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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 17-1975

GENGHIS NICHOLAS KOCAKER

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Kocaker's motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal from Kocaker's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. (volume:page). The postconviction record on appeal shall be referred to as "R" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein. All emphasis is supplied unless otherwise noted.

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE

On November 17, 2004, the grand jury for the Sixth Judicial Circuit, in and for Pinellas County, indicted Kocaker for the offense of first-degree murder. The trial court ordered a competency evaluation of Kocaker on March 27, 2007. A competency hearing was held on January 3 & 7, 2008, and the court found Kocaker competent to proceed on January 8, 2008.

On June 12, 2008, Kocaker was convicted on a single count of first degree premeditated murder following a jury trial. His penalty phase took place the following day, wherein the jury recommended death by a vote of 11 to 1. The *Spencer*[1] hearings took place on December 22, and September 30, 2009.

Kocaker was sentenced to death on December 18, 2009. On direct appeal, this Court affirmed Kocaker's conviction and sentence of death. *Kocaker v. State*, 119 So. 3d 1214 (Fla. 2013). The United States Supreme Court denied certiorari. *Kocaker v. Florida*, 569 U.S. 1008 (2013).

Kocaker timely filed a Motion to Vacate Judgments of Conviction and Sentence along with a motion for competency determination on May 7, 2014. Competency hearings were held on October 23, 2015; December 10, 2015; January 5, 2016; and January 20, 2016. The circuit court found Kocaker incompetent to proceed on March 28, 2016, and remanded him to the care of the South Florida Evaluation and Treatment Center (SFETC). On June 9, 2016, the SFETC found Kocaker competent to proceed. Competency hearings were held on September 15, 2016; October 11, 2016; and October 13, 2016. The circuit court issued an order finding Kocaker competent to proceed on December 16, 2016. Prior postconviction counsel retired on December 31, 2016, and current counsel assumed representation of Kocaker. The circuit court allowed Kocaker's current counsel eighty days to amend his postconviction motion. An amended motion was filed on March 6, 2017.

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[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The circuit court conducted a case management conference on July 21, 2017. At the case management conference, the State conceded that Kocaker was entitled to *Hurst* relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).[2] (R 3023). The court denied an evidentiary hearing on all remaining guilt phase claims and summarily denied Kocaker's 3.851 Motion on October 6, 2017. This timely appeal follows.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed *de novo*. *See Ornelas v. U.S.*, 517 U.S. 690 (1996); *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). Since no evidentiary development was permitted regarding Kocaker's successive motion, Kocaker's factual allegations must be accepted as true. *Borland v. State*, 848 So. 2d 1288, 1290 (Fla. 2003); *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). This Court is to review Kocaker's competence to proceed under an abuse of discretion standard. *Ferguson v. State*, 789 So. 2d 306, 315 (Fla. 2001).

[2] The State has not filed a cross appeal and does not contest the granting of a new penalty phase pursuant to *Hurst*.

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Statement of Facts

Pre-Trial Competency Proceedings:

On March 27, 2007, the circuit court ordered a psychological evaluation of Kocaker. (TR 1:156-57). Following the evaluation, trial counsel filed a motion challenging Kocaker's competency to stand trial on April 20, 2007. (TR 1:70-72). Competency hearings were held on January 3 & 7, 2008. (TR 20:26-119). The following testimony was presented:

Dr. Hyman Eisenstein testified that he is a licensed psychologist and is familiar with the competency standards. (TR 20:39). In February 2007, he conducted a neuropsychological evaluation of Kocaker and completed a competency evaluation on May 29, 2007. (TR 20:41-43). Kocaker reported auditory hallucinations. (TR 20:46). Dr. Eisenstein performed a malingering measure which Kocaker passed, indicating that his delusion of being a helicopter pilot in Vietnam was a mental distortion. (TR 20:47-48). Kocaker was receiving several different types of psychotropic medications. (TR 20:50). Dr. Eisenstein found Kocaker was incompetent to proceed in both his ability to disclose pertinent facts surrounding his case to counsel and to testify relevantly on his own behalf. (TR 20:48-52). His intellectual abilities were also borderline with extreme impairment in judgment, reasoning, and executive functioning skills. (TR 20:50).

