion.

the issue has arisen. See In re: Amendment to the Florida R. Crim. Pro., 518 So. 2d 256 (Fla. 1987).

On January 10, 1997, undersigned counsel for Mr. Medina filed a motion seeking an evidentiary hearing on Mr. Medina's competency to be executed. Without reaching the issue of the proper burden of proof, the circuit court ruled that counsel had not established that an evidentiary hearing was even warranted. Mr. Medina appealed that decision.

On February 10, 1997, this Court agreed with Mr. Medina that the lower court abused its discretion in denying Mr. Medina's motion for stay of execution pursuant to Florida Rule of Criminal Procedure 3.811(e) and ordered that an evidentiary hearing be held regarding Mr. Medina's competency to be executed. Medina v. State, 22 Fla. L. Weekly S75, (Fla. Feb. 21, 1997). The Order required that the evidentiary hearing take place and be decided within twenty-one (21) days. Id. at S78. The Court mandated that evidence was to be received as allowed in Florida Rule of Criminal Procedure 3.812(d), and that the clear and convincing standard of proof contained in Florida Rule of Criminal Procedure 3.812(e) would be applied. Id. at S77. Counsel were forbidden to request rehearing on any issue. Medina v. State, Nos. 89,758 & 89,762, slip op. at 10 (Fla. Feb. 10, 1997).[2]

[2] In this opinion, the majority of this Court attached significance to a pretrial finding of competency which is now fourteen years old. In more recent post-conviction proceedings, the competency issue was found procedurally barred because of the failure to pursue it on direct appeal and at the same time the presiding judge found that Mr. Medina's trial counsel had been advised that Mr. Medina "was psychotic," that the decision to not

The standards and procedures set out in Rule 3.812, and the way they were applied by the circuit court on remand, violated Mr. Medina's rights under the Ex Post Facto Clause and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. At the beginning of the proceedings below, counsel registered an objection to the standards and procedures being applied. During closing argument, the objections were renewed.

Quite simply Rule 3.812 does not comport with Ford, due process, the Eighth Amendment, the Fourteenth Amendment or the Ex Post Facto Clause. Although Florida Rule of Criminal Procedure 3.010 specifically excludes Rules 3.811 and 3.812 from the scope of the rules, strict procedural and evidentiary rules were applied differentially against Mr. Medina, including the preclusion of a case in rebuttal refuting allegations in the state's case-in-chief. The lower court also found that Rule 3.812 precluded any consideration of Mr. Medina's "mental pathologies or infirmities." Opinion Regarding Defendant's Insanity to Be Executed at 15. Confined within the temporal, evidentiary, procedural, and juridical limitations imposed on him, Mr. Medina's right not to be executed while insane has not been protected.

The lower court's order did not resolve the problems in this case. Rather, it put them into sharper relief. It exposed Mr.

---

present this evidence was reasonable, and that the unrefuted fact that Mr. Medina was "psychotic" "was derogatory and would have had, if anything, an adverse effect on the jury." Order 2/6/89 at 8. At the evidentiary hearing in 1988, it was uncontested that Mr. Medina was "psychotic" and it was accepted as fact.

Medina to a great risk of an erroneous competency determination. All risks of an erroneous determination were born by Mr. Medina when the court required Mr. Medina and not the State to bear the risks. This does not comport with the Eighth Amendment right recognized in Ford. Nor does it comport with the due process principles discussed by Justice O'Connor. Finally, it does not comport with the Ex Post Facto Clause since Rule 3.812 altered Mr. Medina's situation to his disadvantage.

Here, a man with judicially recognized mental illnesses was asked to marshall his evidence on two weeks notice to prove by clear and convincing evidence that he lacks the mental capacity merely to know the fact of his pending execution and why it is to be imposed. It was undisputed by the mental health experts that if Mr. Medina's symptoms were real and not faked then he was crazy (R. 711-12, 714, 716). The question boiled down to whether Mr. Medina was and is malingering or insane. In order to resolve that issue with certainty, Mr. Medina's counsel should have been afforded time and resources to marshall and develop evidence. Neither Mr. Medina nor his counsel can place him in a secured mental institution for sixty to ninety days in order to obtain the only proof which would meet the burden imposed upon him. The State has precluded Mr. Medina from having the opportunity to gather the clear and convincing evidence required by Rule 3.812. As to Mr. Medina, the ultimate catch-22 has been created. The State has given the right, but denied the means to vindicate it.

If the lower court's resolution stands, Mr. Medina will go to execution, perhaps knowing some event is to happen, but believing it is for something that happened in Cuba; believing he died in 1979 and lives in a picture on his mother's wall so it doesn't matter if he is executed; or believing he will be going on a mission to the moon. When the seemingly innocuous facts of his compliant responses to the prison personnel are viewed in the proper context of his delusions, denial and other primitive unconscious defenses, Pedro Medina's mental state is not within the Ford standard.

Judge Conrad recognized that probably Mr. Medina is mentally ill, but he found that clear and convincing proof of his incompetency was not presented. Thus, Mr. Medina probably cannot make a rational connection between the murder of Dorothy James and his execution. He probably cannot prepare himself for execution. His death will probably be an example only of morbid cruelty. But since clear and convincing evidence is lacking, the risk of an erroneous determination rests with him, not the State of Florida.

There's the rub. Where evidence is subject to interpretations that come so close to tipping the scales one way or the other, who bears the risk of the wrong answer? According to what standard and by what reasoning? As will be demonstrated infra, the case law provides a clear answer: the state must bear the risk that Mr. Medina would be found incompetent, for whatever

period of time, rather than have Mr. Medina and society bear the risk of executing an insane man.

The risk to the state in this case is infinitesimal compared to the risk to Mr. Medina. Sixty to ninety days of psychiatric care and observation of Mr. Medina would resolve any doubts and might even produce a more mentally healthy Pedro Medina. Mr. Medina is not competent to be executed by any civilized standard, but he has been prejudiced by a process skewed against him.

STATEMENT OF THE CASE

On June 14, 1982, the Grand Jury for Orange County, Florida, indicted Mr. Medina for the first-degree murder of Dorothy Clarke James (R. 1518). On June 15, 1982, a warrant was issued for Mr. Medina's arrest on the murder charge and on a charge of grand theft (R. 1520).

Mr. Medina waived his personal appearance and arraignment on August 31, 1982 (R. 1596). That same day he entered a written plea of not guilty. Id.

Mr. Medina was tried before a jury in Orange County on March 15 through 18, 1983. The jury returned guilty verdicts (R. 1850-1852). The jury recommended a sentence of death and the trial court followed its recommendation (R. 1875, 1877-1879).

On direct appeal, the Supreme Court of Florida affirmed the convictions and sentence. Medina v. State, 466 So. 2d 1046 (Fla. 1985).

Mr. Medina was considered for clemency in 1987. Clemency was denied.

On June 5, 1987, Mr. Medina filed a motion to vacate judgment of conviction and sentence. The trial court held an evidentiary hearing. On February 6, 1989, Judge Powell denied all relief.

Mr. Medina appealed the denial of his postconviction motion to the Supreme Court of Florida. The Court affirmed the lower court's decision. State v. Medina, 573 So. 2d 293 (Fla. 1990).

The Supreme Court of Florida later denied Mr. Medina's state petition for writ of habeas corpus. Medina v. Dugger, 586 So. 2d 317 (Fla. 1991).

Mr. Medina filed a federal petition for writ of habeas corpus which was denied on February 16, 1993. The Eleventh Circuit Court of Appeals affirmed. Medina v. Singletary, 59 F.3d 1095 (11th Cir. 1995), cert. denied, 116 S. Ct. 2505 (1996).

On October 23, 1996, the Florida Supreme Court issued an Administrative Order establishing a procedure for providing capital postconviction litigants with conflict-free counsel. In conformity with the October 23 Administrative Order, a Notice of Conflict was filed in Mr. Medina's case on October 28, 1996.

On October 30, 1996, the Governor signed a warrant for Mr. Medina's death which was to be carried out the week of December 2 through 9, 1996.

On November 1, 1996, the lower court held a hearing on the Notice of Conflict (PC-R2. 57-122).

On November 5, 1996, Judge Powell issued an order directing CCR to assign new counsel to Mr. Medina's case and directing a conflicted Gail Anderson and Michael Minerva to not contact Pedro Medina or appear in subsequent proceedings on his behalf. CCR filed a notice of appeal.

On November 12, 1996, the Florida Supreme Court affirmed.

On November 25, 1996, undersigned counsel filed a motion to disqualify Judge Powell. On November 26, 1996, Judge Powell disqualified himself, and Judge Conrad was assigned to the case.

On December 2, 1996, Mr. Medina's counsel informed the Governor that Mr. Medina may be incompetent to be executed. The Governor pursuant to § 922.07, Fla. Stat., stayed the execution.

On December 6, 1996, undersigned counsel filed an unverified motion to vacate the judgment and sentence on behalf of Mr. Medina (PC-R. 4-287). Counsel also filed a motion requesting a determination of Mr. Medina's competency to proceed (PC-R. 301-75).

On December 10, 1996, Judge Conrad held a status conference. He informed the parties that he would likely be assigned to hear any 3.811 motions in addition to the 3.850. He asked the parties for a discussion of what issues would likely be coming up and the order in which they would need to be addressed.

On January 6, 1997, Governor Chiles reset Mr. Medina's execution for January 29, 1997.

On January 8, 1997, Judge Conrad called up a status conference on thirty minutes notice. Judge Conrad indicated that he would first hear the parties on the motion for a hearing on competency to proceed at a hearing to be set by an order to be issued later in the day. Subsequently, an order was issued setting the hearing for January 14, 1997. There was no indication that the hearing was an evidentiary hearing.

On January 10, 1997, undersigned counsel filed a 3.811 motion to determine Mr. Medina's competency to be executed (PC-R2. 6-43).

On January 14, 1997, the hearing on Mr. Medina's motion for a determination of competency to proceed was held. After hearing argument, Judge Conrad ruled that there was no right in postconviction to be competent to proceed. The judge then indicated that he would nevertheless immediately commence an evidentiary hearing to determine Mr. Medina's competency. The judge indicated that Mr. Medina's counsel should have anticipated that evidence would be heard. He would not give counsel time to obtain the three experts who Mr. Medina's counsel wished to call to say that Mr. Medina was not competent.

On January 15, 1997, Judge Conrad issued his order finding that there was no right to be competent to proceed in postconviction (PC-R. 746-50). In the alternative, the court held that the State had proved Mr. Medina competent after holding a hearing that Mr. Medina's counsel had received no notice would be evidentiary.

On January 16, 1997, Judge Conrad issued an order finding that Mr. Medina's counsel had not issued any reasonable grounds for believing Mr. Medina not competent to be executed (PC-R2. 498-99).

On January 16, 1997, Judge Conrad set Mr. Medina's 3.850 for hearing on January 21, 1997. After the State requested that the setting be for a Huff hearing, Judge Conrad issued an order on January 17, 1997, clarifying that the January 21, 1997, was in fact a Huff hearing at which evidence would not be heard (PC-R. 856-57).

On January 17, 1997, the State filed an answer to the 3.850 motion filed on December 6, 1996 (PC-R. 872-93).

On January 21, 1997, a Huff hearing was held.

On January 21, 1997, undersigned counsel filed a motion for rehearing as to the ruling on Mr. Medina's right to a competency proceed determination (PC-R. 897-925). and a reconsideration as to the ruling on the 3.811 motion (PC-R2 501-769). Judge Conrad denied both motions (PC-R. 995-96; PC-R2. 771-73).

On January 23, 1997, Judge Conrad issued an order denying the 3.850 without an evidentiary hearing (PC-R. 926-78). Mr. Medina filed a Motion for Rehearing (PC-R. 979-92), which Judge Conrad denied on the same day (PC-R. 993-94).

Mr. Medina filed a notice of appeal in both the 3.850 and 3.811 proceedings on January 24, 1997 (PC-R. 1007-08; PC-R@. 774-75). Oral argument was had in this Court on January 27, 1997. That same day, this Court stayed Mr. Medina's execution pending further order of the Court.

On February 10, 1997, this Court issued an opinion, with one dissent, remanding the case to the circuit court for an evidentiary hearing on the issue of whether Mr. Medina is competent to be executed. This Court also denied, with three dissents, Mr. Medina's appeal regarding the issues raised in his Rule 3.850 motion.

This Court's order compelled the circuit court to hold the evidentiary hearing and issue an order within twenty-one days of this Court's mandate, which issued on February 10, 1997.

On February 13, 1997, Judge Conrad set an evidentiary hearing to begin on February 20, 1997.

On February 13, 1997, Mr. Medina filed a Request for Witness List. On February 14, 1997, the State responded to Mr. Medina's Request for Witness list and filed a Motion for Order Allowing Mental State Examination of Defendant.

On February 17, 1997, the circuit court issued orders rescheduling the evidentiary hearing for February 24, 1997, appointing Dr. Alan Berns, M.D., Dr. Jeffrey Danziger, M.D., and Dr. Eric Mings, Ph.D. to evaluate Mr. Medina to determine whether the lacks mental capacity to understand the fact of the pending execution and the reason for it, denying Mr. Medina's Request for Witness List, and denying the State's Motion for Order Allowing Mental State Examination of Defendant.

On February 18, 1997, the circuit court issued an Amended Order, removing Dr. Berns and Dr. Danziger from the evaluation of Mr. Medina and replacing them with Dr. Michael Gutman, M.D. The court's order scheduled the evaluation for February 19, 1997. The court further ordered that the doctors write a report and file the report with the court on February 21, 1997. The court further ordered that Doctors Mings and Gutman provide copies of their reports to counsel for Mr. Medina and the State.

On February 18, 1997, the State filed a Renewed Motion for Order Granting Access to Defendant to Conduct Mental Status Examination. On the same day, the circuit court denied the State's Renewed Motion.

On February 19, 1997, Mr. Medina filed an Objection to Amended Order, objecting to the Court's appointment of Dr. Gutman.

On February 19, 1997, Dr. Mings and Dr. Gutman conducted an evaluation of Mr. Medina at Florida State Prison.

On February 21, 1997, Dr. Gutman provided his report to the court, counsel for Mr. Medina, and the State. Mr. Medina did not receive a copy of Dr. Mings' report on February 21, as the circuit court had ordered.

The evidentiary hearing commenced on February 24, 1997, and concluded on February 27, 1997. On March 3, 1997, twenty-one days after this Court's mandate issued, Judge Conrad issued an Order Regarding Defendant's Insanity to be Executed. Judge Conrad determined that, while it could "probably be said that Defendant suffers from some form of mental pathology or mental illness," that counsel for Mr. Medina have not established by clear and convincing evidence that Mr. Medina was incompetent to be executed.

Mr. Medina filed a Motion for Rehearing on March 11, 1997. The State filed a response, and the court denied Mr. Medina's Motion for Rehearing on March 11, 1997. This appeal follows.

STATEMENT OF THE FACTS

These proceedings came about when Mr. Medina's present counsel were assigned to represent him on November 12, 1996. Prior to that date, Mr. Medina's CCR counsel had been Gail Anderson. Before resigning from CCR in December 1994, Judith Dougherty was co-counsel for Mr. Medina. Both Ms. Anderson and Ms. Dougherty testified in the evidentiary hearing in this matter.

Ms. Anderson testified she began representing Mr. Medina when his case was pending in the United States Court of Appeal for the Eleventh Circuit (H2. 419). Ms. Anderson recounted how she met with Mr. Medina several times to explain the proceedings in the federal appellate court. Mr. Medina, however, was fixated on the question of whether he could speak English at the time of his trial (H2. 420). When Ms. Anderson would explain to Mr. Medina that his ability to speak English was not relevant to the proceedings in federal court, Mr. Medina "would just look at [her], or look away" (H2. 421). Ms. Anderson never received any indication from Mr. Medina that he understood what she was trying to explain to him. Id. Ms. Anderson related that, to appease him, she agreed to provide the Eleventh Circuit with information regarding Mr. Medina's inability to speak English. Instead of reacting favorably to getting what he had so long wanted, Mr. Medina became upset, agitated, hostile, and angry with Ms. Anderson (H2. 422). Thereafter, Mr. Medina refused to come out when Ms. Anderson visited him. Id.

Some time after her last conversation with Mr. Medina, Ms. Anderson learned that a lawsuit had been filed on behalf of Mr. Medina alleging a conspiracy between Ms. Anderson, Ms. Dougherty, CCR Michael Minerva, and the State to kill Mr. Medina (H2. 422-23). See also PC-R2. 123-57 (Pro se complaint). The lawsuit further alleged that Ms. Anderson had called Mr. Medina a "stupid nigger," an allegation Ms. Anderson categorically denied (H2. 423). Ms. Anderson concluded that:

> The only time he seemed to be saying something that I could follow in any fashion was when he was talking about this inability to speak English. Other times he was either silent, simply looking at me, or talking about things that simply didn't make any sense to me.

(H2. 423).

Judith Dougherty's testimony regarding her interactions with Mr. Medina reflected similar difficulties. Ms. Dougherty testified she was assigned to Mr. Medina's case in 1988 prior to Mr. Medina's evidentiary hearing on his 1987 Rule 3.850 motion. Ms. Dougherty recalled:

> [T]here had been an attorney working on his case named Jane Rocamora, and she had been trying to communicate with Pedro Medina. He had called her the red devil[3] and wouldn't see her anymore, and so they wanted me to go out there just to see if I could make contact with him, and I did that.

(H2. 197). Ms. Dougherty testified that her role was to establish a line of communication with Mr. Medina because he refused to talk to his attorneys. Id. Ms. Dougherty explained

[3] Ms. Rocamora has red hair (H2. 497).

