

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,216

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EDWARD CASTRO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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REPLY BRIEF OF APPELLANT

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GREGORY C. SMITH  
Capital Collateral Counsel  
Northern Region  
Florida Bar No. 279080

SYLVIA W. SMITH  
Assistant CCC - NR  
Florida Bar No. 0055816

OFFICE OF THE CAPITAL  
COLLATERAL COUNSEL  
1533-B South Monroe Street  
Tallahassee, FL 32301  
(904) 487-4376

COWSEL FOR APPELLANT

PRELIMINARY STATEMENT

References in this brief are **as** follows:

"R. \_ \_" The record on direct appeal to this Court from the original trial and sentencing.

"R2. " The record on direct appeal to this Court from the first resentencing.

"R3. " The record on direct appeal to this Court from the second resentencing.

'PC-R. ." The record on appeal in these post-conviction proceedings.

'PC-R2. \_\_\_\_." The supplemental record on appeal in these post-conviction proceedings.

"IB, ." The Initial Brief in this case.

"AB. ." The State's Answer Brief in this case.

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ARGUMENT IN REPLY

From page six to page nine, the State advances an argument that this appeal "represents an unauthorized filing". (AB. at 6). This argument is without merit. See e.g. Sanchez-Velasco v. State, 702 So. 2d 224 (Fla. 1997).<sup>1</sup>

A. **EVIDENCE OF MR. CASTRO'S VACILLATION AND INCOMPETENCE TO WAIVE POSTCONVICTION COUNSEL AND REMEDIES.**

The State's argument relies on the fact that Mr. Castro, after months of asserting a purported waiver, upon a visit by his family, entirely repudiated his waiver and instead sought to go forward with his postconviction remedies. The State asserts that collateral counsel is ignoring this fact. (AB at 9). First, this point was addressed at length in this Initial Brief. (IB. at 35-6, footnote 9). Moreover, the circumstances of Mr. Castro's **vacillation** are evidence of his **incompetence**. The record bears the extensive evidence of Mr. Castro's **vacillation** and the **clinical import** of such behavior:

Letter of December 27, 1994 from Edward Castro to CCR Chief Assistant M.J. McClain stating:

"My request is that all work concerning Certiorari stop. I want my appeal to be placed in your office, and proceed as such - a Writ of Habeas **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).

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<sup>1</sup>Moreover, this Court denied Appellee's Motion to Clarify and Limit Scope of Appeal.

Letter of January 29, 1995 from Edward Castro to CCR Chief  
Assistant M.J. McClain stating:

"I am requesting representation by your office of C.C.R. on the following . . . "

"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, plesae send me an address to the court which I can file to for representation."

(PC-R2. 2706).

Letter of February 8, 1995, from Edward Castro to 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).

Letter from Edward Castro to Assisant 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  
concerning the 3.851, (papers to file pro  
se?)

(PC-R2. 2709).

Letter of March 22, 1995, from Edward Castro to 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 amd 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 concerning 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 any  
responsibilities concerning my 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. Your 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).

Letter of March 22, 1995, from Edward Castro Richard Martell, Chief, Capital Appeals, Office of the Attorney General, 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. 2713).

Letter of January 18, 1996, from Edward Castro to Assistant  
CCR, Sylvia Smith, stating:

Recently I received a letter from my  
mother, Angela 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).

Letter of February 2, 1996, from Edward Castro to 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 Optimitrist 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 concerning this federal Writ of Habeous Corpus!!

(PC-R2. 2716-17).

Letter of March 28, 1996, from Edward Castro to 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 generosity!

I'm sorry if our visit ended on a sour note - I hope you realize it's nothing personal. You've done a professional job and I appreciate your honesty. I am open to visits, from you, if ever you should choose to come visit, in the legal or personal sense!! Perhaps I'll see you again soon!

Thank you for the info', stamps, case-law, and sincere concerns.

(PC-R2. 2718).

Letter of May 14, 1996, from Edward Castro to 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-inlaw have come and gone - it went well. We spoke of the appeal, to a degree; "my sister asked me to keep her informed as to where, and how, the appeal stood. I said I would." I explained to her I myself don't know how all this will end, or how long the process would take, because truthfully 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'-inlaw** - 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).

Letter of July 12, 1996, from Edward Castro to 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 analysed.

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).

The record also contained the following observations of collateral counsel:

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 thought 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).

And further, these observations:

MEMORANDUM

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

In recent visits, Edward described three distinct personalities 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).

At the July hearing, collateral counsel presented the testimony of Dr. Jethro Toomer:

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 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.