Dr. Jill Poorman testified that she was court ordered to conduct an evaluation of Kocaker in March 2007, and that Kocaker was cooperative and pleasant during the evaluation. (TR 20:72-73). He denied any psychiatric hospitalizations, but admitted receiving Depakote, a

mood stabilizer at the time of the evaluation. *Id*. Kocaker reported hearing voices that tell him to hurt himself, but he tries to ignore them. (TR 20:80). He reported service in the Vietnam War as a helicopter pilot. (TR 20:80). Dr. Poorman believed that Kocaker truly believes he is hearing voices and is not making this up. (TR 20:81). Although Kocaker could not describe what happened on the day of the crime and said he was intoxicated at the time of the offense, Dr. Poorman felt that Kocaker was competent. (TR 20:76-78).

Dr. Richard Carpenter testified that he evaluated Kocaker for competency on October 9, 2007. (TR 20:96). Dr. Carpenter spent approximately one hour with Kocaker. (TR 20:97). Kocaker told him he was taking Geodon, which is an antipsychotic medication. *Id*. Kocaker had an odd persona, but was cooperative. *Id*. Kocaker reported hearing voices. (TR 20:98). Dr. Carpenter diagnosed Kocaker with psychotic disorder not specified and ruled out schizophrenia. (TR 20:99). Dr. Carpenter found Kocaker to be competent. (TR 20:101). On January 8, 2008, the trial court entered an order finding Kocaker competent to proceed.

Guilt Phase Proceedings:

Undersigned counsel relies on this Court's summary of the guilt phase evidence from its opinion on direct appeal. *Kocaker v. State*, 119 So. 3d 1214, 1217-20 (Fla. 2013).

Penalty Phase Proceedings:

The penalty phase in Kocaker's capital trial lasted only one day and was held on June 13, 2008. (TR 32:1037).

The State entered nine prior judgments and sentences into evidence, and called Kocaker's

probation officer, Ryan Kranz, as a witness. (TR 32:1064-65).

The defense called Dr. Frank Wood, a neuropsychologist and neuroscientist. (TR 32:1069). Dr. Wood testified that Kocaker's brain was abnormally shaped and had reduced sugar consumption in the right hemisphere. (TR 32:1075-76). His brain had been this way since birth. (TR 23:1078). A radiologist interpreted Kocaker's scan to show infection which he attributed to HIV. (TR 32:1079-80).

Kocaker testified to his life history which was in complete contrast to his sister's testimony, Ana Maria Rivas. (TR 32:1098-1106; 1132). Ms. Rivas' video deposition was played for the jury. (TR 1188).

Dr. Eisenstein testified that he evaluated Kocaker and conducted neuropsychological testing over approximately ten hours. (TR 32:1111, 1122). Kocaker believed that he was a helicopter pilot during the Vietnam War, however, Kocaker was about ten years old when the Vietnam War ended. (TR 32:1111-12). Neuropsychological testing revealed Kocaker had an IQ score of 70 and problems with his right brain functioning. (TR 32:1115-16). His testing was also indicative of brain damage. (TR 32:1122). Kocaker reported hearing voices with self-injurious or suicidal ideation tendencies. (TR 23:1124-25). Dr. Eisenstein diagnosed Kocaker with dissociative identity disorder. (TR 32: 1154). Kocaker had this mental illness his entire life. (TR 32:1160). Just prior to the crime, Ms. Rivas reported Kocaker had a paranoid delusion that someone was in the house. (TR 32:1183-84).

In rebuttal, the State called Detective Thomas Klein. (TR 33:1255). Detective Klein

testified that Kocaker was able to give accurate personal history information during his interview in 2004. (TR 33:1258-59). Kocaker told Detective Klein that as a juvenile he was originally charged with first degree murder but the State dropped it to manslaughter. (TR 33:1262).

<u>First *Spencer* Hearing:</u>

Dr. Carpenter evaluated Kocaker on two occasions. (TR 21:11). Despite finding him competent, Dr. Carpenter believed that Kocaker was psychotic at the time of the evaluation and diagnosed him with psychotic disorder not otherwise specified. (TR 21:12). Dr. Carpenter found Kocaker had a thought disorder, illogical thinking, and paranoia. (TR 21:13). The decision on competency was made without talking to family members and with no family history, it was solely based on a clinical interview of Kocaker and a review of the interviews conducted by Drs. Eisenstein and Poorman. *Id*. After the evaluation, Dr. Carpenter learned from trial counsel that Kocaker's self-reported history was wrong. (TR 21:15). Kocaker claimed that his sister was lying. (TR 21:16). Kocaker reported five suicide attempts, but denied being suicidal. (TR 21:19-20). His mental health history was positive for signs of mental illness since the 1980s. (TR 21:23). Despite previously ruling out schizophrenia, Dr. Carpenter believed there was a distinct possibility Kocaker was schizophrenic because his thinking had subtle thought disorder qualities that are hard to fake or malinger, he had illogical thinking, and he reported hearing voices. (TR 21:13). His previous diagnosis of psychotic disorder was a more conservative diagnosis. (TR 21:13; 27).