Mr. Medina never treated her as an attorney, but persisted in relating to her "either as a mother, a grandmother, or a girlfriend" (H2. 213).

Ms. Dougherty testified that she ended up attending Mr. Medina's evidentiary hearing as second chair (H2. 198). Ms. Dougherty described Mr. Medina's behavior at the evidentiary hearing:

> The next morning at the hearing he was extremely, um, distraught, upset, and I could tell -- well, I was very concerned that we were going to have trouble keeping him with enough appropriate courtroom demeanor that he wouldn't be thrown out of the courtroom. And so the only way I could do that is I sat there and spoke to him throughout the hearing, and we talked about soap operas, imaginary people, his life in Cuba, anything but was was going on in the courtroom.
>
> On a few occasions when he did relate to what was happening in the courtroom, he would start speaking loudly and becoming agitated as if he was going to stand up and start being loud, and I would immediately distract him again and say, Pedro, no, no, look here. And we would draw pictures on the papers to maintain his courtroom demeanor.

(H2. 200). Ms. Dougherty related that at one point Mr. Medina asked her if the prosecutor was his father (H2. 201). Mr. Medina spoke so loudly that on numerous occasions Judge Powell stopped the proceedings and told Ms. Dougherty he would remove Mr. Medina from the courtroom if he could not keep his voice down (H2. 204).

Mr. Medina exhibited strange behavior when Ms. Dougherty visited him at the jail in the evenings after the day's proceedings. Ms. Dougherty remembered that:

> He never once asked me a question about the case or what was happening, and he never permitted me to talk to him about it. All I could do was to reassure him I would be there, that I wouldn't let anybody hurt him there, and that -- and then we would talk about social things. But he was unable to discuss what was going on at the hearing with me.

(H2. 201). Ms. Dougherty also discussed a meeting with Mr. Medina in holding cell outside the courtroom:

> I did go speak to Mr. Medina in the holding cell, and when I got to the holding cell, he did not know who I was.
>
> Q How do you know that?
>
> A Because he started saying, You're here to kill me, you're one of the ones trying to kill me, aren't you? You are here to kill me. I don't like -- you're not a person to help me, you are a person to kill me. And he was screaming. And everyone was waiting in the courtroom, the bailiffs and Donna Harris at the counsel table, waiting to start the proceeding. Donna became so concerned about my well-being that she sent the bailiff back because he was screaming and he was in handcuffs behind his back and --
>
> * * * *
>
> He was in a little small barred cell and he was hand-cuffed behind his back, and he was straining against the handcuffs and screaming and saying I was trying to kill him.
>
> * * * *
>
> Well, I then said, I've listened to you long enough, you have to give me a turn. Don't you remember who I am? And I was able to get him back in touch with who I was.

(H2. 206-08).

Ms. Dougherty described her encounter with Mr. Medina at Florida State Prison when she went to inform him that Judge Powell had denied the Rule 3.850 motion:

> I traveled to Florida State Prison, and I had the opinion, and I went into the visiting room with Mr. Medina and I laid the opinion on the table and I said, the Court has ruled against you.
>
> Q How did he react?
>
> A And he recoiled physically back away from the table and away from the paper as if it was an evil thing. And I said, Pedro, do you want me to discuss with you what the opinion says?
>
> Q What did he say?
>
> A He said no. He continued to recoil fearfully from this piece of paper. And I said, Do you want me to take it back to my office or do you want to keep it and read it later? And he said, I want you to take it back.

(H2. 209-10).

Ms. Dougherty continued to represent Mr. Medina in his habeas proceedings in federal court. Like Ms. Anderson, Ms. Dougherty related that the only issue Mr. Medina cared about was presenting evidence that he could not speak English when he was arrested and tried, despite Ms. Dougherty's explanation that it was in the best interests of his case to forego that subject (H2. 211-12). Ms. Dougherty explained that her failure to present the question of Mr. Medina's ability to speak English caused Mr. Medina to fire her as his attorney (H2. 212).

Mr. Medina's investigator at the time of the evidentiary hearing was Donna Harris. Ms. Harris was unsuccessful in

obtaining factual information from Mr. Medina regarding his arrest, trial, the time he lived in Orlando, his upbringing and his background. His responses to her questions were convoluted and unfocused (H2. 434). Mr. Medina was never able to provide Ms. Harris with the accurate, factual information she needed (H2. 435). For example, Mr. Medina insisted the trial was not held in Orlando, but in the Mississippi Delta (H2. 435). Ms. Harris stressed that she did not believe Mr. Medina was trying to be uncooperative. "He just didn't seem to be able to provide the information that we needed." Id. Mr. Medina never provided information that pointed in a legitimate investigative direction (H2. 444). Ms. Harris acknowledged having dealt with uncooperative clients in her eight years as a defense investigator, but that "Pedro was different" (H2. 432, 436).

At the evidentiary hearing, when Ms. Dougherty substituted for Mr. Nolas as lead attorney, it became Ms. Harris' role to keep Mr. Medina calm (H2. 438). Mr. Medina asked Ms. Harris continually throughout the hearing, not about the proceedings but about television shows and characters, songs, and dance steps (H2. 439). Ms. Harris recalled that Judge Powell had to remonstrate Mr. Medina to be quiet several times during the hearing (H2. 443).

Ms. Harris visited Mr. Medina at Florida State Prison after the hearing. Mr. Medina seemed confused about the hearing, leading Ms. Harris to conclude he did not understand what had happened at the hearing (H2. 441). "I asked him specific

questions about the hearing testimony. And he responded in a confused manner, as if he had not been there, as if he had no knowledge of the hearing." Id.

The lead attorney for Mr. Medina during his 1988 evidentiary hearing was Assistant CCR Billy H. Nolas. Mr. Nolas testified that his dealings with Mr. Medina were like those of Ms. Dougherty and Ms. Anderson. Mr. Nolas testified that, from his first encounters with Mr. Medina, he became concerned about Mr. Medina's mental state (H2. 129). Specifically, Mr. Nolas testified:

> As compared to several clients I've represented, both who were on death row and I inherited the case or who I represented originally at the trial level, Mr. Medina is as at the top of the list as far as mental health concerns.

(H2. 133).[4]

Mr. Nolas described Mr. Medina as very guarded, suspicious, delusional and hallucinatory (H2. 131-32). Mr. Medina believed things about the criminal justice system, about his attorneys, about the prosecutors, and about the court that "had no connection to reality" (H2. 131-32). Mr. Nolas described Mr. Medina's statements during their meetings as not coherent, rational, lucid or logical (H2. 133). Mr. Nolas testified he would sometimes speak to Mr. Medina in Spanish, thinking a language barrier was causing the problem in communication, but

[4]Mr. Nolas represented death row inmates in Florida exclusively from 1986-1990, had a criminal practice which included representing death row inmates from 1990-1995, and since 1995 has represented death row inmates in Pennsylvania (H2. 126).

"Mr. Medina would respond in English, and it would still not make sense" (H2. 139). Even in 1988, Mr. Nolas had concerns about Mr. Medina's competency to be executed (H2. 135).

Mr. Nolas' testimony echoed that of Ms. Dougherty regarding Mr. Medina's behavior during the 1988 evidentiary hearing. Mr. Nolas testified that he had to talk to Mr. Medina several times in the holding cell to encourage him to be quiet and to maintain appropriate courtroom behavior (H2. 136):

> The comments [Mr. Medina] made to me when he would lean over to me were just nonsensical and incoherent. The message I tried to get across to Pedro was just the opposite, Try to keep yourself together because there is a hearing that's very important and the judge needs to hear the evidence, you know, not to be distracted by other matters. Regrettably Mr. Medina was unable to understand and act on that advice . . . .

(H2. 137). Mr. Nolas' communication with Mr. Medina about facts relevant to the case was similarly impaired:

> I'm trying to think as concretely as I can what Mr. Medina said about the offense. I don't know if maintaining his innocence would be the appropriate way to phrase it. I mean, there were occasions when Mr. Medina didn't even have insight into the fact that the decedent was dead. There were times when, you know, Mr. Medina thought he was on death row because of a conspiracy involving his defense team, the prosecution, and Judge Powell. So did Mr. Medina ever coherently say anything to me about the offense one way or the another [sic], there's nothing I could put my thumb on. It was rambling, it was all over the place, it was just not logical stuff.

(H2. 139-40).

Mr. Medina's first postconviction attorney, Jane Rocamora, discussed her difficulties in getting relevant factual information from Mr. Medina. Ms. Rocamora testified that when she was unable to elicit relevant information from him in English, she attempted to converse with Mr. Medina in Spanish. However, Mr. Medina "would look at [her] as if [she] were speaking Japanese" (H2. 493). Mr. Medina never acknowledged anything Ms. Rocamora said to him in Spanish. Id.

Ms. Rocamora also described the difficulty she had in obtaining a verification from Mr. Medina for his Rule 3.850 motion:

> He told me he didn't want to sign it because he was innocent, and I tried to point out to him where in the petition it showed that he was innocent. And he kept saying to me, "But I can't sign it, because it doesn't say," or words to that effect, "I can't sign it, because it doesn't say that I am innocent." And I would keep trying to show him places in the petition where, in fact, it said that.
>
> * * * *
>
> After spending, I will say close to an hour and a half with Mr. Medina, trying to get him to sign this petition, he was becoming agitated, and I didn't think that it would be helpful to continue talking to him at that time. I also knew that I had to get his signature that day, or he would miss his deadline for filing the 3.850.
>
> * * * *
>
> What happened was an attorney at CCR called to the prison, and spoke to one of the prison administrators. And I think about forty-five minutes or so later, one of the guards came out where I was seated, and said, "Mr. Medina wants to see you again."

Q Okay. And when you went back in to see Mr. Medina, did he sign the verification?

A At that point, yes, he did.

(H2. 495-96).

It was not just Mr. Medina's postconviction attorneys who had difficulty communicating with and relating to Mr. Medina. Mr. Medina's trial attorney, Ana Tangel-Rodriguez, testified that she was appointed to represent Mr. Medina with co-counsel Warren Edwards. Ms. Tangel-Rodriguez's role, as a Spanish-speaking attorney, was to aid Mr. Medina in understanding the litigation (H2. 446). Ms. Tangel-Rodriguez related that Mr. Medina talked to her "continuously" throughout the trial (H2. 447). Often the things he said "were not related to the trial at all." Id. Mr. Medina referred to the prosecutor, who was not Asian, as "the Japanese." Id. Thus, every attorney who had represented Mr. Medina testified to their difficulties in communicating with him and relating with him relevant to the proceedings to determine whether he would live or die.

The situation was no different with Mr. Medina's new CCR counsel, appointed on November 12, 1996, after the Florida Supreme Court affirmed Judge Powell's order permitting CCR Minerva and Ms. Anderson to withdraw from representing Mr. Medina and ordering CCR to appoint other counsel. Pursuant to Judge Powell's order, CCR Litigation Director Martin J. McClain, Assistant CCR Jennifer M. Corey, and CCR Staff Attorney Timothy P. Schardl undertook representation of Mr. Medina three weeks away from his scheduled execution. CCR Investigators Charles P.

Formosa and Paul M. Mann were assigned to Mr. Medina's team as well.

From the beginning, Mr. Medina's new legal team were concerned about his mental state. Lead counsel McClain described his first meeting with Mr. Medina on November 14, 1996, at Florida State Prison:

> On November 14th I took Mr. Schardl, who was a relatively new attorney with the office, over to interview Mr. Medina.
>
> * * * *
>
> [G]iven the history and Mr. Medina's unhappiness with CCR counsel, I was, of course, concerned about how he would relate to other people from CCR, and me in particular, since certainly on death row I'm well known among clients having been at CCR for such a long period of time.
>
> Q Were there -- did you want to discuss the legal issues in his case with him?
>
> A Absolutely. He was also under warrant and we needed to get started on the case, and one of the places to start is talking to the client.
>
> Q Was there anything in particular you wanted to investigate with him during that interview?
>
> A Well, we sort of wanted to touch base and just see what the interaction would be with me and whether I could count on him, what I could count on coming from him to help me in my representation of him.
>
> * * * *
>
> [F]irst, he told me, and I let him talk for a while about the affidavit situation, he wanted affidavits filed of various people saying he didn't speak English very well. And I had thought that was pretty not

> relevant to the issues in the case of where we were at, and I let him go through that. And then I tried to gently explain that that's not what I saw the case as being about and that I was going to be doing a Chapter 119 questions [sic], public records request, to see if there was anything that had not been turned over before. And also that I wanted to try and talk to jurors, and I was going to be doing a motion to interview jurors. And so I was just sort of generally tossing out those things to him.
>
> Q Did you talk about anything that wasn't related specifically to the legal case?
>
> A After talking on those topics and his reaction, he seemed to be sort of a bit dazed by my telling him that I didn't think the affidavits were going to go anywhere.

(H2. 20-23). Mr. McClain testified that immediately after his meeting with Mr. Medina, he was concerned about Mr. Medina's competency to be executed (H2. 24). Mr. McClain explained:

> Well, I was already a bit familiar with Mr. Medina from what other attorneys who had been involved with him had said. I also knew about the 1988 evidentiary hearing where there were three experts indicating that he was mentally ill, and my meeting with him did not dissuade me of the notion that there were mental problems.

(H2. 25). Mr. McClain explained further that he was familiar with the allegations about Gail Anderson that were raised in the civil rights complaint filed on Mr. Medina's behalf, that they were absolutely untrue, and that their unreal quality added to his concerns about Mr. Medina's mental state (H2. 28-29).

Acting on his concerns about Mr. Medina's sanity, Mr. McClain asked neuropsychologist Ruth Latterner, Ph.D., to evaluate Mr. Medina (H2. 29). Mr. McClain asked Dr. Latterner to

evaluate Mr. Medina regarding his competency to be executed (H2. 30). Dr. Latterner evaluated Mr. Medina on November 22, 1996, and reported that Mr. Medina was not competent to be executed under Florida law. Id. Mr. McClain notified the Governor of these facts and invoked § 922.07, Florida Statutes. Id.

Mr. McClain then described a meeting he had with Mr. Medina and co-counsel Corey and Schardl in a holding cell outside the courtroom on January 20, 1997. The court had instructed Mr. Medina's counsel to meet with him in private in an attempt to obtain a verification from him on the Rule 3.850 motion counsel had filed on his behalf in December, 1996 (H2. 34). Mr. McClain described counsel's efforts to communicate with Mr. Medina about the Rule 3.850 motion:

> The three of us went back into the holding cell, and Mr. Medina was in fact separated from us by basically a cage. And we sat outside the cage, and I tried to talk to Mr. Medina.
>
> His behavior that morning in court had not indicated to me that he was following what was going on, and so I tried to bring him into understanding of why we were back there and to find out from him where he was sort of mentally at.
>
> In that connection, I brought up Judge Conrad and indicated, you know, who Judge Conrad is; and from there we had a fairly lengthy conversation.
>
> I believe the recess was about 20, 25 minutes, maybe a half-hour, during which time I talked to him about the 3.850 and the courtroom proceedings and allowed him to talk as well.
>
> Q And did you get the sense he understood what you were telling him about the 3.850 proceedings?

* * * *

A From the conversation, I got the sense he did not understand what was going on.

* * * *

I made notes and wrote down some of the things he was saying to me.

One of the first things that came up was Judge Conrad, and that's when he indicated he didn't seem to know who I was talking about, and he said, Is he the farmer? You know, we're picking -- he and Anne Frank are picking tomatoes. Who owns the farm they're picking tomatoes at?

He also -- I then tried to bring up Judge Powell because Judge Powell was the trial judge and he was involved -- He was one of the claims in the 3.850, and his response to Judge Powell was to say, Is Judge Powell a minister?

When I tried to talk to him about the trial, the only trial he was familiar with was a trial in Cuba. When I brought up the name Reynaldo Dorta, that's R E Y N A L D O D O R T A, who was a witness at the trial, he seemed confused and said that was somebody he thought he went to school with in Cuba.

When i was talking about the trial and the fact it was in the United States, he indicated the only trial in the United States that he was familiar with was the O.J. Simpson trial.

He then started talking about the fact that he had talked to his mother the previous night which would have been in January - -

* * * *

He indicated that he had talked to his mother the previous night which obviously wasn't possible.

He also brought up the name Bill Cosby and said that Bill Cosby was his uncle. He did not remember anybody by the name of Dorothy James, who was the victim in this case.

I had turned to something about the specific facts of the case. One of the allegations in the 3.850 was with reference to an individual by the name of Joseph Daniels. So I brought up the name Joseph

Daniels, and that's when he asked if Joseph Daniels is the person who killed Bill Cosby's son.

I then brought up the name Billy Andrews, who was also mentioned in the 3.850, and he said he's a blonde who carries a 38.

I was then trying to explain what a 3.850 was, and I asked him if he was familiar with a 3.850, and he said it was a gun with 50 bullets.

He then said that his brother Mayo had been with him, but the sergeant couldn't see him. He indicated that he had never been to the United States and that prompted clarification from me --

* * * *

And I was at the point where he had indicated he had never been to the United States, and then I was clarifying as to where he believed we were located currently, or at least at that point in time, and he indicated we were in Cuba.

He then started talking about an incident where he had gotten a write-up, and it was apparently at prison because he had been transported down here, I think, just for that day, so it must have been like the day before at the prison because he had -- what he said was he doo-dooed on the floor. And the guard didn't understand that there was somebody sitting on the toilet, so he couldn't use the toilet, and the guard couldn't see that person. But the guard was very upset and didn't listen to his explanations.

