IN THE SUPREME COURT OF FLORIDA

Appeal from September 10, 1999, Order of Judge Alex E. Ferrer of the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida

STATE OF FLORIDA, Plaintiff/Appellee, v. JOHN ERROLL FERGUSON, or DOROTHY FERGUSON, Individually and as Next Friend on Behalf of JOHN ERROLL FERGUSON Defendant/Appellant.	Case No. 96,658

Amended

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHOFUTIES

TABLE OF AUTHORITIES
(continued)

Page

CASES:

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES:

IN THE SUPREME COURT OF FLORIDA

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BRIEF OF APPELLANT

Pursuant to Fla. R. App. P. 9.140(i), Appellant John Ferguson ("Ferguson"), an inmate on Florida's death row, appeals the Order of the Eleventh Judicial Circuit summarily denying his Motion to Reinstate Certain Post-Conviction Claims and Stay Further 3.850 Proceedings ("Motion").

Ferguson's Motion raises significant issues that are, as this Court has recognized in another context, "crucial to a proper determination of [his] collateral claim[s]." See Carter v. State, 706 So. 2d 873, 875 (Fla. 1997). Nevertheless, without reading the Motion and in the absence of any formal response from the

State, the trial judge summarily dismissed the Motion at a preliminary hearing that, until moments before it began, the judge had not even realized was on his calendar. See infra at 9. 1/ Unless that decision is reversed, Ferguson may be executed without any meaningful opportunity to pursue significant post-conviction claims related to his death sentence and even his guilt.

STATEMENT OF CASE

Ferguson's Motion is based upon a recent fundamental change in Florida law requiring that a defendant be competent to assist counsel in certain post-conviction proceedings. On December 1, 1987, counsel for Ferguson filed a Motion to Stay 3.850 proceedings on the ground that Ferguson was incompetent to assist counsel in those proceedings. The trial court rejected that motion on February 23, 1989, based, inter alia, on this Court's holding in Jackson v. State, 452 So. 2d 533, 537 (Fla. 1984), that a criminal defendant need not be competent to assist counsel in preparing and pursuing a 3.850 motion. State v. Ferguson, Nos. 77-

1/ See Tr. of First Aug. 18, 1999, Proceedings at 4-5 ("Tr. I (Aug. 18, 1999)") (Appendix Exhibit 1).

28650D, 78-5248 (Fla. Cir. Ct. Feb. 23, 1989) at 13 (citing Jackson, 452 So. 2d at 537) ("Order Denying Motion to Stay"), R. at 4:17. 2/

This Court now has squarely rejected that conclusion of law. In Carter v. State, 706 So. 2d at 875-876, this Court held that collateral proceedings involving factual claims that require an incompetent defendant's assistance must be stayed until the defendant becomes competent to assist counsel. The Court based this holding on its conclusion that post-conviction proceedings would be "practically meaningless" if a defendant were not able to assist counsel with such factual matters rd.

As shown below, Ferguson was plainly incompetent during his post-conviction proceedings, and his input on several factual issues was essential to the development of his collateral claims. Thus, under Carter, Ferguson's post-conviction proceedings were "practically meaningless," Id. But, in dismissing the instant Motion, the trial court refused even to consider Carter's relevance to

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2/ Documents included in the Record of Appeal are cited herein as "R. at [Vol.] : [Page] ." The four-volume Record of Appeal consists of Volumes 1-3, containing pages 1-500, and one unnumbered volume, containing pages 1-38. The unnumbered volume is cited herein as Volume 4.

Ferguson's case. Instead, the trial court found that Ferguson is precluded from asserting his incompetence at this time due to a 1989 finding by Judge Snyder that Ferguson was competent to assist post-conviction counsel.

As demonstrated below, the trial court's ruling violated the most basic principles of issue preclusion. Judge Snyder's ruling cannot prevent litigation of Ferguson's competence because that finding was made in the alternative, and, furthermore, though appealed by Ferguson, it was never reviewed by this Court. In addition, Judge Snyder's 1989 ruling should not be accorded preclusive effect because it was clearly erroneous. Even the State now acknowledges, and has successfully argued in three separate legal proceedings, that Ferguson suffers from schizophrenia. And it is well-established that in 99% of men with schizophrenia, the initial onset of the disease is earlier than Ferguson's age in 1989. See infra at 29-3 1. Any argument that Ferguson was "malingering," as found by Judge Snyder, has been proven false by subsequent events, including a life-threatening episode that occurred when one of Ferguson's doctors temporarily reduced his anti-psychotic medication,

The undisputed record demonstrates that Ferguson suffered, and continues to suffer, from schizophrenia, a serious mental disease, which rendered him incompetent. As a result, Ferguson was utterly unable to assist his counsel in developing crucial claims during his 3.850 proceeding. Ferguson is entitled to reinstate that proceeding now so that the Court can consider the application of the holding in Carter to his case.

Counsel submits that the Court can find on the current record that Ferguson is -- and has been at least since 1987, when the 3.850 motion was filed -- incompetent to assist counsel. Alternatively, if this Court declines to rule on the basis of the current record, Ferguson requests that the Court remand the Motion to the trial court to hold an evidentiary hearing to resolve the issue of his competence. If the Court finds that Ferguson was incompetent in 1987, Ferguson requests that the Court reinstate certain of his 3.850 claims pursuant to Carter in order that these claims can be meaningfully considered. 3/ Furthermore, if the Court finds that

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3/ As explained in Ferguson's Motion, he is seeking to reinstate only those 3.850 claims that require his assistance with factual matters. Specifically, counsel seeks to reinstate claims AII, AIV, and B from his initial Motion for Post-Conviction Relief (filed Oct. 15, 1987), and claims I, II, and VT from the Supplement to 3.850 Petition (filed Sept. 8, 1989). See Motion to Reinstate Certain

[Footnote continued]

Ferguson is incompetent today (as acknowledged by the State), Ferguson requests that the Court stay the reinstated 3.850 proceedings until such time as he becomes competent and can assist counsel.

PROCEDURAL HISTORY

Ferguson was convicted of murder and related charges in two separate cases in 1978 and sentenced to death. In July 1982, the Florida Supreme Court affirmed his convictions but reversed the death sentences because the trial court improperly failed to consider and weigh statutory mitigating factors and because it relied on invalid statutory aggravating factors. Ferguson v. State, 417 So. 2d 63 1 (Fla. 1982). On remand for resentencing, a different judge sentenced Ferguson to death in both cases without impaneling a jury and without any evidentiary hearing. This Court affirmed. Ferguson v. State, 474 So. 2d 208 (Fla. 1985).

[Footnote **continued]**

Post-Conviction Claims and Stay Further 3.850 Proceedings at 3 n. **1,** R. at 1:8; see also R. 1: 10 1, 111, 152. Certain pages of Ferguson's initial 3.850 Motion are missing from the record; counsel has attached a complete copy of that Motion as Exhibit 2 to the Appendix. Counsel has also moved to supplement the record with those missing pages. See Appellant's Motion to Supplement Record (January 21, **2000).**

Through volunteer counsel, Ferguson timely filed a motion for post-conviction relief in the Dade County Circuit Court under Fla. R. Crim. P. 3.850. During the course of the post-conviction proceedings, counsel sought a stay on the ground that Ferguson was incompetent to participate or assist them in the proceedings. The Circuit Court denied the motion for a stay on February 23, 1989, holding, in reliance upon Jackson v. State, that "incompetency is not an issue for a court to address when a motion for post-conviction relief is filed." Order Denying Motion to Stay at 9, R. at 4: 13. The court also purported to find in the alternative that Ferguson was feigning his symptoms and did not suffer from a major mental illness, id. -- a finding that was not necessary to the decision, and was clearly erroneous. See infra at 14-32.