After reviewing additional medical records and spending more time with Kocaker since his original diagnosis, Dr. Carpenter changed his diagnosis to schizophrenia paranoid type. (TR 21:27). Dr. Carpenter believed Kocaker was not malingering. (TR 21:22).

After the original clinical interview, Dr. Carpenter had an opportunity to review department of corrections ("DOC") records, including medical records, which were previously missing, however, the DOC records were still incomplete. (TR 21:18-19). Kocaker's DOC records reported multiple suicide attempts in the early 1980's by swallowing razor blades. (TR 21:18). Dr. Carpenter stated this was "very bizarre behavior." (TR 21:23). Dr. Carpenter also noted that Kocaker has a "flat" demeanor and is HIV positive. (TR 21:18-19).

In March 2006, Kocaker was found exhibiting very odd behavior and was removed for observation. (TR 21:20). He went into a catatonic state. (TR 21:21). Kocaker was transferred to a Jacksonville hospital and a CAT scan was done. *Id*. The scan was positive for brain abnormalities. (TR 21:25). He remained in the hospital for ten days. (TR 21:21). Dr. Carpenter did not believe that this was malingering since Kocaker did not magnify in other interviews when he had the chance, and reported getting better in the hospital over time (TR 21:22-23). Dr. Carpenter opined that Kocaker had a psychotic break. (TR 21:24).

Dr. Carpenter testified that Kocaker is very disturbed with a severe personality disorder, probably of a borderline nature. *Id*. The disorder connotes a tenuous grip on reality. *Id*.

Dr. Eisenstein testified that there has been a marked change in Kocaker's physical

appearance over the past two years. (TR 21:35). A current (2008) photograph from the county jail when compared to a March 2006 photo shows a downward drift in looks and functioning. *Id*. Since the June penalty phase, Dr. Eisenstein had been able to review additional DOC medical records but was still missing records from 1991 through 2006. (TR 21:36). He had also reviewed the testimony of Kocaker's aunt and spoke to Corrin Huddleston, Kocaker's older half-brother. (TR 21:37-38).

Mr. Huddleston reported that his father committed suicide, leaving him as somewhat of a caretaker for the family because he was the oldest child. (TR 21:39). Corrin reported that Kocaker had a different father. *Id*. Corrin was Kocaker's caretaker when he was born. *Id*. Mr. Huddleston reported that Kocaker had difficulties in school and some trouble getting along with people. *Id*. If he felt slighted, he would erupt. (TR 21:40). The family moved seventeen times in response to Kocaker's behavior because he was in trouble or from other issues. (TR 21:43). The mother's response was to move instead of dealing with Kocaker's behavioral problem. *Id*. This was very significant because Kocaker received no treatment as a result. (TR 21:44).

This new information led Dr. Eisenstein to make a different diagnosis than what he testified to at the penalty phase. *Id*. Dr. Eisenstein diagnosed Kocaker with schizophrenia paranoid type. (TR 21:45). The diagnosis is supported by the medical records from DOC, and Dr. Eisenstein testified to a few specific examples. (TR 21:45; 46-64).

Dr. Eisenstein testified that DOC also gave Kocaker an intelligence test. (TR 21:67). In

March 2006, DOC administered the BETA III screening test to Kocaker which showed an IQ score of 57, indicating significant impairment. *Id.* Two days later a second IQ test yielded an IQ score of 77, higher but still significantly impaired. (TR 21:67-68).

Dr. Eisenstein testified Kocaker also showed signs of psychiatric problems while at the county jail. (TR 21:68). On March 24, 2006, he was admitted to the mental health emergency unit because he was found crying, shaking, confused, and was having difficulty with self-care. *Id.* A nurse observed he was flat, anxious, depressed, and sullen. (TR 21:69). Dr. Eisenstein testified this is an indication of a major psychiatric event where Kocaker was decompensating rapidly. *Id.* Kocaker was then determined to be in a catatonic state and transferred to the Jacksonville Memorial Hospital on March 28, 2006. (TR 21:70-74). Kocaker was prescribed two psychiatric medications. (TR 21:75-76).