He also said that he had fallen off a tree and hit his head while picking tomatoes the previous week. He indicated that he did not know Dorothy James, Joseph Daniels, or Billy Andrews, and as a result, he wouldn't swear to anything regarding them as being true when those are the allegations contained in the verification.

* * * *

I asked him about signing the verification, and at that point, he also started saying his pen -- he would only write in German with his pen. And he also made

> reference to not having the blue shirt which is -- which is a common thing that he brings up and talks about is the blue shirt. And that was pretty much the end of the conversation. We were not successful in getting a verification signed by him.

(H2. 35-43).

The other members of Mr. Medina's new legal team had similar concerns about his competency. Staff Attorney Timothy P. Schardl had primary responsibility of maintaining contact with Mr. Medina (H2. 53, 80). Mr. Schardl spoke to Mr. Medina on the telephone almost daily from November 13-December 4, 1996 (H2. 67), and visited him twice at Florida State Prison (H2. 65). Mr. Schardl's impression of Mr. Medina, through his conversations with him, was that he did not seem to appreciate what was happening or what the issues were that needed to be raised (H2. 65). Mr. Schardl explained that, as he had almost daily telephone contact with Mr. Medina, his concerns about Mr. Medina's mental state deepened:

> And as the days went on, he just -- our concerns grew because his mental state seemed to deteriorate basically from when I first started talking to him until I stopped having contact with him.
>
> And it just like -- I don't know how to describe it, it was just each day almost that it was like someone just sinking and the pressure just crushing his ability to keep going, talking to me in a rational way.

(H2. 84).

Mr. Schardl related unusual things Mr. Medina told him. Mr. Medina explained he was learning German, and that Anne Frank was teaching him (H2. 68). He said he and Anne Frank picked tomatoes

together on a farm (H2. 69). These conversations took place before the January 20, 1997 Huff hearing at which Mr. Medina also spoke about Anne Frank to counsel McClain, Schardl and Corey.

During their conversations from November 13 through December 4, 1996, Mr. Medina told Mr. Schardl that other people spoke to him: Albert Einstein, John Earl Bush,[5] Dorothy James, Abraham Lincoln. Mr. Medina said these people came to see Mr. Medina in his cell (H2. 70-71).

Mr. Schardl recounted a telephone call he made to Mr. Medina in early December:

> On that date it was scheduled for around 4:30 in the afternoon when the call went through to Q wing where he was on death watch. I could hear a commotion in the background, and he -- I believe I spoke to a Sergeant Woodall who told me that Mr. Medina refused my telephone call.
>
> I asked whoever I was speaking to -- I know that when I called back it was Sergeant Woodall who was there, and I assume it was the same person. I asked Sergeant Woodall to yell over to Mr. Medina that I had something important to tell him about a say, and, you know, I needed to talk to him. And I believe it was Sergeant Woodall that related to me that he refused to speak to me. . . I'm not sure, but somehow I arranged to try again an hour later.
>
> Q Can I go back for a minute? When You say the phone was picked up when you heard a commotion, what were you hearing? Describe for the court what you heard.
>
> A I heard what I thought was Mr. Medina screaming, talking loudly, and I could not understand what he was saying.

---

[5]John Earl Bush was executed by the State of Florida on October 21, 1996.

* * * *

> . . . I did call an hour later and I did speak to him and he was not very coherent or lucid, but I did speak to him.
>
> Q Did he tell you what was going on earlier, why he refused to take your call?
>
> A . . . He related this was kind of a continuation of what he had been telling me about over the weekend which was that he -- something about a blue shirt belonging to Jorge, who was the brother of Armando, and how there was some suspicion that he had the blue shirt because of it going with his -- with the white pants that he was wearing, and he didn't have it. And he kept saying that he didn't have it, but they kept saying that he did have it. And that somehow was related to him being chased by a woman who wanted to hit him. This apparently was all taking place in Cuba.

(H2. 71-73). Mr. Schardl later learned that Mr. Medina had been seen by a prison psychiatrist on the day Mr. Medina initially refused Mr. Schardl's telephone call (H2. 74-75).

Investigator Paul M. Mann met with Mr. Medina twice in November, 1996. Mr. Mann related experiences with Mr. Medina that were similar to Mr. Schardl's. Mr. Medina was unable to focus on the relevant factual issues in his case (H2. 87-90). Mr. Medina insisted on speaking to Mr. Mann in German, even after Mr. Mann told him he did not speak German (H2. 91). Mr. Medina told Mr. Mann that Albert Einstein gave him direction about issues to explore in his case, and that Einstein visited him in his cell (H2. 92). Others who visited Mr. Medina in his cell were Anne Frank, John Bush, and Dorothy James (H2. 93). At one

point Mr. Medina indicated Anne Frank was in the interview room (H2. 94).

Counsel Jennifer M. Corey had limited contact with Mr. Medina. She did recall that on two of the occasions when they met face to face, in the holding cell during the Huff hearing on January 20, 1997, and at the psychiatric evaluation at Florida State Prison on February 19, 1997, Mr. Medina referred to her as a girl he went to school with in Cuba named Batica (H2. 121).

The strange behavior observed by Mr. Medina's legal counsel throughout the years was echoed by inmates who have lived alongside Mr. Medina on death row these past fourteen years. Mr. Medina's counsel sought writs of habeas corpus ad testificandum from the court to bring nineteen death row inmates to Orlando to testify at the evidentiary hearing. Judge Conrad ruled that Mr. Medina could bring six inmates, and submit testimony from the rest via affidavit.

Juan Melendez was housed near Pedro Medina at Florida State Prison for approximately four to five years beginning in 1984 (H2. 278). Mr. Melendez described his observations of Mr. Medina:

> Pedro Medina always, always saying people was talking about him. What are people doing. Pedro Medina always talking by himself. Pedro Medina always saying that people was talking, always had arguments with people in the yard. Also, Pedro Medina was -- liked to fantasize a lot. There was a time when he was at the fence, looking at the towers, and there was a lady in the gun tower. He started masturbating himself, fantasizing about the lady. Masturbating right near this spot.

Q This was in the recreation yard at Florida State Prison?

A Recreation yard. He used to walk by himself. Talk by himself. He used to catch, keep chicken bones for -- to throw out bad spirits.

Q He would keep chicken bones to throw at bad spirits?

A Yes, like they call Santa ria [sic], in Cuba.

Q Okay.

A So he keep them chicken bones, he said, to throw out bad spirits. Sometimes he used to holler at night. They have bad spirits in his cell.

Q He would holler at night, saying bad spirits are in his cell?

A Yes. Somebody wanting to attack him. There is nobody there. All in his mind, I guess.

* * * *

He hollered at me and say "Hey, Johnny, who is down there, talking about me? I say "Pedro, no one down there talking about me." (sic) I can hear him talking to himself form the same floor. Because he talking loud.

Q Okay.

A People bother him inside the cell. Nobody inside the cell.

(H2. 279-80). Mr. Melendez confirmed that Mr. Medina's strange behavior came and went, interspersed with periods of calm:

> Sometimes he seem normal. Only some, it's not. All of a sudden, you know, I never time it, you know, the periods. But sometimes he go until -- sometimes he talk, then he can snap in a minute. Like a time bomb. He can throw him in a minute.

(H2. 280-81).

Mr. Melendez's recollections of Mr. Medina's behavior were echoed by Barry Hoffman. Mr. Hoffman was housed on the same floor as Mr. Medina at Florida State Prison beginning in 1983 or 1984 (H2. 286). Mr. Hoffman described Mr. Medina as "a bug," meaning a death row inmate with who is reputed to be crazy (H2. 287). Mr. Hoffman confirmed that Mr. Medina would hang chicken bones from the bars of his cell, and that he would put feces on the bars, that he would talk to himself, and that he "had a thing about evil spirits that were trying to get him" (H2. 288). Mr. Hoffman recounted incidents of "outbursts, just raving . . . Sometimes speaking Spanish, English, sometimes a language no one understood" (H2. 289).

Mr. Hoffman testified it was difficult living next to Mr. Medina because:

> He was awful loud, you know.
>
> Q Loud?
>
> A Yeah. And the smell.
>
> Q Smelled bad?
>
> A The feces. Yeah.
>
> Q How many times would you say this putting the feces out on the bars happened?
>
> A Well, the guards would tell him to get it off. He would. The next day it would be there again. On and on. Finally I left the wing, so I don't know how long that continued, but almost the whole time I was around him, it happened.
>
> Q Just over and over again?

A   Yeah.

* * * *

> I have to walk by his cell to go the yard, and we would have to walk by to go to the showers. And the smell, and the things he was saying, we would yell, "Be quiet. We're trying to sleep." And he would just rave and rave and rave . . . .

(H2. 289, 294).

Ronald Heath first encountered Mr. Medina in 1991 at Florida State Prison (H2. 297). Mr. Heath had yard twice a week with Mr. Medina. Mr. Heath continued to have yard with Mr. Medina twice a week when death row moved to Union Correctional Institution in 1993 (H2. 298). Mr. Heath described Mr. Medina as paranoid:

> Seen him watching, looking around behind himself, appearing -- he looked like he was expecting somebody to maybe sneak up on him or something. You know, standing in the corner where he could have his back away from everybody.
>
> * * * *
>
> I know that he plays basketball a lot, and often, by playing basketball, if somebody touches you while you are dribbling the ball, you call foul. And he would call foul quite often, and swear that somebody touched him who wasn't -- hadn't been near him. You know, I mean, where there had been nobody close enough to touch him. You know. I don't know if he was imagining somebody putting their hands on him or not.

(H2. 299-301).

Thomas Pope described similar behavior. Mr. Pope was housed directly next to Mr. Medina on death row at Florida State Prison beginning in April 1983 (H2. 307), and again in 1988 (H2. 309). Mr. Pope described Mr. Medina's behavior as follows:

Q Did you like having him as a neighbor?

A No.

Q Why not?

A He was a bug.

Q What does that mean?

A It means a lot of things. Things that I can't really explain to you properly. Keeping feces in a bowl up underneath your bed so everybody else can smell it, on the walls, on the bars, making noise at ungodly times in the morning, six o'clock in the morning turning the TV wide open, driving you crazy, almost.

(H2. 308). Mr. Pope explained how Mr. Medina would act when a correctional officer came on the tier:

> Well, from my own personal experience, when we were at FSP, there were three tiers. In other words, you can hear people on all three tiers. It wasn't closed floors. The guys who were playing the bug role was always quiet until they hear the jingle of the keys coming, which meant the guard was coming down the tier. Then that meant that they went into their little bug routine.
>
> Q Did Mr. Medina exhibit this pattern of behavior?
>
> A He was totally opposite.
>
> Q What do you mean?
>
> A He was always chattering, talking to people that wasn't there until he heard the clanging of the keys, then he shut up, as though someone was going to come talk to him and then once the guard left, made their rounds, he went back to talking to whoever the hell it was he was talking to.

(H2. 308-09).

Jason Walton was housed next to Mr. Medina from the time death row moved to Union Correctional Institution in the summer of 1993 until Mr. Medina was moved to Florida State Prison after his death warrant was signed in October, 1996 (H2. 323). Mr. Walton described Mr. Medina as:

> A little paranoid. He seems -- I'm not quite sure how to describe it, other than he is what I will term a bug.
>
> Q What do you mean by bug?
>
> A Yeah, different than most of the fellows you would meet. He is nuts, I guess.
>
> * * * *
>
> He seems paranoid.
>
> Q When you say paranoid, was there anything he would do or say that made you think that?
>
> A His actions, sometimes, outside. He will be looking around him, as if waiting for someone or something. He would sometimes say to others outside that they were just out to get him.

(H2. 318). Mr. Walton also related that he heard Mr. Medina talking to himself in his cell for at least an hour at a time, sometimes longer (H2. 319). Correctional Officer Sergeant Joe Gorden confirmed that he had heard inmates refer to Mr. Medina as a "bug" (H2. 455).

Daniel Remeta testified he met Mr. Medina at Florida State Prison in 1987 (H2. 326). Mr. Remeta explained that he filed a complaint against CCR and Gail Anderson for calling Mr. Medina a nigger (H2. 327-28, 331). Mr. Remeta filed the lawsuit, and "tried to get some other people to file some affidavits"

regarding the lawsuit (H2. 328). Mr. Remeta acknowledged that Mr. Medina "gets paranoid. He thinks everyone is out to get him all the time" (H2. 329).

Mr. Medina spoke to Mr. Remeta in German, even though Mr. Remeta did not understand German (H2. 329). Mr. Remeta related that Mr. Medina told him he was getting help learning German from "some lady . . . Anna somebody. Franks, I think." Id.

Mr. Remeta was familiar with Mr. Medina's propensity to handle feces; Mr. Remeta was transferred to a cell that Mr. Medina had occupied, and found feces in milk cartons in the cell (H2. 330). David Cook, who was housed next to Mr. Medina at Florida State Prison, also remembers Mr. Medina's fascination with feces (PC-R3. Ex. 11).

Martin Grossman has known Mr. Medina since late 1986 - early 1987 (PC-R3. Ex. 6). Mr. Grossman recalls that Mr. Medina would "always holler, scream, beat, bang whenever he thought that those around him were talking about him." Id. Mr. Grossman described his interactions with Mr. Medina:

> Pedro and I could talk to each other a little bit as I know Spanish but alot of the time even though I spoke Spanish well Pedro would ramble on in his own words. Pedro has had alot of problems due to his not having a understanding about why he was in prison. Several times he told me that he was in prison in Cuba still.
>
> Since I have known Pedro Medina he has continually been written up for throwing urine, stool, as well as fighting with other death row prisoners.

(PC-R3. Ex. 6).

Clarence Hill, who has known Mr. Medina for thirteen years, confirms that Mr. Medina often spoke to himself in his cell and on the yard, and that Mr. Medina speaks to him in Spanish or German even after Mr. Hill reminds him that he does not understand him when he speaks in a foreign language (PC-R3. Ex. 10). Roy Swafford has known Mr. Medina since 1985, and has also seem Mr. Medina talk to himself (PC-R3. Ex. 9), as has Steven Taylor (PC-R3. Ex. 7). Johnny Robinson, who was housed close to Mr. Medina in Florida State Prison, recalls hearing Mr. Medina "hold long conversations with people or entities that no one could see or hear but him" (PC-R3. Ex. 8).

The testimony of the inmates, and the attorneys and investigators who represented Mr. Medina from the time of his arrest to the present was consistent in describing his strange behavior and mental difficulties. However, the testimony of Alfredo Martinez-Garcia may be the most significant.

Mr. Martinez-Garcia came forward after seeing a story on the news in Orlando on Tuesday, February 25, 1997, showing Mr. Medina in court (H2. 582). Mr. Martinez-Garcia was a social worker in the early 1980s and assisted Mr. Medina's sister Regla in getting settled in Orlando after emigrating from Cuba (H2. 576). Regla brought her brother Pedro to Orlando, where Mr. Martinez-Garcia met him (H2. 577). Mr. Martinez-Garcia would seek Mr. Medina about once a week for a year (H2. 580). Mr. Martinez-Garcia describes Mr. Medina as follows:

> I informed him of places where he could go to get work, things that he needed to do.

* * * *

Q Describe him to me, how he looked to you at that time.

A Young, healthy, a black male; until I talked to him.

Q Okay, and when you talked to him, did that change your opinion of him?

A He was not there, ma'am.

Q What do you mean by he was not there?

A He was blank . . . I talked to him and he would not respond to anything I was saying . . . Nothing. He was like -- like there was hollow behind his eyes. It was kind of scary.

(H2. 578-80). Mr. Martinez-Garcia described Mr. Medina's unusual behavior during the year before Mr. Medina's arrest in 1982:

> He was talking to himself. He was talking to himself. Walking down the street, he was talking to himself, and I would call him, because I would be looking for his sister and he was, he was in another world. It wasn't until I stood in front of him and grabbed him and said, "Listen -- . . . .

(H2. 580). Mr. Martinez-Garcia testified he came forward because he recognized Mr. Medina on television: "That's the exact man, the same color of man, same scary eyes. That's him." (H2. 583).

In addition to lay witness testimony, counsel for Mr. Medina presented to Judge Conrad the testimony of three mental health experts: Neuropsychologist Ruth Latterner, who evaluated Mr. Medina in November, 1996; Psychologist Dorita Marina, who first evaluated Mr. Medina in 1987 and evaluated him again in 1996; and

psychiatrist Stephen Teich, who first evaluated Mr. Medina in 1988 and evaluated him again in 1996.

Dr. Latterner described her evaluation of Pedro Medina at Florida State Prison on November 22, 1996:

> [H]e was hallucinating. He was talking to Anne Frank.
>
> Q How do you know he was talking to Anne Frank?
>
> A Aloud he was discussing, and by name, this individual, and he was having an animated discussion with Anne Frank. He was also having an animated discussion with Abraham Lincoln.
>
> Q How do you know that he was speaking to Abraham Lincoln?
>
> A Again, he was speaking aloud to Abraham Lincoln. He was also talking to Martin Luther King. At one point, he indicated that his mother was in the room. At another point he was talking to the inmate who had been in his cell previously, and had been executed. He also was having an animated discussion with the wife of the inmate who had been executed, who had previously been in his cell. He was, from time to time, incoherent, and yet there were times when I attempted to introduce some structure into the interview, and into the test situation, in which he was actually lucid and able to cooperate for a few minutes. But throughout, there was difficulty in bringing him back to task. At several points, he launched into a barrage of verbalizations in German, and was difficult to stop.