The trial court proceeded to deny Ferguson's 3.850 motion on June 19, 1990. This Court affirmed. Ferguson v. State, 593 So. 2d 508 (Fla. 1992). In its ruling, this Court declared "without merit" Ferguson's claim that "these proceedings should be stayed pending another determination that Ferguson is

competent to proceed." Id. at 5 13. 4/ This Court later denied state habeas relief **on** unrelated grounds. Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1993), reh'g denied, 19 Fla. L. Weekly 101 (Fla. 1994).

On July 10, 1999, Ferguson filed the instant Motion to Reinstate Certain Post-Conviction Claims and Stay Further 3.850 Proceedings in the Circuit Court of the Eleventh Judicial Circuit. R. at 1: 1. On July 15, 1999, during a routine call to the clerk's office to confirm that the Motion had been received, counsel for Ferguson learned that a Report on the Motion had been scheduled for the next day, July 16, 1999. Counsel had received no notice of the Report. Subsequently, the Report was rescheduled to August 18, 1999. Once again, counsel received no notice, and learned of the rescheduled Report only by calling the clerk's office. Counsel for the State likewise did not receive notice of the Report, and learned about it only from Ferguson's counsel. Affidavit of Kristen Donoghue at 1 (Appendix Exhibit 3).

4/ This ruling is contrary to Carter v. State, 706 So. 2d at 875, where this Court held that "a trial court must hold a competency hearing in a post-conviction proceeding [when] a capital defendant shows there are specific factual matters at issue that require the defendant to competently consult with counsel."

Counsel were not the only people who did not receive notice of the Report. When Judge Ferrer reached the Motion on his calendar the morning of August 18, he indicated that he had not scheduled the Report, he had no idea how it got on his calendar, and he had not even read Ferguson's Motion. See Tr. of First Aug. 18, 1999, Proceeding at 4-5 ("Tr. I (Aug. 18, 1999)") (Appendix Exhibit 1). 5/ In fact, until counsel informed him, Judge Ferrer did not know what the Motion was about. See id.

Nevertheless, Judge Ferrer summarily dismissed Ferguson's Motion after hearing brief argument from both sides. On the record, the court indicated that it dismissed Ferguson's Motion because Judge Snyder had previously found Ferguson to be competent, a fact that, in the court's view, precluded further litigation on the issue. Tr. of Second Aug. 18, 1999, Proceeding at 5,6-7 ("Tr. II (Aug. 18, 1999)"), R. at 4:23, 24-25. The court did not address Ferguson's argument that Judge Snyder's ruling could not preclude further litigation of Ferguson's competence because it was neither reached on appeal nor necessary to

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5/ This portion of the transcript was also omitted from the Record. Counsel for Ferguson has included it in Appellant's Motion to Supplement the Record. See supra note 3.

the judgment. Rather, the court found that "collateral estoppel [does not] apply anyway; because competency is fluid and a person can be competent at one time and incompetent in another time." Tr. II (Aug. 18, 1999) at 6-7, R. at 4:24-25.

On August 27, 1999, the clerk filed the court's Order Denying Defendant's Pro Se [sic] Motion, which stated as its only grounds for dismissal that Ferguson's Motion was "insufficient to support the relief prayed." See Order of Judge Alex E. Ferrer (filed August 27, 1999) ("First Order"), R. at 3:481. Subsequently, the judge signed a two-page written Order which stated as the grounds for dismissal that Ferguson had already been given a "full and fair evidentiary hearing" on his competence before Judge Snyder. See Order Denying Motion to Reinstate Certain Post-Conviction Claims and Stay Further 3.850 Proceedings (signed September 10, 1999) ("Second Order"), R. at 4:4. The court acknowledged in that Order that it did not reach any of Ferguson's additional arguments, including the retroactivity of Carter. This appeal follows.

SUMMARY OF ARGUMENT

John Ferguson suffers from schizophrenia and is not competent to assist counsel in his post-conviction proceedings. Twenty-four years' worth of psychiatric evaluations -- including dozens of assessments from state medical personnel -- consistently bear witness to that fact. But in 1989, the trial court denied Ferguson's motion to stay proceedings on his 3.850 motion, concluding, on the basis of Jackson, that a capital defendant was "not entitled to a judicial determination of his competency to assist counsel . . . in preparing a 3.850 motion" because post-conviction proceedings were "civil in nature, rather than criminal." 452 So. 2d at 537. In addition, ruling in the alternative, the court found that Ferguson was in fact competent to assist counsel. Rejecting a string of psychiatric assessments dating back to 1965, the judge reviewing Ferguson's motion to stay concluded that Ferguson's long history of mental illness was just a remarkable stretch of malingering and that Ferguson "does not suffer from a major mental illness." Order Denying Motion to Stay at 9, R. at 4: 13.

This Court flatly rejected the trial court's legal conclusion in Carter v. State. supra. The Court recognized for the first time in Carter that "a trial court

must hold a competency hearing in a postconviction proceeding" when a capital defendant "shows there are specific factual matters at issue that require the defendant to competently consult with counsel." 706 So. 2d at 875 (emphasis added). In those circumstances, a defendant's competency is "crucial to a proper determination" of his claims; otherwise, an incompetent defendant's post-conviction proceedings would be "practically meaningless." Id.

This Court's decision in Carter requires reinstatement of several claims Ferguson raised in his 3.850 motion for post-conviction relief. Carter announced a new and significant constitutional principle -- a principle the judge reviewing Ferguson's motion rejected outright -- that a capital defendant is entitled to a determination of competence in post-conviction proceedings where factual matters are at issue, lest the proceedings be a "meaningless" exercise. Following Carter, Ferguson is entitled to an evidentiary hearing on his competence where he was entitled to none before. His 3.850 motion raises factual claims that require his assistance to develop, Carter squarely applies, and claims fitting Carter's specifications should therefore be reinstated.

STANDARD OF REVIEW

This Court has exclusive jurisdiction to review the lower court's denial of Ferguson's Motion. Ferguson is under a sentence of death, and the Supreme Court of Florida possesses "exclusive jurisdiction to review all types of collateral proceedings in death penalty cases." State v. Fourth Dist. Court of Appeal, 697 So. 2d 70, 71 (Fla. 1997); see also State v. Matute-Chirinos, 713 So. 2d 1006, 1008 (Fla. 1998) (same).

The lower court dismissed Ferguson's motion based upon a legal conclusion: that Judge Snyder's 1989 ruling precludes Ferguson from relitigating his competence at this time. Second Order at 2, R. at 4:4. As a result, the appropriate standard of review is de novo. Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997), cert. denied, 119 S. Ct. 96 (1998) (questions of law subject to de novo review by appellate court); Stanfield v. Osborne Indus.. Inc., 949 P.2d 602, 608 (Kan. 1997), cert. denied, 119 S. Ct. 84 (1998) (whether the doctrine of issue preclusion applies in a certain situation is a question of law subject to unlimited de novo review); Farrell v. Mountain Folk. Inc., 730 A.2d 597, 599 (Vt. 1999) (same).

ARGUMENT

I. FERGUSON IS ENTITLED TO RENEWED CONSIDERATION OF HIS COMPETENCE TO ASSIST COUNSEL REGARDLESS OF JUDGE SNYDER'S EARLIER RULING.

In summarily dismissing Ferguson's Motion, the court below did not reach most of the issues presented by Ferguson, including the retroactivity of Carter and the clearly erroneous nature of Judge Snyder's finding of competence. Second Order at 2, R. at 4:4. Instead, the court dismissed the Motion on just one ground: that Judge Snyder had given Ferguson "a full and fair evidentiary hearing" on his competence that constituted "due process of law." Id. Based on that conclusion alone, and despite the fundamental change in law brought about by Carter, the court precluded Ferguson from raising his incompetence.