Dr. Eisenstein explained that a neurological consult was done. (TR 21:77). Kocaker was in an unresponsive, wandering state consistent with his status at DOC. (TR 21:77-78). On March 28, 2006, an MRI of Kocaker's brain showed abnormal, small lesions in the white matter bilaterally in both hemispheres. (TR 21:78). Two EEG's were performed on Kocaker. (TR 21:78-79). The results suggested Kocaker has brain impairments throughout both hemispheres and that he has altering brain functioning. *Id.*

Dr. Eisenstein testified that Kocaker remained at the hospital for seven to ten days and the discharge report indicated Kocaker likely experienced a psychotic episode. (TR 21:74-75). Kocaker returned to DOC and was diagnosed with depressive disorder and psychotic

disorder. (TR 21:79-80). He received a Global Assessment Functioning ("GAF") score of 20, indicating a low level of functioning in the severely impaired range. (TR 21:80). Kocaker was still reporting auditory hallucinations, but could not remember what they said. (TR 21:81-82). Several days after discharge, Kocaker reported he could not stand or move and felt stiff. (TR 21:81). This is a common side effect of the medications he was receiving. (TR 21:82).

Dr. Eisenstein testified that on April 29, 2006, Kocaker was taken to the medical center emergency room because he was unresponsive. (TR 21:84). A diagnosis of either psychosis or chronic brain syndrome was made. (TR 21:85). On May 3, 2006, a psycho-social workup was done. *Id*. Four mental health professionals reached a diagnosis of depressive disorder and psychotic disorder with a GAF score of 20. *Id*. Kocaker continued to hallucinate while on psychotropic medication. (TR 21:86). He was placed on suicide watch for psychotic behavior. (TR 21:86-87). DOC increased Kocaker's medications and by June 30th, he had reduced auditory hallucinations, meaning he was responding to treatment. (TR 21:87-88).

In August 2006, his GAF score improved to 55 corresponding with improvement in his overall functioning. (TR 21:88). Through November, the GAF score was stable and the diagnosis remained major depression with psychotic features. (TR 21:89).

In January 2007, Kocaker reported auditory hallucinations, but he was unconcerned with them and had incorporated them into his daily life. (TR 21:89, 91). He received psychotropic medication. (TR 21:92).

In February 2007, Kocaker was diagnosed with schizoaffective disorder. (TR 21:93). He continued to report auditory hallucinations. *Id*. As is typical for patients with schizophrenia, Kocaker continued to deny he has a major mental illness but complied with treatment. (TR 21:94). This is also inconsistent with someone who malingers. (TR 21:95). Although Kocaker did improve with treatment, he was still significantly impaired. (TR 21:96).

Prior to testifying, Dr. Eisenstein spent three hours with Kocaker. (TR 21:97). Kocaker continued in his delusional thought patterns even after being presented with additional information. (TR 21:98). Kocaker acknowledged hearing voices and had an extremely flat affect. (TR 21:99).

Dr. Eisenstein believed Kocaker suffered from schizophrenia paranoid type. (TR 21:101). Schizophrenia is a major mental illness which was exacerbated when Kocaker was using crack cocaine and alcohol. (TR 21:102-03). Dr. Eisenstein also diagnosed Kocaker with intermittent explosive disorder due to history of head injuries and his psychotic symptomatology. (TR 21:104-05). Kocaker's brain scans also confirmed brain damage. (TR 21:105).

The State called Dr. Michael Gamache. (TR 22:40). Dr. Gamache met with Kocaker on October 9, 2008, at which time he administered two tests. (TR 22:44, 46). There was no indication on the testing that Kocaker was malingering. (TR 2246-47).

Dr. Gamache disagreed with Dr. Eisenstein's IQ test result of 70 and believed Kocaker's IQ score was more in the 89-90 range based on earlier IQ testing in the 1980s and his

personal observations of Kocaker. (TR 22:51).

Kocaker could not articulate to Dr. Gamache why he was prescribed Depakote and believed he did not need the medication. (TR 22:53). Kocaker did report hearing voices. (TR 22:54). Dr. Gamache testified that Depakote is not an antipsychotic medication but conceded it "is indicated for psychiatric use." (TR 22:54-55). Dr. Gamache also admitted that he is not a prescribing physician or psychologist. (TR 22:84-85).