(H2. 344-45). As with Daniel Remeta, Clarence Hill, and Paul Mann, Mr. Medina spoke in German to Dr. Latterner even after she told him she did not understand German (H2. 345-46). Mr. Medina also told Dr. Latterner that he had died in 1979 (H2. 361).

After evaluating Mr. Medina and reviewing background materials regarding his background, childhood, interviews with family members and mental health professionals, Dr. Latterner concluded that Mr. Medina suffers from a longstanding organic psychotic disorder (H2. 347, 350).

Dr. Latterner identified in Mr. Medina many characteristics indicative of brain damage: Mr. Medina is hypergraphic, which means he writes and writes and has difficulty stopping (H2. 347). Mr. Medina also perseverates, meaning he is unable to stop behaviors, "much like in an old record player when the needle was stuck, the phrases are repeated over and over again" (H2. 348). Mr. Medina perseverates verbally in the form of echolalia, in that he echoed sentences Dr. Latterner said to him long after it was appropriate. Id. Mr. Medina employs neologisms, or made-up words that make no sense. Id.

Dr. Latterner relied on the longitudinal consistency of her results to determine that her conclusion was valid; that is, there was consistency in the data collected by mental health professionals over time (H2. 349).

Dr. Latterner concluded that, because of his longstanding organic psychotic disorder, Mr. Medina does not have the mental capacity to appreciate the meaning of execution, and the reason for it (H2. 353). Dr. Latterner explained that, because he said he died in 1979, Mr. Medina "[M]ay verbalize these seemingly cogent ideas, and I don't think he has a real grasp of whether he is alive or whether he is dead, and I think that his

understanding of reality fluctuates from moment to moment" (H2. 361-62). Dr. Latterner added that:

> I would be receptive to new information, if he were observed, for instance, in a psychologically structured facility by professionals for sixty to ninety days, because I don't believe he can sustain any malingering behavior for that period of time, and I would be receptive to that data.

(H2. 358-59).

Psychologist Dorita Marina testified as to her evaluation and testing of Mr. Medina in 1987 and 1996. In 1987, Dr. Marina concluded that Mr. Medina was out of touch with reality and schizophrenic, paranoid type, and that his condition existed at the time of his trial in 1983 (H2. 368-36; PC-R3. Ex. 12).

Dr. Marina evaluated Mr. Medina again in December 1996. Dr. Marina conducted her clinical interview and testing in Spanish (H2. 389). In addition to her clinical interview and testing, Dr. Marina reviewed background materials and spoke to Mr. Medina's sister and stepmother in Cuba (H2. 37-71). Mr. Medina's sister provided information that was unavailable when Mr. Medina was evaluated before trial and before his evidentiary hearing: that Mr. Medina suffered physical and emotional abuse as a child, and possibly sexual abuse, and that he had been treated for psychological problems while an adolescent in Cuba (H2. 372-73).

Dr. Marina concluded, after evaluating Mr. Medina again in 1996 and reviewing additional and previously unavailable background materials, that Mr. Medina suffered from paranoid schizophrenia, secondary to organicity (H2. 375). Dr. Marina

testified that, at the time of his trial, his evidentiary hearing in 1988, and in 1997, Mr. Medina functions at the psychotic level:

> He has a poorly, or let me put it this way, a diffused sense of identity, instead of an integrated one of self, and of others, so he is beyond that, and he has mechanisms of defense that distort reality, primarily projection, and projective identification. And in addition, he displays psychotic thinking, including hallucination, both auditory and visual, and delusions, and he is out of touch with reality. My Bender-Gestalt gave the impression of someone who is in a position of organic, and Dr. Carbonell and Dr. Latterner's reports show organicity. So I would say that he is a paranoid schizophrenic, and what I meant by paranoid, a type of personality who thinks that people are against him, who are going to try to do him harm, and who also projects onto other's thoughts, feelings, and actions.

(H2. 380-81).

Dr. Marina reported that Mr. Medina said he has been dead since 1979 (H2. 383). Dr. Marina agreed with Dr. Latterner's explanation that Mr. Medina's mental state fluctuates:

> His own identity is very diffused. And that of others. When he talks about being dead since 1979, there is a diffused lack of identity. There are days in which he may recognize he is, in fact, not dead, but alive. So he is not the same person from one moment to another to himself. And the same diffused identity applies to other people in his life. For example, Dr. Latterner might become Anne Frank to him. There is, again, this is another way of displaying diffused identity. He thinks that he is with Anne Frank, perhaps, because he is with her.
>
> Q So you say from one day to the next he can change. Is there, like, a set time period that --

A No.

Q -- one will be in and out?

A No.

Q So it could be from one moment to the next?

A It could be from one moment to the next.

(H2. 383). Dr. Marina concluded that Mr. Medina does not have the capacity to understand that he is being executed, nor the reason for it (PC-R2. 525).

Psychiatrist Stephen Teich evaluated Mr. Medina in 1988 and again in 1996. In 1996 Dr. Teich was retained specifically to determine whether Mr. Medina was competent to be executed (H2. 592). Dr. Teich evaluated Mr. Medina for over three hours at Florida State Prison.[6] Dr. Teich also spoke to Mr. Medina's younger sister, his mother, his older sister, and his stepmother in Cuba (H2. 594).

After his interview of Mr. Medina on December 20, 1996, Dr. Teich determined Mr. Medina was either crazy or malingering (H2. 600). Dr. Teich eventually reached a diagnosis of psychosis, in particular schizophrenia, with a depressive disorder (H2. 643, 654). In order to reach this diagnosis, Dr. Teich had to rule out malingering:

> I think that the findings here ultimately in reality can be more wrong and right as to whether this is a product of conscious

---

[6] A videotape of Dr. Teich's evaluation of Mr. Medina was transcribed in the court record and entered into evidence (PC-R3. Ex. 1).

> decisional behavior, or a product of what essentially is unconscious mental illness. . . . It's one or the other. Malingering, for the totality of his behavior, as opposed to mental illness, for the totality of his behavior, are absolutely contradictory. They cannot co-exist. And in fact, the DSM4 defines it like that. That malingering is a diagnosis -- that is not a diagnosis. It's a finding one makes after you have explored to see whether the same symptoms can be better explained, or explained first by a mental illness. That's the first task in doing an evaluation of malingering. You have to look for the mental illness. If you don't find it, then you can consider that this is malingering.

(H2. 644-45).

Dr. Teich relied on a number of factors to rule out malingering. First, Dr. Teich determined that Mr. Medina "has had mental problems since well before he was ever involved in this legal situation and he has them going back to his time in Cuba:

> He has it going back to his teenage years and he has it going back to actually pretty much in kindergarten was the first incident I heard about with difficulties that, from the mother where there was information that suggested that he was starting to be seen and present differently than everybody else at the time and in ways one might see in correspondence with mental illness or some mental disorder manifesting already at that time.

(H2. 608-09).

In addition to the information from Mr. Medina's childhood, Dr. Teich found the information provided by Alfredo Martinez-Garcia regarding Mr. Medina's behavior in 1981-82 extremely

helpful in resolving the question of whether Mr. Medina is crazy or malingering:

> This was an area which in many respects was a sort of gap in the knowledge we obtained because we did not -- we were unable to locate his sister, Regla, wherever she is now, so I did not have information about what was going on with him during the time after he left New Jersey before he became involved with the criminal justice system here in Florida . . . and this really fills that gap and I think it's important to know that what was described here, at least, his behavior exactly the same as has been described since that time in terms of what Mr. Medina was doing and that existed prior to the situation of being in the criminal justice system, where that kind of secondary gain that we are talking about, using it to counter punishment and being held responsible for the punishment but secondary gain does not exist.

(H2. 611-12).

Dr. Teich also found the testimony of Mr. Medina's legal representatives helpful in determining whether Mr. Medina was crazy or malingering:

> [T]hey have described it as an ongoing similar pattern of inability to work with him as a client, to get him to respond to them, develop information, do all of the things that ar a part of what's necessary in a productive attorney-client relationship, and that goes back, I think, we've heard it from as far back as his lawyer involved in the trial was providing essentially the same kind of information about his behavior then throughout the process.

(H2. 611).

Dr. Teich found the testimony of inmates who observed Mr. Medina on death row for fourteen years important to the resolution of whether Mr. Medina is crazy or malingering:

The significance to me has to do with the fact that depending upon the acceptance of their validity, if it's as they said, then Mr. Medina was behaving in the same ways he does in front of authority figures when he is alone in his cell, when he is in the yard, that his behavior continues in an ongoing way irrespective of the circumstances, whether he is being observed by quote authority figures, people who may be in the position to take the information, transmit it to the criminal justice system, and place it in such a way that it's useful for him unless, useful, unless, of course, one sees this as somebody who is an extremely sophisticated malingerer who understands, who is highly intelligent, who understands that somebody may reach in and actually ask the other inmates to testify about him and who has a strong personality and willing to be able to exist this long by himself without developing any relationships with the people and peers around him and maintain an act over a period of years.

In essence, that is a possibility and cannot be just discarded by itself.

But that's what it would take for somebody to consciously act in the way Mr. Medina is described as acting in all the circumstances of his life in an ongoing way over years.

It would take a great strength of character.

* * * *

Q Also in resolving this craziness versus malingering, how important is malingering?

Is it exhausting?

Is it tiring?

Is it something that takes energy?

A Of course it's something that takes energy.

(H2. 616-17, 627-28).

Dr. Teich opined that those mental health experts who spent more time with Mr. Medina were better able to determine whether he is crazy or malingering:

> Spending more time is important in this issue because it's not so much energy as you referred to it but's the ongoing nature that can be seen.
>
> It's easier to, if you are trying to malinger, to do it for a short period of time than for a long period of time.
>
> It's easier to do anything for a short period of time than a long period of time, so it's easy for me to introduce for a shorter period of time to keep focused.

(H2. 629).

Dr. Teich agreed with Dr. Marina and Dr. Latterner that Mr. Medina's mental illness meant he fluctuated in and out of reality:

> [M]entally ill people are not crazy all the time.
>
> They can be rational on certain things and on some things and that is that varies depending upon the degree of mental illness and depending upon the particular circumstances that are going on at the time.

(H2. 606, 618). In fact, Dr. Teich testified that inconsistencies in bizarre behavior is consistent with untreated psychosis (H2. 653).

Dr. Teich concluded that Mr. Medina was not competent to be executed:

> He did not understand I mean, could go in it, actively appreciate what an execution is, that it is a penalty, that it means that he would be killed and that he did not understand why this was being done to him.

(H2. 596).

The lower court appointed two experts to evaluate Mr. Medina for competency to be executed, psychiatrist E. Michael Gutman and psychologist Eric Mings. Mr. Medina objected to Dr. Gutman's

appointment. Dr. Mings and Dr. Gutman evaluated Mr. Medina at Florida State Prison on February 19, 1997. A videotape of that interview was introduced into evidence below (PC-R3. Ex. 2). The State called Dr. Gutman and Dr. Mings as witnesses in the evidentiary hearing below.

Dr. Mings testified that, in his opinion, Mr. Medina was competent to be executed (H2. 697). Dr. Mings noted that his review of the prison records indicated that Mr. Medina had a history of unusual behavior resulting in his being transferred to a confinement wing and monitored:

> I did find evidence of some episodes of unusual behavior, which resulted in him being placed on a wing of being monitored. These occurred at different times. One in 1983. There was a series of them that occurred, beginning in late 1987, and through 1988. And each time, he will be admitted, observed, and then released. I don't know what to make of these.

(H2. 703).

Dr. Mings agreed with Dr. Teich that the issue is whether Mr. Medina is crazy or malingering:

> Q Would it be fair to say that the question of Mr. Medina's competency comes down to is his behavior crazy, or is it malingering?
>
> A to a certain extent, yes. I guess that's a simplication (sic) whether he is capable of understanding his impending execution, and the reason for it. Those are the issues which I think are at hand.
>
> * * * *
>
> Q If he was not malingering, hypothetically, I know that was your conclusion. If he is not malingering, then

> would you think that this behavior really did raise a question about competency to be executed?
>
> * * * *
>
> A If I thought he was truly evidencing behaviors arising out of the psychosis, as opposed to malingering, it would raise some questions. If that answers your question.

(H2. 711-12).

> Q [W]ould it be fair to say it gets back to the question of is it malingering or is it a psychosis?
>
> A The behavior I say at that time, yes, I would say so.

(H2. 714).

> Q But until deciding whether or not he comprehends his execution, isn't the important issue whether his behavior is motivated by a psychosis, or malingering?
>
> A Right. As I have said, yes. Basically.
>
> Q So the extent that, the other side of the coin from malingering is psychosis.
>
> A Or other mental illness.

(H2. 716).

Dr. Mings agreed that all the bizarre behaviors noted in the prison records, in the inmates' testimony, in the attorneys' and investigators' testimony, and in Mr. Martinez-Garcia's testimony were consistent with psychosis (H2. 719-21, 728). Dr. Mings also agreed that more data would help resolve the question of whether Mr. Medina was crazy or malingering:

> You know, I suppose if one could sit there and observe somebody 24 hours a day, seven

> days a week for several months, as is done when somebody is transferred to a state hospital. I used to work in North Florida Evaluation and Treatment Center, which is for inmates who are found incompetent to stand trial, and not guilty by reason of insanity. One of my jobs there, among other things, was to try to determine whether some of the symptoms were genuine or not. The more sources of information you have, the better off you are. They have the luxury, as I said, of being an in-patient facility, and that can be helpful. . . I'm comfortable that what I saw in conjunction with the records that I reviewed, and everything else that supports my opinion.

(H2. 730).

Psychiatrist E. Michael Gutman also testified for the State. Dr. Gutman concluded that Mr. Medina had the mental capacity to understand the fact of the pending execution, and the reason for it (H2. 752). Dr. Gutman based his opinion on several factors, including inconsistent channels of communication, overacting, and inconsistencies in behavior (H2. 753-55).

Dr. Gutman admitted to having no information from Mr. Medina's family in Cuba or any information regarding Mr. Medina's behavior in Orlando before his arrest for this offense (H2. 758). Dr. Gutman admitted that many of the instances of bizarre behavior noted in the prison records were consistent with something other than malingering, including incidents in which Mr. Medina wrapped feces in toilet paper and tried to hide it from correctional officers; in which Mr. Medina is medicated with Haldol for his extremely loud, hostile, incoherent speech, rambling and circumstantial, and disorganized thought processes; in which Mr. Medina is seen by mental health officers for

displaying inappropriate behavior, becoming quickly agitated, and becoming very agitated when questioned about suicide; in which Mr. Medina was written up for a filthy cell with urine on the floor; in which he is reported talking to himself, repeating statements, having a long history of hostile behavior, and, in Dr. Gutman's own words, displaying a "fascination with feces" (H2. 762, 766-67, 773, 777, 779).[7] Dr. Gutman said these behaviors were consistent with psychosis, schizophrenia, manic depression, organicity (H2. 768, 776, 777, 778, 779, 780, 781, 782, 783).

Referring to the specific factors mentioned in his report that led Dr. Gutman to conclude that Mr. Medina was malingering, Dr. Gutman conceded that displaying inconsistent channels of communication could be consistent with psychosis, schizophrenia, manic depression, and organicity (H2. 786), as could overacting and giving approximate or peripheral answers (H2. 787).

Dr. Gutman agreed with Doctors Latterner, Marina, Teich, and Mings that mental illness, particularly psychosis, ebbs and flows (H2. 799). In the videotaped interview of Pedro Medina introduced into evidence, Dr. Gutman said to Mr. Medina, "you are either crazy or you are faking, and I think you are faking."

---

[7]Dr. Gutman did testify, however, that eating feces in court is not necessarily indicative of mental disease or disturbance (H2. 800).

ARGUMENT

ARGUMENT I.

MR. MEDINA WAS DEPRIVED OF HI8 RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THE EX POST FACTO CLAUSE WHEN HE WAS REQUIRED TO PROVE HIS INCOMPETENCY TO BE EXECUTED BY CLEAR AND CONVINCING EVIDENCE.

A. THERE SHOULD BE NO PRESUMPTION OF COMPETENCY HERE WHERE **IN** 1988 UNCONTEBTED EVIDENCE **ESTABLISHED** THAT MR. **MEDINA** SUFFERS **PSYCHOSIS**

Florida Rule of Criminal Procedure 3.812(e) requires that Mr. Medina must meet this exacting burden merely to avoid being the object of the "miserable spectacle" of executing the insane. This Court in its February 10, 1997, opinion held that Mr. Medina must meet this burden relying upon a presumption of competency arising from a pretrial competency finding. This Court justified such a presumption on the basis of Justice Powell's opinion in Ford. The court in this case was not entitled to presume Mr. Medina was sane in light of the 1989 findings by Judge Powell in denying Mr. Medina's 3.850 motion.

The facts of this case and the law of this case distinguish it from the scenario envisioned by Justice Powell in his concurring opinion in Ford.' Id. at 420, 425-426. In 1989,

---

[8] Two issues were before the Court in Ford. While a majority of the Court agreed the Eighth Amendment prohibits execution of the insane, there are three opinions as to what due process requires before someone can be executed once he is believed to be insane. Although the doctrine of Marks v. United States, 430 U.S. 188, 190 (1977), suggests Justice Powell's opinion should be taken as controlling, courts interpreting the case have borrowed from the opinions of the plurality and Justice O'Connor as well. See generally Weeks v. Jones, 52 F.3d 1559, 1574 (11th Cir. 1995) (Kravitch, C.J., concurring in part and dissenting in part) (noting that there is no established competency standard in this

Judge Powell, the trial judge found that Mr. Medina was at the time of his sentencing "psychotic; he had organic brain damage; he was diagnosed to be suffering from paranoid schizophrenia or major depressive disorder, recurrent with psychosis, of long standing, and he was potentially dangerous." Order Denying Defendant's Amended Motion to Vacate Judgment and Sentence, at 8 (Feb. 6, 1989) (hereinafter Powell 3.850 Order). In fact, no evidence was presented in 1988 to refute this contention. This is contrary to Justice Powell's premise in his opinion in Ford: "his competency must have been sufficiently clear as not to raise a serious question for the trial court." Ford, 477 U.S. at 426.