Notwithstanding Judge Snyder's determination -- and for reasons the trial court refused even to consider -- Ferguson is entitled to renewed consideration of his competence in light of Carter. Judge Snyder's ruling on Ferguson's competence was explicitly made in the alternative. Judge Snyder also found, contrary to Carter, that Ferguson was not entitled to be competent to assist post-conviction counsel. Order Denying Motion to Stay at 9, R. at 4: 13. As a result,

Judge Snyder's competence ruling was not necessary to the judgment, and cannot be used to preclude further litigation. Second, though raised, Ferguson's competence was not reviewed on appeal. As a consequence, Ferguson was denied the opportunity fully to litigate the issue, and cannot be precluded from raising it at this time.

A. Judge Snyder's 1989 Ruling Has No Preclusive Effect Because It Was Made In The Alternative.

As explicitly acknowledged in his written Order, Judge Snyder denied Ferguson's motion to stay his post-conviction proceedings for two alternative reasons. First, relying upon Jackson, Judge Snyder held (contrary to Carter) that "incompetency is not an issue for a court to address when a motion for post-conviction relief is filed," Order Denying Motion to Stay at 9, R. at 4: 13. Second, he concluded (erroneously and unnecessarily) that Ferguson was competent. Id.

These prior rulings do not preclude Ferguson from obtaining a new competency determination under Carter. It is elementary that "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second)

of Judgments § 27 cmt. i (1982). 6/ Underlying this principle is the conviction that "a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense, it has some of the characteristics of dicta." Id. Likewise, preclusive effect is not accorded any determination that was "nonessential" to an earlier judgment. See id. at cmt. h ("If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues . . , is not precluded."). Nonessential determinations, like alternative judgments, "have the characteristics of dicta," and, as such, the "interest in providing an opportunity for a considered determination . . . outweighs the interest in avoiding the burden of relitigation." Id. 7/

6/ This Court has relied on the authority of the Restatement (Second) of Judgments on numerous occasions. See. e.g., Crosby v. Jones, 705 So. 2d 1356, 1358 (Fla. 1998) (citing § 5 1); Whitehurst v. Camp, 699 So. 2d 679, 684 n.2 (Fla. 1997) (citing § 18); JFK Med. Ctr. v. Price, 647 So. 2d 833, 834 n. 1 (Fla. 1994) (citing § 5 1); Zeidwig v. Ward, 548 So. 2d 209, 209, 213-214 (Fla. 1989) (approving rationale expressed in § 85).

7/ "Nonessential determinations" are also denied preclusive effect because they "may not ordinarily be the subject of an appeal by the party against whom they were made." Restatement (Second) of Judgments § 27 cmt. h, i (1982). This notion also weighs in favor of denying preclusive effect to Judge Snyder's ruling. As discussed below, although Ferguson appealed Judge Snyder's finding that he was competent, this Court did not reach that issue, affirming instead Judge Snyder's

[Footnote continued]

Florida adheres to these basic principles of issue preclusion. Thus, Florida courts do not bar relitigation of previously decided issues where the judgment "could be grounded upon an issue other than that which [the other party] seeks to foreclose from consideration." Davis v. State, 645 So. 2d 66, 67 (Fla. Dist. Ct. App. 1994). See also Peabody Coal Co. v. Spese, 117 F.3d 1001, 1008 (7th Cir. 1997) ("[H]oldings in the alternative, either of which would independently be sufficient to support a result, are not conclusive in subsequent litigation with respect to either issue standing alone."); Deweese v. Town of Palm Beach, 688 F.2d 73 1, 734 (11 th Cir. 1982) (declining to preclude further litigation on previously litigated issue when alternative ground existed for holding). Nor does issue preclusion apply to nonessential judgments. Florida precludes litigation of previously decided issues only if identical parties seek to relitigate issues that are "identical to necessary and material issues" resolved in an earlier suit. Seaboard

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[Footnote continued]

ruling that Ferguson did not have the right to be competent. Ferguson v. State, 593 So. 2d at 5 13. This fact provides another independent ground for denying preclusive effect to Judge Snyder's ruling. See infra Section IIB.

Coast Line R.R. Co. v. Cox, 338 So. 2d 190, 19 1 (Fla. 1976) (emphasis added); St. Louis & S.F. R.R. Co. v. Wilson, 338 So. 2d 192, 194 (Fla. 1976) (same). 8/

Judge Snyder's finding that Ferguson was competent was explicitly made in the alternative, and was therefore unnecessary to his 1989 judgment. See Order Denying Motion to Stay at 9 (stating that dual rulings on Ferguson's motion provided "alternative grounds" for decision), R. at 4: 13; A.J. Taft Coal Co. v. Connors, 829 F.2d 1577, 1580 (11 th Cir. 1987) (noting that a ruling is only "necessary to a judgment" when the claim could not have been decided without resolving the issue). The legal conclusion that accompanied the ruling -- that Ferguson did not have the right to be competent -- has since been overruled by Carter, and Ferguson's competence to assist post-conviction counsel has become a critical issue. Ferguson must not be barred from litigating that critical issue on the

8/ See also Porter v. Saddlebrook Resorts, Inc., 679 So. 2d 1212, 12 14-1215 (Fla. Dist. Ct. App. 1996) (litigation precluded based upon earlier proceeding only if "the issues in the prior litigation were a critical and necessary part of the prior determination"); Delap v. Dugger, 890 F.2d 285, 3 14 (1 lth Cir. 1989), reh'g denied, 898 F.2d 160 (11 th Cir. 1990), cert. denied, 496 U.S. 929 (1990) (issue preclusion applies only when "the determination was a critical and necessary part of the final judgment in the earlier litigation").

basis of an alternative and nonessential ruling by a judge who also had concluded that the issue was irrelevant. 9/

B. Judge Snyder's 1.989 Ruling Has No Preclusive Effect Because It Was Not Addressed On Appeal.

Furthermore, Judge Snyder's earlier ruling cannot preclude Ferguson from re-litigating his competence because, though raised, that ruling was not addressed on appeal. "[T]he availability of review for the correction of errors [is] critical to the application of preclusion doctrine." Restatement (Second) of Judgments § 28 cmt. a (1982). If a judgment is appealed, issue preclusion "only

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9/ Furthermore, even when the elements of issue preclusion are met, it is exceedingly rare for courts to allow the State to bar arguments by a criminal defendant. See United States v. Pelullo, 14 F.3d 881, 890 (3d Cir. 1994) (reviewing cases from the 19th century forward and noting that "[i]nstances of invoking collateral estoppel against the defendant have been rare . . ."). See also Richard B. Kennelly, Jr,, Precluding; the Accused: Offensive Collateral Estoppel in Criminal Cases, 80 Va. L. Rev. 1379, 1399 (1994) (noting that issue preclusion in the criminal system has been invoked almost exclusively as a defensive mechanism in large part because of the higher stakes for the criminal defendant). Even in the "defensive collateral estoppel" context in criminal cases, courts in Florida only allow a verdict in one context to preclude litigation of a different charge if the party seeking preclusion carries its burden of proving that "it was necessary in the initial trial to determine the fact sought to be foreclosed." Davis, 645 So. 2d at 67 (citation omitted); see also State v. Acevedo, 632 So. 2d 1130, 113 1 (Fla. Dist. Ct. App. 1994).

works as to those issues specifically passed upon by the appellate court." Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168 (5th Cir. 1981), reh'g denied, 668 F.2d 531 (5th Cir. 1982). 10/ "'[O]nce an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision."' Dow Chem. v. United States EPA, 832 F.2d 3 19, 323 (5th Cir. 1987) (citations omitted). 11/

10/ See Alvarez v. Cotarelo, 626 So, 2d 267,268 (Fla. Dist. Ct. App. 1993) ("Where . . . a party, without fault on his/her part, is prevented from obtaining appellate review of an adverse final judgment . . . the final judgment has no res judicata or collateral estoppel effect . . . ."); R&S Partnership v. Martin Schaffel Enters.. Inc., 529 So. 2d 794, 795 (Fla. Dist. Ct. App. 1988) (same). See also Church of Scientology v. Linberg, 529 F. Supp. 945, 966 (C.D. Cal. 1981) (declining to preclude reconsideration of issues not addressed on appeal because matters that are not passed on by an appellate court are not "essential to the judgment") (internal quotations and citations omitted); Dorsey v. Solomon, 435 F. Supp. 725, 742 (D. Md. 1977) ("the availability of appellate review for the correction of errors [is] critical to the application of preclusion doctrine") (internal quotations omitted); 18 Charles Alan Wright et al., Federal Practice and Procedure § 4421 at 205 (198 1) ("As to matters passed over by the appellate court, however, preclusion is not available on the basis of the trial court decision.").

