CASE NO. 91,216

EDWARD CASTRO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA

CORRECTED
INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Marion County Circuit Court's orders granting Mr. Castro's Motion to Discharge Attorney, Mr. Castro's ore tenus motion to withdraw motion for postconviction relief, and Mr. Castro's ore tenus motion to withdraw motions to compel public records under Chapter 119, Florida Statutes.

References to the Record on Appeal will be symbolized by "R.", and references to the Supplemental Record on Appeal will be labelled as such.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND FACTS

Edward Castro was born in El Centro, California. As an infant, Edward was hospitalized 4 times for bowel problems and dehydration. He was a very sick infant and required alot of special case. His mother indicated that he was born prematurely and had difficulty achieving early developmental tasks. He could not walk until age two. Through childhood, he suffered from poverty, neglect and social alienation. At age two, his parents divorced. Brigado Castro, Edward's father, had been abusive toward Edward's mother and had a drinking problem. Edward did not see his father again till he was an adult. Edward and his siblings were frequently left alone. From age 2-4, Edward was sent by his mother to Tijuana, Mexico to be cared for by acquaintances who physically abused and neglected him and his siblings. At age three, Edward began consuming alcohol given to him by the Tijuana caretakers (PC-R. 2801-11).

At age 4, Edward's mother remarried to Bill Minor. Bill was also an alcoholic, like Edward's mother. The children would frequently be left in the car while their mother and step-father drank. Id.

Sometime between the ages of four and eight, Edward was physically and sexually abused by an uncle and cousin. Edward was forced to perform sexual acts and to engage in incest with his sister, Edward's uncle reportedly slammed a car trunk on Edward's head when he was six. Edward began to suffer from

severe headaches and to have nightmares. At age 8, Edward was reportedly also molested by a babysitter. Id.

Edward completed the 8th grade. However, Edward, one of the only Mexican-American males attending an all white suburban high school, suffered alienation, became extremely introverted and dropped out of high school. Edward had been suspended many times from school and often locked himself in the house refusing to come out. Id.

At 17, and at the urging of his father, Edward joined the U.S. Marine Corps. Castro began drinking heavily and about this time his mother and step-father broke up. Five months later, he deserted his Marine post and was convicted and sentenced for auto theft and reckless driving in Canada. Upon release, he was apprehended by the FBI and eventually sentenced to 6 months for desertion. Id.

At age 23, Edward married Darlene Castro and had two sons. Edward made an effort to afford the family a stable home life and stopped drinking for one year by attending AA meetings. But eventually his alcoholism relapsed. His drinking was a factor in his subsequent troubles. He was cut in fights which occurred while he was drinking and he had one serious car accident in which he suffered a head injury. He began suffering alcoholic blackouts. At one point, he reentered rehab. Id.

At 28, Edward and Darlene divorced. Following the divorce, Edward suffered a mental breakdown and cut his wrist. His mother

almost had him committed to a mental institution. At 29, he again entered a substance abuse treatment program. Id.

From age 31-36, Edward lived on and off with Shirley Castro, who became his common-law wife in California. According to Shirley, when Edward was not on drinking binges, he engaged in excessive cleaning rituals. Shirley observed that Edward had another personality when he was in a drunken state and that he in his alcoholic blackouts, he even called himself by another name, Tony Valdez. Edward suffered numerous additional head injuries as a result of assaults suffered by police and other men. Id.

Mr. Castro has been diagnosed with Dependent Personality Disorder (1982); Chronic Alcohol Abuse in Remission (1982); Borderline Personality Disorder (1987); Mild Depression (1987); Mixed Personality Disorder (1988); Alcohol and Drug- Addicted Personality (1988) Adjustment Disorder (1989); Organic Brain Syndrome (1990); Post-Traumatic Stress Disorder (1990); Advanced Chemical Dependency (1990) Memory Disorder (1990); and Mild to Moderate Cortical Dysfunction (1993) (PC-R2. 2799-2800).

At age 36, Mr. Castro was indicted by the grand jury on January 29, 1987 (R. 2517) and charged with first-degree murder and robbery with a deadly weapon.

Jury trial commenced January 19, 1988. Mr. Castro was found guilty of both counts. The jury recommended the death penalty by a vote of 10 to 2. The trial court sentenced Mr. Castro to death but this Court vacated that sentence and remanded for resentencing due to the failure of the trial court to instruct

the jury that they could consider non-statutory mitigating factors and the erroneous presentation and admission of irrelevant and presumptively prejudicial testimony of collateral crimes. Castro v. State, 547 So. 2d 111 (Fla. 1989).

At the resentencing, the jury recommended the death penalty by 8 to 4. On September 4, 1990, the trial court sentenced Mr. Castro to death however this Court vacated the sentence and remanded the matter for resentencing because the trial court erred in refusing to disqualify the Fifth Judicial Circuit State Attorney's Office. Castro v. State, 597 So. 2d 259 (1992).

At the second resentencing in February, 1993, the jury recommended the death penalty by 8 to 4. On April 12, 1993, the trial court sentenced Mr. Castro to death (R3. 317-28). This Court affirmed the sentence on September 8, 1994. Castro v. State, 644 So. 2d 987 (Fla. 1994). Appellate counsel did not file a Petition for Writ of Certiorari on any guilt or penalty phase issues. Mr. Castro's conviction and sentence became final in December of 1994 nearly eight years since his arrest.

On December 27, 1994, Mr. Castro wrote a letter to Capital Collateral Representative Chief Assistant Martin J. McClain (PC-R2. 2705). In said letter, Mr. Castro requested that the work on his case be placed "in your office, and proceed as such - a Writ of Habeous [sic] Corpus be submitted to the U.S. Supreme Court for review of the one issue pertaining to Motion to Suppress all statements made by me during the interrogation period after my arrest!" (PC-R2. 2705).

On January 29, 1995, Mr. Castro wrote CCR Chief Assistant M.J. McClain stating:

> "I am reqgesting representation by your office of C.C.R. on the followins . . . "
> "I am waiving Certiorari, 3.850 in the state level and wish to move forward to the Federal District Court on a writ of Habeas Corpus concerning one issue of my appeal - Motion to Suppress! !"
> "Should your Coalition choose not to file the Writ of Habeous [sic] Corpus for me, please send me an address to the court which I can file to for representation."

(PC-R2. 2706).

On February 8, 1995, Mr. Castro wrote Capital Collateral Representative, Michael Minerva stating:

> This is to inform you that I spoke with both Theresa Walsh, and Martin McClain. I instructed them both that I am waiving, Certiorari & 3.850, Post Conviction Relief in the state level.
> I choose to move forward on a federal Writ of Habeous Corpus concerning one trial issue, Motion to Suppress, and filing it in the Federal District Court.
> Mr. Minerva, I do not wish to wait in line for representation to be assigned to me by CCR - I am requesting lawyers be assigned to help me file this Writ of Habeous Corpus, immediately. I wish to have the Writ in the Federal District Court before Sept. 95! If your office wishes not to participate in my waiving of the state procedure, please let me know, immediately!
> Should I have problems in obtaining representation for the filing of the federal writ of Habeous Corpus I will stop all appeal immediately.
> Sir, please assign a lawyer immediately to represent me in this legal maneuver!

(PC-R2. 2707-08).

Then around March 9, 1995, Mr. Castro wrote Assistant CCR, Jennifer Corey, stating:

> Ms. Corey, here is the package permit. Thank YOU for your assistance in all things!!
>
> My apology for the tangent in our discourse this last meeting. My decision to proceed as I am is a firm decision, thus my emotions. I do appreciate your assistance, and want to meet with you soon, if you're willing? I still have need for legal advice concernins the 3.851, (papers to file pro se?)

(PC-R2. 2709).

On March 22, 1995, Mr. Castro wrote Capital Collateral Representative, Michael Minerva stating:

> I've received copies of both your filing a Motion for Extension of Time, on behalf of me, in the Florida Supreme Court, on Mar. 15, 1995, case No. 81,731 and the State's response opposing this action.
>
> Sir, I noted, your office never informed me of this intention, nor did you send a copy to me -- Mr. Richard B. Martell Esq. Chief, Cap. Appeals, Fla. Bar No. 300179, Office of Attorney General did furnish me with a copy of the response of the State.
>
> I do not appreciate your office filing motions on my behalf without consulting me. Our decision has, been made, your office will not represent me, I relieve your office of all legal responsibilities concernins my appeal.
>
> Mr. Minerva, I have written a letter to Mr. Richard B. Martell and the Office of the Attorney General informing them of my wish to waive 3.850 - under Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). I waive the right to a 3.850 motion - and have asked his office to present to the Fla. Sup. Court my desire to relieve your office of anv responsibilities concernins mv appeal. Also that the filing of this motion for extension of time, by your office, was done without my permission or request.

> Sir, a copy of the letter which I've mailed to the Attorney General's Office will arrive at your office.
>
> Again, your office does not represent me. I do not want representation from your office, You're office is deceptive and self serving. I am firm with my decision to waive all collateral remedies in state level courts.

(PC-R2. 2711-12).

Then on March 22, 1995, Mr. Richard Martell, Chief, Capital Appeals, Office of the Attorney General, filed a letter from Mr. Castro stating:

> I am in receipt of the State's Response to Motion for Extension of time, Etc./Motion to Strike.
>
> Sir, thank you for this copy! I am writing this letter to inform you that C.C.R. is not authorized by me to represent me in any manner. I have dismissed them of any responsibilities concerning my appeal.
>
> Mr. Martell, you may present this letter to the court - "I am competently waiving 3.850 or any potential remedy from state level courts. I do not need an extension for filing 3.850. I have no intention of filing 3.850 and am prepared to move forward,
>
> Under Durocher v. Singletary, 623 F\So. 2d 482 (Fla. 1993) I Edward Castro invoke my right to waive 3.850 and further state remedies!
>
> Mr. Martell, I am interested in being advised as to how to formally effectuate waivers of any collateral remedies. I desire to waive! Which Circuit Court has jurisdiction over my appeal? Please send the address, and if possible advise me on procedures to formally invoke my rights to waive collateral remedies.
>
> I Edward Castro #110488 move this Honorable Court to strike the instant motion for extension of time by C.C.R. - they are asking for an extension on time on a motion of 3.850 that will never take place. A) They do not represent me by my choice, B) I waive 3.850 under Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993) competently.

I make above proposals without coercion, and competently.

(PC-R2. 2712-13).

The Capital Collateral Representative's (CCR's) request for an extension of time to designate counsel was denied on May 9, 1995 by this Court and the Court ordered the pleadings under Rule 3.850 and 3.851 be filed on or before March 20, 1996. Castro v. State, No. 81,731 (Fla. May 9, 1995) (order granting extension of time).

Mr. Castro was provided collateral counsel who began requesting and obtaining public records, conducting an investigation, and interviewing Mr. Castro. Mr. Castro agreed that public records should be obtained and provided a signed release to his attorney and investigator. Mr. Castro met with his collateral counsel and investigator numerous times and was consulted regarding the investigation and litigation.

In September of 1995, public records requests were made on the Office of the State Attorney for the Fifth Judicial Circuit. Mr. Castro's investigator had numerous conversations with representatives of the SAO and was informed that no files existed in their office due to the assignment of the case to the Office of the State Attorney for the Seventh Judicial Circuit.

On October 9, 1995, Mr. Castro's investigation requested records from the Seventh Circuit SAO, on the 16th and 18th the investigator called the Office and because the records department could not find the request, re-faxed it. On the 24th, the records department called to say that the Deland (Volusia County)

Office had sent the file to the Fifth Circuit SAO in Ocala (Marion County) at their request and that only now did she have it back from Mr. Brad King, the State Attorney for the Fifth Circuit. The records department promised to call when the file was copied.

On October 24th, collateral counsel also received a letter from the Fifth SAO stating that the files had been sent to the Seventh Circuit SAO pursuant to the Special Order of the Governor.

On October 31, 1995 the Seventh Circuit SAO called to say the file of 2200 pages was copied. After negotiations over the State's request for prepayment, the file was received on December 18, 1995. In the records received were the following receipt prepared by the Fifth Circuit SAO and on their letterhead, signed by an Assistant State Attorney for the Seventh Circuit SAO:

> May 19, 1992
>
> RE: STATE OF FLORIDA VS EDWARD CASTRO,
> CASE NO: 87-119-CF
>
> RECEIPT FOR THE CASTRO FILE FROM THE STATE ATTORNEY'S OFFICE OCALA, FLORIDA, TO THE OFFICE OF THE STATE ATTORNEY, SEVENTH CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA, PURSUANT TO GOVERNOR'S ASSIGNMENT.
>
> TOTAL OF 4 BOXES.
>
> /s/
> _____
> ASSISTANT STATE ATTORNEY
> SEVENTH CIRCUIT
> VOLUSIA COUNTY

(PC-R. 696). This document was evidence that the Fifth Circuit SAO compiled a very large file before they transferred the case to the Seventh Circuit SAO for resentencing, yet collateral counsel had only received 2200 pages or 2 boxes of materials.

This document of communication from the Fifth Circuit SAO to the Seventh Circuit SAO after the files were received by the Seventh Circuit SAO a week previously was also found:

INVESTIGATION REPORT

TO: RICHARD WHITSON, ASA DATE: 5/27/92

FROM: DOUG WOODALL, SAI FILE #CF87-119, 5TH CIRCUIT

RE: EDWARD CASTRO

SYNOPSIS:

Per your instructions, I went throush all of the materials in each of the four case file boxes regarding Castro. I removed all handwritten notes; however, I did leave some annotated typewritten pages due to their being so many. If you want all of these removed as well, please advise.

/s/ D.S. Woodall

(PC-R. 697). This document evidences that the Fifth Circuit SAO culled its handwritten notes from its file prior to transferring its files to the Seventh Circuit SAO for resentencing.

On January 26, 1996, undersigned collateral counsel wrote the Seventh and Fifth Circuit SAOs requesting the missing materials. On February 7, 1996, a reply was received stating the SAO for the Fifth had no additional information. On February 16,

1996, a reply was received stating that the SAO for the Seventh had sent everything.

On January 18, 1996, Mr. Castro wrote Assistant CCR, Sylvia Smith stating:

> Recently I received a letter from my mother, Angel V. Minor, stating that an investigator by the name of Formosa intends to meet with her and members of my family. Why was I not informed of this? I distinctly ordered no contact with my immediate family without first consulting me. It appears to me that your office is again undermining my wishes - - -
>
> Attn. Sylvia Smith, I am requesting a face to face conference with you or Brett before the ending of January '96 - I would like to discuss the progress of my appellate procedure and where we stand.

(PC-R2. 2715).

The record also contained the following observations of collateral counsel from visitation with Mr. Castro around this time:

> MEMORANDUM
>
> TO: Bret Strand
> FROM: Sylvia Smith
> DATE: January 26, 1996
> RE: Visit with Edward Castro
>
> I saw Edward Castro this week again and wanted to pass on to you the following. Edward explained that he has no problem with anyone from his legal team speaking with his mother or any other member of his family. He only has a concern that no one scare her.
>
> We discussed his habeas petition. Towards the last ten minutes of the visit, he finally told me he thousht I had said we would not be filing his federal habeas until after March 20. And he had heard that if he was not in federal court by that time, he would be warrant eligible at that time. I told him

that we would be in court by March 20 and he would not be warrant eligible at that time. He was relieved.

We discussed legal matters at length. We also had discussions about death. Edward told me that he believes that electricity cannot kill his spirit because it is the presence of electricity that determines when the brain is alive or dead.

He told me he thinks he will be the first Hispanic electrocuted in Florida, because he is US born, unlike other immigrant Hispanics. He thinks a lot of Hispanic get relief in part because their home governments would not like it if the US executed them.

(PC-R2. 2721).

On February 2, 1996, Mr. Castro wrote Assistant CCR, Sylvia Smith, stating:

I am in receipt of your recent correspondence and the 20x32¢ stamps - and, yes, I do like the artwork on these stamps - (Have you heard about the new Richard Nixon stamps? Apparently there was a misprint on a few stamps and one of the Nixon stamps sold for $16,000. The misprint is a stamp with half of Nixon's head on top of the stamp and half on the bottom!! Be on the look out for these valuable stamps.)

Thank you for the stamps and for the kind words - I too enjoyed our last visit.