Q Now, Dr. Toomer, I don't know if you're familiar with the case of Faretta v. California, where they talk of a "knowing, intelligent, voluntary waiver."

A Yes.

Q Mr. Castro would fail and would be incompetent in order -- under that standard -- to --

MR. MARTELL: I would object.  
That's a legal standard.

THE COURT: Sustained. Do you have any other questions?

MS. BREWER: I do, Your Honor, just a few.

THE COURT: Go ahead.

BY MS. BREWER:

Q Okay. And the other thing, Dr. Toomer, that I need to get into, first of all, there's some suggestion that the testing was not complete, and even if that were the case, based upon the review of the materials would you be able to -- based on what you were able to do -- to come to the conclusion and the opinions that you've arrived at?

A Yes, I did.



Q And the testing was complete with regard to the final receipt of all the data.

A Yes.

Q And are the background materials and the things that you have done in your evaluation of Mr. Castro those that are reasonably relied upon in the community of **p;psychology** and psychiatry, in forming and basing your opinion of that?

A **Yes.** It is the data that is currently relied upon.

Q One last inquiry. Dr. Toomer, I have your opinion here, the expert opinion that Mr. Castro was incompetent to knowingly, intelligently waive his right to counsel and his post-conviction remedies, and yet Mr. Castro is sitting over there apparently normal, and I would like you to explain to the Court how that can be, that Mr. Castro can say "X, Y, Z" and apparently appear to know what he's doing.

A The fact that there's absolutely no relationship -- when I say "relationship" I mean a one-to-one relationship between one's ability to communicate in a way that appears logical and coherent.

In the hospital I see individuals with serious schizophrenic problems that although they are so severely impaired that they have to be hospitalized, at the same time you can sit down with them and they can things that logical and that are coherent.

What we're talking about here is not what that person says. What we're talking about here is the process by which the person gets to a particular point. So the fact that someone can communicate something does not mean that person is necessarily operating in a logical, coherent, reasonable fashion.

And that process is one that psychologists and psychiatrists see all the time. The issue becomes, How does that person get to a particular point; does that person have the ability to move beyond the

literal meaning of words; is that person's reasoning ability free and clear of any underlying interference from mental impairment. Those are the kinds of issues that come into play in terms of reaching the conclusions that I have reached.

And in my conclusions, as I have opined, that ~~was~~ with regard to all of the information that I've looked at, there's no way that you can look at the person's history, look at the person's underlying trauma, and what have you, look at the variety of diagnostic categories that have been attributed to him by both psychiatrists and psychologists, and without any kind of intervention, or what have you, say that this person is able to reason in an appropriate fashion that would equip him -- that would cause him to be equipped in such a way, i.e., competent to render a particular decision. It is inconsistent with the data.

MS. BREWER: Your Honor, may I have a moment?

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.

(R. 285-302).

\* \* \*

**CROSS-EXAM BY MR. DALY**

Q Okay. Tell me what Mr. Castro told you in his interview.

A He described for me in his interview --

Q Let me -- I'm sorry. How did it start? What question did you ask first?

A Just the usual demographics.

Q You didn't ask him "Why don't you want C.C.R. representing you"?

A That wasn't the first question, no.

Q Did you ask him that at some point in time?

A Yes, sir.

Q And what did he say?

A He said he just wanted to get everything over and get it -- and get on with, what have you, and be done and finished with it.

(R. 315-316).

\* \* \*

Q Did all of the answers he gave you to the questions you asked, where they correct in context?

A Yes.

Q So he was answering what you were asking?

A He answered the questions that I asked, yes, sir.

Q I see; and did he -- what responses that he gave you led you to the conclusion that -- I mean, how did you put it -- that his high -- higher-order thought processes were not functioning properly?

What answers did he give you that led you to that conclusion?

A The answers that he gave me, as I indicated, were responsive to the questions that were asked. But, you see, it's not that simple a factor in terms of someone saying something that is logical and coherent.

If we used that -- if we used that model to make a determination -- in other words, if we said or assumed that everyone who responded in a logical manner was functioning appropriately in terms of their competency, we'd be way off base, so it's not just that simple a factor.

(R. 316-317).

\* \* \*

Q If the Defendant takes the stand and tells us that he is competent --

A Not necessarily. You see, it's not -- you see, you have to understand. It's not -- it's not a one-to-one situation, a process such as that.

Your contention with -- which I totally disagree -- is that if a person gives you the answer to a question, then that means that he's functioning appropriately. And for me, I'm sorry, that just doesn't work.

Q And that is because you want to know his motivation for giving you that answer?

A -- (Incomprehensible.) -- a different motivation.