11/ Cf. Standefer v. United States, 447 U.S. 10, 22 (1980) (finding inappropriate the use of nonmutual collateral estoppel against the government in a criminal case because, inter alia, the government "cannot secure appellate review where a defendant has been acquitted").

This Court "passed over" the issue of Ferguson's competence when it considered his appeal. On appeal, Ferguson presented extensive briefing on two issues related to his competency: (1) as a matter of law, a capital defendant must be competent to assist in post-conviction proceedings; and (2) as a matter of fact, he was not competent. This Court did not reach the second issue. Instead, it summarily dismissed Ferguson's competency claim by finding "without merit" his claim that "these proceedings should be stayed pending another determination that Ferguson is competent to proceed." Ferguson v. State, 593 So. 2d at 5 13. In other words, the Court relied upon Jackson and re-affirmed its prior holding that, having been found competent to stand trial in the first place, a defendant was not entitled to a new competency determination at the post-conviction stage.

Because it disposed of Ferguson's competency claim by ruling that he was not entitled to another competency hearing at the post-conviction stage, this Court did not reach the factual question of Ferguson's competence. As a result, Ferguson was denied the opportunity to "fully litigate[]" his competency through appellate review. R & S Partnershin, 529 So. 2d at 795; see also Restatement § 27 cmt. o ("If the appellate court upholds one . . . determination as sufficient but not

the other, and accordingly affirms the judgment, the judgment is conclusive [only] as to the first determination.").

Given that the prior competency determination by this Court was made in the alternative, and that Ferguson did not have a full opportunity to litigate that determination on appeal, that ruling cannot now bar Ferguson's claims from adjudication under this Court's declaration of due process rights as set forth in Carter. 12/ As discussed below, the State has provided further proof of Ferguson's incompetence in the intervening years. Ferguson is entitled to a stay due to his clear incompetence, which dates back at least to the time of his 3.850 motion, and which has continued to this day.

12/ Even under principles of issue preclusion, "reconsideration [of a prior decision] should be freely available whenever a cogent claim is made that the law has changed." 18 Charles Alan Wright et al., Federal Practice and Procedure, § 4418, at 172 (1981).

XI. THE OVERWHELMING EVIDENCE DEMONSTRATES THAT FERGUSON SUFFERS FROM SCHIZOPHRENIA AND THAT HE WAS PREVIOUSLY AND IS NOW UNABLE TO ASSIST COUNSEL IN POST-CONVICTION PROCEEDINGS; JUDGE SNYDER'S CONTRARY FINDING WAS CLEARLY ERRONEOUS.

Because of its misplaced reliance upon Judge Snyder's earlier finding, the trial court did not reach the issue of Ferguson's competency to assist counsel. However, the record plainly demonstrates that Ferguson was incompetent at the time of Judge Snyder's ruling. This Court should find Ferguson incompetent based upon the record or, alternatively, remand the matter to the trial court for a hearing on Ferguson's competence.

Ferguson's tragic thirty-four year mental health history is detailed in the Appendix attached to Ferguson's Motion and permits only one possible conclusion: Ferguson suffers from a serious mental disorder -- schizophrenia -- with a probable onset in 1965 (or earlier) and continuing to the present time. See R. at 2:219-3:476. This mental disorder, and the anti-psychotic medications necessary to prevent dangerous psychotic episodes, render Ferguson unable to assist counsel in pursuing his post-conviction remedies, This was true in 1986, when post-conviction counsel began preparing Ferguson's 3.850 motion. It was true in 1988, when Ferguson was examined to determine ability to assist counsel,

and in 1989, when Judge Snyder found that he was not suffering from a major mental illness but was instead feigning his symptoms. It was true in 1995, when his Petition for Habeas Corpus was tiled in federal court, It remains true today.

Moreover, any argument the State could make that Ferguson does not have a serious mental illness, or that Judge Snyder's original conclusion was correct, has been overtaken by events which demonstrate beyond any doubt that Ferguson is severely ill, and that he has not been malingering his symptoms of schizophrenia. The State, in fact, has effectively waived any such argument by itself twice having Ferguson committed to a mental health institution on an emergency basis, on grounds of his serious mental illness. Both of these commitments occurred after Ferguson's 3.850 motion was denied, and one took place after his state habeas corpus petition was denied. not be allowed to argue that Ferguson is malingering, subsequently commit him as mentally ill, and then rely on the original malingering finding as if nothing had occurred in the meantime. 13/

13/ The two experts who found that Ferguson was malingering (and on whom Judge Snyder relied in his 1989 ruling to that effect) were two of three experts appointed to examine Ferguson during proceedings in the trial court in 1988, when

[Footnote continued]

The Appendix to Ferguson's Motion below outlines Ferguson's mental health history from 1965 to the present. 14/ However, for purposes of this motion,

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[Footnote continued]

the issue of Ferguson's capacity to assist post-conviction counsel first arose. These three court-appointed experts, as well as three independent experts, examined Ferguson to determine his capacity to assist counsel and testified in the proceedings before Judge Snyder. See App. at 8- 10, R. at 2:226-228. Four of the experts found Ferguson incompetent as the result of his schizophrenia. See App. at 9- 10, R. at 2:227-228. However, two of the experts, neither of whom had had any previous contact with Ferguson, saw evidence of major mental illness but concluded that some of Ferguson's symptoms were more likely to be associated with organic brain disorder (which Ferguson does not have) and that he thus was feigning such symptoms. See App. at 8-9, R. at 2:226-227. They therefore concluded that he was malingering all of his many symptoms of schizophrenia. They reached this conclusion even though they found Ferguson "uncooperative" during the examination and the psychologist could not administer any psychological tests. Id. There is nothing in either of their reports to indicate that they had reviewed Ferguson's then 20+ years of medical records or any indication that either of them took into account the fact that Ferguson was receiving significant doses of anti-psychotic medications at the time of the examinations. On cross-examination, both admitted that during their examinations they had observed all of the classic symptoms of schizophrenia and that if these symptoms were genuine, the experts would have found Ferguson incompetent. See App. at 17, R. at 2:235.

14/ See R. at 2:219-3:476. The Appendix contains citations to medical records, previous court proceedings, expert reports and other materials which constitute part of the record in this case through 1988, when the issue of Ferguson's competence to assist counsel was first litigated, as well as prison medical records through June 23, 1999. For the Court's convenience, the discussion in this section contains citations to the Appendix, as well as parallel citations to the Record of Appeal.

[Footnote continued]

it is most useful to focus on the relevant portions of such history from 1986, when the issue of Ferguson's capacity to assist post-conviction counsel first arose, to the present. During this thirteen-and-a-half year period, Ferguson has been seen by nineteen psychiatrists and psychologists, ten of them responsible for his treatment. Only two of these nineteen experts disagreed with the long-standing diagnosis of schizophrenia, paranoid type. One of those two experts, Dr. Hankins, has revised his opinion that Ferguson was malingering his illness and now agrees that Ferguson is seriously mentally ill. Every single one of Ferguson's treating physicians, and every single one of the examining physicians who have seen Ferguson over time, believes that he suffers from schizophrenia. See App. at 29-34, R. at 2:247-252.