Bret S. was by this past week - He mentioned to me that you were in a grey area concerning the reading glasses which I asked you for - Don't concern yourself with the glasses. Thank you for remembering. This April I will go to the Optometrist to have a new set of glasses made for me. They will test my eyes for the needed strength!! Thank you for your concern.

Yes ! I would like to see you again soon - for now I've requested to Bret that nothing be filed concerning my appeal, and I am, for now, against suing the agencies Bret mentioned. I am thinking everything over and when we meet we can discuss the particulars

concernins this federal Writ of Habeous Corpus!!

(PC-R2. 2716-17).

Public records litigation began in February of 1996 when Hoffman suits were filed against state agencies outside the jurisdiction of the Seventh Circuit and on March 20, 1996, an initial Motion for Postconviction Relief was filed (PC-R. 10-159). The Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend alleged that records requests of sixteen (16) agencies had not fully been complied with (Claim I). The motion, incomplete due to the lack of full chapter 119 compliance, alleged 28 claims including that:

- the state relied on misleading and/or false testimony regarding Mr. Castro's intoxication at the time he allegedly waived his Miranda rights and/or that counsel 13D in litigating the statements issues constituted prejudicial ineffective assistance of counsel (Claim II).
- that violations of Brady v. Maryland, Giglio v. United States, and/or trial counsel's ineffectiveness resulted in the denial of an adversarial testing of the State's unlawful stop and arrest of Mr. Castro (Claim III).
- that violations of Brady v. Maryland, Roman v. State, and Giglio v. United States arising from the State's failure to fully disclose information regarding its deal with key witness, Bobby McKnight, and presentation

of false representations that Mr. McKnight had not been charged with first degree murder, when in fact he had initially been so charged, and/or counsel's ineffectiveness for failure to discover this information rendered Mr. Castro's conviction unconstitutional (Claim IV) .

- that Mr. Castro was denied a venire comprised of a fair cross-section of the community because only 5.6% of the venire was black in a 13.1% black county and that trial counsel's failure to discover this clear violation of Mr. Castro's rights was unreasonable and prejudicial (Claim V) .

That motion was verified by counsel who attested that he believed Mr. Castro was incompetent to verify the pleading (PC-R. 156).

And further, the record contains these observations of undersigned:

MEMORANDUM

TO: Bret Strand
FROM: Sylvia Smith
DATE: March 27, 1996
RE: Recent visits with Edward Castro

In recent visits, Edward described three distinct personalties existing within him. This summary is based on his representations.

Each personality is highly compartmentalized and separated from the other. The first is "Eddie." Eddie is no longer allowed out by the other personalities except to visit with me. In the past Eddie was revealed to his wife Shirley. Eddie is gentle and frightened.

> Eddie is extremely shameful. Eddie's extreme shamefulness is reportedly associated not only with the childhood sexual abuse he experienced, the rape by his uncle Joe Castro and his resulting feelings of loss of manhood, but also by sexual events and experiences from adulthood. These events and Eddie's feelings about them also contributed to Eddie leaving his military post. This military duty was supposed to be Eddie's way of getting his "manhood" together.
>
> The second is "Tony" who is the personality that is confident, outgoing, flirtatious, and makes friends easily. He is aggressive but not violent. He is the only personality which is allowed to interact with the outside world. He can hold **a** job and joke around and more or less get along.
>
> The third is the "animal." The animal is violent and paranoid.
>
> Tony and the animal do not let Eddie do anything. The animal and Tony make all the decisions and Eddie has not been allowed to speak regarding whether he wants to live or die, whether he wants psychiatric help, whether he wants his lawyers to try to prevent his execution, Letting Eddie speak means letting Eddie feel and that is too painful. Eddie does not believe he can withstand feeling his feelings, but he will never know because Tony and the animal do all the acting out. Tony represses Eddie's feelings by acting out bravado and "animal" represses them by acting out rage.
>
> Additionally, you should be **aware** that Edward does not believe in or understand death. He believes that execution will equal his freedom, but not his death. Additionally, he does not believe that electricity can hurt him because life is an electrical force.

(PC-R2. 2722).

Then in a letter dated March 28, 1996, Mr. Castro wrote Assistant CCR, Sylvia Smith, stating:

> Just a note to let you know I received both of your postings, the cite case on Vining v. State, and the other envelope which notes the medical aspects of Hers & His transmissables.!! I appreciate these sheets of info. Also, the 20x32¢ stamps were enclosed, and, thank you for your thoughtful generousity!
>
> I'm sorry if our visit ended on a sour note - I hope you realize it's nothing personal. You've done a professional iob and I awwreciate vour honestv. I am open to visits, from vou, if ever vou should choose to come visit, in the legal or wersonal sense!! Perhaps I'll see vou asain soon!
>
> Thank you for the info', stamws, case-law, and sincere concerns.

(PC-R2. 2718).

In a May 14, 1996, letter, Mr. Castro wrote Assistant CCR, Sylvia Smith, stating:

> Just a note to let you know all things with me are well; good health, good spirit. Hopefully this will find you doing well in both respects. Give my regards to Heidi B., wish her well, too.
>
> My visit with my mother, sister & bro-in law have come and gone - it went well. We swoke of the appeal, to a degree; "my sister asked me to keew her informed as to where, and how, the awweal stood. I said I would." I explained to her I mvself don't know how all this will end, or how long the process would take, because truthfullv it's in the hands of the courts, but that I would inform her if serious decisions came to light. Most of our visit revolved around reminiscence. (This was my first meet with, Eric, my new bro'-in law - I like him! He is 57. German-American, retired, and very conservative)
>
> The three spent a week touring through Georgia and Northern Florida, they enjoyed the vacation, and I enjoyed the fact that the money spent for travel went for a vacation for all of them as well as a visit with me. Seeing Mom on the 11th of May, the day prior to Mother's Day, was a great delight for all of us especially me. She looks well and is well taken care of. Eric is a good sort, and

highly respectful of mom, and very much in love with, **Sally**, my eldest sister. They flew home on the 12th of May - "Mother's Day flight."

Well, I promised I'd write a letter to you to let you know how the visits went. Hope to see you again. Stay happy, stay healthy, stay a sensitive soul as I know you are. Thank you for lending me an ear.

P.S. Don't forget to send the stamps, if you're able-thanks!

(PC-R2. 2719-20).

In a letter dated July 12, 1996, Mr. Castro wrote the Honorable Judge Thomas Sawaya, stating:

> Your Honor, Soon there will be a continuance of the competency hearing, which began on July 2, '96 in your courtroom, to determine if I, Edward Castro, am competent enough to waive all future collateral appeals - You've read the previous letters, which I wrote to the Attorney General's Office of the State of Florida. Sir, I am without ambivalence and still maintain my constitutional right to waive all future representation from Capital Collateral Representative; and, under Durocher v. State, the right to waive all state and federal collateral appeals.
>
> Competency is the issue: In 1987, Jan. 14th, I was arrested, a confession was obtained, I then made claim to temporary insanity. Through the years of 1987 I was seen and tested by three doctors of psychology, I was taken to a clinic here in Ocala where a scan of my brain was taken - results were no evidence of malfunction - through all of this I was deemed competent to stand trial in the court room of Judge Musleh . . .
>
> Sir, the trial produced a conviction, again questions arose of my mental state and competence. After a full delivery of psychological information pertaining to my mental state a jury of 12 voted 10-2 for the death sentence, Judge Musleh agreed. All felt I was proven competent to stand trial, and to understand the imposition of the sentence of death.

Your Honor, in 1989, I again was proven competent to receive the death sentence, and in 1991, and 1993!! Three penalty phases, two separate circuit court magistrates, seven Fla. Sup. Ct. magistrates, and four separate juries, amongst countless psychologists have all found me competent to face the guilt phase aspects of the trial, and the penalty phase results. I have been in the courts for almost ten years, I understand procedural law, due process, and the opportunities which the constitution of the United States affords me - still, I choose to waive all future state and federal collateral remedies.

Sir, I've written this out, because it isn't easy for me to speak my mind in an open court where I am constantly made to feel as if each word, each phase is being analyzed.

Your Honor, I realize there will be three psychologist testifying as expert witnesses, at this upcoming waiver hearing - and I, just a blue-collar short, can not compete with the experts, but I wish for the court to consider this letter, and these words as testimony to my competent nature.

"I would say to you, sir, and the doctors" - "I agree, the sky is blue, but do any of you have any idea of how I perceive it? What it looks like to me? How I see blue? I propose to YOU - Unless YOU were inside my head YOU wouldn't know!

"Individual realities go much further than colors. How do you know what a violin sounds like to me? These questions have no answers. There is no empirical basis for ever assuming that we experience things the same way.

Judge T. Sawaya, in the county jail of Pinellas County, 1987, I took the G.E.D. test and passed. Betty Castor signed a certificate of completion and awarded me a G.E.D. diploma. Sir, upon my initial arrest I was an alcoholic, a drug abuser, and perhaps mentally unstable while under the influence of either alcohol or drugs --- but always a competent soul when sober.

Your Honor, today I'm several years sober and several years clean of drugs. My prison records will reveal to the court a changed man. The initial years were filled with strife & turmoil, the last four have

> been without incident. I propose to the court that this is the sign of a competent man -- In the years of my incarceration I have educated myself, gained years of clean sober living, stayed clear of trouble.
>
> Judge, the three expert witnesses will obtain their analysis of my competency from out dated records and files, along with their impressions of me through a limited time frame of actual verbal discourse, and testings. I place before the court this written affidavit to enlighten the court of my competent capacity. I pray the court, in reaching its decision, will rule, by evidence merits found in this affidavit, in my competence.

(PC-R. 387-91).

On April 2, 1996, by Executive Order, the Governor appointed the Seventh Circuit State Attorney's Office to represent the State in postconviction proceedings (PC-R. 160-62).

On April 8, 1996, the Attorney General filed a Notice of Filing/Motion for Waiver Hearing in this Court. The Notice of Filing consisted of the letter Mr. Castro had written to CCR on December 27, 1994, as well as three (3) letters written to the Attorney General's Office on March 22, 1995, April 5, 1995, and March 25, 1996 (PC-R. 165-88). These letters to the Attorney General's Office, Mr. Castro stated his intention to waive all collateral remedies available to him. Following the response filed by collateral counsel, this Court transferred the state's motion to the circuit court (PC-R. 164).

On June 25, 1996, counsel for Mr. Castro filed a Motion to Compel disclosure of chapter 119 materials in the circuit court listing several state agencies that had not fully disclosed public records (PC-R. 203-10).

On July 2, 1996, the court below, Judge Thomas D. Sawaya presiding, held a hearing on the State's motion for waiver hearing (PC-R. 250-386). The Court inquired of Mr. Castro (PC-R. 265-73) who indicated he would not like to continue to be represented by counsel and would not like to waive his postconviction remedies, state and federal offering only that while he did not know what the outcome of his postconviction proceedings would be, he was concerned with the "quality of life" more than "the quantity." However, his feelings should the court deny his request would be "neither here nor there. Whichever you [the court] decide, I'll leave it with you" (PC-R. 268).

Counsel for Mr. Castro then presented the testimony of Dr. Jethro Toomer in support of the allegation that Mr. Castro was not competent for purposes of a waiver of counsel and postconviction remedies (PC-R. 280-368). Dr. Toomer testified that:

> Q And, Dr. Toomer, if you could please tell the Court, through your evaluations and your testing and your review of all the materials included in that background packet, what you were able to glean from that about Mr. Castro.
>
> A The test results that I gleaned were consistent with the test findings that were reported by other experts as part of the process in previous occasions.
>
> Also the sum total of the information that I gleaned from all of the documents and from my evaluation revealed a picture of an individual who has been exposed to early-onset trauma that was chronic, that was severe and that was intense.

And when we talk about "early-onset trauma" we're talking about a variety of factors, we're talking about family dysfunction, we're talking about family alcoholism, we're talking about physical abuse, we're talking about sexual abuse, we're talking about abandonment.

But the significant aspect of this is not just the intensity and the severity, but the early onset of it. Because we know that the earlier the onset, the more severe the devastation because the individual has not yet armed himself in order to be able to deal with certain traumatic events.

Trauma experienced at age thirteen or fourteen is not the same as trauma experienced at age six. Mr. Castro's trauma and all the dysfunctional processes that we were talking about came at -- started at an early stage and continued.

And what occurred or what resulted as a part of that was an individual involved who manifested a great deal -- in terms of behavior -- manifested a great deal of impulsivity, a great deal of instability and who had difficulty over his entire life, in terms of adjusting, with respect to feelings, emotions and personal relations, and what have you.

There was just this lifelong impairment in terms of his overall function. That's reflected in deficits in terms of his interpersonal relationships, his lack of success in terms of school, his lack of success in terms of employment, in terms of marital history, and all of these kinds of factors.

And this particular -- this whole area of dysfunction, this whole lack of adjustment that was reflected is documented in terms of the array of diagnoses given to Mr. Castro from -- according to my evaluation and my analysis from 1982 up through 1993.

He has been diagnosed as suffering -- if you talk about a continuum in terms of -- in terms of mental illness and mental

disorders, you're talking about diagnoses ranging from dependent personality disorder at one end of the continuum, all the way to organic brain syndrome, psychoactive substance abuse marked with great cortical dysfunction, drug dependency, and a whole array of manifestation in terms of diagnoses.

And to a psychologist or to a psychiatrist what that means falls into a couple of categories; one, you're talking about the severity of the underlying dysfunction, and secondly, you're talking about the fact that what tends to happen is that when an individual is diagnosed, what seems to be diagnosed is the symptomatology that is most prominent at that particular point in time.

And this says to me that what you have here is an individual who manifested a variety of symptomatology of mental disorders over time that came to the fore. At some point the impact resulted in -- significant drug abuse was manifested, at other times other emotional or mental dysfunctions was manifested.

So when you have an individual and you look at the history over a ten- or twelve-year period and you see an array of -- diagnostic array attributed to that particular person, you're talking about an individual who is significantly impaired and whose diagnostic categories reflect that.

The other things that manifests itself is that when you have the early-onset trauma, when you have a significant underlying mental dysfunction, the first aspect of the behavior that is lost is that of a higher-order thought.

Individuals who suffer from underlying forms of mental illness tend to lose the abstract reasoning ability. And what we mean by that is that what tends to be to a higher-order process, such things as projecting consequences, weighing alternatives or choosing from among varying alternatives, those higher-order thought processes, and what remains are the very

basic concrete kind of child-like processes in terms of thought and decision-making, and what have you.

And this, overall, has been consistent in terms of Mr. Castro's history. The history of poor decision-making, poor impulse control, maladapted behavior, that has been consistent over time. If you look at his history it is consistent over time.

There were periods when he has attempted to deal with some other problems that he's had but he's not been able to sufficiently. And the history is complete in terms of showing this pattern of dysfunction over time, from early on up to the present time when he became involved with the criminal justice system.

Q And, Dr. Toomer, in that -- in your review of the background materials, did the background materials contain correspondence between Mr. Castro and the Attorney General and also as well as letters to C.C.R. regarding our preparation and -- my question to you is:

The letters from Mr. Castro to C.C.R. that say, "I don't want for you to file something," at one point in time, and yet, then again he will say, "I'm still considering filing federal habeas," and all that, is that consistent with what you found with the overall evaluation of Mr. Castro?

A Yes.

Q His behavior.

A Yes. What is consistent is this inconsistency which has been a pattern of his life and which is a pattern now.

In terms of the issue at hand, the letters reflect the kind of changeability, if you will, in terms of his desire for your -- for the involvement of C.C.R. or the lack of desire for your involvement.

I notice, in looking at the array of correspondence, that it appears that at

one juncture there was something that was done that he did not approve of, or what have you, and at that particular juncture the orientation then became "I don't want you to -- to represent me anymore."

But you get that kind of -- that changeability in terms of orientation, and what have you; and inconsistency is the typical pattern that's been manifested lifelong.

Q And, Dr. Toomer, in your review of the background materials, do you recall seeing materials which indicated, I suppose for lack of a better term, different personalities of Mr. Castro, and would that be consistent with what your evaluation shows?

A Yes. The very -- when we talk about the variation in terms of personality, that is one of the manifestations that come out of that early trauma, the early disfunctional environment, and what have you, and reflected in the records from the individuals who knew him.

And based upon also prior evaluations was some very significant dysfunction in terms of personality orientation, where he was described as manifesting different personalities, sometimes relating to his use of drug abuse, of drugs or alcohol and abuse of toxic substances.