Given the facts and law of this case--the longstanding judicial recognition of Mr. Medina's mental problems--it is inappropriate and unjust to impose such a clear and convincing burden of proof upon Mr. Medina in reliance upon a presumption of competency. The scenario envisioned by Justice Powell in Ford, where a defendant is presumed mentally fit because he has gone through numerous legal proceedings, id. at 420, 425-426, is simply not present here. In a case such as this, where the trial court has already found the defendant is psychotic and brain damaged, the state, not the defendant should bear the burden of proving that the defendant's known mental infirmities do not render him incompetent for execution. Cf. Addinston v. Texas,

---

circuit and that federal appellate courts have adopted varying standards).

441 U.S. 430 (1979). The balance of risk and equities tilts towards requiring the State to prove sanity.

Justice Powell's opinion as to the requirements of due process in a case of incompetence for execution was explicitly grounded on the assumption that someone who has gone through trial and postconviction proceedings must be presumed sane. Ford, at 420, 425-426. He did not take into account a case such as Mr. Medina's where a man is found competent to stand trial but is also deemed to have been a psychotic, brain-damaged, paranoid schizophrenic at the time he was sentenced.[1] The uncontroverted testimony of Mr. Medina's counsel from his trial to the present establishes that Mr. Medina's mental illnesses, his severe anxiety, delusions and disorganized thought processes, have always been an impediment to his representation. Far from being a helpful participant in legal proceedings to save his life, Mr. Medina's fear and paranoia have made it difficult for counsel even to bring him along for the ride. See, e.g., (H2. 200).

---

[1]Judge Powell's Order in 1989 found that Mr. Medina was not entitled to relief on his claim on ineffective assistance of counsel during the penalty phase of his 1983 trial. The court's opinion finds that the evidence of Mr. Medina's psychosis, brain damage, and schizophrenia could have been presented in 1983 but would have "strengthened the jury's resolve to recommend a sentence of death." Order at 9. Although this ruling is inconsistent with the holdings of Miller v. State, 373 So. 2d 882 (Fla. 1979) (invalidating sentence where evidence of mental illness considered as an aggravating circumstance), and Elledge v. State, 346 So. 2d 998 (Fla. 1987), the important point here is that Judge Powell necessarily made a finding about Mr. Medina's mental illnesses at the time he was sentenced. Cf. Burns v. State, 609 So. 2d 600 (Fla. 1992).

In 1989, Judge Powell accepted the testimony of trial counsel, Ana Tangel-Rodriguez. Powell 3.850 Order at 8. He found her decision not to present mental health evidence during the penalty phase a "reasonable exercise of professional judgment" after "Dr. Cassidy the jail psychologist [informed her] that defendant was psychotic." Id. At the Rule 3.812 hearing before Judge Conrad, Ms. Tangel-Rodriguez testified that during the trial Mr. Medina believed "the prosecutor, Mr. Ray Sharp [sic], who was not oriental, was the 'Japanese,' and he kept insisting that he was Japanese. There were many other instances such as that." (H2. 447). For more examples from the trial, see R. 28, 36, 48, 60-61 (Mr. Medina thinks "the Japanese" is laughing at him), 95, 280-283, 661-662, 669, 696 (Mr. Medina addresses Mr. Sharpe as "daddy")," 829-834. Ms. Tangel-Rodriguez testified that she spoke to Mr. Medina "continuously" throughout the trial in 1983 and that "there were a number of instances where he would talk to me about things that were not related to the trial at all." Id.

---

[10]It is not unusual for Mr. Medina to refer to people as family members. This was described and explained by Dr. Teich as an indication of Mr. Medina's poor sense of identity. "It's called projective identification . . . trying to, in states of anxiety, gain comfort . . . and stability by saying I'm attached to you. I'm not secure enough in my own personality so I'm going to take a piece of yours." (H2. 625). Dr. Teich considers this behavior "another major part of . . . his personality structure . of denial and projective identification internally." (H2. 626). Dr. Marina testified that Dr. Teich's conclusions were consistent with her diagnoses (H2. 392) regarding Mr. Medina's use of the "very primitive, archaic defense mechanism" of projection (H2. 384-386) and his diffused identity (H2. 383).

Mr. Medina's postconviction counsel faced the same problems. Jane Rocamora, the first CCR attorney who tried to work with Mr. Medina testified that she could not get background information from Mr. Medina not because he was recalcitrant but because he was apparently unable to discuss his background. (H2. 492). Ms. Rocamora testified to facts indicating Mr. Medina did not understand that his attorneys were trying to help him by filing postconviction pleadings. Mr. Medina refused to sign the verification for his first Rule 3.850 motion in 1987. (H2. 495). Ms. Rocamora testified that Mr. Medina would not sign because he believed the motion did not say he was innocent. Id. Ms. Rocamora showed Mr. Medina the portions of the motion indicating he is innocent, but he did not accept her explanations. (H2. 495). Counsel later learned that Mr. Medina believed Ms. Rocamora was "the red devil" (H2. 197), perhaps because of her red hair. (H2. 497).

The CCR attorneys and investigator who represented Mr. Medina at the evidentiary hearing in 1988 gave an account of their experiences in court with Mr. Medina that was identical in kind but more severe than Ms. Tangel-Rodriguez' experience. Former Assistant CCR Judith Dougherty testified that she "sat there and spoke to him throughout the hearing, and we talked about soap operas, imaginary people, his life in Cuba, anything but what was going on in the courtroom" (H2. 200), merely to keep Mr. Medina from being ejected from the proceedings.

Again, as during the trial, there was evidence of Mr. Medina's delusions and projective identification. See footnote Muaras . Dougherty testified that Mr. Medina related to her "as a mother, a grandmother, or a girlfriend." (H2. 213). He asked if the prosecutor was his father. (H2. 201); see R. 696. At one point, Mr. Medina became so convinced that Ms. Dougherty was trying to kill him that he had to be removed from the courtroom and a bailiff was sent to the holding cell to ensure Ms. Dougherty's safety. (H2. 206-208). Ms. Dougherty's co-counsel in 1988, Billy Nolas, testified that Mr. Medina was very guarded, suspicious, delusional, and hallucinatory (characterizations echoed in prison records reviewed by the lower court's expert, Dr. Gutman, infra). (HZ. 131-132). Assistant CCR Gail Anderson testified that in all of her interactions with Mr. Medina "[t]he only time he seemed to be saying something that I could follow in any fashion was when he was talking about his inability to speak English." (H2. 423). The rest of the time he either stared at her or simply did not make sense. Id.

But more than the testimony of all of Mr. Medina's attorneys, it is the finding by Judge Powell in 1989, which disentitles the state to presume that Mr. Medina was sane when the death warrant was signed. Judge Powell accepted the unrefuted evidence at the 1988 evidentiary hearing that Mr. Medina suffered from psychosis and was psychotic.

Removal of the presumption of sanity that Justice Powell anticipated would be proper shifts the balance of equities and

alters the analysis of what burden of proof due process requires. It is the law of this case that Dr. Teich, Dr. Marina, and Dr. Joyce Carbonell showed in 1988 that Mr. Medina suffers from psychosis. It was error for Judge Conrad to impose a burden of proof on Mr. Medina.

B. EVEN IF THERE IS A PRESUMPTION OF COMPETENCY, TEE BURDEN OF PROOF CAN BE NO HIGHER THAN PREPONDERANCE OF THE EVIDENCE

In his opinion in Ford, Justice Powell recognized that prior findings of competency may permit a state to "presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process." Ford, 477 U.S. at 426. This hardly authorizes a state after a petitioner has met the threshold showing of insanity to impose a clear and convincing burden of proof. Since this Court determined that the threshold showing had been made, it was error to require more proof than preponderance of the evidence. The State of Florida has custody of Mr. Medina. Undersigned counsel's access was limited; Mr. Medina's mental health experts had limited access. The State through correctional officers and other personnel had unlimited access. The State's control over Mr. Medina and the conditions of his confinement preclude imposing more than a preponderance of the evidence burden of proof.

The Eighth and Fourteenth Amendments do not permit the State of Florida to require Mr. Medina to prove by clear and convincing evidence that his illnesses render him incapable of knowing he is

to be executed and why," Can the State of Florida execute a man who is mentally ill even if it is more likely than not that his illness renders him incapable of comprehending his execution and the reasons for it? Taking into account the relative interests of the parties as well as the concerns of society, the answer must be no. See Cooper v. Oklahoma, U.S. , 116 S.Ct. 1373 (1996).

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' In re Winship, 397 U.S. 358, 370 . (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addinston v. Texas, 441 U.S. 418, 423 (1979). The Court of Appeals for the Eleventh Circuit has said

> The Constitution requires that when the fact or timing of an execution is contingent upon the resolution of a disputed issue, then that issue must be determined 'with the high regard for truth that befits a decision affecting the life or death of a human being.' Ford [at 411].

Zeisler v. Wainwrisht, 805 F.2d 1422, 1426 (11th Cir. 1986) (emphasis added). The standard of proof contained in Rule 3.812(e) allows someone to be executed when it is more likely than not that he is incompetent. This is not an appropriate

[11]As will be argued infra this standard for competency does not comport with the Eighth Amendment requirements as outlined in Ford.

regard for the truth or for the consequences to Mr. Medina and the people of the State of Florida.

The Court must first take account of the interests involved. "Of course, the prisoner's interest in avoiding an erroneous determination of when he is to be executed is very great." Martin v. Dugger, 686 F.Supp. 1523 (S.D. Fla. 1988) (tracking language used by Justice O'Connor in Ford, at 429). The plurality and Justice Powell in Ford spelled out just what this interest involves. Will Mr. Medina be able to prepare for execution in whatever way his beliefs and conscience dictate? Ford at 419-420. For that preparation to be meaningful, for his execution to carry the retributive meaning authorized by the Eighth Amendment, he must be able rationally to understand the consequences of his execution and the reason for it. See Martin, 686 F. Supp. at 1571-1572.

As the Court in Ford pointed out, society shares its interests with Mr. Medina in this situation. See Ford at 419. Our society has for centuries recognized that the execution of an insane person is more an example of "extream inhumanity and cruelty" than an example of true retributive justice. Id., quoting, 3 E. Coke, Institutes 6 (1794).

By contrast to the interests of Mr. Medina and society, the state's interests identified in Ford are "more varied and detailed." Martin, 686 F. Supp. at 1559. As described infra the state in this case is not entitled to make Mr. Medina bear the risk that, though he is probably incompetent, he cannot gather

the necessary clear and convincing evidence. The state can have no legitimate interest in taking Mr. Medina's life while he is incompetent as that act is prohibited by the Eighth Amendment. On the other hand, the state's interest in the finality of it criminal process is most likely only deferred in this case, not lost. This Court quoted Justice Powell's concurrence stating that "the only question raised is not whether, but when" the execution may take place. Medina v. State, 22 Fla. L. Weekly at s77. Justice Powell also noted, Mr. Medina's "Eighth Amendment interest [is] in forestalling his execution unless or until he recovers his sanity." Ford at 424 (emphasis added).

The risk to the state of an erroneous determination based on the preponderance of the evidence is, as the Supreme Court said in Cooper, "modest." Id., 116 S. Ct. at 1382. The differential risk to the state of an erroneous determination based on the more-likely-than-not standard compared to the clear-and-convincing standard is inconsequential. At most the execution is delayed.

The state's interest is, as Justice Powell said, "substantial, " but it is only legitimate if Mr. Medina is competent at the time of his execution. Four Justices of this Court cited Justice Marshall's plurality opinion in Ford in support of the proposition that the state's interest in immediate finality "sometimes must yield to the fact that 'execution is the most irremediable and unfathomable of penalties."' Swafford v. State, 679 So. 2d 736, 740 (Fla. 1996), quoting, Ford at 411.

"Such heightened scrutiny ensures, as much as humanly possible, that only those who are legally subject to execution are executed." Id. If Mr. Medina, at the time he is to be executed, cannot comprehend his execution and the reasons for it sufficiently to prepare himself, and for his execution to have just retributive effect, he is not "legally subject to execution." Yet Rule 3.812(e) would permit him to be executed even if it is more likely than not that he incompetent.

"[S]tandards of proof are important for their symbolic meaning as well as for their practical effect." Addinston v. Texas at 426. The question is whether the State of Florida seeks to vindicate its constitutionally protected interest in retribution or whether the state seeks merely pounds of dumb flesh.

The other states in this federal appellate circuit do not permit someone to be executed if it is more likely than not that he is incompetent. Alabama law requires only that "it is made to appear to the satisfaction of the trial court that the convict is then insane" for purposes of execution.[12] ALA. CODE ANN. § 15-16-23 (1996). The State of Georgia applies a preponderance of the evidence standard and presumes competence only if there was a

[12]As will be discussed infra the standard for competency in Alabama is in accord with the common law tradition requiring that the person be able to consult with counsel with a reasonable degree of rational understanding. See Maqwood v. Smith, 791 F.2d 1438 (11th Cir. 1986, cert. denied, 493 U.S. 923 (1989).

previous adjudication under the same statute.[13] GA. CODE ANN, §§ 17-10-68(e) & 17-10-69 (1996). See also, Miss. Code Ann. § 99-39-23(7) (1996) (preponderance). Again, it was error for Judge Conrad to require clear and convincing proof of incompetency when he found that Mr. Medina probably was mentally ill.

c. REQUIRING MR. NEDINA TO PROVE HIS INCOMPETENCE FOR EXECUTION UNDER THE TIME PARAMETERS IMPOSED HERE VIOLATED DUE PROCESS

The requirements that Mr. Medina prove by clear and convincing evidence that he is incompetent to be executed in a time frame that precludes his ability to gather the evidence violated due process. Mr. Medina's "very great" interest in avoiding an erroneous determination of his competency for execution, Ford at 429 (O'Connor, J., concurring), was not protected by due process of law because the process he was given necessarily prevented a favorable outcome given the specifics of his illness.

The testimony of mental health experts, including the lower court's own expert called by the state, Dr. E. Michael Gutman, was that someone suffering from psychoses who, like Mr. Medina, goes untreated in a prison, "will show an ebb and flow of their psychosis, with more acute symptomatology, and then a subsiding of their psychotic symptoms just on the natural exacerbation and remission type theme." (H2. 799). Dr. Gutman repeatedly testified that the recorded facts about Mr. Medina's behavior in court and in prison--eating and inhaling feces (H2. 765, 784),

[13]In Georgia, too, the standard is more exacting. See GA. CODE ANN. § 17-10-60 (1996).

throwing feces and urine (H2. 777, 780, 783), defacating on newspaper on the floor (H2. 782), constantly talking to himself (H2. 777, 778, 781), perseverating (H2. 779, 780), showing anxiety (H2. 773, 777, 780), claiming hearing voices (H2. 767), being paranoid or overly suspicious (H2. 767, 777-778, 781), extremely loud incoherent speech (H2. 767), disorganized insight and judgment (H2. 777), and suicide attempts (H2. 773)--were consistent with mental illness, manic-depressive psychosis, schizophrenia, organic brain damage, or a mental disorder associated with brain damage. (H2. 762, 766, 768, 775, 776, 778, 780, 781, 783, 784, 786). Dr. Gutman stated that he had not ruled out "organic factors" playing a role in Mr. Medina's behavior (except for Dr. Gutman's diagnosis of Ganzer's Syndrome). (H2. 787).

In Dr. Gutman's videotaped interview of Mr. Medina, Dr. Gutman said that Mr. Medina is either crazy or faking, and he, Dr. Gutman, believed that Mr. Medina was faking.

Similarly, Dr. Mings testified:

> Q Okay. Would it be fair to say that the question of Mr. Medina's competency comes down to his behavior crazy, or is it malingering?
>
> A To a certain extent, yes. I guess that's a simplication [sic] whether he is capable of understanding his impending execution, and the reason for it. Those are the issues which I think are at hand.
>
> Q Correct. We have seen the tape, just so you know, of the evaluation that you did. I think at one point in time Dr. Gutman actually said that to Mr. Medina, and you

concurred, that the behavior that he was displaying, if real, was pretty bizarre?

A It was bizarre behavior.

Q Okay. If he was not malingering, hypothetically, I know that was your conclusion. If he is not malingering, then would you think that this behavior really did raise a question about competency to be executed?

MR. NUNNELLEY: Is that a hypothetical, your honor?

MR. MCCLAIN: Yes.

A If I thought he was truly evidencing behaviors arising out of the psychosis, as opposed to malingering, it would raise some questions. If that answers your question.

*** * * ***

Q Which then gets back to -- would it be fair to say it gets back to the question of is it malingering or is it a psychosis?

A The behavior that I saw at that time, yes, I would say so.

*** * * ***

Q But until deciding whether or not he comprehends his execution, isn't the important issue whether his behavior is motivated by a psychosis, or malingering?

A Right. As I have said, yes. Basically.

Q So the extent that, the other side of the from malingering is psychosis.

A Or other mental illness.

(T. 711-12, 714, 716).