Every single treating psychiatrist -- even Dr. Hankins -- has prescribed for Ferguson major tranquilizers in doses properly used only for serious, acute schizophrenia. Each such expert has agreed with the core diagnosis that Ferguson

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[Footnote continued]

Counsel will be happy to supplement the record with complete prison medical records if the Court would find that useful.

suffers from schizophrenia. See App. at 17-19, R. at 2:235-237; App. at 29-34, R. at 2:247-252.

Moreover, Ferguson was the subject of at least three legal proceedings during the critical time period, in each of which experts employed by the State of Florida testified -- and officials of the State of Florida found -- that Ferguson was incompetent and suffering from schizophrenia. In September 1986, there was a formal hearing in which Dr. Laura Parado testified (and it was found) that Ferguson was "'incompetent to go into any kind of hearing or court, because . . . he doesn't even know who a judge is; he doesn't even know the name of his lawyer he is working with."' Tr. of Hr'g before Fla. Parole & Probation Comm'n at 4 (Sept. 12, 1986), R. at 1:75. And prior to each of two emergency commitments to the Florida Corrections Mental Health Institute (CMHI) -- one from March 12, 1991 through January 14, 1992, see App. at 21-23, R. at 2:239-241, and the second from July 12, 1994 through February 2, 1995, see App. at 24-26, R. at 2:242-244 -- Ferguson was found in a commitment proceeding to be incompetent due to mental illness and, according to the Act under which he was hospitalized, to have a

"mental illness [] that require[d] hospitalization and intensive psychiatric inpatient treatment. " 11 Fla. Stat. Ann. § 945.41(1). See App. at 25-26, R. at 2:243-244.

The second commitment, in 1994 -- six years after Judge Snyder's finding -- was triggered by the suspicions of Dr. Hankins, the treating psychiatrist, that Ferguson was malingering some of his symptoms. In a tragic error, he reduced Ferguson's anti-psychotic medication to test his malingering theory. Ferguson's response was intense and immediate: he refused to eat -- claiming his food was poisoned -- and lost 22 pounds in two weeks. He became totally unresponsive. He lay in the fetal position, with a sheet over his head. When the prison physicians could not effectively treat his florid psychosis, he was sent to CMHT for another round of intensive hospital-based treatment. He was immediately administered Trilafon, an anti-psychotic medication appropriate only for severely mentally ill patients, to which he responded in a manner unique to persons with severe mental illness, thereby once and for all putting to rest any lingering suggestion that Ferguson was feigning symptoms of schizophrenia. See App. at 18- 19, R. at 2:236-237; App. at 23-26, R. at 2:241-244.

Since that time, Ferguson has continued to evidence symptoms of his terrible disease, notwithstanding his anti-psychotic medications. 15/ Even Dr. Hankins now agrees that Ferguson is severely mentally ill. There is no longer any suggestion whatsoever in the clinic records or otherwise that he is malingering; nor could any reasonable person disagree, in light of his response to the withdrawal of anti-psychotic medications. The experts upon whom Judge Snyder relied have been shown to have been wrong.

Furthermore, the fact that Ferguson currently suffers from schizophrenia is all but conclusive medical evidence that he was already schizophrenic in 1989. Mental health specialists all agree that, in men, the average age of onset of schizophrenia is the early to mid-20s. See American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 282 (1994) [hereinafter "DSM"] ("The median age at onset for the first psychotic episode of Schizophrenia is in the early to mid-20s for men . . . . "); N. Davies et al., Which

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15/ The State previously suggested that Ferguson exhibits symptoms of his disease only at times when he anticipates some kind of court proceedings. But no such proceedings have been scheduled since those before Judge Snyder in 1987-1988.

Characteristics of Schizonhrenia Predate Psychosis?, 32 J. Psychiat. Res. 121, 122 (1998) (average age of onset for men is 23.4 years); Mental Health Net, The Well-Connected Guide to Schizonhrenia: Who Gets Schizophrenia? (visited Dec. 11, 1999) <http://schizophrenia.mentalhelp.net/ schizophrenia/schizophrenia4.htm> (average age of onset for men is fifteen to twenty-four years old); see also Lynn E. DeLisi et al., Age of Onset in Familial Schizonhrenia, 5 1 Arch. Gen. Psychiat. 334, 334 (1994) (mean age of onset for men is 2 1.1 in families with at least two afflicted siblings); B.M. Murphy et al., An Analvsis of the Clinical Features of Familial Schizophrenia, 89 Acta Psychiat. Scand. 421,425 (1994) (mean age of onset for men is 24.9 in families with at least two afflicted siblings). In ninetv-nine percent of men with schizophrenia, onset has occurred by age 39. See, e.g., Armand W. Loranger, Sex Difference in Age at Onset of Schizophrenia, 41 Arch. Gen. Psychiat. 157, 158 (1984) (74% by age 24, 91% by age 29, 98% by age 34, 99% by age 39). In addition, schizophrenia is a permanent affliction that cannot be cured, only treated. See DSM, supra, at 282 (noting that a "return to full premorbid functioning" is not common).

When Judge Snyder found him competent in February 1989, Ferguson was just days from his forty-first birthday. Thus, over one hundred years of medical research and observation establishes that, given his current schizophrenia, Ferguson almost certainly suffered from schizophrenia in 1989, at the time Judge Snyder ruled otherwise. See, e.g., Loranger, supra, at 158.

The medical records since 1988, except for Dr. Hankins' clearly erroneous (and since revised) malingering opinion, uniformly show that Ferguson is -- and has been since around 1965 -- a schizophrenic who frequently experiences hallucinations and delusions, despite his continued medication with strong anti-psychotic drugs. For example, as recently as June 23, 1999, Dr. Arora, Sr. Physician, UCI, listed the diagnosis as "schizophrenia" and made changes to his medications in response to evidence of Ferguson's continuing "persecutory ideas" and auditory hallucinations. See Clinical Records (June 23, 1999), R. at 3:428. The previous physician, Dr. M. Fagel, who saw Ferguson most recently on August 19, 1998, noted a diagnosis of schizophrenia, with reference to hallucinations and delusions. See Clinical Records (Aug. 19, 1998), R. at 3:42 1.

It is unquestionable from his copious medical records that Ferguson is incompetent to assist post-conviction counsel by reason of his illness and the medications that are necessary to contain it. Judge Snyder's finding to the contrary was based on a malingering theory that was demonstrably erroneous at the time, as was indisputably confirmed by later events.

III. CARTER V. STATE ENTITLES FERGUSON TO A RETROACTIVE STAY OF HIS 3.850 PROCEEDINGS.

Because of its erroneous reliance upon Judge Snyder's 1989 finding that Ferguson was competent, the lower court did not decide whether Carter could be applied retroactively to Ferguson. See Second Order at 2, R. at 4:4. The retroactivity of Carter presents a mixed question of law. This Court should reach that question as part of this appeal. Allen v. State, 326 So. 2d 419, 420 (Fla. 1975); P.C. Lissenden Co. v. Board of County Comm'rs, 116 So. 2d 632, 636 (Fla. 1959).

A. Carter Represents A New Development In Florida Law That Must Be Applied To Ferguson's 3.850 Proceedings.

In 1989, Judge Snyder ruled that Ferguson's post-conviction proceedings should proceed regardless of his asserted incompetence and inability to

assist counsel with important factual matters. Order Denying Motion to Stay at 1, R. at 4:5. In so holding, the judge expressly relied upon Jackson, 452 So. 2d at 533. See Order Denying Motion to Stay at 12-13, R. at 4:16-17.

In Jackson, this Court considered whether a competency hearing was required at the collateral proceeding stage. The defendant had relied upon Florida statutes and rules pertaining to criminal proceedings. The Jackson Court found this reliance "misplaced," reasoning that because a 3.850 proceeding "is civil in nature, rather than criminal," the cited statutes and rules were therefore inapplicable. 452 So. 2d at 536-537. Likewise, relying on the lack of governing rules and statutes, Judge Snyder held that a defendant "is not entitled to a judicial determination of his competency to assist counsel either in preparing a 3.850 motion or a petition for writ of habeas corpus," which is similarly civil in nature. Order Denying Motion to Stay at 12-13 (quoting Jackson, 452 So. 2d at 536-537), R. at 4:16-17.