And that was reflected in, at various times, his manifesting different personalities to the point of being called by a different name, which certain -- where certain behaviors were being manifested.

And at the same time the significance of this was that in conjunction with the difference in the personalities there were blackouts and a lack of recall, of behavior that was manifested when an individual was functioning in one particular sphere as opposed to another.

That was also part of his history, and once again, and indicator of this overall pattern of inconsistencies that has characterized his existence.

Q Dr. Toomer, could you give the Court an example -- I know you can't probably pinpoint the cause of Mr. Castro's mental state at this time -- but some of the -- the examples of things in his background that would attribute to his mental illness.

A Probably the best place to start would be at the beginning. And when we talk about starting at the beginning we have to talk about the early-on physical abuse and sexual abuse at the hands of caregivers.

And then we would have to further talk about the fact that his father -- his biological father as well as his stepfather were both alcoholics and Mr. Castro was an observer.

An observer of abuse, an observer, whether in part -- as part of the process he was an observer of abuse of his mother by his father. Also, the other part of this process is that the abuse was physical and sexual, was not just at the hands of caregivers, but family members.

And that persisted for a period of time, at least to the time that he was -- from the time he was in school up until he was age ten or eleven.

You also have the issue of abandonment, which was another issue that came into play when his father abandoned the family, and his stepfather was basically, for all intents and purposes, psychologically absent, was not there even though his mother remarried.

You have a situation where he was -- because of his ethnic background -- was harassed and teased by members of -- by his peer group in school. And he eventually dropped out of school and gravitated towards the military, but only after being involved in a good deal of aggressive behavior while

in school and attempted to cope and to achieve some degree of acceptance.

Those are is some of the examples of the early-on trauma; and once you have that as a base, once you have that as a foundation and there's no further intervention or any type of treatment that is substantial to deal with that, you're going to have an individual who is ill-equipped to deal with society, to deal with the requirements of societal behavior and to deal with and adapt to societal norms.

And that is what you have here. And you have a situation -- and Mr. Castro is a classic case -- where what you have happening -- again, that background -- is you have individuals who gravitate to drug abuse, to toxic substances, oftentimes as part and parcel of trying to self-medicate to deal with the underlying anger and resentment.

What you have is individuals who are unable to maintain a positive relationship and are unable to engage in positive interaction with others. It's kind of like an up-and-down kind of process.

In personal relationships you have a great deal to be desired. So what you have involves -- from this early pattern of behavior, you have an individual who is ill-equipped both in terms of emotions, in terms of cognitive function, in terms of intellectual functioning to cope with and deal with -- to deal with what will be required to in order to function appropriately.

And that is the one thing that we know in psychology and psychiatry and mental health, and what have you. You expose an individual to early-onset trauma and we can guarantee that you will have a dysfunctional individual later on unless that individual received some substantial ongoing intervention. And that is what we have here with Mr. Castro.

Q Dr. Toomer, if you could, distinguish for the Court how you could have

-- you've explained Mr. Castro's background and his environment and his alcohol use, and all that.

How can you make the distinction that he had a bad childhood and a bad environment and then he used alcohol but those are just bad things that happened to him as -- distinguish just that as opposed to how that affects his cognitive processes now.

A That particular process, as I've indicated, affects how the individual functions both in terms of emotions, feelings, interactions, coping with things, thought process, and what have you.

And what you have taking place, basically, is this: In order for an individual to function cognitively, in other words, higher-order thought, as an individual develops, the individual moves from concrete thoughts, which is what we call "abstract thoughts," higher-order thought which is going beyond the literal meaning, means engaging in like projecting and weighing alternative, and those kinds of things. That is what normal individuals do as they progress.

If you, if you adversely impact that process with early-on trauma, then what you get is a process whereby you don't get an individual who develops intellectually from concrete reasoning to abstract reasoning. That process is short-circuited because the individual becomes preoccupied with compensating for the underlying emotional deficits.

So what you get is an individual who increases his chronological age, but emotionally, cognitively, the individual remains at a much lower level of development, because what happens is the individual is preoccupied with all of the residual deficits from the early-on trauma, the residual anger, resentment, hostilities.

And all of those factors remain, so as a result we have an individual who is of a

certain age who basically is primarily motivated by his deficits.

In other words, the underlying deficits that have never been addressed is what fuels the behavior, so the decision-making that's done is basic decision-making that is impulsive. It is not decision-making based on a process of higher-order thought. It is not a decision-making process that's based upon a consideration of alternatives.

It is decision-making that is, if you would, by the underlying deficits that -- we have a term for it. It's called "deficiency modification." And that is what you have operating.

You have all of these deficiencies that have never been addressed. That's what fuels the behavior and the decision-making. And that is why when it's never addressed it recurs. The person makes the same mistakes over and over and over again because the same deficits unresolved are following the behavior and decision-making and the thought process.

Q And, Dr. Toomer, did you find that all of that was the case regarding Mr. Castro?

A Yes.

Q And were you able to form an opinion, Dr. Toomer, regarding Mr. Castro's ability or his competency and his ability to waive post-conviction remedies and/or counsel?

A Yes, I did.

Q Okay; and is your opinion within a reasonable degree of psychological certainty?

A Yes, it is.

Q And what is that opinion?

A My opinion is that based upon the processes that I have outlined, based upon the deficits and based upon the totality of

the history of Mr. Castro I'm of the opinion that all of those processes came together and they preclude his operating in terms of rational decision-making, in terms of his operating, in terms of -- with respect to higher-order thought process, precludes a rational participation in this process, and as a result he is not competent to waive his legal remedies of post-conviction matters or to waive legal assistance of counsel.

***

THE COURT: Uh-huh.

Did you did you conduct any intelligence testing, I.Q. testing, that type of thing?

THE WITNESS: No, I did not conduct any I.Q. testing.

THE COURT: Why not? Wouldn't that be a factor that you would want to consider, whether this person has a high I.Q. or a low I.Q., whether he's borderline retarded, whether he's --

THE WITNESS: Well, there was nothing -- there was nothing in the data -- two answers to that -- there was nothing in the data on his clinical presentation to suggest that I.Q. was a problem. In fact, it was just the opposite.

THE COURT: He's pretty bright, isn't he?

THE WITNESS: The testing data reflected that he had a very high I.Q., in the superior range. Also, as I said, there was nothing in his clinical presentation that suggested that there were any kind of intellectual deficits or I.Q. deficits that were manifested.

BY MS. BREWER:

Q Spinning off of that, if I may -- is it true, Dr. Toomer in some of the testing that you were able to conduct you were able to find that Mr. Castro was actually faking,

did you find that to be the case, some of the testing?

A Yes. One of the -- in the Minnesota Multiphasic Personality Inventory, that is one of the standard -- one of the standards in the field in terms of personality assessments.

There is a set of scales that are called "Validity Scales," which are -- actually look at malingering and whether a person is trying to present as being mentally ill and -- which often occurs -- and in the profile of Mr. Castro his results reflected that what he was basically doing was he was trying to present a more positive picture of himself than was actually attested by -- at -- in other words, "faking good" to present as more organized than he really was.

Q What did the overall results reflect under --

A Good, presented good organization.

Q Dr. Toomer, just a few more things. Going back -- and I apologize for the spottiness of the -- did you find from Mr. Castro's history that he suffered head injuries?

A Yes. There were -- there were numerous significant instances of head trauma where he was rendered unconscious at least three or four times. That would -- that would be considered significant in terms of his overall functioning.

Q And significant to your determination.

A That's correct, yes.

Q Okay; and this will be the final question. Dr. Toomer, should Mr. Castro be able to make a decision, or is he competent and able to make the decision at this time to waive counsel and/or his post-conviction remedies?

A In my opinion, no, he is not.

(PC-R. 285-302).

REDIRECT EXAM BY MS. BREWER

* * *

Q And, Dr. Toomer, just a few things to cover here briefly. Would the fact that -- would the fact that Mr. Castro has allowed counsel some twenty-five legal visits between the time of February '95 and May '96, would that be consistent with what you have found where when he sometimes is acting as if he's waiving and then at other times he's saying, "Okay, now, for limited purposes I'll let you represent me," and that type of thing?

A Yes. That -- that is an example of the inconsistency over time that I think is due to underlying, unresolved emotional and psychological issues.

Q And, Dr. Toomer, in your background materials, in a letter dated March 28th, 1996, from Mr. Castro to his attorney, Sylvia Smith, when he says, "Even if you should choose to come visit in a legal or personal sense," is that -- again, does that comport with what you found in his --

A That is --

Q -- consistent with what everything you've -- (Incomprehensible.) --

A That's correct.

Q Okay; and would it also be consistent to the background materials? I believe there's, somewhere in there, a memorandum regarding Edward Castro's idea of death and how -- in the electric chair, and how the electric chair wouldn't necessarily have an impact on life because life is electricity. Do you recall that?

A Yes.

Q Are those thoughts, again, part of -- part of what you have used in your determination?

A That's correct, yes.

(PC-R. 366-67).

Dr. Toomer's testimony supported collateral counsel's assertion that Mr. Castro was not competent to waive postconviction proceedings or representation. Counsel again informed the court that the state had failed to complete full disclosure of public records, including records bearing on Mr. Castro's competence.

The court, having been convinced of the need for a full competency hearing, appointed Dr. Harry Krop and ruled that out of fairness each party, the state and the defense would be permitted to choose an additional expert (PC-R. 368-72; 375; 396; 461). However that ruling was reversed on the basis of the State's argument that any additional evaluation by an appointed expert chosen by the defense would cause delay (PC-R. 376). The Court then refused to permit defense counsel to be heard on this matter (PC-R. 376) yet acknowledged that it could seek an extension of time from this Court in which to complete the proceedings and over objection refused to appoint a third expert (PC-R. 377-78).

Collateral counsel requested an evidentiary hearing on the motion to compel pending (PC-R. 379-383). The Court ordered the Office of the Attorney General to turn over all letters in its possession from Mr. Castro and further ruled that collateral

counsel may be entitled to any records related to the competency hearing but if the records were related to something else, then the State's argument that "we're putting the cart before the horse" (PC-R. 379) had a point (PC-R. 381). The court ruled that only if he found Mr. Castro incompetent, would collateral counsel be entitled to receive from the state agencies the requested records (PC-R. 381). And only at that time would motions to compel be entertained. Collateral counsel explained that Mr Castro cannot waive that which he does not know about, including any claims which may be raised from yet undisclosed records (PC-R. 382). The Court again refused to consider the pending motion to compel or set it for hearing by ruling that it was not relevant "unless it related to information relating to competency" (PC-R. 383).

The State selected Dr. Harry McClaren and the Court appointed Dr. Harry Krop (PC-R. 396).

Judge Sawaya wrote this Court a letter dated July 9, which this Court treated as a motion for extension of time and granted. The time the trial court was given to complete the hearing pursuant to Durocher was extended until October 7, 1996 (PC-R. 410).

On August 30, 1996, collateral counsel received a box of records from the Seventh Circuit SAO without explanation.

On September 12, 1996, Judge Sawaya again wrote this Court to explain the difficulties he perceived in meeting the October 7th deadline (PC-R. 411-12). This Court then entered an order

extending the time for completion of the hearing until November 21, 1996 (PC-R. 441).

On September 20, 1996, the Court faxed collateral counsel a notice of hearing scheduling the competency hearing for October 4, 1996 (PC-R. 414). On that same date, the State scheduled a status conference for September 30th (PC-R. 420-21).

On September 27, 1996, counsel for Mr. Castro filed an Amended Motion to Compel in the lower court (PC-R. 425-33).

At the September 30th status conference (PC-R. 485-92), counsel for Mr. Castro explained that Dr. Toomer would be unavailable on October 4th. The Court's response was to ask whether Dr. Toomer had testified before and to say that he did not know that Dr. Toomer needed to be recalled (PC-R. 486). Because of the deadline imposed by this Court, Judge Sawaya would not entertain any re-scheduling and since Dr. Toomer's commitment was a previously scheduled out-of-state evaluation, the Court urged counsel to subpoena its expert.

On October 2, 1996, collateral counsel filed a notice of hearing to *argue* the Amended Motion (PC-R. 438-39).

The State objected to any evidentiary hearing on the motion to compel and attacked the motion's relevance and "putative" counsel's motives (PC-R. 434-37).

Court convened on October 4, 1996 at which time collateral counsel filed Mr. Castro's written verification of the Motion to Vacate Judgment and Sentence (PC-R. 440) and informed the circuit court and state that Mr. Castro wanted to proceed with his

postconviction proceedings and continue to be represented by his postconviction counsel (PC-R. 495-96). Further, Mr. Castro informed the court that he no longer wanted to waive postconviction proceedings and affirmatively stated that he wanted the representation of his postconviction counsel (PC-R. 498-99). This time the exchange went as follows:

> THE COURT: Is this the Verification document that you personally signed this morning?
>
> MR. CASTRO: Just a minute ago, yes, Your Honor.
>
> THE COURT: What does that mean?
>
> MR. CASTRO: What it means to me is that I've had a change of mind, that I've reconsidered my position, that after communicating with my attorney Heidi Brewer that we've come to a -- different terms that -- in that I've chosen to proceed with 3.850, to have this drawn up and filed for me, and I wish to have Heidi Brewer and Sylvia Smith to represent me.
>
> THE COURT: All right. And so it's no longer your wish that you waive any further proceedings relating to post-conviction relief motion. It's also your position now and your desire that their office continue to represent you in those proceedings.
>
> MR. CASTRO: Exactly.
>
> THE COURT: All right; and you're making this choice freely, knowingly and voluntarily?
>
> MR. CASTRO: I am.
>
> THE COURT: All right; and nobody's put any undue pressure on you or coerced you in any way to make that decision?
>
> MR. CASTRO: No, sir.
>
> THE COURT: Well, it certainly would've been nice if we would've known that sometime ago, rather than having to go through all this

expense of having witnesses subpoenaed and having a competency hearing.

MR. CASTRO: I didn't know until last night, Your Honor.

****

THE COURT: (While witness approaches the stand)

Now, Mr. Castro, is this your final decision, now, this is what you want to do? Is this what you want to do?

Once you make this decision here, is this -- is this it, now? You're not going to change your mind in the future and come back and say "Okay, now, I've changed my mind, now I want to waive again"?

THE DEFENDANT: No, sir.

THE COURT: All right; and you're sure that this is what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: Absolutely positive, no doubt in your mind, is that right?

THE DEFENDANT: No doubt in my mind.

****

THE COURT: You're telling me for the final time that you don't want to waive C.C.R. representation and you want to go through with your post-conviction relief motions and all those proceedings; is that what you're telling?

THE DEFENDANT: That's what I'm telling you, yes, sir.

(PC-R. 544).

Over objection of counsel, the circuit court nevertheless went forward with the competency hearing. At the hearing, Dr. Krop and Dr. McClaren testified that Mr. Castro was competent,

but Dr. Toomer, who remained unavailable, did not testify. The Court found Mr. Castro competent.

Collateral counsel requested an evidentiary hearing on the motion to compel (PC-R. 550).

According to the record, on October 7, 1996, a Monday, the State submitted a proposed order by facsimile and allegedly served collateral counsel by facsimile and mail (PC-R. 448). The facsimile was never received and the mailed copy was not received until October 11, 1996 (five days later) (PC-R. 453).

Upon receipt of the mailed copy on October 11th, counsel for Mr. Castro submitted a letter to the Court via facsimile indicating that she had received a proposed order from Kenneth Nunnelley on October 11, 1996, had not received the October 7th facsimile, objected to the State's proposed order and requested an opportunity to submit a proposed order (PC-R. 453). Counsel also faxed a formal motion - Motion for Leave to Submit Proposed Order - to the court, the original of which was filed on October 17th (PC-R. 450-52).

In a letter dated October 17th, Judge Sawaya acknowledged receipt of the letter and motion and indicated that he preferred "the order prepared by Mr. Nunnelley" (PC-R. 454) and had already signed it that day (PC-R. 455-58).

On October 21, 1996, collateral counsel, noting her prior objection, submitted a proposed order (PC-R. 464).