Q Explain to me what -- explain it to me why if the Defendant tells you "I understand what I'm giving up" --

A It's got nothing --

Q "And I want to give it up" --

A It's got nothing to -- it has nothing to do with motivation. It has to do with the process of higher-order thought that leads to the conclusion whether or not the person can conceive or perceive of a series of steps, can go beyond the literal meaning of words, can bring higher-order thought in terms of consequences and weighing of alternatives to the particular issue at hand.

Those are the things that are important, not simply because someone can mouth the proper -- proper answer. That's not -- that's not the issue.

(R. 327-328).

\* \* \*

Q Doctor, what does this man have to tell you to demonstrate to you that he's capable of making that decision, that he's waiving his counsel?

A Well, you see, that's -- that's where you and I differ. You said --

Q Well, I just want to know.

A No. Well, that's what I'm saying. You're telling -- you're asking me "What can you tell me," and what I'm saying to you is it's not just a matter of what he can tell me, it's what is consistent in terms of his behavior over time; in other words, whether what he tells me and what he indicates and his level of awareness and level of knowledge

with regard to what is going on is consistent with his history.

But as I said before, you -- it is impossible for me to sit here and look at an individual with this history, with this level of dysfunction, with the array of mental health disorders, and for you to say to me that a person says -- answers "Yes" to this question or "No" to that question, and that is appropriate, that that means that that person is competent.

(R. 331).

\* \* \*

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.

(R. 366-367).

**THE DEFENDANT:** Sir, I didn't waive penalty phase because I was not aware at that particular time that I had the right to waive. I was under the impression that it was part of the direct appeal and that it is mandated by law. Therefore, I wasn't in a position --

I spoke to Tricia Jenkins, who represented me at my trial --

**THE COURT:** Chief Public Defender here in Marion County.

**THE DEFENDANT:** Correct. And she explained to me specifically that I was mandated by law to file a direct appeal; and that until that was over, completely over, I could not waive anything.

So therefore when the Florida Supreme Court initially in '89, 1989, gave me a penalty phase, I -- at that time I had not picked up any law books and I was merely going along with my attorney's wishes, and I felt that it was, it was all part of the direct appeal.

It occurred again in '91, it occurred again, I believe, in '93, and each time I had not received a solid resolution from the Florida Supreme Court because they kept returning it to the trial court.



In 1994, in December of 1994 when the Florida Supreme Court affirmed the death penalty, well, I waived certiorari. I waived certiorari and ever since then I have been waiving all future State and Federal collateral appeals.

The only period that I ever **waivered** was when CCR introduced, as I stated before, my long-lost biological sons into my life. And it created, it created a state of confusion, I admit, for a period of maybe about 30 days.

But once I returned to the prison and was allowed to reflect on my particular position -- and this is another thing, is that CCR is misrepresenting my position. It's not a desire or a wish, but it deals more with contention. I am content at this date, I am content with the arbitration that has taken place on my particular case.

I'm not attacking the conviction of guilt, I'm not -- and I'm not attacking the conviction -- opposed to the sentence imposed. I understand the finality that it entails. But the fact of the matter is that everyone --

And maybe it took all these years for me to study, to study the books of law that I've studied, to read the case law that I've read and to develop my vocabulary to the point where I could articulate exactly what is in my mind to the Court.

Initially, I grant you, that everything they are saying about me by description is 100 percent correct of who I **was** in 1987 and prior. But it is not who I am today.

(R. 797-801).

What is obvious is that Mr. Castro does not want to waive when he is momentarily relieved from his pain -- pain resulting from his life-long trauma and incarceration. That his waiver is a result of his desperate circumstances is evidence of his lack of competence to make the waiver and its involuntariness.

The record is also clear that Mr. Castro does not understand what he is waiving. He believes that his conviction and sentence are final (PC-R. 800). His waiver is based on his assessment that he has received an adequate "arbitration" (PC-R. 800) because he was three times sentenced to death. This thought process reveals that Mr. Castro does not and cannot appreciate the nature of the postconviction challenges he purportedly waived.

B. JUDGE SINGBUSW'S FAILURE TO CONVENE A COMPETENCY HEARING AND HIS RELIANCE ON THE NULL AND VOID FINDINGS OF JUDGE SAWAYA VIOLATE DUE PROCESS.