That Jackson was understood by Florida courts to create no right whatsoever to a competency hearing in collateral proceedings is demonstrated by the rulings in Ferguson's case. In denying Ferguson's motion to stay the 3.850 proceedings, Judge Snyder declared that, under Jackson, "incompetency is not an

issue for a court to address when a motion for post-conviction relief is filed." Order Denying Motion to Stay at 9, R. at 4: 13. In affirming that ruling, this Court, in obvious though unstated reliance on Jackson, found "without merit" Ferguson's claim that "these proceedings should be stayed pending another determination that Ferguson is competent to proceed" at the post-conviction stage, given that he had been found competent to proceed at trial. Ferguson v. State, 593 So. 2d at 513 (emphasis added).

Since the rulings in Ferguson's 3.850 proceeding, Jackson's blanket holding that competency is irrelevant to post-conviction proceedings has been overturned. In Carter v. State. sum-a, this Court held that a criminal defendant's collateral claims must be stayed if the defendant is incompetent to assist appellate counsel with factual matters. In stark contrast to Jackson, which had relied on the lack of any rule or statute creating a right to be competent at the post-conviction stage, the Carter Court found that such a right necessarily exists, irrespective of

rule or statute. The Court reasoned:

> There can be no question that a capital defendant's competency is crucial to a proper determination of a collateral claim when the defendant has information necessary to the development or resolution of that claim. Unless a death-row inmate is able to assist counsel by relaying such information, the right to collateral counsel, as well as the post conviction proceedings themselves, would be practically meaningless.

706 So. 2d at 875.

Thus, this Court recognized in Carter that a criminal defendant's due process rights would be violated if that defendant were forced to proceed with a 3.850 petition while incompetent -- meaning that the decisions of Judge Snyder and this Court to the contrary in Ferguson's 3.850 proceeding rested on a conclusion of law that now has been squarely rejected.

Because of the effect that Judge Snyder's misplaced reliance on Jackson had on the validity of Ferguson's 3.850 proceedings, Ferguson here seeks to reinstate portions of those proceedings, in light of Carter. However, even if this motion is viewed as instituting a new proceeding under 3.850, it is permitted by Florida law. A defendant does not "abuse[] the process of post conviction relief by filing a second rule 3.850 motion which asserts a change in the law." McCuiston v.

State, 507 So. 2d 1185, 1187 (Fla. Dist. Ct. App. 1987). Such a motion accordingly is not a prohibited "second or successive motion." Fla. R. Crim. P. 3.850(f). 16/ Nor is the motion untimely; the rule provides an exception to the one-year rule for changes in the law if "the fundamental constitutional right asserted was not established within the period provided for . . . and has been held to apply retroactively." Fla. R. Crim. P. 3.850(b)(2). In Dixon v. State, 730 So. 2d 265 (Fla. 1999), this Court held that the clock does not start running on the changes-in-law exception until the Court announces whether the rule -- here, Carter -- should be given retroactive effect. For the reasons set forth below, Carter should be applied retroactively to Ferguson's case, resulting in reinstatement of certain portions of his 3.850 motion. However, because this Court has not yet ruled on Carter's retroactive effect, this motion indisputably is within the allotted time under the rule.

16/ In addition, the petition falls within the statutory exception permitting a second 3.850 motion on the same grounds as the first if the prior determination was not "on the merits." Fla. R. Crim. P. 3.850(f). Ferguson's 3.850 proceeding was not "on the merits" because, without his factual assistance, it was "practically meaningless." Carter, 706 So. 2d at 875.

Retroactive application of Carter is required because: (1) it was decided by this Court; (2) the rule announced is constitutional in nature; and (3) the new rule constitutes a development of fundamental significance. See Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980). 17/

B. Carter's Rule Was "Constitutional In Nature" Because This Court Relied Upon Due Process In Holding That A Defendant Must Be Competent To Assist Post-Conviction Counsel.

Carter was premised on a defendant's right to due process of law. t was therefore "constitutional in nature," This Court correctly concluded in Carter that a post-conviction proceeding without a defendant's factual assistance is

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17/ The Witt standard customarily has been applied to situations in which a defendant on post-conviction review seeks retroactive application of a new decision to reverse a sentence or conviction as to which the direct appeal has become final. Witt focuses, therefore, on the risk of undermining the finality of convictions and sentences if the retroactivity standard is applied too leniently. 387 So. 2d at 927. In contrast, Ferguson here seeks retroactive application of Carter, which by its nature can affect the progress only of his post-conviction proceeding. Counsel are not aware of any reported case invoking Witt that has involved similar circumstances. Because of this distinction, there is no risk that applying Carter retroactively to post-conviction proceedings will call into question the conviction or sentence of Ferguson or any similarly situated defendant. The concerns for finality expressed in Witt are thus of far less moment here, because Witt is the test for retroactivity customarily applied in Florida in other circumstances, it is the standard applied in the analysis below.

virtually no proceeding at all. It is, in the Court's words, "practically meaningless." Carter, 706 So. 2d at 875. that "[t]here can be no question that a capital defendant's competency is crucial to a proper determination of a collateral claim." Id.

Carter's holding is premised on giving meaningful effect to 3.850 proceedings. As was argued in the original motion to stay Ferguson's 3.850 proceeding and in the subsequent petitions filed on Ferguson's behalf with this Court and US. District Court, the due process notions of fundamental fairness and meaningful access require a defendant -- especially one on death row -- to be competent before his collateral proceedings can move forward. Courts may not arbitrarily or unreasonably foreclose a litigant from having his claim heard before a fair tribunal. See Logan v. Zimmerman Brush Co., 455 U.S. 422,430 n.5 (1982) (noting that the Court has recognized a "right of access to courts"). The right of access is not merely the right to enter a courtroom; "[m]eaningful access to justice has been the consistent theme" of the Supreme Court's jurisprudence. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

Other courts have reached similar conclusions on due process grounds. The Wisconsin Supreme Court, in recognizing the right to receive competent assistance on appeal, noted that "the federal constitutional due process guarantee mandates fair procedures on appeal[]." State v. Debra A.E., 523 N.W.2d 727, 733 (Wis. 1994). In that case, "[t]he state expressly join[ed] the defendants in the goal of protecting defendants' fair opportunity to pursue postconviction relief as [a] right." Id. Similarly, in People v. Owens, 564 N.E.2d 1184 (Ill. 1990), the Supreme Court of Illinois held that the state statutory right to collateral counsel would be "'an empty formality"' without a defendant's competence to assist counsel. Id. at 1187 (quoting People v. Garrison, 25 1 N.E.2d 200,201 (Ill. 1969)). The court noted that "the State and the [defendant] agree[d] that the court must determine whether the petitioner's mental condition so interferes with his counsel's effectiveness as to render a hearing on the post-conviction petition fundamentally unfair." Id. (emphasis added).

The fact that this Court did not expressly cite to the Constitution in Carter does not foreclose the decision from being "constitutional in nature." It is well-established that a decision need not explicitly rely upon a provision of the

Florida or United States Constitutions to be "constitutional in nature." For example, in State v. Callaway, 658 So. 2d 983, 986 (Fla. 1995), receded from in part on other grounds, Dixon v. State, 730 So. 2d 265 (Fla. 1999), this Court held that an earlier decision, Hale v. State, 630 So. 2d 52 1 (Fla. 1993), cert. denied, 5 13 U.S. 909 (1994), should be applied retroactively even though Hale was not explicitly decided on constitutional grounds. See also State v. Stevens, 714 So. 2d 347, 349 (Fla.), cert. denied, 119 S. Ct. 452 (1998) (Harding, J., concurring) (arguing that courts -- including this Court -- have repeatedly found cases to be "constitutional in nature" even when not explicitly phrased as such).