A Motion to Disqualify Judge Sawaya, verified by Mr. Castro on October 25th, 1996, was timely filed on October 28th

(PC-R. 473-84). In the meantime, in a letter to Judge Sawaya explaining why the expert appointed by the Court at the selection of the state, Dr. Harry McClaren, had charged $7200 to conduct his evaluation (PC-R. 559-61), Assistant Attorney General Kenneth Nunnelley explained his view that Mr. Castro's decision to proceed was a "last minute" decision in nature and followed a three month period in which Mr. Castro "stated his continuing desire to waive further review." In explaining the complexity of the record and mental health question before the court characterized by Mr. Nunnelley as whether Mr. Castro was competent "to decide to allow his case to proceed with execution of sentence" (PC-R. 560), Mr. Nunnelley defended the need for Dr. McClaren's three separate evaluation sessions which was that three sessions were necessary to "detect psychological manifestations that might not be observable in a single evaluation." Id. See also PC-R. 566; 600; 603-4).

On November 8, 1996, Mr. Nunnelly submitted a letter purporting to be from Mr. Castro indicating that he did not want to pursue post-conviction remedies or to be represented (PC-R. ____).

On November 21, 1996, the motion to disqualify Judge Sawaya was granted (PC-R. 590-91).

On November 21, 1996, collateral counsel filed a Motion for Further Review (PC-R. 576-87), challenging the competency finding and arguing that Mr. Castro's chronic pattern of mental instability was again apparent referring to Mr. Castro's November

5, 1996 letter which alleged that Mr. Castro's decision to proceed with his post-conviction remedies was the "product of exploitive and cajoling tactics by the attorneys of the Capital Collateral Representative" and that he was "misled".

Collateral counsel informed the Court of Mr. Castro's relevant state of mind and the instability demonstrated by it and explained the October 10, 1996 letter collateral counsel had received from Mr. Castro stated that he was grateful for counsel's efforts and for counsel's patience and for having his sons in his life. Moreover, Mr. Castro expressed interest in "future plans regarding his appeal, time frames, filings, etc." (PC-R. 585-87).

Counsel argued that Mr. Castro's behavior was a product of his unstable mental state resulting in a chronic pattern of erratic impulse driven actions and that Mr. Castro had a history of vacillating regarding whether to pursue post-conviction remedies; that throughout CCR's representation of Mr. Castro, Mr. Castro has waffled on whether to pursue or waive post-conviction remedies; that Mr. Castro fluctuates from a fervent desire to tenaciously pursue each and every legal remedy to a dark, hopeless and destructive impulse to be executed; that Mr. Castro's most recent letter of November 5, 1996 must not be taken solely at face value nor in isolation; and that Mr. Castro's instability and pendulation is a product of his mental illness and incompetence.

On December 2, 1996, Chief Judge William T. Swigert entered an order recusing Judge Thomas D. Sawaya and reassigned Mr. Castro's case to the Honorable Jack Singbush (PC-R. 588).

On December 31, 1996, the court granted the motion for further review and set hearing for January 21st (PC-R. 601). Hearing was also scheduled on the pending Amended Motion to Compel Disclosure for January 21st (PC-R. 605-7).

On January 1, 1997, Capital Collateral Counsel instructed the attorneys at CCR that no funds for experts except in the case of an inmate under active death warrant would be approved due to the Legislative underfunding of the agency.

At the January 21st hearing, the State was represented by new counsel, Mr. Ben Fox (PC-R. 612), collateral counsel was present, but Mr. Castro was not present. Given these circumstances, the State agreed with collateral counsel to conduct a status hearing to catch everyone up, given both the Court and Assistant State Attorney were new to the case (PC-R. 615). The Court, in light of Mr. Castro's absence, determined to conduct a case management conference and not to entertain any pending motions.

Judge Singbush commented and the following exchanges took place:

> THE COURT: Well, let's take a look at where we are now. We have a new judge that knows very little about this case other, than what he's managed to read in the past few days.
>
> I've reviewed the court's file. That, of course, gives me the cold and sterile

record such as is contained within the file. It does not give me the flavor of the case that counsel may be aware of and that the Court is not.

Now, I have not laid eyes on the Defendant nor any of the witnesses in the cause. Counsel for the prosecution, for the State of Florida is present here. You're also new to the case?

MR. FOX: I have had an opportunity to discuss the case at length with both the assistant state attorney Sean Daly and the assistant attorney general Ken Nunnelley. Of course, I agree with the Court, that that's not the same as actually being in it up until now, but I feel ready to proceed with what needs to be done.

* * * * *

THE COURT: Okay. Well, having said all of that, do I need to set a hearing on this? Or is this something that the parties can resolve?

MR. FOX: While I think we can certainly attempt to resolve, it, Your Honor, frankly, I didn't know exactly what to expect with regard to the amended motion, since I personally didn't have a copy of it and I couldn't get one from the Attorney General's Office either before I left this morning. I thought we were here basically on the issue of --

THE COURT: We are.

MR. FOX: So in that event, I do not see in here some -- there are some letters back and forth between members of our office and a member of CCR regarding, you know, what we have and what has been sent and our attempts to comply. So I'm not sure whether we can attempt to further discuss matters amongst ourselves first or --

MS. BREWER: That's fine, Your Honor, you know, if we can work it out where the

State Attorney can help us get all the records that we need. I mean, that's great. And if we need a hearing in the future --

THE COURT: Well, I don't want to leave them hanging out here, so y'all take as long as you need. 30 days and you can't work it out, we'll just set it for hearing and --

MR. FOX: That's fine with the State.

MS. BREWER: Yes, Your Honor.

MR. FOX: I think, of course, it may all be moot if Mr. Castro does come back here and repeat what his allegations are in the affidavit that he filed with the Court in November.

THE COURT: Which may be so. Nevertheless, that is not a reason to do anything other than fully protect his rights, such as those that may be as they may wish them to be protected.

MR. FOX: I agree, Your Honor. No question.

THE COURT: All right. Well, that's what we'll do then. If you don't get what you need within the next 30 days, then we'll just have a hearing and we'll thrash it all out. To the extent you're entitled to it, I'll make sure you get it.

(PC-R. 673).

Following the January 21, hearing, counsel for Mr. Castro and Mr. Castro's investigator discussed missing public records with counsel for the State. Counsel for the State indicated that he would comply with the public records requests and counsel for Mr. Castro indicated that CCR would communicate with the State regarding records CCR believed to be missing in order to assist the State in complying.

On January 28, 1997, the state filed a letter in this Court purporting to be from Mr. Castro indicating that he did not want to pursue postconviction remedies or to be represented.

Collateral counsel communicated by telephone with counsel for the State during February. The State informed Mr. Castro's counsel that it was searching the files of the State Attorney's Office initially and would then be prepared to move forward toward resolving other outstanding requests. On March 12, 1997, collateral counsel wrote Assistant State Attorney Fox memorializing this understanding (PC-R. 656).

On March 5, 1997, counsel for Mr. Castro filed a Renewed Motion to Compel Disclosure of Public Records in an abundance of caution re: 3.852.

On March 26, 1997, undersigned collateral counsel wrote Assistant State Attorney Fox and provided Mr. Fox with copies of the documents found in the SAO files referred to infra (PC-R. 658-59).

On April 30, 1997, the state filed its Motion to Dismiss Defendant's Motion for Post-Conviction Relief (PC-R. 646). Counsel for Mr. Castro filed a Response (PC-R. 650-59) informing the Court of developments since the January 21st hearing including discussions between Mr. Castro's investigator and the State regarding missing public records; the State's indications that it would comply with the public records requests; collateral counsel's communication with the State regarding records CCR believed to be missing in order to assist the State in complying;

the State's communications that it was searching the files of the State Attorney's Office initially and would then be prepared to move forward toward resolving other outstanding requests. These communications were memorialized in letters which are attached to this Response. Id.

On May 12, 1997, the state filed in this Court and the lower court another letter purporting to be from Mr. Castro indicating that he wanted to waive his right to counsel and withdraw his Motion for Postconviction Relief (PC-R. 660-666).

On May 13, 1997, the circuit court issued an order for collateral counsel to Show Cause why the State's Motion to Dismiss Mr. Castro's Motion for Postconviction Relief should not be granted (PC-R. 648) and a hearing was scheduled for June 24, 1997 (PC-R. 667).

On June 10, 1997, counsel for Mr. Castro filed a Memorandum of Law in compliance with the lower court's May 13th Order to Show Cause (PC-R. 675-750).

On June 24, 1997, the lower court held a hearing on the state's Motion to Dismiss (PC-R. 755-906). At that hearing, Mr. Castro admitted that he had previously determined to proceed with his postconviction remedies and counsel (PC-R. 759). Despite Judge Sawaya's recusal, the State urged Judge Singbush to rely on Judge Sawaya's ruling on Mr. Castro's competency (PC-R. 768), yet conceded that the ruling was not binding on the court (PC-R. 771). Judge Singbush ignored collateral counsel's urging that competency was still an issue for the proceeding underway and

that the Judge Sawaya's determination could not be relied upon due to his recusal, that a further hearing was required and the Court could not rely on any prior determinations of Judge Sawaya without hearing the evidence himself in order to assess the credibility of the witnesses (PC-R. 770; 784; 792; 797; 817). Mr. Castro stated that his understanding of waiving counsel and postconviction remedies was not to say "Hey, kill me" (PC-R. 783), but did concede that he had experienced a "state of confusion" (PC-R. 800). Mr. Castro's statements were Collateral counsel further explained that in the records received only August of 1996, after the hearing at which they presented Dr. Toomer, the State disclosed files which contained letters requesting the files of the mental health experts from the prior proceedings, but not the records themselves.

Collateral counsel proffered that Dr. Toomer was prepared to offer an opinion that Mr. Castro was incompetent and to specifically explain that Mr. Castro's mental state in October and decision not to waive and then subsequent mental state and assertion that he wanted to waive were of crucial importance and relevance to the competence of Mr. Castro to make the subsequent assertion (PC-R. 807-08). Counsel was unable to have Dr. Toomer conduct further evaluations in person and was unable to present live testimony from Dr. Toomer due to the lack of available funds for experts.

Mr. Castro conceded that the conditions under which he makes his "decisions" is relevant. Counsel proffered that Dr. Toomer

would testify to how those circumstances, including the circumstance described by Mr. Castro, effected his competency to decide whether to waive his postconviction counsel and remedies and the voluntariness of the "decision."

Counsel further argued at length the basis for the assertion that there was not full chapter 119 compliance and that in the records provided by the State without explanation in August of 1996, there were indications that specifically mental health records were missing (PC-R. 836-855).

The Court ruled over objection that collateral counsel had failed to file a timely and proper motion to set aside the order of Judge Sawaya despite the fact that counsel's motion was filed the very day Judge Sawaya recused himself.

Over objection, Judge Singbush conducted an inquiry of Mr. Castro (PC-R. 835; 855-882). During this exchange, Mr. Castro specifically explained that he thought he had a Sixth Amendment right to post-conviction counsel.

Over the objection of Mr. Castro's counsel, the circuit court found Mr. Castro to have waived his right to counsel (PC-R. 882-86). The court then denied the state's Motion to Dismiss (PC-R. 887) with the intention of giving Mr. Castro time to consider his options, but at the State's urging and upon inquiry of Mr. Castro as to whether he was later going to have a change of heart, rescinded his own ruling that the motion would be granted without prejudice and proceeded to grant Mr. Castro's Ore Tenus Motion to Withdraw Motion for Postconviction Relief and

Motions to Compel Public Records Under Chapter 119, Florida Statutes with prejudice.

This Appeal follows.

SUMMARY OF ARGUMENT

The lower court erred in granting Appellant's motion to discharge his attorneys and to represent himself in postconviction. The waiver hearing conducted by the lower court was not adequate in that it was not a full and fair hearing, violating Appellant's due process rights. The lower court was unable to ensure Appellant was competent to waive because the lower court was unable to consider all of the evidence relative to Appellant's competency. Counsel for Appellant was unable to present the lower court with all of the evidence relative to Appellant's competency due to the state's noncompliance with public records requests. The lower court also relied on a defective waiver determination from earlier in Appellant's case. The lower court also erred when it refused to consider evidence indicating a change in Appellant's competence or, as defense counsel argued, evidence of Appellant's continuing incompetence. Individually or together, these errors denied Appellant the full and fair hearing he was entitled to in the court below, and resulted in a waiver of counsel by an incompetent defendant.

Even if the lower court was correct in its determination that Appellant was competent to waive, allowing Appellant to waive was still a violation of due process. Counsel for Appellant was not in possession of all information relevant to

Appellant's case due to the actions of the state and lower court. Records and files relevant to Appellant's case in possession of the state were never turned over to the defense, preventing Appellant from making a knowing waiver of his rights.

Constitutional and policy reasons also dictate that Appellant should not be allowed an outright and total waiver of counsel. Death is different. Allowing an outright and total waiver of counsel causes the process to break down, and it allows for violations of substantive due process because, ultimately, incompetent defendants will be executed.

The lower court also erred in granting Appellant's ore tenus motion to withdraw his pending postconviction motions. The lower court allowed Appellant to withdraw the motions after determining that Appellant was competent to waive counsel and represent himself. However, the waiver hearing conducted by the lower court was not adequate in that it was not a full and fair hearing. Furthermore, the determination by the lower court that Appellant was competent to waive was also error.

Policy reasons dictate that Appellant should not be allowed an outright waiver of all avenues of appeal available to him. Whether a defendant is legally subject to execution is not limited to whether or not a defendant is in fact guilty of the crime charged. Rather, it is also necessary to ensure that a defendant does in fact deserve to die for the crime he or she committed.

This Court has recognized that innocence of the death penalty constitutes a claim in postconviction. Society's concern that the death penalty be imposed only on those who deserve it is a continuing theme behind the laws, rules and cases which govern capital litigation. If Appellant is allowed a waiver of appeal avenues in postconviction at all, it should be limited to issues regarding guilt. Postconviction review is not only necessary to protect Appellant's rights, but is also necessary to assure society that the death penalty is not imposed arbitrarily or mistakenly. Only a heightened scrutiny at the postconviction stage of appeals can satisfy both of these compelling interests.

By allowing Appellant to waive all avenues of appeal, the state would be assisting Appellant in committing suicide. Appellant's desire to waive is solely a product of his dissatisfaction with the situation his life is in. Because of this dissatisfaction, Appellant is now expressing a desire to end his life by waiving counsel and waiving all avenues of appeal. The state is affirmatively acting in a manner designed to assist Appellant in ending his own life by refusing to comply with Appellant's public records requests, by refusing to assure Appellant's waiver is knowing, and by advocating for Appellant's right to waive postconviction proceedings.

ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN GRANTING APPELLANT'S MOTION TO DISCHARGE ATTORNEY AND FOR SELF-REPRESENTATION IN ALL POSTCONVICTION PROCEEDINGS.

A. Introduction

Defendants have the constitutional right to waive professional counsel and to represent themselves if they so choose. Faretta v. California, 95 S. Ct. 2525 (1975); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). If a defendant expresses a desire to exercise this right, the proper course of action for the trial court is to conduct a Faretta-type inquiry to determine that the defendant understands the consequences of the waiver. Id. Furthermore, the state has an obligation to assure that the waiver is knowing, intelligent and voluntary. Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993).

To engage in self-representation, however, requires that the defendant be competent. If the Faretta-type inquiry raises questions in the court's mind regarding the competency of the defendant, an **adequate hearing** on the question of the defendant's competency must be held. Id. In fact, due process requires no less.

For several reasons, the waiver hearing conducted by the lower court (and the resulting order of competency) was not adequate. This proceeding was not a full and fair hearing, violating Appellant's due process rights. The lower court could not ensure Appellant was competent to waive because the lower

court did not have all of the evidence relative to Appellant's competency to consider. Counsel for Appellant was precluded from presenting all of the evidence relative to Appellant's competency due to the actions of the state. In fact, the defense expert who examined Appellant in the court below provided an incomplete analysis due to the actions of the state. Records and files relevant to Appellant's competency in possession of the state were never turned over to the defense.

The lower court also relied on a defective waiver determination from earlier in Appellant's case. And, the lower court erred when it refused to consider evidence indicating a change in Appellant's competence or, as defense counsel argued, evidence of Appellant's continuing incompetence. Individually or together, these errors denied Appellant the full and fair hearing he was entitled to in the court below.

It is incumbent upon the court to ensure that an incompetent defendant is not allowed to waive his or her constitutional right to representation. Allowing an incompetent defendant to waive counsel would be a complete and total violation of that defendant's due process. Yet, this is exactly what happened in Appellant's case.