Due process requires that the trier of fact hear the testimony upon which their decisions rely, particularly when the trier of fact must resolve the credibility of witnesses. Suarez v. State, 527 So. 2d 190 (Fla. 1988), Steinhorst v. State, 636 So. 2d 498 (Fla. 1994); Hatcher v. St. Joe Paper Co., 603 So. 2d 65 (Fla. 1st DCA 1992); Smith v. Smith, 612 So. 2d 713 (Fla. 2nd DCA 1993); Reaves v. Reaves, 546 So. 2d 744 (Fla. 2nd DCA 1989); Paragon Group v. Hoekseman, 475 So. 2d 244 (Fla. 2nd DCA 1985); Davalos v. Davalos, 592 So. 2d 1171 (Fla. 3rd DCA 1992); Smith v. Silberman, 586 So. 2d 467 (Fla. 3rd DCA 1991); Alvord v. Alvord, 572 So. 2d 925 (Fla. 3rd DCA 1990); Beattie v. Beattie, 536 So. 2d 1078 (Fla. 4th DCA 1988); L.S. v. State, 593 So. 2d 296 (Fla. 5th DCA 1992); or, Bradford v. Foundation & Marine Construction co., 182 So. 2d 447 (2d DCA 1966).

There was absolutely no basis for Judge Singbush's decision in this matter, one which required resolution of conflicting testimony, since he did not hear the testimony.

Collateral counsel requested and was granted an opportunity to further litigate the issue presumably so Judge Singbush could hear the contested testimony. Without notice, however, the Court rescinded from that ruling and based on a cold and incomplete record, adjudicated Mr. Castro's competence and waiver.

Moreover, the court erred in ruling that collateral counsel had failed to file the appropriate motion to set aside the order entered by Judge Sawaya. The pleading filed put the court and the parties on fair notice that the finding of competence was being challenged. Even the State conceded that it was not proper for the court to rely on the cold record.

C. NO KNOWING, INTELLEAGENT WAIVER OF ANY POSTCONVICTION RIGHT OR REMEDY CAN BE RENDERED BY THE DEFENDANT WHILE THE STATE IS WITHHOLDING PUBLIC RECORDS FROM THE DEFENDANT AND HIS COUNSEL.

The record is clear that the State Attorney's Offices of Florida are withholding public records, therefore collateral counsel cannot fully investigate Mr. Castro's case and advise him of his rights. Further the State appears to be withholding records pertaining to Mr. Castro's mental health. No full and fair evaluation of Mr. Castro's competency and no valid waiver can be made by Mr. Castro under these circumstances.

The lower court erred in granting Mr. Castro's motion to discharge his attorneys and granting his motion to withdraw his pending postconviction motions. The state's lack of compliance

with Mr. Castro's public records requests resulted in several errors below: it prevented Mr. Castro from making a knowing waiver; it prevented counsel from advising Mr. Castro regarding the substantive rights available to him; it prevented the defense expert from doing a complete competency analysis of Mr. Castro; and, it prevented both the waiver court and the lower court from considering all of the evidence relative to Mr. Castro's competency.

In the Durocher opinion, then Chief Justice Barkett **stated** the following in her concurrence:

**Safeguards to ensure that due process is followed, such as the Faretta-type inquiry of Durocher, are essential in cases of this nature.**

Durocher, at 485 (Barkett, C.J., specially concurring) (emphasis added). The several errors committed below may be due in part to the lack of established procedures in cases such as this. The Durocher opinion, as well as subsequent **caselaw**, establishes some guidelines for cases where an individual wishes to waive postconviction counsel and, ultimately, waive postconviction review. However, Mr. Castro's case demonstrates **that established** procedures still lack **a** guarantee that due process is provided or that the outcome is reliable. The procedure utilized here was insufficient. This Court should reward this case for further **proceedints**.

The actions of the state and circuit court denied Mr. Castro a full and fair waiver hearing, in violation of due process. Because the lower court relied on the determination of Judge

Sawaya and refused to consider new information regarding Mr. Castro's competency or grant a new competency hearing, allowing Mr. Castro to waive postconviction counsel and postconviction review was error. The lower court should be reversed.

I HEREBY CERTIFY that a true copy of the foregoing reply has been furnished by facsimile transmission and United States Mail, first class postage prepaid, to all counsel of record on June 19, 1998.

GREGORY C. SMITH  
Capital Collateral Counsel  
Northern Region  
Florida Bar No. 279080



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SYLVIA W. SMITH  
Assistant CCC - NR  
Florida Bar No. 0055816  
Post Office Drawer 5498  
Tallahassee, FL 32314-5498  
(904) 487-4376  
Attorney for Appellant

Copies furnished to:

Kenneth Nunnelley  
Assistant Attorney General  
Department of Legal Affairs  
444 Seabreeze Boulevard, 5th Floor  
Daytona Beach, Florida 32118