Kocaker denied ever being diagnosed or treated for mental illness. (TR 22:55). He admitted to swallowing razor blades in 2000 because "voices" told him if he hurt himself, then things would be better. (TR 22:55-56). Dr. Gamache testified that, although hearing voices is a common symptom in paranoid schizophrenics, usually they report paranoid hallucinations and Kocaker did not. (TR 22:57-58). Dr. Gamache did not feel that the auditory hallucinations described by Kocaker were of a paranoid nature because they were not persecutory. (TR 22:58).

Dr. Gamache took a social and familial history from Kocaker. (TR 22:59). Kocaker did not independently describe any military service, however, when asked, Kocaker said he was in the Air Force from 1979 to 1980. (TR 22:60). Kocaker said he was honorably discharged with the rank of lieutenant and that he had a shrapnel wounds. *Id*. He also gave an inaccurate account of his family history. (TR 22:60-61). Dr. Gamache testified that Kocaker's military history was not rationally consistent as his alleged active duty in Vietnam did not align with the actual years of U.S. military activity in Vietnam. (TR 22:61). Yet, Kocaker did not waiver

in this belief. (TR 22:62). Dr. Gamache believed these statements to be "confabulations." *Id*. According to Dr. Gamache, since these beliefs are not paranoid in nature, they cannot be used to support a diagnosis of paranoid schizophrenia. (TR 22:62-63).

Dr. Gamache believed the key finding in the March 2006, episode was a low B-12 lab finding. (TR 22:73). B-12 deficiency can cause a metabolic disorder and an altered mental state like acute dementia. *Id*. Due to his positive HIV history, Kocaker could also have HIV encephalopathy, which occurs when HIV begins to affect the immune system, in particular the brain, and causes deterioration of the brain. (TR 22:73-74). While the brain lesions from the 2006 MRI were not consistent with encephalopathy, they were clearly present. (TR 22:74). The lesions were suspicious. (TR 22:74). Dr. Gamache felt the March 2006, incident was inconsistent with a diagnosis of paranoid schizophrenia. (TR 22:78).

Dr. Gamache agreed that Kocaker was placed on two antipsychotic medications that are used to treat paranoid schizophrenia. (TR 22:98-99). Dr. Gamache admitted that Kocaker had been diagnosed with schizoaffective disorder by DOC psychiatrists in 2007, but he disagreed with this diagnosis as well. (TR 22:101).

Dr. Gamache was not retained by the State to evaluate or diagnose Kocaker -- his role was to review Dr. Eisenstein's findings. (TR 22:86). He was not hired to independently evaluate whether Kocaker had a mental illness. (TR 22:86-87). However, Dr. Gamache did not "find any other diagnosis that would adequately account for the signs and symptoms" in Kocaker's records. (TR 22:87).

Second *Spencer* Hearing:

Subsequent to the first *Spencer* hearing, DOC was able to find additional medical records, necessitating additional review and expert testimony at a second hearing. (TR 23:5).

The defense introduced numerous exhibits, including a composite exhibit of the additional DOC records. (TR 23:7). Dr. Eisenstein testified that he had reviewed these records, which totaled approximately 3,000 additional pages, and the information did not change his diagnosis that Kocaker is a paranoid schizophrenic with dissociative identity disorder and intermittent explosive disorder. (TR 23:9; 13-14). The paranoid schizophrenic diagnosis was based on the auditory hallucinations, the negative symptoms of withdrawal, and asocial behavior. (TR 23:10). Dr. Eisenstein opined that both statutory mental health mitigators were established -- Kocaker was under an extreme mental disturbance at the time of the offense, and he could not conform his conduct to the requirements of the law. (TR 23:11-12). Dr. Eisenstein testified that Kocaker is mostly unaware of his behavior because he is in a confused mental state most of the time due to his psychotic mental process. (TR 23:12-13).

Dr. Eisenstein noted that a bio-psychosocial assessment prepared at Zephyrhills Correctional Institute from the years 2000 to 2003 indicated a primary diagnosis of major depressive disorder with psychotic features, adjustment disorder with depressed mood, and a major depressive disorder. (TR 23:16; 19-20). Kocaker reported flashbacks of an earlier attack by another inmate and paranoid ideation, specifically feeling like other inmates would

attack him. (TR 23:21). Kocaker was consistently given Fluoxetine and Trazodone, and had at least one psychiatric hospitalization. (TR 23:19-20). Fluoxetine and Trazodone are antipsychotic medications and would not be given for antisocial issues. (TR 23:21). These symptoms and treatment would have nothing to do with a vitamin B12 deficiency. (TR 23:24). An MMPI also indicated elevations on all major scales, indicative of major psychopathology. (TR 23:32-33). Several suicide attempts were reported by Kocaker that were documented with independent evidence such as an x-ray showing razor blades in his stomach. (TR 23:34-35; 41-48; 54). The "voices" told Kocaker to hurt himself. (TR 23:51-53).