Even if the lower court was correct in its determination that Appellant was competent to waive, allowing Appellant to waive was still a violation of due process. Counsel for Appellant was not in possession of all information relevant to Appellant's case due to the actions of the state and lower court.

Since the state refused to comply with Chapter 119, records and files relevant to Appellant's case were never turned over to the defense, preventing Appellant from making a knowing waiver of his rights.

Constitutional and policy reasons also dictate that Appellant should not be allowed an outright and total waiver of counsel. Death is different, and it is well established that the state has the responsibility to ensure that society's ultimate penalty is only imposed in appropriate cases, and not the result of mistake or arbitrary action. Yet, considering the adversarial nature of the entire process and the role the state plays in that process, it is impossible to see how the state can fill both roles and maintain the constitutionality of the process, particularly in this case where the state was arguing for Appellant's right to waive and, ultimately, for his execution. Allowing an outright and total waiver of counsel under these circumstances causes the process to break down. It leaves the state free to ignore its responsibility. It also allows for violations of substantive due process because, ultimately, incompetent defendants will be executed.

B. The waiver hearing held in the court below was not a full and fair hearing, in violation of Appellant's Due Process rights.

Appellant is entitled to Due Process in postconviction, including full and fair proceedings before the postconviction court. See, Tefftellerv. Dugger, 676 So. 2d 369 (Fla. 1996); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); Huff v. State,

622 So. 2d 982 (Fla. 1993); Holland v. State, 503 So. 2d 125 (Fla. 1987); Evitts v. Lucey, 105 S. Ct. 830 (1985). When a capital defendant chooses to waive counsel, the proper course of action for the court to take is to conduct a Faretta-type inquiry to determine that the defendant understands the consequences of waiving counsel. Furthermore, the court must determine that the defendant's waiver is knowing, intelligent and voluntary. Only after following these steps can a court allow a defendant to waive.

To engage in self-representation, however, requires that the defendant be competent to proceed. If a question arises regarding the competency of the defendant, the court must conduct an adequate hearing to determine if the defendant is competent to proceed. Questions regarding a defendant's competency may arise during the Faretta-type inquiry, requiring a court to conduct a competency hearing on its own motion. Moran v. Godinez, 57 F.3d 690, 695 (9th Cir. 1994); Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993); Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995). Furthermore, the language in Durocher makes it clear that an attorney representing a client who wishes to waive may raise the question of the client's competency to the court, as well as present any evidence that supports that contention. Durocher, at 484.

The Constitutional standard governing a criminal defendant's competency to waive counsel is the same as the standard for competency to stand trial. Godinez v. Moran, 509 U.S. 389, 401-

02 (1993). See also Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994)(standard applies equally before trial and during postconviction). Due process requires a court to conduct a competency hearing "whenever a reasonable judge would be expected to have a bona fide doubt as to the defendant's competence." Moran, at 695. See generally United States v. Rodriquez, 799 F.2d 649, 655 (11th Cir. 1986)("As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents sufficient facts to create a 'real, substantial and legitimate doubt as to [his] mental capacity . . . . '"). A defendant's due process rights are violated if the state trial court does not afford him an adequate hearing on the question of competency. Pate v. Robinson, 86 S. Ct. 836, 838 (1966)(citing Bishop v. United States, 76 S. Ct. 440 (1956)).

1. The lower court did not consider all of the evidence relative to Appellant's competency.

Counsel for Appellant was precluded from presenting the lower court with all of the evidence relevant to the issue of Appellant's competency due to the actions of the state. The state never complied with the records requests made by counsel for Appellant. The result of this noncompliance was to deny counsel the ability to present all relative information to the court, both directly and through expert testimony. This violated Appellant's due process rights, rights under the Florida Constitution, and Florida's public records law.

On March 20, 1996, counsel for Appellant filed an unverified Motion for Postconviction Relief in the court below.[1] (R. 10-159). Among other things, the motion informed the lower court of several agencies that had not complied with Chapter 119 public records laws. On June 25, 1996, counsel for Appellant filed a Motion to Compel in the lower court. (R. 203-10). The motion listed several state agencies that had not disclosed public records to Appellant's counsel in compliance with Chapter 119, Florida Statutes. Furthermore, in said motion, counsel for Appellant informed the court below that the state's failure to comply had made it impossible for counsel to fully and properly represent Appellant.

At the July 2, 1996 Durocher hearing[2], counsel for Appellant again informed the lower court of the state's failure to comply with public record requests. (R. 379-383). Although the court would not fully explore the issue, the court made it clear that the records would only be relevant if they related to the issue of competency. (R. 383). The court never considered how counsel for Appellant could determine if unprovided records related to competency without first having access to said

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[1] Counsel was unable to obtain a signed verification from Appellant. Counsel was, and still is, under the belief that Appellant was incompetent. Counsel filed the unverified motion in order to preserve Appellant's rights.

[2] This was the waiver hearing held by Judge Sawaya, who subsequently granted Appellant's Motion to Disqualify Judge on November 21, 1996. Appellant's motion was based upon the fact that Judge Sawaya had wholly adopted the State's proposed order regarding competence verbatim without providing Appellant an opportunity to be heard regarding the proposed order.

records. Nor, did the court consider the effects of this noncompliance on the defense expert's ability to render an opinion.

On September 27, 1996, counsel for Appellant filed an Amended Motion to Compel in the lower court. (R. 425-33). Like the first Motion to Compel, this motion listed fourteen (14) state agencies that had not complied with Chapter 119, Florida Statutes. Without resolving any of the public records issues before it, the lower court held a competency hearing on October 4, 1996, and determined that Appellant was competent to waive.[3] Counsel for Appellant again informed the court that the state had not complied with their 119 records requests. (R. 548).

The lower court held a hearing on January 21, 1997, which ultimately became a status hearing.[4] (R. 611-628). At that hearing, counsel for Appellant informed the lower court that full disclosure of public records had not been furnished. The lower court ordered the proceedings continued so that the parties could work toward effectuating compliance with the public records issues in this case.[5] (R. 623-24).

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[3] The lower court also determined that Appellant was competent to waive **in the future** if he later chose to do so.

[4] This hearing was held before the Honorable Jack Singbush, who had recently taken over the case after Judge Sawaya had granted Appellant's Motion to Disqualify Judge.

[5] The lower court did not enter an order regarding this matter until June 4, 1997. (R. 673). The order, however, is clear in that matters are to be continued until the state and the defense can resolve the public records issues.

Immediately following the January 21st hearing, counsel for Appellant and Appellant's investigator discussed missing public records with counsel for the State. Counsel for the State indicated that he would comply with the public records requests and counsel for Appellant indicated that CCR would communicate with the State regarding records CCR believed to be missing in order to assist the State in complying. Counsel for Appellant communicated by telephone with counsel for the State during February. The State informed Appellant's counsel that it was searching the files of the State Attorney's Office initially and would then be prepared to move forward toward resolving other outstanding requests. Relying upon the State's representations, counsel for Appellant was operating under the belief that the State was making a good faith effort to comply. (See, Response to State's Motion to Dismiss Defendant's Motion for Postconviction Relief, R. 655-59). On March 5, 1997, counsel for Appellant filed a Renewed Motion to Compel Disclosure of Public Records in order to preserve Appellant's statutory right to the materials. (Supplemental Record on Appeal, 4-15).

On April 30, 1997, (and without having been provided any of the missing records) counsel for Appellant received the State's Motion to Dismiss Defendant's Motion for Post-Conviction Relief. (R. 646). On June 24, 1997, the lower court held a hearing on the state's Motion to Dismiss. At that hearing, the public records issue was brought up to the court on several occasions. (R. 773, 784, 837).

Ultimately, the lower court ruled that Appellant could waive, and that the lack of compliance by the state regarding public records disclosure presented no barrier to Appellant's waiver:

> I further find that as a potential barrier to proceeding today that as to the issues raised in the discovery motion issue that counsel has made much about -- "Well, we don't think we got all of these documents" and that sort of thing -- you heard all of that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And without regard to your declarations to the Court that you didn't even want to know about all of that stuff, probably because you were there at the time, **I find that that particular material does not constitute a barrier to the Court's going forward today on the motion filed by the State for a number of reasons.**
>
> **First, whether or not one or more documents may have been produced in one or more boxes dating back to 1992 and what we may idly speculate may have been contained within them doesn't bear on your present ability to proceed in your own best interests, as long as you are self-motivated, as long as you're intelligent, as long as you're alert and as long as you're not suffering any mental deficiency.**
>
> **You have no mental deficiency observable by the Court. A court of competent jurisdiction, this very Court has found you to be competent.**

(R. 884-5) (emphasis added).

This determination by the lower court is erroneous. Before making a competency determination such as this, a court must consider all of the evidence relative to a defendant's competency

if competence is at issue. Hunter v. State, 660 So. 2d 244, 247 (Fla. 1995), citing Carter v. State, 576 So. 2d 1291, 1292 (Fla. 1989), cert denied 112 S. Ct. 225 (1991) ("It is incumbent upon the court to consider all evidence relative to competence and to render a decision on that basis."). Competence was at issue in this case.

It was impossible for the lower court to consider all of the evidence relative to Appellant's competency. Counsel for Appellant did not have all of the evidence relative to Appellant's competency to present to the court due to the state's refusal to turn over the requested public records. This is so despite defense counsel's numerous requests, both written and oral, for the material. Counsel was entitled to these records, and had a duty to seek and obtain them. See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Porter v. State, 653 So. 2d 375 (Fla. 1995), cert. denied, 115 S. Ct. 1816 (1995). Defense counsel expressed to the lower court the "Catch 22" she was faced with:

> And I just -- with all due respect, Your Honor, I feel that in some way the State has, for lack of a better word -- they said they were going to turn over certain documents to us. We relied upon that.
>
> And I feel like we were hoodwinked in some respects, because now they're saying: "It doesn't matter, anyway, because your client wants to waive," **although we don't even have all the relevant documents that we need to be able to present all the issues to the Court.**

(R. 805).

Furthermore, due to the actions of the state, the defense expert who examined Appellant did not have all of the evidence relevant to Appellant's competency before making his determination. In Carter v. State, Case No. 88,368, slip opinion (Fla. March 12, 1998), this Court recently held that the rules for raising and determining competency at trial should be looked to when addressing competency to proceed in postconviction.[6] This Court went on to state:

> In considering the issue of competency to proceed in postconviction proceedings, the examining experts should follow the basic procedures set forth in Florida Rule of Criminal Procedure 3.211 and, to the extent that they are relevant to a postconviction competency determination, should consider the factors set forth in subdivision (a)(2), subdivision (B) of which specifically provides for consideration of "**any other factors deemed relevant by the experts.**"

Id, at 4 (emphasis added). This Court's language clearly indicates that all relevant information should be available to experts in order for them to "consider" any factors relating to a defendant's competency. Otherwise, the experts would be unable to provide a complete competency analysis to the court, thus preventing the court from rendering a competency determination based on all of the evidence relative to a defendant's competence. Appellant's expert was never provided with all relevant information due to the actions of the state. Here, the lower court was without all of the information it needed to make

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[6] Carter was not a case in which the defendant's competency to waive postconviction was at issue. Rather, Carter concerned a defendant's competency to proceed in postconviction.

a proper competency determination, denying Appellant the full and fair competency hearing he was entitled to.

2. The lower court relied on a previous waiver determination which was defective.

It is true that previous determinations of competency can be taken into account when making a subsequent competency determination. See Whitmore v. Arkansas, 495 U.S. 149 (1990); Sanchez-Velasco v. State, No. 89,511 (Fla. December 4, 1997); Hunter v. State, 660 So. 2d 244 (Fla. 1995); Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). Relying on an improper competency determination, however, would result in a violation of due process. This is exactly what happened in Appellant's case.

The state's lack of compliance with public records requests resulted in an improper waiver determination by the previous Judge assigned to this case, a determination which the subsequent Judge relied upon. The previous Judge, like lower court, determined that the missing records were irrelevant unless they were materials relating to competency. (R. 379-383). Not knowing what the records contained, counsel was only able to speculate as to their relevance and importance, and the expert retained by the defense was forced to examine Appellant and render an opinion without having the records. Clearly, the previous Judge did not have all of the information needed to make the waiver determination, making the determination defective. See Carter v. State, 576 So. 2d 1291, 1292.

The waiver determination by Judge Sawaya was also defective because it was not the product of a full and fair hearing. On

July 2, 1996, Judge Sawaya held a hearing pursuant to Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). At the hearing, counsel asserted that Appellant was not competent to waive postconviction proceedings or representation, and Judge Sawaya allowed counsel to present expert testimony to that affect. Counsel for Appellant informed the court that she was only presenting expert testimony to call Appellant's competency into question, as required by Durocher, and that counsel did not want to be precluded from a full presentation of evidence at any subsequent hearing on the matter. At first, the court seemed to agree with counsel's interpretation of Durocher:

> MS. BREWER: Your Honor, just so I may be clear. My purpose in presenting Dr. Toomer today was to jump that hurdle. That wasn't jumped, or at least crossed, in Durocher, and so I don't want to be precluded or have to just rely upon what I've presented today.
>
> I would like the opportunity -- in fact -- I mean, as far as to what Mr. Daly was saying, you know, don't -- (Incomprehensible.) -- him because it's just a proffer and all of that, I would like the opportunity to open that case again if I need to.
>
> MR. DALY: That's fine.
>
> THE COURT: Okay.
>
> * * *
>
> THE COURT: Yeah, I know that. Well, the decision says that, yeah. All right. So I'll go with Dr. Krop as one, you pick on[sic] and you pick one. All right. Dr. Krop will be one. You pick one and you pick one. You don't have any idea who you want right now? You will have time to --

MR. MARTELL: I'd like to see who is available, Judge.

MR. DALY: I thought we already had one picked.

THE COURT: Dr. Krop is one. I told her that I would not -- if she desired I would not preclude her from one other expert.

She used this expert to raise a question in the Court's mind as to whether Mr. Castro is competent, and I think he was able to do that; although, from talking to Mr. Castro, he certainly appears to be competent to me and to know and understand what he's doing.

But I just want to make sure all the bases are covered. If he's not going to have representation at post-conviction relief hearings I want to make sure that all the bases are covered and we don't have to come back and do this again after an appeal.

MR. DALY: It's unfortunate -- and I understand what the Court's doing -- but from Mr. Castro's point of view we're going to force him to undergo three more mental health examinations, when no one in the world other than Dr. Toomer has ever said that he's incapable to --

THE COURT: Well, he was the only one that was presented.

MR. DALY: -- make that decision.

THE COURT: He was the only one that was presented today. That didn't mean that you couldn't present one, as well.

MR. DALY: Well, I --

THE COURT: I mean, the decision says the judge goes through the Faretta inquiry, and the decision also says that if they raise the issue as to whether -- in Durocher -- whether Durocher was competent, but they didn't present anything else.

And that was certainly included in, to come in with an expert and raise the question

> in the judge's mind whether this man was competent or not. We've got an expert opinion that says he's not. And so then the opinion says "go through with the competency hearing."

(R. 369-70, 372-74).

At the urging of the state, the court suddenly refused to allow counsel to choose other experts for the subsequent competency hearing because, as the state argued, doing so would delay the competency matter:

> MR. NUNNELLEY: Judge, one thing I'd point out, our time that was -- that this case was back in this Court from the Supreme Court is about to run out. What's our time priority going to be as to -- when are we going to try to come back to -- to wrap this up?
>
> THE COURT: Well --
>
> MS. BREWER: Your Honor, may I -
>
> THE COURT: I don't know how long we can get the evaluations -- I realize they take --
>
> MR. NUNNELLEY: Well, not if we've got -- I mean, if we -- Dr. Krop, presumably, could do it fairly quickly, since he's got kind of a baseline back from the trial at the -- from the prior penalty phase before Your Honor.
>
> Dr. Toomer, obviously, has made his decision and all that. That was based on four hours, by the way. And I -- (Incomprehensible.) -- but, you know, if we go with one more expert, we're going to have to go find some -- figure out who we're going to try to get in.
>
> Maybe we can get somebody in early next week or maybe even late this week, and get this over with and get back down here. **But if we go with yet another C.C.R. expert, I'll**

guarantee you it's going to take us two more months to get back here, Judge.

THE COURT: All right. He's got a point. You're going to use Dr. Toomer, Dr. Krop. And you've got one choice.