As Dr. Mings explained, if Mr. Medina is malingering, then he is doing so because he understands that he will be executed

and why, and his bizarre behavior is a calculated attempt to avoid execution (T. 714). If he is crazy, then his bizarre behavior is spontaneous, and does not indicate that Mr. Medina understands that his execution is imminent or why the execution will take place.

In the final analysis, the circuit court found that Mr. Medina was "probably" suffering from mental pathology, but that counsel could not establish incompetency by clear and convincing evidence. Even the state acknowledged it did not bear the burden of "demonstrating that Mr. Medina is a completely healthy individual" (H2. 976). Mr. Medina is either malingering or crazy, as Dr. Mings and Dr. Gutman have acknowledged. To the extent that undersigned counsel cannot marshall clear and convincing evidence while operating within the time constraints of a death warrant, the only way to permit an opportunity to meet the standard is to commit Mr. Medina for an extended period of time in a controlled psychological setting so that he can be evaluated by trained psychological professionals (not correctional officers who admitted to having no psychological training). The declaration of Arturo Gonzalez, M.D., the psychiatrist who evaluated Mr. Medina in 1983 for competency to stand trial, attests that the only way to determine if Mr. Medina is crazy or malingering is to commit him and have him continuously evaluated by in a controlled psychological setting.

> 1. I am a psychiatrist licensed to practice medicine in the State of Florida. I have been a practicing psychiatrist far forty-four years.

2. In 1983, Dr. Lloyd Wilder and I were appointed by Circuit Judge Rom Powell to evaluate Pedro Medina for competency to stand trial. Dr. Wilder and I evaluated Mr. Medina on January 14, 1983, in an interview that lasted approximately two hours. I concluded that Mr. Medina was competent to stand trial under existing Florida law. I have not seen or evaluated Mr. Medina since 1983.

3. In February 1997, I was contacted by Mr. Medina's attorneys. Mr. Medina's counsel informed me that they had argued that Mr. Medina was incompetent to be executed under Florida law. I was provided with various records and reports regarding Mr. Medina, including the report of Doctors Ekwall, Gallemore, and Myers, who were appointed by the Governor to evaluate Mr. Medina and who concluded his bizarre behavior indicated malingering rather than mental illness.

4. After reviewing the materials provided, I conclude there are indications of mental illness. It is my professional psychiatric opinion that, in order to determine by clear and convincing evidence that Mr. Medina is competent to be executed, he must be evaluated in a controlled, psychiatric setting for 60-90 days. If Mr. Medina is malingering, he will not be able to maintain his bizarre behavior for an extended period of time while being continually evaluated by mental health professionals. Without such a controlled psychiatric evaluation, I cannot say whether his bizarre behavior rises to the level of incompetence to be executed.

5. Due to the time constraints involved, I have submitted this declaration by facsimile transmission.

Dr. Gonzalez's recommendation is supported by Dr. Umesh Mhatre, who is involved in the case of another schizophrenic death row inmate, Antonio Carter. In his testimony at Mr. Carter's pretrial competency hearing, Dr. Mhatre found

malingering, but conceded that malingering could be ruled out only after Mr. Carter was confined in a controlled psychological setting for an extended period of time.

> DEFENSE COUNSEL: What would be the best way to make a solid determination of [malingering], sir?
>
> DR. MHATRE: I think the basis to make a solid determination would be to observe him consistently for a period of time.
>
> **Q** How would you do that, sir?
>
> A Well, I think probably I would mind him being hospitalized, if that is what would be agreed by everybody.
> My observations, in my opinion, I feel comfortable in saying he is malingering but I realize some other people involved in this case have had some doubts and probably if you ask me the best way of determining --
>
> **Q** That's what I was trying to do, sir.
>
> A The best way to determine would be to hospitalize him for a period of time where observations can be made consistently for twenty-four hours a day for an extended period of time.
> People who try to malinger will try to con somebody for a brief period of time but are not able to consistently do it.
> When you observe them for an extended period of time, it becomes more and more obvious, they're malingering.
> So if you ask me, the best way would be hospitalization.

Testimony of Dr. Mhatre at 15-16. After Mr. Carter was convicted and confined, Mr. Mhatre found that his earlier malingering conclusion was in error. Dr. Mhatre concluded Mr. Carter was incompetent. Thus, in order to allow undersigned the opportunity to obtain clear and convincing evidence, this Court should order

Mr. Medina confined and evaluated in a controlled psychological setting for 60-90 days. In Mr. Carter's case, more data from institutionalization made Dr. Mhatre conclude that his initial reaction was wrong -- Mr. Carter was incompetent and not malingering.

Mr. Medina should not be executed if he is psychotic. His counsel should be afforded the necessary tools to obtain the evidence necessary to establish his incompetency before the execution. The order of the lower court should be reversed and the matter remanded for reconsideration after Mr. Medina has been observed in a controlled psychiatric setting.

D. THE CLEAR AND CONVINCING BURDEN OF PROOF VIOLATES EX POST FACTO

On April 3, 1982, Pedro Medina's conviction and sentence of death were affirmed by this Court in an opinion dated January 31, 1985. Subsequently, Mr. Medina's rehearing request was denied on April 30, 1985. At the time of the offense and at the time the sentence of death became final, Florida law provided:

> (1) When the Governor is informed that a person under sentence of death may be insane, he shall stay the execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the

> sentence shall appoint counsel to represent him.
>
> (2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.
>
> (3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a Department of Corrections mental health treatment facility.

Section 922.07, Fla. Stat. (1985). According to this provision there was no clear and convincing burden of proof placed upon the condemned who "may be insane." It was simply up to the Governor to make a determination of whether "the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him."

On June 26, 1986, the United States Supreme Court issued its opinion in Ford v. Wainwright, 477 U.S. 399 (1986). In Ford, the United States Supreme Court held that there was an Eighth Amendment prohibition against executing the insane. Ford at 422 (Powell, J. concurring). Moreover, Florida had extended a state law right not to be executed while insane to those who were under sentence of death by virtue of section 922.07. Ford at 428 (O'Connor, J. concurring and dissenting). The Court further concluded that the failure to provide "an impartial officer or board that can receive evidence and argument from the prisoner's

counsel" violated due process. Ford at 427 (Powell, J. concurring).

In response to the decision in Ford, this Court promulgated an emergency rule. See In re Emergency Amendment to Florida Rules of Criminal Procedure (Rule 3.811, Competency to be Executed), 497 So. 2d 643 (Fla. 1986). This emergency rule did not impose a clear and convincing burden of proof upon the death sentenced individual. It simply provided that the presiding court was to determine whether "the prisoner understands the nature and effect of the death penalty and why it is to be imposed upon the prisoner." This rule thus simply provided for a judicial officer to make the decision that under the statute had been for the Governor alone to make.

On December 31, 1987, this Court adopted a permanent rule. See In re Amendments to the Florida Rules of Criminal Procedure, 518 So. 2d 256 (Fla. 1987). This rule for the first time imposed upon the condemned a clear and convincing burden of proof. It provided that "[i]f, at the conclusion of the hearing, the Court shall find, by clear and convincing evidence, that the prisoner is insane to be executed, the Court shall enter its order continuing the stay of the death warrant, otherwise, the Court shall deny the motion and enter its order denying the stay of execution." Imposing this burden of proof upon Mr. Medina whose offense occurred more than four years before the adoption of this permanent rule and whose conviction was final more than two years

before the adoption of this permanent rule, violated the constitutional ban on ex post facto laws.

In Kring v. Missouri, 107 U.S. 221 (1983), the United States Supreme Court addressed the ex post facto prohibition under the United States Constitution. There, the defendant had pled guilty to murder in the second degree. Under controlling Missouri law at the time of the offense, the acceptance of this plea amounted to an acquittal of first degree murder. The defendant, thereafter, appealed claiming his sentence imposed had violated the agreement with the prosecution. The appellate court reversed and remanded for a new trial. Meanwhile, the state law was changed so that a plea to second degree murder did not constitute an acquittal of first degree murder. The defendant was then tried for first degree murder, convicted and sentenced to death. The United States Supreme Court found the ex post facto prohibition was violated when Missouri tried and convicted the defendant of first degree murder. The Supreme Court explained that the question before it was:

> This law, in force at the date of the homicide for which Kring is now under sentence of death, was changed by the state of Missouri between that time and his trial so as to deprive him of its benefit, to which he would otherwise have been entitled, and we are called on to decide whether in this respect, and as applied by the court to this case, it is an ex post facto law within the meaning of the constitution of the united States. There is no question of the right of the state of Missouri, either by the her [sic] fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment. The question

> **here is,** does it deprive the defendant of anv **right** of defense which the law **gave** him when **the** act was committed, so that as to the offense it is ex post facto.

Kring, 107 U.S. at 224-25 (emphasis added). The Supreme Court concluded that Missouri had violated the **ex** post facto prohibition saying:

> We are of the opinion that any **law** passed after the commission of an offense which, in the language of WASHINGTON, in U.S. v. Hall, 'in relation to that offense, or its consequences, alters the situation of **a** party to his **disadvantage,'** is an ex post facto law; and in the language of DENIO, in Hartung v. People: **'No** one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.'

Kring, 107 U.S. at 235 (emphasis **added).**

In Host v. Utah, **110** U.S. 574 **(1884),** the United States Supreme Court again discussed the operation of the **ex** post facto prohibition. In **Hopt,** the specific issue concerned a change in the competency of a convicted felon to testify. The change allowing a convicted felon's testimony occurred **between the date of the offense and the date of trial.** In concluding that such a change **did not** violate the **ex** post facto prohibition, the Court explained:

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, **than was** required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon ex post facto laws. But **alterations** which do not increase the punishment, nor change the ingredients of the offense or the

> ultimate facts necessary to establish guilt, but--leaving untouched the nature of the crime and the amount or degree of proof essential to conviction--only removing existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.

Hopt, 110 U.S. at 589-90 (emphasis added).

In Thompson v. Utah, 170 U.S. 343 (1898), the United States Supreme Court considered a change in Utah's law as to the number of jurors a defendant was entitled to in a criminal proceeding. At the time of the offense, a criminal defendant was entitled to have a jury of twelve. However, by the time of the trial at issue, Utah's law had changed to allow a jury of eight. In finding an ex post facto violation, the Supreme Court concluded:

> It cannot therefore, be said that the constitution of Utah, when applied to Thompson's case, did not deprive him a substantial right involved in his liberty, and did not materially alter the situation to his disadvantage.***It was not for the state, in respect of a crime committed within its limits while it was a territory, to dispense with that guaranty simply because its people had reached the conclusion that the truth could be as well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case.

Thompson, 170 U.S. at 623-24 (emphasis added).

In Miller v. Florida, 482 U.S. 423 (1987), the United States Supreme Court discussed the ex post facto prohibition in the context of Florida's sentencing guidelines. The guidelines were initially adopted in 1983 prior to the defendant's offense. After the date of the offense, the guidelines were altered. The

altered sentencing guidelines did not change the authorized sentence for the particular crime at issue. However, the definition of "primary offense" was changed. The impact upon the defendant was to increase the number of primary points assigned to his primary offense and in turn increase his presumptive sentence. This imposed a burden to show clear and convincing reasons justifying a downward departure. This Court found no error as to Miller (Miller v. State, 488 So. 2d 820 (Fla. 1986)) relying upon its decision in another case where it found a modification in sentencing guidelines procedure was "merely a procedural change, not requiring the application of the ex post facto doctrine." Jackson v. State, 478 So. 2d 1054, 1056 (Fla. 1985). However, the United States Supreme Court reversed finding a violation of the ex post facto prohibition. The Supreme Court explained:

> [A] change in the law that alters a substantial risht can be ex post facto "even if the statute takes a seemingly procedural form."

Miller, 482 U.S. at 433 (emphasis added).

> Nor do the revised guidelines simply provide flexible "guideposts" for use in the exercise of discretion: instead, they create a high hurdle that must be cleared before discretion can be exercised, so that a sentencing judge may impose a departure sentence only after first finding "clear and convincing reasons" that are "credible," "proven beyond a reasonable doubt," and "not . . . a factor which has already been weighed in arriving at the presumptive sentence." [Citations omitted] Finally, the revised guidelines directly and adversely affect the sentence petitioner receives.

Miller, 482 U.S. at 435.

Most recently, the United States Supreme Court addressed the ex post facto doctrine in Lynce v. Mathis, 60 Cr.L. 2081 (decided Feb. 19, 1997). At issue there was the cancellation of early release credits. The Supreme Court found an ex post facto violation saying:

> As we recognized in Weaver, retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are "one determinant of petitioner's prison term . . . and . . . (the petitioner's] effective sentence is altered once this determinant is changed." Ibid.

Lynce, 60 Cr.L. at 2085.

Here, Florida law provided at the time of the offense that a death sentence would not be carried out on a person who was insane. It was up to the Governor to determine whether the condemned person was insane. The United States Supreme Court held that due process was violated by the failure to provide "an impartial officer or board" to make the determination. Ford, 477 U.S. at 427. This Court then promulgated a rule providing for a judicial officer to make the determination. The interim simply transferred the decision to be made under the statute to a judicial officer. It did not raise the condemn's burden of proof. Subsequently in 1987, well after the offense, well after the death sentence was final, did this Court increase the burden of proof that the condemned had to meet in order to vindicate his right to not be executed while insane. The change in the burden

of proof is clearly more onerous. It clearly disadvantaged the condemned. As such, it violates the constitutional prohibition against ex post facto laws.

The circuit court in proceedings below required Mr. Medina's counsel to meet the clear and convincing burden of proof. This was an improper ex post facto application of law and thus violated the Ex Post Facto Clause of the United States Constitution. Requiring Mr. Medina to prove his incompetency by clear and convincing evidence violated the Ex Post Facto Clause. The circuit court's decision must be reversed and the matter remanded for further proceedings which conform with the Ex Post Facto Clause.

ARGUMENT II

THE STANDARD FOR COMPETENCY TO BE EXECUTED CONTAINED IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.811(b) IS INSUFFICIENT TO PROTECT MR. MEDINA'S EIGHTH AMENDMENT RIGHT NOT TO BE EXECUTED WHILE HE IS INSANE.

The Supreme Court in Ford did not determine the meaning of incompetence in the context of the Eighth Amendment's prohibition on executing the insane. Ford at 418 (Powell, J., concurring in part and concurring in judgment). Today there is no established Eighth Amendment standard for incompetence to be executed in this federal appellate circuit. Weeks v. Jones, 52 F.3d 1559, 1562 (11th Cir. 1995). The court in Weeks indicated that whatever the standard is, it lies somewhere on a continuum from a "[reasonable or rational] appreciation of the connection between the crime and the punishment," as applied by Judge King in Martin, 686 F. Supp.

at 1571, to the standard advanced by the American Bar Association ("ABA").[14] Weeks, 52 F.3d at 1562.

> In Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986), cert. denied, 493 U.S. 923 . . . (1989), the Eleventh Circuit suggested that inquiries into an accused competency to stand trial and a death row inmate's sanity at the time of execution are sufficiently analogous that standards used to determine competency [for trial] should provide any necessary instruction for purposes of (defining competency for execution].

Weeks, 52 F.3d at 1568 (appendix, quoting State of Alabama v. Weeks, No. CC-82-042 (Cir. Ct. of Macon County, Ala. April 21, 1995)). Alabama's application of the ABA standard was upheld in Weeks.

---

[14]The ABA standard states that

> A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceeding, what he or she was tried for, the reason for punishment or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or retardation, the convict lacks sufficient capacity to recognize or understand any fact which may exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or the court.

Standard 7.5-6, American Bar Association Criminal Justice Mental Health Standards, quoted in Weeks, 52 F.3d at 1568. Several states employ standards that are versions of the ABA standard or at least include the assistance prong. See, Singleton v. State, 437 S.E. 53, 57 (S.C. 1993), citing In re Smith, 176 P. 819 (N.M. 1918); People v. Geary, 131 N.E. 652 (Ill. 1921); In re Grammer, 178 N.W. 624 (Neb. 1920). See also State v. Harris, 789 P.2d 60 (Wash. 1990) (inmate must have sufficient capacity to communicate rationally with counsel); State v. Rice, 757 P.2d 889 (Wash. 1988) (same). Cf. Rector v. Bryant, 501 U.S. 1239 (1991) (Marshall, J., dissenting from denial of certiorari) (four-justice dissent).

The standard contained in Florida Rule of Criminal Procedure 3.811(b)[15] and employed by Judge Conrad falls short of the minimum limits of this scale.[16] Judge Conrad required Mr. Medina to prove "by clear and convincing evidence that Defendant lacks the mental capacity to understand the fact of the pending execution and the reason for it." Judge Conrad required no reasonable or rational comprehension sufficient to make a connection between the crime and the punishment. Execution of someone who cannot rationally appreciate the reason he is to die does not serve the constitutionally defined retributive purpose of the death penalty. Ford, 421 (Powell, J., concurring); Martin, 686 F. Supp. at 1569-1570.

At a minimum the Eighth Amendment requires some "rational understanding" or "realistic appreciation" of the connection between the sentence and the reason it is to be imposed. Martin, 686 F. Supp. at 1571-1572. A valid standard must incorporate at least a "limited rational understanding" of the execution as part of the criminal process for it to have any constitutionally sound

---

[15]Florida Rule of Criminal Procedure 3.811(b) defines insanity for purposes of execution as "lack[ing] the mental capacity to understand the fact of the impending execution and the reason for it." See also Fla. R. Crim. P. 3.812(b).