C. Carter Was A Decision Of "Fundamental Significance" To Ferguson And Similarly Situated Defendants.

In addition to being "constitutional in nature," Carter is also a decision of "fundamental significance," and thus satisfies the third prong of the Witt test. decision from this Court is of "fundamental significance" if it either "'place[d] beyond the authority of the state the power to regulate certain conduct or impose certain penalties"' or if it is "'of sufficient magnitude to necessitate retroactive

application"' under the threefold test of Stovall v. Denno, 388 U.S. 293 (1967). 18/ Callaway, 658 So. 2d at 986-987 (citations omitted). Carter satisfies the Stovall test because in considering (1) the purpose of the rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice, Carter was a decision of "fundamental significance." Stovall, 388 U.S. at 297.

Where the purpose of the new rule is to promote the truth-seeking process, the rule is given retroactive effect. See Scott v. State, 345 So. 2d 414,415 (Fla. Dist. Ct. App.), cert. denied, 434 U.S. 853 (1977) ("New rules have been held to be retroactive where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises questions about the accuracy of guilty verdicts in past trials."). In Scott, the court found that the rule set forth in Faretta v. California, 422 U.S. 806 (1975), that defendants have the right to represent themselves, should not be given retroactive effect because acting as one's own counsel does not serve the

18/ Although Stovall is no longer followed by the U.S. Supreme Court, see Teague v. Lane, 489 U.S. 288, reh'g denied, 490 U.S. 1031 (1989), this Court has continued to employ Stovall's three-part test. See Callaway, 658 So. 2d at 984; see also House v. State, 696 So. 2d 5 15, 5 18 (Fla. Dist. Ct. App. 1997).

truth-seeking process, The court emphasized that a defendant is more likely to have a successful defense if he is represented by counsel. In contrast, the purpose of the rule laid down in Carter is to promote the truth-seeking process by ensuring that a defendant's post-conviction motion is fairly and fully considered. See Carter, 706 So. 2d at 875. In Ferguson's case, his guilt and punishment depend in great part on factual disputes that have not been fully investigated or developed, because Ferguson is incompetent to assist in developing those factual issues. See Supra Section II. by the circumstances of this case, retroactive application of Carter therefore promotes truth-seeking because it enables courts to have a fully developed factual record before proceeding.

As to the issue of reliance, there is no evidence that courts relied extensively on Jackson. During the thirteen years it was in effect, it was cited for the proposition at issue here in only one published opinion: Medina v. State, 690 So. 2d 1241 (Fla. 1997). 19/ See Gantorius v. State, 693 So. 2d 1040, 1042 (Fla. Dist. Ct. App. 1997) (finding limited reliance where statute in question had been in

19/ A Westlaw KeyCite check was run on Jackson by counsel on January 20, 2000 to verify this information.

effect less than seven years). Although there is no data on how often competency claims would have been raised at the post-conviction stage had Jackson permitted them, that number is probably quite low, since Jackson, like Carter, involved a capital defendant. Jackson, 452 So. 2d at 536.

In addition, retroactive application of the rule laid down in Carter will not obstruct the administration ofjustice. Carter applies only to capital cases. Carter, 706 So. 2d at 875 (speaking in terms of "capital defendant[s]"). And even within that small subset of cases, Carter applies only to capital defendants who are incompetent to assist counsel and whose post-conviction proceedings involve factual issues as to which the defendant's assistance is necessary. See id. at 876 (holding that until Florida Rules of Criminal Procedure are amended, standard for trial competence governs); Fla. R. Crim. P. 3.210-3.2 12. Reopening post-conviction proceedings in the few cases that likely would be affected by a retroactive application of Carter in order to hold competency hearings will not be administratively inconvenient.

Applying Carter retroactively will not require "overturn[ing] convictions." Callawav, 658 So. 2d at 987. Unlike the situation in State v.

Woodlev, 695 So. 2d 297 (Fla.), cert. denied, 522 U.S. 893 (1997), retroactive application of the rule in Carter would not require -- indeed, it would not permit -- retrial of defendants. Carter simply suspends a defendant's collateral proceedings temporarily while a competency hearing is conducted and treatment is administered. Carter, 706 So. 2d at 876. Once a defendant is competent, the proceedings can go forward. Id. Thus, retroactive application of Carter creates even less threat to the finality of proceedings than did Callawav, 658 So. 2d at 983, and Gantorius, 693 So, 2d at 1040, both of which held retroactive decisions that required the resentencing of numerous defendants.

Nor will courts be required to "delve extensively into stale records," Callawav, 658 So. 2d at 987, to apply the test for competency set forth in Fla. R. Crim. P. 3.2 10-3.212. In this case, Ferguson's history of mental illness goes back several decades and is well documented. See supra Section II. Indeed, during the time Ferguson's 3.850 motion was pending, counsel attempted to speak with him about fully formulating issues for his 3.850 petition, but he was either mute or delusional. Counsel, who have had long-standing relationships with Ferguson

dating back to his 3.850 proceedings, have filed affidavits in previous proceedings stating, inter alia:

> I have consistently found it impossible to obtain information from [Ferguson] as pertains to his current legal proceedings, the facts surrounding the crimes for which he has been sentenced to death, or his personal and familial background. It is my belief that for as long as I have known him, he has been incapable of assisting me or his post-conviction counsel in any meaningful or material way in pursuing and presenting his capital collateral claims. . . . [Ferguson] "won't talk and won't eat" , , , [Ferguson] was almost completely immobile and appeared totally disoriented. . . . [H]e appeared completely unable to speak. , . . [Ferguson] appeared to be catatonic. . . . [and in an] apparent vegetative state.

Aff. of Anne F. Jacobs (Mar. 16, 1995), R. at 1: 199-2:202. Similarly,

> Affiant E. Barrett Prettyman, Jr. had met with Mr. Ferguson in prison or jail on no less than five prior occasions, during most of which he unsuccessfully sought relevant factual information. . . . [W]e were unable to secure Mr. Ferguson's assistance in discussing matters important to the preparation of [an appeal] on his behalf, including details regarding his childhood and early life and other life events, his knowledge of events related to the charges against him, details concerning the legal proceedings arising out of such charges in which he has been involved and continues to be involved, and his recollection of events involved in the allegations made in [his appeals].

Joint Aff. of Sara-Ann Determan and E. Barrett Prettyman, Jr. (Mar. 16, 1995), R. at 3:453.

Ascertaining Ferguson's competence at the time of his 1987 3.850 proceedings also will be relatively straightforward. His last competency hearing occurred in 1988 before Judge Snyder. The same witnesses who testified then could be recalled, if necessary, and the same reports submitted into evidence. 20/

Although retroactive application of Carter will affect only a few defendants, the impact in those cases will be significant and of constitutional importance. Applying the Carter rule retroactively will ensure that those few defendants' collateral proceedings are full and complete, and are reviewed in accordance with due process.

20/ Although the evidence submitted in 1988 will be helpful to this Court in making a competency determination based upon the record, the factual conclusions drawn by Judge Snyder are owed no deference; they were not necessary to the judgment and were clearly erroneous. See supra Sections I & II.

IV. SEVERAL PIVOTAL, FACTUAL ISSUES IN FERGUSON'S CASE REQUIRE HIS ASSISTANCE.

Although Ferguson's 3.850 motion raised many legal arguments, the instant Motion seeks only to reinstate factual issues that were not fully developed due to his incompetence. See Carter, 706 So. 2d at 876 (noting that resolution of purely legal issues in a 3.850 proceeding may proceed absent a finding of competence). Ferguson -- and only Ferguson -- can provide the answers to several pivotal factual questions presented in the 3.850 motion. Counsel have exhausted every other possible avenue for resolving these factual questions. Accordingly, Ferguson's 3.850 motion should have been stayed until he is competent to assist his counsel as to those issues.