MR. NUNNELLEY: We'll come up with somebody and find out --

MR. BREWER: Your Honor --

THE COURT: That's it -- period.

MS. BREWER: Your Honor, may I be heard on --

THE COURT: No, no.

MS. BREWER: Your Honor, regarding the Florida Supreme Court ruling coming back for sixty days, all they said was --

THE COURT: I think I can request an extension of time on that.

MS. BREWER: **And if I may -- might point out that they didn't say that, that the matter had to be resolved in sixty days. They said you needed to conduct this kind of inquiry. Surely, the inquiry -- (Incomprehensible.) -- within sixty days.**

Surely they didn't say that if you have reason to believe that he's incompetent you should somehow have to rush through it.

THE COURT: Well --

MS. BREWER: -- (Incomprehensible.) -- sixty days, when the result is --

THE COURT: I'm not saying that. From what I've heard I think that if the man does knowingly understand -- but you've raised the question in my mind, and under the decision I want to make sure I dot the I's and cross the T's. **I'm going to conduct a hearing so that we don't have to come back and do this a year or two from now.**

MS. BREWER: And I appreciate that, Your Honor.

THE COURT: All right. So you're going to use Dr. Toomer and Dr. Krop and --

MR. NUNNELLEY: By 5 o'clock tomorrow, Your Honor.

THE COURT: And you have to provide her, by fax, with the name and address of this person.

MR. NUNNELLEY: Thank you, Judge.

MR. DALY: Thank you, Judge.

MR. MARTELL: Thank you, Judge.

MS. BREWER: Your Honor, although they're packing up, there are other matters that I do need to bring up -- bring to the attention of -- I'm sorry to belabor the matter, but I have to on behalf of Mr. Castro.

THE COURT: All right. Go ahead.

MS. BREWER: Number 1, I still think that I should have the option of another expert.

THE COURT: He's a good expert.

MS. BREWER: I understand that, Your Honor, but my --

THE COURT: All right. Now, you're going to use him.

MS. BREWER: And I'm somewhat concerned if -- that even though I presented that, that you say that even though you -- that -- that he appears on the face that he can do all of this --

THE COURT: He appears that way. But I'm not saying he is and I'm not saying he's not. That's why I'm -- I want the hearing. I want to know what these other experts are going to say. If you want to have Dr. Toomer come back, have him come back.

[THE COURT][7]: **And I'm still entitled to, if I want to have another expert, to come -- to come -- and without delaying matters, I mean, I would do it expeditiously. The point is, I'm -- I'm --**

THE COURT: You're going to use --

MS. BREWER: I'm asking -- yes.

THE COURT: You're going to use Dr. Toomer. That's who you chose, and that's who you're going to use.

(R. 375-79) (emphasis added).

The court subsequently held the competency hearing on October 4, 1996. At the hearing, counsel informed the court that Appellant had just changed his mind and was willing to proceed with his postconviction litigation. Over counsel's objection, the court went forward with the competency hearing. (R. 502). Furthermore, counsel was unable to secure the attendance of the defense expert from the Durocher hearing, and repeatedly objected to going forward without the only expert assistance the court would allow. (R. 502-3, 514, 545).

The court's decisions denied Appellant a full and fair competency hearing. Counsel explained to the court that this was a situation with little or no precedent to rely upon, and that there were no clear standards regarding how counsel should proceed in this case. (R. 545-46). At the Durocher hearing, counsel for Appellant informed the court that she was only presenting expert testimony to call Appellant's competency into

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[7] The record is incorrect. This is actually Ms. Brewer, counsel for Appellant, speaking and not the court.

question, as required by Durocher, and that counsel did not want to be precluded from a full presentation of evidence and expert testimony at any subsequent hearing on the matter. (R. 369-70).

Although the court seemed to agree with defense counsel at first, the court reversed its decision at the urging of the state, who argued that allowing another defense expert would delay matters. (R. 375-76). Whether the state's assertion was correct is irrelevant. A logical reading of Durocher indicates that the defense must first present evidence calling into question the defendant's competency. This is the threshold issue. In this case, defense counsel did so through expert testimony. If the defense presentation causes the court to question a defendant's competency, the next step requires the court to hold a full evidentiary hearing on the issue before making the competency determination.

Simply because the defense used expert testimony to call the defendant's competency into question to meet the threshold of Durocher should not preclude the defense from fully exploring the issue of competency at the subsequent competency hearing. After all, expert testimony is surely not the only way to pass the first step in Durocher. Furthermore, the expert used by the defense was retained simply to pass the first step in Durocher. There was no agreement that the expert would continue on the case, nor was there any guarantee that the expert would be able to attend further hearings on the matter or assist counsel in the future. In fact, the expert was not available to assist counsel

at the subsequent competency hearing. A defense expert was essential to assist counsel in reviewing, interpreting and challenging the findings of the other experts. Counsel informed the court of this at a status conference held prior to the competency hearing. (R. 486). At the competency hearing, counsel repeatedly objected to going forward without the expert's assistance. (R. 502, 503, 514-15, 545). In the end, there simply was not a hearing on the issue of Appellant's competency that comported with due process.

This competency determination, relied on by the substitute judge, was defective. The court that made the determination was not aware of all of the information relevant to Appellant's competency due to the actions of the state. Furthermore, the court made the determination without providing Appellant a full and fair competency hearing. Counsel for Appellant argued to the lower court that it should not accept the previous competency determination for several reasons: the lower court was not present at the previous competency hearing to assess the credibility of those who testified (R. 792); competency is not static (R. 792); the state possessed mental health records which the defense (and the court) had not seen (R. 794, 797-98); and, circumstances regarding Appellant's case had changed (R. 794).

The lower court clearly relied on the defective competency determination in deciding that Appellant could waive representation:

> You have no mental deficiency observable by the Court. **A court of competent**

jurisdiction, this very Court has found you to be competent.

(R. 884-5) (emphasis added) (see also R.827). This violated Appellant's right to due process.

Furthermore, it was also error for the lower court to rely on the previous court's order (regarding Appellant's competency) because that order was invalid. After the October 4, 1996 competency hearing held by the previous court, the State submitted a proposed order which was received by undersigned counsel on October 11, 1996[8]. On October 15, 1996, counsel for Appellant sent the previous court a letter via facsimile informing the court that Appellant objected to the state's order and that counsel was simultaneously filing a motion for leave of Court to file a proposed order on behalf of Appellant. Counsel for Appellant asked for ten (10) days from receipt of the State's proposed order in which to file a proposed order.

Without ruling on Appellant's Motion to Submit Proposed Order, or considering an alternative order, Judge Sawaya adopted the state's proposed order verbatim on October 17, 1996. In the cover letter accompanying the order, the previous court acknowledged receipt of counsel's October 15th facsimile. In response to the court's order, counsel for Appellant filed a Motion to Disqualify Judge, which Judge Sawaya granted on

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[8] The State's proposed order contained a cover letter addressed to Judge Sawaya which stated that a facsimile of the proposed order was sent to undersigned counsel on October 7, 1996. Undersigned never received this facsimile. In fact, at no time during the October 4th hearing did the court instruct counsel for the State or Appellant to submit proposed orders.

November 21, 1996. Counsel for Appellant was never given the opportunity to be heard regarding the previous court's order. The previous court made a wholesale and verbatim adoption of the State's proposed order without hearing Appellant's position, without considering an alternative order, and without affording Appellant Due Process of law. Thus, the previous court's order should not be considered valid, and should not have been relied upon by the lower court.

3. The lower court erred in adopting the previous competency order on a cold record, and not making its own competency determination.

Previous determinations of competency can be considered when making a subsequent competency determination. See Whitmore v. Arkansas, 495 U.S. 149 (1990); Sanchez-Velasco v. State, No. 89,511 (Fla. December 4, 1997); Hunter v. State, 660 So. 2d 244 (Fla. 1995); Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). However, once a defendant is declared competent to proceed, a court must still be receptive to new information regarding a defendant's competency, or lack thereof. Furthermore, if circumstances change, a court must be willing to revisit the competency issue. See Hunter, at 248; Pericola v. State, 499 So. 2d 864, 867 (Fla. 1st DCA 1986).

Counsel for Appellant put the lower court on notice that they were aware of information relevant to Appellant's mental health held by the state which had not been turned over to them:

> **Ms. Smith:** And if I could add, Your Honor, there have been files which we have been unable to obtain because the experts who

> were involved in the various proceedings prior to 1992 do not have the records.
>
> I make that representation, there have been files that I have not been able to obtain, which based on indications in materials I have gotten from the state attorney, they have received materials from mental health experts that were involved which I submit I can't get anymore because those experts don't have them anymore.
>
> And yet, they won't disclose them to me. And those are other experts that -- there were several involved at various stages.
>
> I do have a file that Dr. Krop maintained and was able to forward to us upon our request, but that's not the only issue here. There were other evaluations that collected information because there were issues --
>
> And Mr. Castro, you know, had a lot of penalty phase presentation to be made. He was not waiving, you know, penalty phase at trial; and therefore there was investigation into his mental health and presentations.
>
> The state has the possession of those materials, some of which I can't get because they are no longer available from the doctors, themselves.

(R. 797-8). The state was in possession of information relevant to Appellant's competency. Because this information was not provided by the state for the competency hearing held before Judge Sawaya previously, it was new information which the lower court was put on notice about, and it should have been considered by the lower court before allowing Appellant to waive. Cf. Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990)(disposition of substantive due process claim [regarding right not to be tried while incompetent] requires examination of all the evidence

regarding competence, whether it was available to the state trial court or not).

The lower court was also put on notice that circumstances had changed since the last competency hearing held five months earlier. The original competency hearing (before Judge Sawaya) was held on October 4, 1996. Prior to the hearing, Appellant had asserted that he wanted to waive his right to representation. However, at the October 4th hearing, Appellant announced that he did not want to waive his right to pursue postconviction remedies and that he did not want to waive his right to counsel.

Appellant told the Court that he was certain of his decision and that it was voluntary. Appellant signed the verification for his Rule 3.850 motion.[9] This time the exchange went as follows:

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[9] By presenting the lower court with a signed verification, counsel for Appellant was in no way conceding that Appellant was competent. Rather, counsel made what appeared at that time to be the safest choice. As counsel related to the court below, this was a case with little or no precedent, and there were no clear standards regarding how counsel should proceed in this case. (R. 545-6). Once Appellant was willing to sign the verification, counsel, continuing to believe that Appellant was incompetent, was left with two choices: challenge the verification, go forward with the competency hearing without having received all of the relevant records and information from the state, and risk having the court open the door for an incompetent individual to waive his constitutional rights later on; or, present the verification to the court and litigate postconviction matters, at least ensuring that the incompetent defendant would be represented. Unfortunately, as the record indicates, either choice would have resulted in the present outcome because the lower court was determined to hold the competency hearing (despite the signed verification and despite defense counsel's inability to fully litigate the competency issue) in order to assure Appellant's ability to waive **at any time in the future**. Thus, Appellant, an incompetent individual, is now one step away from losing all of his rights in this process, save one: the right not to be executed while incompetent (a Due Process right). However, if he is allowed to waive representation, there will be no counsel

THE COURT: Is this the Verification document that you personally signed this morning?

MR. CASTRO: Just a minute ago, yes, Your Honor.

THE COURT: What does that mean?

MR. CASTRO: What it means to me is that I've had a change of mind, that I've reconsidered my position, that after communicating with my attorney Heidi Brewer that we've come to a -- different terms that -- in that I've chosen to proceed with 3.850, to have this drawn up and filed for me, and I wish to have Heidi Brewer and Sylvia Smith to represent me.

THE COURT: All right. And so it's no longer your wish that you waive any further proceedings relating to post-conviction relief motion. It's also your position now and your desire that their office continue to represent you in those proceedings.

MR. CASTRO: Exactly.

THE COURT: All right; and you're making this choice freely, knowingly and voluntarily?

MR. CASTRO: I am.

THE COURT: All right; and nobody's put any undue pressure on you or coerced you in any way to make that decision?

MR. CASTRO: No, sir.

THE COURT: Well, it certainly would've been nice if we would've known that sometime ago, rather than having to go through all this expense of having witnesses subpoenaed and having a competency hearing.

MR. CASTRO: I didn't know myself until last night, Your Honor.

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there looking out for Appellant to ensure this remaining right is not violated. This perfectly illustrates one flaw in a system that allows a total and outright waiver of counsel in capital postconviction under these circumstances.

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THE COURT: (While witness approaches the stand)

Now, Mr. Castro, is this your final decision, now, this is what you want to do? Is this what you want to do?

Once you make this decision here, is this -- is this it, now? You're not going to change your mind in the future and come back and say "Okay, now, I've changed my mind, now I want to waive again"?

THE DEFENDANT: No, sir.

THE COURT: All right; and you're sure that this is what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: Absolutely positive, no doubt in your mind, is that right?

THE DEFENDANT: No doubt in my mind.

****

THE COURT: You're telling me for the final time that you don't want to waive C.C.R. representation and you want to go through with your post-conviction relief motions and all those proceedings; is that what you're telling?

THE DEFENDANT: That's what I'm telling you, yes, sir.

(R. 498-9, 505-6).

On November 8, 1996, Assistant Attorney General Kenneth Nunnelly submitted a letter purporting to be from Appellant indicating that he did not want to pursue postconviction remedies or to be represented. On January 28, 1997, the state filed a letter in this Court purporting to be from Appellant indicating that he did not want to pursue postconviction remedies or to be

represented. Clearly, circumstances had changed. Counsel for Appellant appealed to the lower court to revisit the competency issue due to the change of circumstances:

> [Counsel for Mr. Castro]: Also that, as Ms. Smith stated, competency is not a static thing and, therefore, I believe a further hearing would be necessary for that. So I don't know that Your Honor would be in a position to be able to say that today.
>
> * * *
>
> [Counsel for Mr. Castro]: Your Honor, just with regard to "idle speculation," I believe we have information that's more than just idle speculation that there are mental health records in the State Attorney's file. That's my understanding.
>
> I haven't seen them. I don't think were just guessing that there are materials that are -- that address the mental health issue.
>
> Also, the whole -- the way this whole thing played out, with Dr. Toomer testifying and then the subsequent hearing Mr. Castro deciding that he wanted to go forward with his, with his collateral proceedings and CCR as his attorneys, and then all of the subsequent letters that he has written, all of that is relevant to the change in circumstances that have occurred since that hearing Judge Sawaya held on that particular day.

(R. 792-3, 794-5).

The lower court was on notice that circumstances had changed and that information relevant to Appellant's competency had not been presented before, yet refused to revisit the issue of Appellant's competency. This was a violation of Appellant's Due Process rights. Cf. United States v. Ives, 574 F.2d 1002 (9th Cir. 1978)(due process rights violated where trial court refused

to consider evidence proffered by defense indicating a change in Petitioner's competence, including fact that five months had elapsed since he was last found competent by government experts).

4. Appellant was denied Due Process by the actions of the lower court.

The lower court failed to provide Appellant a full and fair competency hearing. The lower court failed to consider all of the evidence relative to Appellant's competency. The lower court relied on a defective competency determination previously made by another judge, as well as a cold record. And, the lower court erred in not revisiting the competency issue once it was put on notice that circumstances had changed. All of these errors, individually and combined, worked to deny Appellant the Due Process he was (and still is) entitled to in postconviction. See, Tefftellerv. Dugger, 676 So. 2d 369 (Fla. 1996); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); Huff v. State, 622 So. 2d 982 (Fla. 1993); Holland v. State, 503 So. 2d 125 (Fla. 1987); Evitts v. Lucey, 105 S. Ct. 830 (1985).

C. Appellant was unable to make a knowing waiver due to the actions of the state.

Even assuming the lower court was correct in its determination that Appellant was competent to waive, allowing Appellant to waive was still a violation of his constitutional rights. Counsel for Appellant was not in possession of all information relevant to Appellant's case due to the actions of the state. Records and files relevant to Appellant's case in possession of the state were never turned over to the defense.

This lack of Chapter 119 compliance prevented counsel from informing Appellant of his rights and from conducting investigation which are the principal duties of any attorney representing a criminal defendant. Thus, the actions of the state prevented Appellant from making a knowing waiver of his rights.