[16]Indeed, the Rule 3.811 standard falls short of most standards applied by the states. See, e.g., Ariz Rev. Stat. Ann. § 13-4021B (1996); Colo. Rev. Stat. § 16-8-110 (1996) (same as competency for trial); Ga. Code Ann. § 17-10-60 (1996) (mental condition makes person unable to know reason for and nature of punishment); Miss. Code Ann. § 99-19-57(2)(b) (1996) (sufficient understanding to convey facts to counsel that would make punishment unjust or unlawful); N.Y. Correction Law § 656 (McKinney 1996) (standard requires rational understanding of the nature of the penalty).

retributive or deterrent effect. Id. The rationality determination "must not be devoid of common ordinary understanding," id., i.e., it must be an understanding that ordinary people would recognize as consistent with reality. The standard must include a component of "objective rationality" based on psychological or psychiatric science. Id. Otherwise, the first justification for the prohibition is violated: the execution is the "miserable spectacle . . . of extream inhumanity and cruelty" condemned by Sir Edward Coke. Ford at 407 (Marshall, J.), at 419-421 (Powell, J., concurring).

The Rule 3.811(b) standard employed by Judge Conrad is also constitutionally deficient because it does not require that Mr. Medina is actually able to make a rational connection between the murder of Dorothy James and himself at the time he is to be executed. See Weeks, 52 F.3d at 1573 (trial court concluded Ford required determination at time of execution). By focusing on Mr. Medina's capacity to understand a fact when someone states it to him, rather than whether Mr. Medina is able to place that fact within an objectively rational framework, this standard ignores the psychiatric fact, as stated by Dr. Gutman, that psychotic people are not always out of touch with reality. Since even a severely psychotic person has the capacity, at some time, to know for example that the next day might be called "execution day," virtually no one suffering from a mental illness could meet this standard. It is, in essence, a loophole for the state. Simply knowing that a day called "the execution date" is coming up is

not enough absent a rational understanding of what the execution date is.

With Justice Powell's concurrence two justifications for the prohibition on executing the insane received a majority vote. From those justifications a minimal definition of insanity for this Eighth Amendment purpose emerges. See Martin v. Dugger, 686 F. Supp. 1523, 1566 (S.D. Fla. 1988).[17] Justice Powell agreed with Justice Marshall that two of the reasons for which the common law prohibited executions of the insane have equal force today. Ford at 419-421 (Powell, J., concurring); Martin 686 F. Supp. at 1567. In Martin, Judge King held that the Eighth Amendment required a rational understanding and appreciation of the death penalty and why it is being imposed:

> The subject of this evidentiary hearing is Martin's competency to be executed. Because this is an independent review of this question in light of Ford, the standards established in Fla.Stat.Ann. s 922.07 are inapplicable. This court, therefore, must determine the meaning of competency under the eighth amendment. To do so, the court will review the several viewpoints of the Ford Court, examine these viewpoints in light of the constitutionally permissible policies supporting capital punishment, and compare the meaning of competency here with others in criminal law.
>
> The court begins by reviewing the first issue addressed in Ford: the right of the defendant not to be executed while insane. In the plurality opinion of Justice Marshall, the concurring opinions of Justices Powell and O'Connor, and the dissent of Justice Rehnquist, this issue was addressed. Because

[17]In Martin, Judge King noted that Ford "is a precedential quagmire." Id., 686 F. Supp. at 1557.

these positions varied greatly, an extensive examination of each is required.

Justice Marshall, in writing for three other justices, found that the eighth amendment prohibits the state from inflicting the penalty of death upon a prisoner who is insane. Ford v. Wainwright, 106 S.Ct. at 2602. Justice Marshall premised this conclusion upon his belief that the eighth amendment prescribes two kinds of historical punishment. He first noted that the eighth amendment's ban on cruel and unusual punishment "embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted." Ford v. Wainwright, 106 S.Ct. at 2600 (quoting Solem v. Helm, 463 U.S. 277, 285-286, 103 S.Ct. 3001, 3007, 77 L.Ed.2d 637 (1983)). Marshall then commented that the eighth amendment not only prohibits those practices condemned by the common law in 1789, but "also recognizes the 'evolving standards of decency that mark the progress of maturing society.' " Id. at 2600 (citing Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion)). Justice Marshall then conducted a twofold analysis, first concentrating on those acts banned in 1789 and then considering "evidence of contemporary values." Id.

Marshall noted that under the common law, the bar against executing the prisoner who had lost his sanity was long established. In Marshall's viewpoint, the practice "consistently has been branded 'savage and inhumane.' " Ford v. Wainwright, 106 S.Ct. at 2600 (citing 4 W. Blackstone, Commentaries, 24-25 (1769)). Justice Marshall found other reasons in the common law. He found that Sir Edwin Coke noted that the execution of an insane person provides "no example to others and thus contributes nothing to what deterrence value is intended to be served by capital punishment." E. Coke, Third Institute 6 (6th Ed.1680). Marshall also found a long history of religious reasons for this rule. Ford v. Wainwright, 106 S.Ct. at 2601 (citing Hawles' Remarks on the Trial of Mr. Charles Bateman (1685), 11 How.St.Tr. 474, 477 (1816)). Justice Marshall also noted that under the

common law, the doctrine of furiosus solo furore punitur (madness is its own punishment) applies. Ford v. Wainwright, 106 S.Ct. at 2601 (citing Blackstone, Commentaries at 395).

Justice Marshall next found that this common law rule has uniform acceptance in the United States today. Marshall believed recent commentators consider the execution of the insane as discrediting the death penalty. Id. 106 S.Ct. at 2601. In a footnote, he noted that of the 41 states having the death penalty, 26 have statutes specifically requiring the suspension of execution of a prisoner who meets the legal test for incompetence. Ford v. Wainwright, 106 S.Ct. at 2601 n. 2. Marshall, therefore, found that "the various reasons put forth in support of the common law restriction have no less logical, moral and practical force than they did when first voiced." Ford v. Wainwright, 106 S.Ct. at 2602. Marshall continued: "For today, no less than before we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." Ford v. Wainwright, 106 S.Ct. at 2602 (citing Note, The Eighth Amendment and The Execution Of The Presently Incompetent, 32 Stan.L.Rev. 765, 777 n. 58 (1980)). Marshall further commented that "the natural abhorrence of civilized societies at killing one who has no capacity to come to grips with his own conscience or deity is still valid today." Ford v. Wainwright, 106 S.Ct. at 2602.

Justice Marshall then summarized his two-prong reasoning. He stated: "Whether it's aim be to protect the condemned from fear and pain without comfort of understanding or to protect the dignity of society from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the eighth amendment." Id.

Justice Powell, in essence, agreed with Justice Marshall. He relied on Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and noted "that while the framers 'may have intended the eighth amendment to go beyond the scope of its English counterpart, their use of the

language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection.' " Ford v. Wainwright, 106 S.Ct. at 2606 (citing Solem v. Helm, 463 U.S. at 286, 103 S.Ct. at 3007)).

Justice Powell wrote separately, however, to address the meaning of insanity, "a pivotal concept carefully avoided by the majority." See Note, Leading Cases: Death Penalty and The Execution Of The Insane, 100 Harv.L.Rev. 100, 103 (1986). Justice Powell noted that the bounds of insanity with respect to the eighth amendment "are necessarily governed by federal constitutional law." Ford v. Wainwright, 106 S.Ct. at 2607. Powell noted "that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes [of the death penalty]." Id. 106 S.Ct. at 2608. For this reason, Powell believed that no one "disputes the need to require that those who are executed know the fact of their impending execution and the reason for it." Id. Accordingly, Powell found that such a standard should define the kind of mental deficiency that triggers the eighth amendment prohibition. Id.

Justice Powell then tried to give some substance to this reasoning. He noted that "if the defendant perceives the connection between his crime and his punishment, the retributive goal of criminal law is satisfied." Id. 106 S.Ct. at 2608-09. In addition, Justice Powell believed that the defendant can only prepare himself for passing if he is aware that his death is approaching. Id. 106 S.Ct. at 2609. Justice Powell then proposed this meaning of insanity: "I would hold that the eighth amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Id. 106 S.Ct. at 2609.

Justice O'Connor rejected the conclusion that the eighth amendment forbids the execution of the insane. Ford v. Wainwright, 106 S.Ct. at 2611-13. She concurred in the result that the defendant should not be executed because she believed Florida positive law created a protective liberty interest of avoiding execution in an

incompetent prisoner. Id. 106 S.Ct. at 2611. She noted that this liberty interest protected by the fourteenth amendment arises from two sources: the due process clause and the laws of the state. Justice O'Connor believed that the due process clause did not create a protected interest in avoiding the execution of a death sentence during incompetency. Id. (citing Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950)). Justice O'Connor did find, however, that Florida law, largely espoused in Fla.Stat. s 922.07(3), did give the condemned prisoner a protected liberty interest, for this section mandated that the governor to stay the execution of an incompetent person. Id. 106 S.Ct. at 2612.

* * * *

With only five justices believing that the eighth amendment prohibits the execution of the insane, and only one of these justices determining the type of mental state actually protected by this right, Ford is of limited assistance here. This court must determine the true reach of this new eighth amendment right. To do so, this court will review the few decisions interpreting Ford, examine the social policies behind the death penalty, and formulate a definition that is consistent with that promulgated by Justice Powell.

Although the majority of courts interpreting Ford have concentrated on the procedural aspects of its ruling, see, e.g., Evans v. McCotter, 805 F.2d 1210, 1212-13 (5th Cir.1986), the courts that have focused upon the eighth amendment analysis have largely agreed with Justice Powell. In Johnson v. Cabana, 818 F.2d 333, 336 (5th Cir.1987), the court interpreted Ford as prohibiting the execution of a defendant who "could not perceive the connection between his crime and punishment." This is a direct quote from Justice Powell's concurrence. See Ford, 106 S.Ct. at 2608-2609.

The Supreme Court denied certiorari on the Cabana case. See Johnson v. Cabana, --- U.S. ----, 107 S.Ct. 2207, 95 L.Ed.2d 861 (1987). Justices Brennan and Marshall dissented, and in so doing shed some light on the Ford opinion. For the first time, these

justices who penned the plurality opinion interpreted Ford as holding that the eighth amendment bars execution of convicted prisoners found to be not only insane but incompetent. cabana, 107 S.Ct. at 2207. Justices Brennan and Marshall then went on to adopt the mental state Justice Powell considered protected by the eighth amendment. Id. (citing Ford, 106 S.Ct. at 2608-2609).

While these cases may be persuasive on the point that the eighth amendment only protects a prisoner with the mental state espoused by Justice Powell, his view cannot be blindly accepted for it was far from majority acceptance. Some other indicia must be found to show that the Powell position is consistent with the eighth amendment. For this court, these indicators are the policies supporting the constitutionality of capital punishment.

At its bare minimum, the eighth amendment guarantees to a condemned prisoner that the state cannot enforce a capital sentence if to do so "does not 'measurably contribute' to one or both of the two social purposes which this court has accepted as justifications for the death penalty." See Enmund v. Florida, 458 U.S. 782, 799, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982); see also Tison v. Arizona, 481 U.S. ---- 107 S.Ct. 1676, 1695-96, 95 L.Ed.2d 127 (1987) (Marshall, J. dissenting). The death penalty serves two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. See Enmund v. Florida, 458 U.S. at 798, 102 S.Ct. at 3377 (citing Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976)). Unless this connection exists, imposition of the death penalty " 'is nothing more than the purposeless and needless imposition of pain and suffering.' " See Enmund, 458 U.S. at 798, 102 S.Ct. at 3377 (citing Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977)).

The two purposes behind the death penalty were discussed in great detail in the Supreme Court's landmark decision in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The Gregg court first dealt with retribution. The Court believed that capital punishment "is an expression of

society's moral outrage at particularly offensive conduct." Id. 428 U.S. at 183, 96 S.Ct. at 2930. The Court found that capital punishment is essential in an ordered society because it allows citizens to rely on legal processes rather than self-help to vindicate their wrongs. Id. In support of this position, the Gregg Court noted that the instinct for retribution is part of the nature of man. The Court believed that channeling this instinct into the administration of criminal justice serves an important purpose in promoting the stability of society governed by law. Id. The court concluded that " 'when people begin to believe that organized society is unwilling or unable to impose upon a criminal defendant the punishment they 'deserve' then there are sown the seeds of anarchy--of self- help, vigilante justice and lynch law." Id. (quoting Furman v. Georgia, 408 U.S. 238, 308, 92 S.Ct. 2726, 2761, 33 L.Ed.2d 346 (1972)). The Court found this position to be consistent with our respect for the dignity of man, for capital punishment is nothing more than "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Id. 428 U.S. at 184, 96 S.Ct. at 2930.

The Gregg court then dealt with the deterrence purpose. The court found that for many offenders "the death penalty undoubtedly is a significant deterent." Id. 428 U.S. at 185-186, 96 S.Ct. at 2931. The court admitted its deterent effect for murderers who act in the act of passion is probably pretty little, but the effect for those carefully-contemplated murders, such as murder for hire, is probably great. Id. at 186, 96 S.Ct. at 2931.

Under this precedent, a state can only execute a condemned prisoner if it contributes to these goals. This court, therefore, must determine what type of mental state a prisoner must have so that his execution "measurably contributes" to these goals.

The court first examines this question in light of the death penalty's retributive aspects. As the court stated in Gregg, the

retributive purpose has two components. The first is the just desserts argument which is nothing more than society's belief in the eye-for-an-eye theory. The second is the channeling-of-anarchy proposition.

In order for the just-desserts theory to be fulfilled, a defendant must appreciate the connection between his crime and punishment. An essential part of the punishment society imposes on a defendant is to make the defendant realize and live with the concept that he will die for what he did. In many respects, the execution of a prisoner who does not have this appreciation is a lesser punishment than society intended to give. Accordingly, if retribution is to be served by the death of a condemned prisoner, the prisoner must at least have this realization. Under the previous analysis, therefore, if a prisoner does not have this realization, and the state executes him, the eighth amendment is violated.

The execution of a prisoner without this understanding also would do a disservice to the second aspect of retribution: the channeling of anarchy. At its heart, the channeling-of-anarchy theory advocates that the state, in an ordered, rational fashion, can administer the punishment society desires, and, therefore, avoid the anarchy that would naturally arise if society itself haphazardly imposes discipline. The execution of a person who does not appreciate the connection between his crime and punishment is nothing more than an unrestrained act of violence. This punishment would defeat the administrative organization of justice that is at the heart of the channeling- of-anarchy theory. Administration of justice in this fashion "would make capital punishment look less like a guarantee of rational order and more like the instrument of terror and social catharsis that it is." Note, Leading Cases: Ford v. Wainwright, The Death Penalty and The Execution of Insane, 100 Harv.L.Rev. 100, 106 (1986).

If the defendant appreciated the connection between his crime and punishment, however, the state's imposition of the death penalty would be consistent with the desired punishment society would like to have

imposed. The natural instinct of man and society for retribution would be administered in a organized fashion. The execution of a defendant with this state of mind serves the retributive purpose for the death penalty, and, therefore, is consistent with the eighth amendment.

Similar to this retributive purpose analysis, the execution of a prisoner without an appreciation of the connection between his crime and punishment would be a disservice to the deterrence aspect of capital punishment. The essence of this deterrence purpose is the rational concept that if you do this act society considers heinous you will be killed; that is, society will make you an example to others so that their acts conform to the accepted standards of humanity. The execution of a person who cannot appreciate the connection between his crime and punishment would be tantamount to an act of inhumanity. This violence would be the killing of a person who had no idea why the state was killing him. This action would be nothing more than an efficacious function indicating that the state absolutely controls life and death within its borders. Such arbitrary, inhuman action would deter no one. Potential offenders would rationalize that the state may capriciously take my life anyway, so I might as well commit this offense.

If both purposes behind the death penalty are to be served, and, therefore, the sentence is to be carried out in accordance with the eighth amendment, the defendant must at least appreciate the connection between his crime and punishment. This appreciation consists of both a subjective and objective part. The subjective part is nothing more than the defendant's perception of the connection between his crime and punishment. A defendant must understand the fact he committed his crime and the fact that he will die at a specific time and place. A defendant must also understand the basic and fundamental logical proposition that because he has committed an act that society and all civilized humanity finds heinous he is to be killed. The objective aspect of this realization test is relatively straightforward. This concept determines

whether the defendant's subjective understanding is grounded in reality; that is, is rational.

This appreciation of the connection between crime and punishment is very similar to Justice Powell's "perceives the connection" requirement. The terms "perception" and "appreciation" necessarily imply a similar understanding. Moreover, while appreciation and perception are inherently subjective terms, when an individual perceives or appreciates a cognitive connection between two factual concepts, a small objective understanding developes.

A possibility exists, however, that the appreciation test may not be fully consistent with all of Justice Powell's reasoning. Powell believed that the eighth amendment forbids the execution of condemned prisoners who are unaware of the punishment they are about to suffer and why they are to suffer it. Justice Powell's use of the term "why" may imply that some sort of explanation is necessary in order to serve the purposes behind the eighth amendment. To serve the policies behind the death penalty, no explanation is necessary. The defendant should only understand that he committed a crime that society finds offensive and because of it, he is to be punished by death. For eighth amendment purposes, the defendant is not entitled to a detailed explanation of death. Moreover, the defendant is not even entitled to an explanation as to why society (and, obviously, not himself) perceives the offense he committed to be heinous enough to deserve death as punishment. The court believes that Justice Powell's term "why" can be read to be consistent with these viewpoints, and, hence, the appreciation of the connection between the crime and punishment definition is very similar to Justice Powell's viewpoint.