A. Ferguson's Assistance Is Required To Develop Factual Information Necessary To His Ineffective Assistance And Hitchcock Claims.

The evidence is overwhelming that Ferguson has had a long history of mental illness and family problems. See supra Section II; see also e.g., Aff. of Dorothy Ferguson, R. at 1:70. During the sentencing phases of both trials, however, trial counsel presented hardly any of this evidence in mitigation. Counsel alleged in the 3.850 motion, and reiterate now, that these inexplicable lapses

constituted ineffective assistance of counsel. See Supp. to 3.850 Petition at 1-105, R. at 1:83-197.

Ferguson's consultation on this subject is crucial. Although the 3.850 motion alleged that trial counsel's failure to introduce any meaningful evidence at the sentencing phases was per se ineffective, it might be possible that trial counsel had sound strategic reasons at the time for not doing so. But more likely, with Ferguson's assistance, his present counsel may find that trial counsel never even investigated Ferguson's mental health background, or that Ferguson gave full disclosure of his background to trial counsel but that the information he gave was ignored or not presented to the jury. Regardless, present counsel need complete and coherent disclosure from Ferguson to understand the full extent of his dealings with his trial counsel. Only then can there be a presentation of a full, complete, "meaning[ful]" argument in support of Ferguson's ineffective assistance claims. Carter, 706 So. 2d at 875.

Along the same lines, Ferguson's consultation is also vital in helping counsel understand the extent to which the trial judge's Hitchcock error was not harmless. Hitchcock v. Dugger, 481 U.S. 393 (1987), held that a trial judge cannot

preclude a jury from considering nonstatutory mitigating factors during the sentencing phase of a capital trial. This Court agreed that Hitchcock error occurred, but concluded that the error was harmless. See Ferguson v. State, 593 So. 2d at 5 12-5 13. Ferguson's assistance is needed to show that the trial judge's error was in fact not harmless. This can only be done if counsel know the full extent of the information which could have been introduced as nonstatutory mitigation evidence. Examples of nonstatutory mitigating factors include the extent, duration, and intensity of Ferguson's mental illnesses and abusive childhood; the circumstances surrounding an incident in which he was shot by a police officer in the head (possibly causing or exacerbating his mental illness); and the extent of the investigating officers' involvement in the Miami-Dade drug trade. See infra Section TVB; see also Supp. to 3.850 Petition at 60-70, R. at 1: 152-162. This information can come only from Ferguson himself.

B. Ferguson's Assistance Is Required To Develop Factual Information Necessary To His Claim Of Police Corruption And Brady Violations.

The prosecution did not disclose to Ferguson's trial counsel that several of the police officers who investigated the Carol City and Hialeah crimes, arrested Ferguson, and testified against him were under investigation themselves for criminal activity. Counsel argued in the 3.850 motion that the prosecution had a duty to disclose this information under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, United States v. Bagley, 473 U.S. 667 (1985); Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). See Supp. to 3.850 Petition, State v. Ferguson, Nos. 77-28650D, 78-5428, at 19-38 (Fla. Cir. Ct., filed Sept. 8, 1989), R. at 1: 111-130. But counsel need Ferguson's assistance to understand if and to what extent these officers' involvement in criminal activity affected his cases. Complete factual development may lead to the conclusion that the investigation and prosecution of Ferguson were hopelessly corrupted by rogue police officers.

The police officers who investigated the Carol City and Hialeah cases were themselves engaged in a drug trafficking conspiracy in the Miami-Dade County area. See United States v. Alonso, 740 F.2d 862 (11 th Cir. 1984), cert.

denied, 469 U.S. 1166 (1985). From 1977 through 1979, federal and local authorities investigated many of the same homicide detectives who were investigating Ferguson during that time period. That investigation culminated in a forty count indictment, captioned United States v. Alonso. Three of the detectives who testified against Ferguson -- Robert Derringer, Charles Zatrepalek, and Michael MacDonald -- were either convicted of or implicated in criminal activity in Alonso. See Alonso, 740 F.2d at 865 (describing defendants). Since the Carol City homicides were alleged to have been drug-related, see Ferguson v. State, 4 17 So. 2d at 641 ("the 'wheel-man' . . . testified he'd dropped the defendant . . . in the Carol City area to 'rip off a drug house"), it is certainly relevant to know what relationship, if any, existed between the homicide detectives/drug-dealers and Ferguson prior to the murders, particularly as to establishing the claim of ineffective assistance of counsel. If trial counsel was told by Ferguson of these officers' involvement in drug-related murders, Ferguson's claim of ineffective assistance of counsel (in failing to present those facts to the jury) would be proved.

It may also be possible that with Ferguson's assistance, it can be established that the police officers' criminal activity extended well beyond drug

trafficking and included some involvement in the Carol City murders themselves. Detectives may well have had a motive to implicate or frame Ferguson for murders for which they or their colleagues were responsible. There was testimony during the Alonso trial, for example, that Detective Derringer had threatened to kill at least one narcotics dealer and that one of Derringer's fellow detectives had admitted that homicide detectives had arranged for the killing of between seven and twenty people as part of their drug-related conspiracy. See Motion at 21-22 (citing Alonso Tr. at 6014-60 15 (referring to grand jury testimony of Roy Tateishi)), R. at 1: 113- 114. This testimony is only a starting point; counsel need Ferguson's assistance to develop these facts fully, to obtain corroborative evidence, and to present that evidence at a later time -- possibly to prove not only Ferguson's innocence but also his claim of ineffective assistance of counsel.

These arguments can be fully developed and explained only with Ferguson's help, Counsel have reason to believe that Roy Tateishi -- who provided the testimony in Alonso that Detective Derringer, the lead investigator in the Carol City case, had threatened to kill a narcotics dealer in the past -- is currently in the federal witness protection program. Ferguson's counsel therefore are unable to

locate him or obtain information from him about the extent of Detective Derringer's criminal activity in this case. Similarly, Ferguson's family does not know about these officers' involvement in the Miami drug trade and their possible involvement with Ferguson prior to the shootings.

C. Ferguson's Assistance Is Required To Develop Factual Information Necessary To His Batson Claim.

Ferguson's 3.850 motion also argued that African-Americans were unlawfully excluded from the jury pools in violation of Batson v. Kentucky, 476 U.S. 79 (1986). However, there is no record of how many African-Americans were excluded from the jury pools or what kinds of questions were asked of them before they were struck from the panel. Batson claims depend on circumstantial evidence such as the types of questions asked and the number of people excluded from the jury pool. See United States v. Blackman, 66 F.3d 1572, 1575 (1 lth Cir. 1995), cert. denied, 5 17 U.S. 1126 (1996) (Batson requires "the drawing of an inference of racial discrimination through any means"). Counsel expect that, once competent, Ferguson will be able to remember some details of the jury selection process and to assist in proving that the prosecutors at trial excluded potential

jurors because of race. This is information that at this point can be obtained only from Ferguson, if at all. Trial counsel cannot remember the information.

CONCLUSION

For the reasons stated, Appellant John Ferguson respectfully requests an Order reversing the trial court's dismissal of his Motion to Reinstate Certain Post-Conviction Claims and Stay Further 3.850 Proceedings. Ferguson further requests an Order stating that Carter applies retroactively to his case, and staying his post-conviction proceedings until such time as he becomes competent to assist counsel. Alternatively, Ferguson requests that this Court remand this matter for a hearing to determine his competence.

Respectfully Submitted,

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Date: January 27, 2000

CERTIFICATE OF FONT STYLE AND SIZE

1 hereby certify that this brief is printed in Times New Roman 14 point type.

Kristen Donoghue

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2000, copies of Appellant's Brief were served by First Class Mail, postage pre-paid, upon the following:

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