On March 20, 1996, counsel for Appellant filed a Motion for Postconviction Relief in the court below. (R. 10-159). Among other things, the motion informed the lower court of several agencies that had not complied with Chapter 119 public records laws. On June 25, 1996, counsel for Appellant filed a Motion to Compel in the lower court. (R. 203-210). The motion listed several state agencies that had not disclosed public records to Appellant's counsel in compliance with Chapter 119, Florida Statutes. Furthermore, in said motion, counsel for Appellant informed the court that the state's failure to comply had made it impossible for counsel to fully and properly investigate and advise Appellant.

At the July 2, 1996 Durocher hearing, counsel for Appellant again informed the lower court of the state's failure to comply with public record requests. (R. 379-383). The court determined that the records would only be relevant if they related to the issue of competency and yet failed to explore this issue further. (R. 383)[10]. On September 27, 1996, counsel for Appellant filed

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[10] The lower court never considered how counsel for Appellant could determine if unprovided records related to competency without first having access to said records.

an Amended Motion to Compel in the lower court. (R. 425-33). Like the first Motion to Compel, this motion listed fourteen (14) state agencies that had not complied with Chapter 119, Florida Statutes, and turned over public records to Appellant. Without resolving any of the public records issues before it, the lower court held a competency hearing on October 4, 1996, and determined that Appellant was competent to waive. (R. 493-558). Counsel for Appellant again informed the court that the state had not complied with their 119 records requests. (R. 548).

The lower court held a hearing on January 21, 1997, which ultimately became a status hearing.[11] (R. 611-628). At that hearing, counsel for Appellant informed the lower court that full disclosure of public records had not been furnished. The lower court ordered the proceedings continued so that the parties could work toward effectuating compliance with the public records issues in this case. The lower court did not enter an order regarding this matter until June 4, 1997. (R. 673). The order, however, is clear in that matters are to be continued until the state and the defense can resolve the public records issues.

Immediately following the January 21st hearing, counsel for Appellant and Appellant's investigator discussed missing public records with counsel for the State. Counsel for the State indicated that he would comply with the public records requests and counsel for Appellant indicated that CCR would communicate

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[11] This hearing was held before the Honorable Jack Singbush, who had recently taken over the case after Judge Sawaya had granted the defense Motion to Disqualify Judge.

with the State regarding records CCR believed to be missing in order to assist the State in complying. Counsel for Appellant communicated by telephone with counsel for the State during February. The State informed Appellant's counsel that it was searching the files of the State Attorney's Office initially and would then be prepared to move forward toward resolving other outstanding requests. Relying upon the State's representations, counsel for Appellant was operating under the belief that the State was making a good faith effort to comply. (See, Response to State's Motion to Dismiss Defendant's Motion for Postconviction Relief, R. 655-59). On March 5, 1997, counsel for Appellant filed a Renewed Motion to Compel Disclosure of Public Records. (Supplemental Record on Appeal, 4-15).

On April 30, 1997, (and without having been provided any of the missing records) counsel for Appellant received the State's Motion to Dismiss Defendant's Motion for Post-Conviction Relief. (R. 646). On June 24, 1997, the lower court held a hearing on the state's Motion to Dismiss. At that hearing, the public records issue was brought up to the court on numerous occasions. (R. 773, 784, 837). Counsel for Appellant specifically argued that the lack of compliance by the state prevented a knowing waiver:

> [By Ms. Smith]: And then I -- you know, and then the State's representation was, you know, I guess, made in the Motion to Dismiss, that that was how they were planning to proceed, although the Court did order the case continued pursuant to efforts to effectuate compliance with the public records.

And we submit that the records issues are intertwined to the extent that there are mental health issues, mental health records that were never provided to counsel for Mr. Castro which may give rise to further -- may lead us to further evidence that would assist Your Honor in determining whether Mr. Castro can make a knowing and intelligent and voluntary waiver.

And also, basically, counsel and counsel's investigative staff are unable to resume investigation of what Mr. Castro's issues of post-conviction could be because of further noncompliance with basically a discovery rule on post-conviction that entitles us to the State Attorney's files to research non-record material and discover issues.

We cannot advise Mr. Castro what his issues are without full investigation, and that is a major barrier to his ability to make a knowing waiver of those remedies in this situation.

* * *

MS. SMITH: That's a part of my argument as to access. **The other part is that, you know, the scope of the issues available and the relief opportunities available to Mr. Castro remain unknown because, for all intents and purposes, the investigation of possible post-conviction issues of ineffective assistance of counsel, of Brady cannot be investigated while the State refuses to disclose materials in their possession. And I think that simply, you know, prevents a knowing waiver.**

THE COURT: How? You told him all those things you just told me, right? He knows -- if everything you say is true, he knows that there might be materials out there that could even get him off; or at least save his life, right? You told him that just now.

MS. SMITH: Yes, Your Honor. But it remains -- you know those opportunities, those issues remain uninvestigated and unknown and **he remains unadvised as to any**

details on issues that may arise from those materials.

And to be honest, Your Honor, I don't know what the state of law is with regard to that question, but I certainly think that it would be --

THE COURT: I guess.

MS. SMITH: -- a mistake to make waivers based -- you know, when there's no knowledge.

THE COURT: Well, is it against the law for somebody to say: "I don't care," if he's considered that?

MS. SMITH: I'm sorry, Your Honor.

(Conference between defense counsel.)

THE COURT: I guess really the gravamen of the question is, in lay terms: "Is it not the right of a citizen of this country to say, I've had enough. I want to quit fooling with this'?"

MS. SMITH: I don't think that -- you know, **I'm going to argue that the law doesn't allow an "I don't care" waiver, and the issue of competency remains before the Court.**

(R. 776-77, 780-81) (emphasis added). Ultimately, the lower court ruled that Appellant could waive, and that the lack of compliance by the state regarding public records disclosure presented no barrier to Appellant's waiver. (R.884-5). This was despite the fact that records pertaining to the very issue of Appellant's mental health had not been turned over by the state.

If the lower court's determination that Appellant was competent to waive was not complete error, it was clearly premature. Counsel for Appellant had vigorously sought public records pursuant to Fla. Stat. Ch. 119. See Ventura v. State,

673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 634 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Counsel for Appellant has the duty to seek and obtain public records, and this Honorable Court has ruled that collateral counsel must obtain every public record in existence regarding a capital case or else a procedural default will be assessed against the defendant. Porter v. State, 653 So. 2d 375 (Fla. 1995), cert. denied 115 S. Ct. 1816 (1995). This Court has also made it clear that a concomitant obligation under relevant case law as well as chapter 119 rests with the State to furnish the requested materials. Ventura v. State, 673 So. 2d 479 (Fla. 1996).

When the State's inaction in failing to disclose public records results in a capital postconviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the postconviction motion should be denied or dismissed. This is exactly what occurred in Appellant's case. The State ignored numerous requests for public records. This is true despite the lower court's order continuing this matter in order to allow the parties to effectuate compliance with Chapter 119. (R. 673). Counsel for Appellant repeatedly attempted to work with the State in order to obtain these records. However, the State ignored these requests and refused to comply with chapter 119. Because of this state action, or lack thereof,

counsel was unable to adequately advise and inform Appellant of the substantive rights available to him, which is the obligation of every attorney appointed to represent a criminal defendant. Without this advice, Appellant could not make a knowing waiver.

It is the law that defendants have a constitutional right to represent themselves. Faretta v. California, 95 S. Ct. 2525 (1975). However, a waiver of collateral counsel must be knowing, intelligent and voluntary. Sanchez-Velasco v. State, Case No. 89, 511 (Fla. December 4, 1997) (citing Boykin v. Alabama, 395 U.S. 238 (1969); Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993)). Under these circumstances this was impossible. Furthermore, the state also has an obligation to assure that the waiver of collateral counsel is knowing, intelligent and voluntary, an obligation the state did not meet in this case. Durocher, at 485. Here, the state is undermining the integrity of the system by arguing in favor of Appellant's waiver and execution, and withholding relevant records at the same time. Thus, due to the actions of the state, Appellant was unable to make the knowing waiver required under the law.

D. Policy reasons dictate that Appellant should not be allowed to waive postconviction counsel outright.

Capital cases are set apart from other cases in that the punishment involved is the most severe allowed under the law. Unlike other punishments, the carrying out of a death sentence is truly final. Florida courts, as well as Federal courts, recognize that this punishment is different in both its severity and its finality. Swafford v. State, 679 So. 2d 736 (Fla.

1996)(Harding, J., specially concurring); see also California v. Ramos, 103 S. Ct. 3446 (1983); Thompson v. Oklahoma, 108 S. Ct. 2687 (1988); Woodson v. North Carolina, 96 S. Ct. 2978 (1976).

Due to the difference between death and all other forms of punishment, courts have recognized the need for greater scrutiny in reviewing capital cases. "However, in recognition of the 'qualitative difference of death from all other punishments,' our jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings." Swafford, at 740 (quoting from California v. Ramos, at 3451-3452). "Such heightened scrutiny ensures, as much as humanly possible, that only those who are **legally subject** to execution are executed." Id (emphasis added).

Florida laws regarding capital punishment provide a heightened scrutiny at all stages leading up to the imposition of the death sentence. For example, although defendants are afforded the right to plead guilty to the capital crime, defendants are not given the right to waive a sentencing hearing. Section 921.141(1), Florida Statutes, states that the trial court "**shall** conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment..." (emphasis added). A defendant may refuse to present mitigation evidence, but a sentencing hearing must still be held. Cf. Farr v. State, 656 So. 2d 448 (Fla. 1995); Allen v. State, 662 So. 2d 323 (Fla. 1995).

A defendant is also precluded from waiving the direct appeal that follows a sentence of death. Section 921.141(4), Florida Statutes, states that a "judgement of conviction and sentence of death **shall be subject to automatic review** by the Supreme Court of Florida..." (emphasis added). In fact, the constitutionality of Florida's capital sentencing procedure depends on the Florida Supreme Court's role in reviewing each case in order to ensure uniformity in the imposition of the death penalty. Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 101 S. Ct. 796 (1980). See also Goode v. State, 365 So. 2d 381 (Fla. 1979); Klokoc v. State, 589 So. 2d 219 (Fla. 1991).

The procedures set out in Sections 921.141(1) and (4), Florida Statutes, ensure that every death sentence is legally imposed, as well as ensuring uniformity in the imposition of the death penalty. Witt. In fact, society's concern that the death penalty be properly imposed is so great that the legislature in Florida has imposed a duty on the Florida Supreme Court to examine every case which results in a death sentence. See Goode, at 384. Furthermore, although a defendant has the right to waive counsel at both the guilt and penalty phases of the capital trial, Florida does not allow for the waiver of counsel at the direct appeal stage. See Klokoc, at 222. This Court has stated that defense counsel must not only litigate the direct appeal, but must do so with "diligent appellate advocacy." Id.

Society's concern that the death penalty be properly imposed and carried out appears in other laws relating to capital

punishment. The Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane. Ford v. Wainwright, 106 S. Ct. 2595 (1986). The Court in Ford went on to state "[W]e bear in mind that, while the underlying social values encompassed by the Eighth Amendment are rooted in historical traditions, the manner in which our judicial system protects those values is purely a matter of contemporary law." Id. at 2602. In Florida, Section 922.07, Florida Statutes, sets out the procedure the Governor must follow if informed that the defendant under sentence of death appears insane when execution is imminent. Florida Rules of Criminal Procedure 3.811 and 3.812 provide the procedure that courts (and counsel) must follow if an issue appears regarding the capital defendant's sanity.

Society's concerns regarding capital punishment are not limited to the issue of sanity. In Florida, Section 27.2001, Florida Statutes (1991), created the capital collateral representative (CCR) to provide counsel to indigent death row inmates who were seeking to collaterally attack their convictions and\or sentences "so that collateral legal proceedings to challenge such conviction and sentence may be commenced in a timely manner and **so as to assure the people of this state that the judgements of its courts may be regarded with the finality to which they are entitled in the interests of justice.**" (emphasis added). Thus, CCR was created not only to provide counsel to indigent capital defendants, but to assure society that justice was properly carried out.

Society's concern that the death penalty be carried out only when justice requires it is a continuing theme behind all of the laws, rules and cases which govern capital litigation. Yet, allowing a capital defendant to waive counsel outright in the postconviction phase of capital litigation undermines this very concern.

The law is clear that a defendant must not be executed while insane or incompetent. The capital process, however, breaks down if the defendant is allowed an outright waiver of counsel. Competency is not static. Competency concerns the defendant's immediate mental state, but the process fails to establish who will protect the defendant's rights should competency or sanity become an issue later on. Who will look out for the defendant? Considering the state's role in this adversarial process, it is impossible (if not unconstitutional) for the state to take on this role.[12] Furthermore, the court with jurisdiction over the matter can only look out for an incompetent defendant's rights if put on notice that a competency issue exists. Only defense

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[12] At the final waiver hearing (June 24, 1997), the potential conflict appeared. The state informed the lower court that it found itself in the unique position of representing the defendant against the defendant's own attorneys. (R. 765). This is unquestionably a conflict because the state, by representing Appellant in his bid to waive postconviction counsel and postconviction appeals, is essentially relieving itself of several obligations imposed by the process: obligation to assure the waiver is knowing, under Durocher; obligation to assure that requested public records are provided to the defense, under Ventura; obligation to provide the heightened scrutiny necessary to assure that only those who are **legally subject** to execution are executed, under Swafford; and, obligation to assure that Due Process rights are not violated by the execution of an incompetent individual.

counsel would be in the position to observe a defendant over a significant period of time and notify the proper court should competency become an issue. Cf. Carter v. State, Case No. 88,368, slip op. at 4 (Fla. March 12, 1998)(Collateral counsel will be in a position to adequately represent the inmate's best interest, to determine which claims must be raised, and to make all decisions necessary to the proceedings.)

Allowing a defendant who may seem competent now to waive counsel denies the reality that competency often changes over time. Thus, allowing a waiver of counsel will inevitably lead to the execution of those who constitutionally should not be executed, and society's interest in justice would ultimately be ignored.

In Florida, society's interest in imposing the death sentence only where justice demands it requires that every case be scrutinized in order to ensure that the sentence is legally sound. As stated earlier, this demand for a higher level of scrutiny has resulted in laws that call for a mandatory sentencing proceeding, as well as a mandatory direct appeal. In fact, not only is a direct appeal mandatory, but counsel must pursue it with "diligent appellate advocacy", even when a defendant wishes to waive his right to the appeal. Klokoc, at 222. It is also clear that the Eighth Amendment cannot tolerate the imposition of the death penalty where there is a "risk that the death penalty will be imposed in spite of factors which may

call for a less severe penalty." Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

Allowing a defendant to waive postconviction counsel, however, defeats society's interest in a higher level of scrutiny in capital cases. A defendant may waive counsel at the trial level, but no law establishes a defendant's right to waive counsel during the direct appeal phase. A direct appeal is necessary to ensure that the imposition of the death penalty is proper, and counsel is necessary to ensure a proper and adversarial direct appeal. Indeed, this Court has previously acknowledged counsel's crucial role in the direct appeal process:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985).

The same zealous advocacy should be mandatory at the postconviction stage of the process. Claims asserted for the first time during the postconviction stage are not simply technicalities. Instead, these claims directly implicate the constitutional requirement that the death penalty be imposed in a fair, non-arbitrary manner. See e.g., State v. Spaziano, 692 So. 2d 174 (Fla. 1997)(key witness recanted); Hildwin v. Dugger, 654

So. 2d 107 (Fla. 1995)(ineffective assistance of counsel); Card v. State, 652 So. 2d 344 (Fla. 1995)(claim of denial of right to independent weighing of aggravating and mitigating circumstances); Garcia v. State, 622 So. 2d 1325 (Fla. 1993)(Brady violation); Johnson v. State, 593 So. 2d 206 (Fla. 1992)(evidence that court may have been mistaken about jury's penalty phase vote); Jones v. State, 591 So. 2d 911 (Fla. 1991)(newly discovered evidence of innocence); Burr v. State, 576 So. 2d 278 (Fla. 1991)(invalid underlying conviction); Eutzy v. State, 541 So. 2d 1143 (Fla. 1989)(claim predicated on Johnson v. Mississippi, 486 U.S. 578 (1988)); Mason v. State, 489 So. 2d 734 (Fla. 1986)(incompetent to stand trial); Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986)(postconviction recognizes fundamental error); Witt v. State, 387 So. 2d 922 (Fla. 1980)(fundamental change in law).