This meaning of insanity is also consistent with the recent pronouncements of the American Bar Association concerning this topic. In August 1987 the ABA proposed some standards for the determination of competence to be executed. See American Bar Association, Criminal Justice Standards: Criminal Justice Mental Health Standards--Competence and

Capital Punishment, Standard 7-5.6. (b) (August, 1987). The ABA noted that its proposed standards were selected "to reflect the substantive concern that individuals should not be executed when they lack the capacity for rational understanding of the nature of the proceedings or the penalty that is about to be imposed." Id. (Comment). To the extent that this rational understanding of the nature of the penalty requires a realistic appreciation, the ABA standard conforms with the appreciation definition.

In many respects, the appreciation of the connection definition is very similar to the factual and rational understanding requirements that the Supreme Court established in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). In Dusky, the Supreme Court considered the competency to stand trial requirement of 18 U.S.C. s 4244. The court adopted the view put forth by the Solicitor General that it was not enough for the district judge to find that " 'defendant (is] oriented to time and place and [has] some recollection of events.' " Id. The court noted that the test should be "whether the [defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-- and whether he has a rational as well as factual understanding of the proceedings against him." Id.

Much as the meaning of insanity here promotes the interest behind the eighth amendment in the capital punishment context, the test proposed in Dusky was designed to safeguard certain constitutional protections. The test insures that an incompetent person will not be tried, a prohibition that "is fundamental to an adversarial system of justice." Drope v. Missouri, 420 U.S. 162, 171-172, 95 S.Ct. 896, 903-904, 43 L.Ed.2d 103 (1975); accord Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); Dix v. Newsome, 584 F.Supp. 1052 (N.D.Ga.1984). In addition, the test proposed in Dusky protects "an accused's fifth and sixth amendment rights to a fair trial and effective assistance of counsel." United States v. Swanson, 572 F.2d 523, 526 (5th Cir.1978) (citing Wilson v. United States, 391 F.2d 460 (D.C.Cir.1968).

Because the Dusky standard was developed in a similar context, the definition's particular components are somewhat comparable to those here. While the condemned prisoner need not understand the nature of the collateral death penalty proceedings, the eighth amendment does require a limited factual understanding, which must be combined with an even more limited rational understanding.

Because of these similarities, the judicial interpretations of the Dusky definition are of limited, but useful guidance to applying the appreciation standard. Of particular importance here are the decisions that attempt to define the term "rational" and that tie in the Dusky test with the science of psychology.

The courts that have interpreted the Dusky term "rationality" have done so in a similar manner as this court does today. "Rationality from a standpoint of competence is not determined by foolishness or wisdom." Sweezy v. Garrison, 554 F.Supp. 481, 492 (W.D.N.C.1982). In addition, a defendant's irrationality cannot be defined in terms of acting against his or her interests. The term "rationality" must not be devoid of common ordinary understanding. See United States v. Blohm, 579 F.Supp. 495, 499 (S.D.N.Y.1983). For this reason, courts have found that the rationality to be demonstrated "is that of an objective rationality what would be regarded as rational to the average person." Id. These authorities support the objective portion of the appreciation definition.

The courts that have interpreted Dusky are in uniform agreement that incompetency to stand trial is not defined in terms of mental illness. See United States v. Zovluck, 425 F.Supp. 719, 721 (S.D.N.Y.1977). For this reason, a defendant can be found incompetent to stand trial without being mentally ill. Id. Accordingly, psychiatric evaluations serve only as recommendations in making the final judgment. Id.

Moreover, courts have been careful to distinguish incompetency to stand trial from a mental illness that absolves the defendant of criminal liability. A defendant may be competent to stand trial even though he had a

> mental disease. That mental disease may have been the cause of his criminal act and he may still be suffering from the same disease does not necessarily mean that the defendant is incompetent to stand trial. See Lee v. Alabama, 386 F.2d 97, 110 (5th Cir.1967) (Bell, J., dissenting). The Fifth Circuit reached a similar result in McCune v. Estelle, 534 F.2d 611 (1976). In McCune, the defendant had a life-long history of severe mental deficiency and bizarre, volatile, irrational behavior. Id. at 612. Defendant had been adjudged feeble-minded and he consistently scored at very low levels on mental capacity tests. Nonetheless, the court held that low intelligence and weird behavior cannot be equated with incompetency to stand trial. Id.; accord United States v. Hearst, 412 F.Supp. 858, 859 (N.D.Cal.1975).
>
> A court, however, need not thoroughly divorce itself from considering the defendant's mental condition. To adequately apply the Dusky standard, a court must thoroughly acquaint itself with the defendant's mental condition. See United States v. Makris, 535 F.2d 899, 907 (5th Cir.1976). Once a court obtains a medical description or classification of defendant's illness, it still has further work to do. Id. The court must analyze the medical and other evidence to arrive at a legal conclusion. Id.

<u>Martin</u>, 686 F.Supp. at 1566-72 (footnotes omitted). Judge King specifically found that neither this Court nor the state circuit court had complied with <u>Ford</u>:

> As evidenced from the record, Florida did not apply properly the appreciation standard. Both Judge Fagan and the Florida Supreme Court claimed to have followed the standard espoused in Fla.Stat. s 922.07 (1987). This section defines competency as "does the defendant understand the nature and effect of the death penalty and why it is to be imposed upon him?" Id. While section 922.07's requirements are sufficient to satisfy the eighth amendment, the Florida courts applied section 922.07 in a

constitutionally impermissible manner. Section 922.07's requirements are sufficient to satisfy the dictates of the eighth amendment. As noted earlier, this definition, being very similar to that of Justice Powell, has the required subjective and objective components. If a Florida court found a condemned prisoner competent under this definition, the state could execute him without violating the eighth amendment. Neither Judge Fagan nor the Florida Supreme Court, however, properly applied the statute. Judge Fagan found Martin competent because Fagan believed that Martin understood the nature and effect of the death penalty and why it was to be imposed upon him. Fagan Transcript at p. 88. He premised this finding only upon Martin's factual understanding. Judge Fagan did not determine whether Martin's understanding was grounded in reality. Fagan refused to consider whether Dusky had any relevance. Fagan Transcript at p. 90. He only noted that a rational understanding did not equal rational explanation. Fagan Transcript at p. 90. He did not further explain this conclusion, let alone apply it to the facts before him. In Martin v. State, 515 So.2d 189, 190 (Fla.1987), the Florida Supreme Court not only indicated that Fagan ruled based solely on a factual understanding, but found that this mental state was all that was required. The court noted that the evidence before Judge Fagan "clearly show[ed]" that Martin was competent. Id. The court made this finding even after assuming that Dr. Lewis' conclusions that Martin lacked a rational understanding were true. Id. In essence, the court found that any rational understanding was not required. Moreover, the court specifically held the Dusky standard inapplicable. Id. Accordingly, the court found the "mere fact that Martin believes that a satanic conspiracy resulted in his conviction does not override his understanding of why he is being executed." Id. (emphasis added). Such a statement indicates that the Florida Supreme Court believed only a factual understanding was necessary, for this belief of Martin may have some bearing on the objective aspect of the eighth amendment here.

Martin, 686 F.Supp. at 1573 n. 23. Judge King's ruling referred to the interim rule. The permanent rule, at issue here, has no rationality component. The present standard is thus less consistent with Ford than the standard Judge King found inadequate!

Here, Judge Conrad has failed to follow Ford. He did not address whether Mr. Medina's "understanding was grounded in reality." He did not address in any fashion the concept of "rationality." Without considering this component of the competency standard, Judge Conrad erred; the Eighth Amendment has been violated; and the matter must be remanded for further proceedings.

ARGUMENT III

ERRONEOUS RULINGS OF THE LOWER COURT DEPRIVED MR. MEDINA OF A FULL AND FAIR HEARING IN VIOLATION OF HIS RIGHTB UNDER FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND FORD V. WAINWRIGHT.

Florida Rule of Criminal Procedure 3.812 (1996), the rule governing proceedings in circuit court to determine a condemned person's competency to be executed, gives the circuit court considerable flexibility in conducting the hearing.

> (d) Evidence. At hearing held pursuant to this rule, the court may admit such evidence as the court deems relevant to the issues, including but not limited to the reports of expert witnesses, and the court shall not be strictly bound by the rules of evidence.

Fla. R. Crim. P. 3.812(d). Here, however, the lower court's evidentiary rulings were inconsistent, violated the spirit of the rule, and in some cases were nothing short of bizarre. A hearing

conducted under such conditions can never be full and fair; indeed the conduct of this hearing violated due process and Ford v. Wainwriaht.

The lower court's inconsistent rulings reached their zenith in the court's order denying Mr. Medina's motion for rehearing. Mr. Medina raised several points that were relevant to the court's findings denying relief under Rule 3.811. However, the lower court took umbrage at the mere act of filing a rehearing motion, stating that, "Nowhere within rule 3.812 is there any provision which permits a defendant, or counsel on his behalf, to file a motion for rehearing." (PC-R3. 4293). The court is technically correct. Yet the rule gives the circuit court the authority to do what is "appropriate and adequate for a just resolution of the issues presented," including the authority to "enter such orders as may be appropriate to effectuate a speedy and just resolution of the issues raised." Fla. R. Crim. P. 3.812(c). It stands to reason that if the court may grant orders that are not specifically delineated in Rule 3.812, then counsel may move for such orders. See Fla. R. Civ. P. 1.100(b)("An application to the court for an order shall be by motion . . . ").

The circuit court next took issue with the purpose of Mr. Medina's rehearing motion, accusing Mr. Medina of trying to distort the issue before the court (PC-R3. 4293). The court also accused Mr. Medina of trying to "discuss 'evidence' that was never introduced at the hearing," "introduce evidence for which

no predicate establishing the admissibility thereof was shown at the hearing," "introduce evidence which Defendant's counsel either failed to introduce or decided not to introduce at the hearing," and "introduce evidence which has absolutely nothing to do with the issue before the Court, or for that matter, this case." (PC-R. 4293).

The court's order denying rehearing, with it emphasis on Mr. Medina's perceived failure to adhere strictly to the rules of evidence, violates both the letter and the spirit of Rule 3.812(c) & (d). The entire process envisioned by Rule 3.812 is a proceeding where the rules are relaxed so that the search for the truth may proceed unimpeded. Both Mr. Medina and the State have a compelling interest in ensuring that Mr. Medina is not executed while he is insane. Yet, despite the fact that this hearing was supposed to be a search for the true state of Mr. Medina's capacity to understand the fact of the pending execution and the reason for it, the circuit court rejected out of hand any evidence offered or proffered by Mr. Medina that did not meet the strict rules of evidence.

Mr. Medina attached several items to his motion for rehearing, items that counsel believes are relevant to the issue of whether Mr. Medina has the capacity to understand the fact of the pending execution and the reason for it. Mr. Medina attached medical records from Florida State Prison from January 14, 1997, indicating that Mr. Medina was seen in the clinic at 21:58 hours for "alleged assault" (PC-R3. 4024). The nurse's notes indicate

Mr. Medina claimed "Sgt. jumped me" Id. The doctor described Mr. Medina's injuries as abrasions on the forehead and swelling of the left eye, and swelling and abrasion of the right wrist (PC-R3. 4026). These medical records are important information because they rebut the affidavit of Officer Padgett.

Assistant State Attorney Paula Coffman provided affidavits to Doctors Gutman and Mings on the day they evaluated Mr. Medina. Those affidavits were not provided to defense counsel. In fact, defense counsel did not see the affidavits until the morning of the evidentiary hearing (H2. 5-7). One of the affidavits was from Officer Charles Padgett, who said that after Mr. Medina returned from Orlando after the first of the two hearings he attended in January, 1997, Mr. Medina was very upset and was pacing in his cell. Officer Padgett stated that Mr. Medina at that point made an inculpatory statement (PC-R3. 3177).

Mr. Medina attended two hearings in January, on January 14 and January 20. The first of the hearings was, therefore, on January 14, 1997. Thus, Officer Padgett alleged that Mr. Medina made this inculpatory statement when he returned from Orlando on the evening of January 14. Yet Officer Padgett never saw the injuries that Mr. Medina sustained before he returned to his cell and allegedly made the inculpatory statement to officer Padgett.

Defense counsel attempted to introduce the records in rebuttal to Officer Padgett's testimony. The lower court sustained the State's objection to the admission of the records. Defense counsel twice attempted to proffer the records to

preserve the issue for appeal, but the court refused to accept counsel's proffer. Counsel also attempted to elicit from counsel Schardl that Mr. Medina had told him about the night he returned from Orlando after the January 14 hearing, and that Mr. Medina claimed he had been beaten up. The State objected to the whole line of questioning, and the lower court sustained (H2. 934). Defense counsel asked to proffer the medical records for the record, but the court refused to accept the proffer (H2. 934-35). The records are in the record on appeal only because defense counsel provided them to Dr. Gutman and Dr. Mings, and pursuant to the court's order, filed everything with the Clerk of Court in Bradford County.

The court also refused to hear a proffer regarding defense counsel's communications with Mr. Medina about this Court's ruling on February 10, 1997. Correctional officers testified that Mr. Medina reacted to the news that he had "lost" in the Florida Supreme Court. (H2. 907). Mr. McClain attempted to proffer Mr. Schardl's testimony that he had told Mr. Medina that he had won in the Florida Supreme Court, and that he had won an evidentiary hearing (H2. 940-41). The court refused to accept that proffer either. Refusing to accept a proffer of evidence is error because it precludes full and effective appellate review. Piccirrillo v. State, 329 So. 2d 46, 47 (Fla. 1st DCA 1976).

Mr. Medina's counsel filed a request for witness list prior to the start of the evidentiary hearing, The court denied the defense request. Denying Mr. Medina discovery left his counsel

ill-prepared to respond to the state's case, particularly under the time parameters in place. The court's rulings regarding the proffered rebuttal evidence compounded the problem.

The circuit court refused to accept into evidence a transcript of the testimony of Dr. Joyce Carbonell at the 1988 evidentiary hearing on the Rule 3.850 motion (H2. 685). The court also refused the accept into evidence the report of Dr. Marina from 1987 that had been entered into the record of the 1988 evidentiary hearing (H2. 684). Both items offered had been made part of the record of the 1988 3.850 proceedings. Both items were relevant to the issue of Mr. Medina's mental state through time. In the search for truth regarding Mr. Medina's competency to be executed, Dr. Carbonell's testimony and Dr. Marina's report must be considered if Mr. Medina is ever to meet the burden imposed on him by clear and convincing evidence.

The court erred in denying Mr. Medina's request to present each of the nineteen death row inmates defense counsel sought to call to the stand. By limiting defense counsel to six inmates' live testimony, the court defeated Mr. Medina's ability to carry his burden by clear and convincing evidence. At the same time, the State was in no way impeded from calling as many correctional officers as it wished to testify. Because Mr. Medina was dependent upon the court to grant his motion for writs of habeas corpus ad testificandum, the court's ruling impeded Mr. Medina's efforts to carry his burden by clear and convincing evidence.

Defense counsel objected on Mr. Medina's behalf to the lower court's substitution of Dr. Gutman for Dr. Alan Berns and Dr. Jeffrey Danziger. The basis for the objection was information obtained from Orange County attorneys that Dr. Gutman was prosecution-oriented, while the two doctors removed from the order were reputed to be more balanced in their biases. The court never addressed Mr. Medina's objection. The error of replacing Doctors Berns and Danziger with Dr. Gutman was compounded by the court's erroneous (and inconsistent) rulings prohibiting defense experts from commenting on the findings of the court's experts (H2. 352).

Mr. Medina's motion for rehearing also referred to the most recent reports of the Correctional Medical Authority regarding psychological services at Florida State Prison and Union Correctional Institution. These reports became relevant when the lower court found significant the testimony of Superintendent Ron McAndrew that Mr. Medina was classified "S-1," meaning he could hold any job in the prison (H2. 918). Prior to receiving the lower court's ruling, Mr. Medina had no notice that the "S-1" classification would be relevant. Dr. Mings referred to the S-1 classification in his report (PC-R3. State Ex. 1), but Dr. Mings failed to serve a copy of his report on defense counsel as ordered by the court; consequently defense counsel did not see Dr. Mings' report until the morning the evidentiary hearing began. Despite these facts, the lower court ruled, "The proper

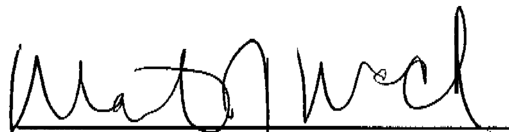
time to attack this classification was on cross examination, not in a motion for rehearing." (H2. 4295).

In its conduct of the evidentiary hearing, the lower court placed form over substance, in contravention of the letter and spirit of Rule 3.812. In so doing, the court compromised Mr. **Medina's** ability to carry his burden by clear and convincing evidence. In these circumstances, the evidentiary hearing held below was not full and fair, and the resulting competency determination must be vacated and remanded for further proceedings.

CONCLUSION

Based upon the foregoing and upon the record, Mr. Medina urges the Court to grant a stay of execution, **vacate** the order of the circuit court, and remand for proceedings consistent with *Ford*, *Martin*, the Fifth, Eighth and Fourteenth Amendments, and the Ex Post Facto Clause.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by facsimile transmission and United States Mail, first class postage prepaid, to all counsel of record on March 14, 1997.



MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director

JENNIFER M. COREY
Florida Bar No. 0999717
Assistant CCR

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Kenneth S. Nunnelley
Assistant Attorney General
444 Seabreeze Boulevard
5th Floor
Daytona Beach, Florida 32118