These claims, and others, implicate several constitutional rights which may establish that a defendant is in fact ineligible for death. If these claims exist, they must be put to a proper adversarial testing, and only counsel can provide the knowledge, resources, and zealous advocacy necessary to do an adequate job. If a defendant is allowed to waive counsel, claims of constitutional magnitude will never be addressed, or will be inadequately addressed, risking the possibility that the death sentence will be carried out "in spite of circumstances calling for a different penalty." Penry, at 2952. This certainly defeats

society's interest that the death penalty be carried out only when circumstances call for it.

Policy reasons thus dictate that Appellant should not be allowed an outright waiver of postconviction counsel. Death is different in that it is truly final. Counsel is not only necessary to protect Appellant's interests in this adversarial process, but is also necessary to assure society that the death penalty is not imposed arbitrarily or mistakenly. Without counsel, the process inevitably breaks down.

ARGUMENT II

THE LOWER COURT ERRED IN GRANTING APPELLANT'S ORE TENUS MOTION TO WITHDRAW MOTION FOR POSTCONVICTION RELIEF AND MOTIONS TO COMPEL PUBLIC RECORDS UNDER CHAPTER 119, FLORIDA STATUTES, WITH PREJUDICE.

A. The granting of Appellant's Ore Tenus Motion was based on both an inadequate waiver hearing and an erroneous competency determination in the court below.

The decision of the lower court allowing Appellant to withdraw his Motion for Postconviction Relief and Motions to Compel was erroneous. The lower court allowed Appellant to withdraw the motions after determining that Appellant was competent to waive counsel and represent himself. However, the waiver hearing conducted by the lower court was not adequate in that it was not a full and fair hearing.[13] Furthermore, the

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[13] Appellant incorporates everything plead in Argument I into Part A of Argument II. For reasons of judicial economy, Appellant presents an abbreviated argument in Part A of Argument II.

determination by the lower court that Appellant was competent to waive was also error.

As the law now stands, Appellant has the constitutional right to waive professional counsel and to represent himself in postconviction if he so chooses. Faretta v. Califormia, 95 S. Ct. 2525 (1975); Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). To engage in self-representation, however, requires that the defendant be competent. Durocher. The Constitutional standard governing a criminal defendant's competency to waive counsel is the same as the standard for competency to stand trial. Godinez v. Moran, 509 U.S. 389, 401-02 (1993). See also Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994)(standard applies equally before trial and during postconviction).

If questions are raised in the court's mind regarding the competency of the defendant, an adequate hearing on the question of the defendant's competency must be held before the defendant is allowed to waive. Durocher, at 485. A defendant's due process rights are violated if the state trial court does not afford him an adequate hearing on the question of competency. Pate v. Robinson, 86 S. Ct. 836, 838 (1966)(citing Bishop v. United States, 76 S. Ct. 440 (1956)).

It is incumbent upon the court to ensure that an incompetent defendant is not allowed to waive his or her constitutional right to representation. The lower court, however, was unable to ensure Appellant was competent to waive because the lower court

was unable to consider all of the evidence relative to Appellant's competency. Thus, allowing Appellant, an incompetent individual, to waive constitutional rights was a violation of Appellant's due process.

Counsel for Appellant was unable to present the lower court with all of the evidence relative to competency due to the actions of the state. As demonstrated, records and files relevant to Appellant's competency in possession of the state were never turned over to the defense. The lower court also relied on the defective waiver determination from earlier in Appellant's case. And, the lower court erred when it refused to consider evidence indicating a change in Appellant's competence or, as defense counsel argued, evidence of Appellant's continuing incompetence.

If the lower court was correct in its determination that Appellant was competent to waive, allowing Appellant to waive was still a violation of due process because Appellant could not have made a knowing waiver. Counsel for Appellant was not in possession of all information relevant to Appellant's case due to the actions of the state and lower court. Records and files relevant to Appellant's case in possession of the state were never turned over to the defense, preventing Appellant from making a knowing waiver of his rights.

Lastly, allowing Appellant to waive his postconviction appeal after a constitutionally erroneous waiver of counsel defeats society's interest in a higher level of scrutiny in

capital cases. Death is different in that it is truly final. Collateral counsel is not only necessary to protect Appellant's best interests in the adversarial process of capital litigation, but is also necessary to assure society that the death penalty is not imposed arbitrarily or mistakenly, or imposed on the incompetent. Without counsel, the process inevitably breaks down, and incompetent defendants will be allowed to waive postconviction appeals despite the existence of factors which mandate a lessor sentence.

B. Policy reasons dictate that Appellant should not be allowed an outright waiver of all available avenues of appeal.

Capital cases are set apart from other cases in that the punishment involved is the most severe allowed under the law. Unlike other punishments, the carrying out of a death sentence **is** truly final. Florida courts, as well as Federal courts, recognize that this punishment is different in both its severity and its finality. Swafford v. State, 679 So. 2d 736 (Fla. 1996)(Harding, J., specially concurring); see also California v. Ramos, 103 S. Ct. 3446 (1983); Thompson v. Oklahoma, 108 S. Ct. 2687 (1988); Woodson v. North Carolina, 96 S. Ct. 2978 (1976).

Due to the difference between death and all other forms of punishment, courts have recognized the need for greater scrutiny in reviewing capital cases. "However, in recognition of the 'qualitative difference of death from all other punishments,' our jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings." Swafford, at 740 (quoting from California

v. Ramos, at 3451-3452). "Such heightened scrutiny ensures, as much as humanly possible, that only those who are **legally subject** to execution are executed." Id (emphasis added).

Whether a defendant is legally subject to execution is not limited to whether or not a defendant is in fact guilty of the crime charged. Rather, it is also necessary to ensure that a defendant does in fact deserve to die for the crime he or she committed. This Court has recognized that innocence of the death penalty constitutes a claim in postconviction. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992); Jones v. State, 591 So. 2d 911 (Fla. 1991).

Florida laws regarding capital punishment provide a heightened scrutiny at all stages leading up to the death sentence being carried out. This is not due to the severity of the crime, but due to the severity of the punishment. For example, although defendants are afforded the right to plead guilty to a capital crime, defendants have no right to receive a death sentence. In fact, defendants are not even given the right to waive a sentencing hearing. Section 921.141(1), Florida Statutes, states that the trial court "**shall** conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment..." (emphasis added). A defendant may refuse to present mitigating evidence, but a sentencing hearing must still be held. Cf. Farr v. State, 656 So. 2d 448 (Fla. 1995); Allen v. State, 662 So. 2d 323 (Fla. 1995).

A defendant is also precluded from waiving the direct appeal that follows a sentence of death. Section 921.141(4), Florida Statutes, states that a "judgement of conviction and sentence of death **shall be subject to automatic review** by the Supreme Court of Florida..." (emphasis added). In fact, the constitutionality of Florida's capital sentencing procedure depends on the Florida Supreme Court's role in reviewing each case in order to ensure uniformity in the imposition of the death penalty. Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 101 S. Ct. 796 (1980). See also Goode v. State, 365 So. 2d 381 (Fla. 1979); Klokoc v. State, 589 So. 2d 219 (Fla. 1991).

The procedures set out in Sections 921.141(1) and (4), Florida Statutes, ensure that every death sentence is legally imposed, as well as ensuring uniformity in the imposition of the death penalty. Witt. In fact, society's concern that the death penalty be properly imposed is so great that the legislature in Florida has imposed a duty on the Florida Supreme Court to examine every case which results in a death sentence. See Goode, at 384. This examination takes place at the direct appeal stage. Furthermore, although a defendant has the right to waive counsel at both the guilt and penalty phases of the capital trial, Florida does not allow for the waiver of counsel at the direct appeal stage. See Klokoc, at 222. In fact, this Court has stated that defense counsel must not only litigate the direct appeal, but must do so with "diligent appellate advocacy." Id.

Society's concern that the death penalty be properly imposed and carried out appears in other laws relating to capital punishment. The Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane. Ford v. Wainwright, 106 S. Ct. 2595 (1986). The Court in Ford went on to state: "[W]e bear in mind that, while the underlying social values encompassed by the Eighth Amendment are rooted in historical traditions, **the manner in which our judicial system protects those values is purely a matter of contemporary law.**" Id. at 2602 (emphasis added).

Also in Florida, Section 922.07, Florida Statutes, sets out the procedure the Governor must follow if informed that a defendant under sentence of death appears insane when execution is imminent. Florida Rules of Criminal Procedure 3.811 and 3.812 provide the procedure that courts (and counsel) must follow if an issue appears regarding the capital defendant's sanity. These are both examples of legislative and judicial action in response to society's concern that only those who are eligible receive death.

Society's concerns regarding capital punishment are not limited to the issue of sanity. In Florida, Section 27.2001, Florida Statutes (1991), created the capital collateral representative (CCR) to provide counsel to indigent death row inmates who were seeking to collaterally attack their convictions and\or sentences "so that collateral legal proceedings to challenge such conviction and sentence may be commenced in a

timely manner and **so as to assure the people of this state that the judgements of its courts may be regarded with the finality to which they are entitled in the interests of justice.**" (emphasis added). Thus, CCR was created not only to provide counsel to indigent capital defendants so their appeals would proceed in a timely manner, but also to assure society that justice was properly carried out.

Society's concern that the death penalty be carried out only where justice requires it is a continuing theme behind the laws, rules and cases which govern capital litigation. Our jurisprudence recognizes that "death is different" because our jurisprudence is a product of that same society. Yet, allowing a capital defendant an outright waiver of all avenues of appeal in the postconviction phase of capital litigation undermines this very concern.

Society's concern that the death sentence be imposed only where justice demands it requires that every case be carefully scrutinized in order to ensure that the sentence is legally sound. As stated earlier, this demand for a higher level of scrutiny has resulted in laws that call for a mandatory sentencing proceeding, as well as a mandatory direct appeal which counsel must pursue with "diligent appellate advocacy". Klokoc, at 222. It is also clear that the Eighth Amendment cannot tolerate the imposition of the death penalty where there is a "risk that the death penalty will be imposed in spite of factors

which may call for a less severe penalty." Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

Society's interest in the proper imposition of the death penalty requires a greater scrutiny in capital cases. This demand for a higher level of scrutiny in capital cases was recently bolstered by this Court's decision in Carter v. State, Case No. 88,368, slip opinion (Fla. March 12, 1998). In Carter, this Court held that a trial court must hold a competency hearing in a postconviction proceeding only after a capital **defendant shows there are specific factual matters at issue**[14] that require the defendant to competently consult with counsel (accepting Justice Overton's concurring view in Jackson v. State, 452 So. 2d 533 (Fla. 1984)). Id, at 3 (emphasis added). If the defendant is found incompetent, this Court also held that "claims raising purely legal issues that are of record and claims that do not otherwise require a defendant's input must proceed." Id, at 4 (emphasis added).

This Court adopted the procedures specified in Carter "in the hope of ensuring the consideration of all viable collateral claims a death-row inmate may have, thereby **furthering society's interest in the proper imposition of the death sentence** while at the same time promoting the timely commencement and resolution of postconviction proceedings." Id (emphasis added). Clearly,

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[14] Obviously, a capital defendant's ability to determine if "specific factual matters" exist depends on the availability of public records necessary for the investigation of factual claims.

society's interest in the proper imposition of a death sentence extends into postconviction proceedings. Society's interest in this matter is so strong that, according to Carter, an incompetent defendant can be forced into the postconviction appeals process simply because of his incompetence, so long as the issues are not factual and do not require his input.[15] On the other hand, Appellant, if found competent, can waive his postconviction appeals despite the existence of viable collateral claims, despite the existence of factors which may call for a lessor penalty, and despite society's interest in the proper imposition of the death penalty.

Allowing a defendant to waive all avenues of appeal at the postconviction stage ignores the necessity for a higher level of scrutiny in capital cases, and ignores society's interest in the proper imposition of the death penalty. At the direct appeal stage, this Court automatically reviews the entire record to determine if any legal errors occurred that affected the conviction or the sentence. However, this Court only reviews issues which appear in the record of the trial.

By contrast, the postconviction stage provides a defendant the opportunity to attack the conviction and sentence on factual or legal grounds that were previously unknown or could not have been raised at trial or on appeal. These claims are not simply technicalities. Instead, they directly implicate the

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[15] This is so despite the possibility that an incompetent defendant may harbor a desire to waive, and may actually waive if found competent at a later date.

constitutional requirement that the death penalty be imposed in a fair, non-arbitrary manner. See e.g., State v. Spaziano, 692 So. 2d 174 (Fla. 1997)(key witness recanted); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(ineffective assistance of counsel); Card v. State, 652 So. 2d 344 (Fla. 1995)(claim of denial of right to independent weighing of aggravating and mitigating circumstances); Garcia v. State, 622 So. 2d 1325 (Fla. 1993)(Brady violation); Johnson v. State, 593 So. 2d 206 (Fla. 1992)(evidence that court may have been mistaken about jury's penalty phase vote); Jones v. State, 591 So. 2d 911 (Fla. 1991)(newly discovered evidence of innocence); Burr v. State, 576 So. 2d 278 (Fla. 1991)(invalid underlying conviction); Eutzy v. State, 541 So. 2d 1143 (Fla. 1989)(claim predicated on Johnson v. Mississippi, 486 U.S. 578 (1988)); Mason v. State, 489 So. 2d 734 (Fla. 1986)(incompetent to stand trial); Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986)(postconviction recognizes fundamental error); Witt v. State, 387 So. 2d 922 (Fla. 1980)(fundamental change in law).

Several other capital defendants have received relief at the postconviction stage which ultimately led to a life sentence. See Arango v. Florida, 497 So. 2d 1161 (Fla. 1986)(reduced to life after postconviction relief); Bassett v. Florida, 541 So. 2d 596 (Fla. 1989)(reduced to life after postconviction relief due to ineffective assistance of counsel); Copeland v. Florida, 565 So. 2d 1348 (Fla. 1990)(reduced to life after postconviction relief); Garcia v. Florida, supra, (reduced to life after postconviction

relief due to ineffective assistance of counsel, **as well as** Brady violation and improper actions by the state); Harvard v. Florida, 486 So. 2d 537 (Fla. 1986)(reduced to life after postconviction relief due to Lockett and Hitchcock errors); Holmes v. Florida, 429 So. 2d 297 (Fla. 1990)(reduced to life after postconviction relief due to ineffective assistance of counsel at the penalty phase); Roman v. Florida, 528 So. 2d 513 (Fla. 1988)(reduced to life after postconviction relief due to the withholding of exculpatory evidence by the state); Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992)(reduced to life in postconviction due to newly discovered evidence of codefendant's life sentence).[16]

The issues presented in these cases implicate errors of constitutional or fundamental character which may establish that a defendant is in fact not guilty, or, more importantly, that a defendant is ineligible for the death penalty. If these issues exist in Appellant's case, they must be subjected to constitutional scrutiny. Otherwise, if Appellant is allowed to waive postconviction review (which necessarily includes waiving all appeal avenues), issues of constitutional magnitude will never be addressed, risking the very real possibility that the death sentence will be carried out "in spite of factors which may call for a less severe penalty." Penry, at 2952. This certainly

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[16] This brief listing of cases is merely illustrative and is not an exhaustive listing of all cases where postconviction relief led to the reduction of a death sentence to life imprisonment. Furthermore, this listing of cases is by no means an exhaustive listing of all cases that received postconviction relief.

defeats society's interest that the death penalty be carried out only when circumstances call for it.

If Appellant is allowed a waiver of appeal avenues in postconviction at all, it should be limited to issues regarding guilt. A competent defendant has the right to plead guilty at the trial level. A competent defendant, however, has no right to receive the death penalty. The death penalty is reserved for the worst offenders. Furthermore, the greater degree of scrutiny provided in capital cases is not due to a defendant's guilt, but due to the punishment that has been imposed. "[D]eath is different", Swafford, in that death is final and irreversible, and a higher degree of scrutiny is necessary to assure that those who do not deserve death are not put to death by the state. Allowing an individual the right to waive postconviction review of a death sentence, despite the existence of issues which would call for a less severe punishment, would be allowing that individual **the right to receive the death penalty.**

Policy reasons thus dictate that Appellant should not be allowed an outright waiver of appeal avenues in postconviction. Death is different in that it is truly final. Postconviction review is not only necessary to protect Appellant's rights, but is also necessary to assure society that the death penalty is not imposed arbitrarily or mistakenly. Only a heightened scrutiny at

the postconviction stage of appeals can satisfy both of these compelling interests.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 24, 1998.

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