Dr. Eisenstein testified Kocaker's positive HIV status was confirmed by the records and Neurotonin was prescribed for HIV symptoms. (TR 23:29). Neurotonin would have also helped to reduce psychiatric symptomology. (TR 23:30). Records indicated that no HIV treatment had been given to Kocaker since 2003. (TR 23:30).

The records further corroborated an eye injury occurring in prison in 1984. (TR 23:25-26). Kocaker reported using alcohol since age eleven, drinking a six pack of beer or a quart of liquor a day. (TR 23:30-31). He also reported alcohol consumption while incarcerated and was hospitalized while in prison after drinking "bad buck." (TR 23:31). Kocaker reported drug abuse since age fourteen, with daily crack cocaine and marijuana usage. (TR 23:31). Dr. Eisenstein explained that early drug usage is consistent with self-medication for psychiatric issues. (TR 23:31-32). He was able to "numb himself, basically, from hearing

voices." (TR 23:32).

Dr. Eisenstein testified the records indicate that in 2000 Kocaker was able to more accurately report on his life, specifically, he identified a head injury and denied military service, however, Kocaker completely decompensated in 2006, following his catatonic state. (TR 23:26-27). Kocaker's mental illness has been present since an early age. (TR 23:28).

Dr. Gamache testified that he disagreed with Dr. Eisenstein and did not believe that Kocaker met the diagnostic criteria for paranoid schizophrenia or dissociative identity disorder. (TR 23:99-100). Dr. Gamache only reviewed select documents from the newly obtained DOC records which were chosen by the State Attorney's Office. (TR 23:102).

Dr. Gamache opined that other explanations for swallowing razor blades, besides hearing voices, includes malingering or manipulation, which is common in correctional settings. (TR 23:108). Dr. Gamache did not agree that Fluoxetine or the other medications were antipsychotics, but stated he believed they were antidepressants. (TR 23:118).

Dr. Gamache believed Kocaker had a history of acting criminally and impulsively, but that he could conform his conduct to the requirements of the law outside the effects of the drugs and alcohol he was abusing. (TR 23:116-17). The drugs could have had a considerable impact on his judgment and reasoning. (TR 23:117).

Sentencing Hearing:

Kocaker was sentenced to death on December 18, 2009. (TR 23:131, 150). The trial court found the following aggravators: the capital felony was committed by a person previously

convicted of a felony and on community control or on felony probation (great weight); the defendant was previously convicted of a felony involving the use or threat of violence to a person (great weight); and, the capital felony was especially heinous, atrocious, or cruel (great weight). (TR 23:134-40).

The trial court rejected the statutory mitigating factors. (TR 23:140-41). The court also found that the evidence did not establish the non-statutory mitigating factor that the defendant was under the influence of crack cocaine at the time of the crime, and rejected the non-unanimous jury recommendation as a mitigating factor. (TR 23:144; 149).

The court found the following non-statutory mitigating factors: defendant's mental health issues (moderate weight); defendant has loving relationships with family members (some weight); a history of drug and alcohol use (some weight); under the influence of alcohol at the time of the crime (some weight); brain damage (some weight); defendant was sexually abused as a child (some weight); defendant is HIV positive (some weight); defendant called 911 (very little weight); birth father was absent (some weight); head injuries as a child (very little weight); and the defendant could not focus as a child because of possible ADD (very little weight). (TR 23:141-49).

Postconviction Competency Proceedings

On May 7, 2014, prior postconviction counsel filed a "Motion for Postconviction Relief and Motion for Competency Determination." (R 426-37). The circuit court granted Kocaker's motion for a competency determination on September 24, 2014. (R 660-64).

October 23, 2015 Hearing

Part one of the competency hearings was held on October 23, 2015. (R 772). Dr. Wood, who previously testified in Kocaker's capital trial, reviewed additional materials, including a second set of brain scans. (R. 782-84). Dr. Wood testified that the 2006 MRI results showed several white spots in both hemispheres of the brain which was diagnosed as a small vessel brain disease. (R 786). The 2015 MRI shows not only more lesions but also larger ones, indicating a progression of the small vessel disease in Kocaker's brain. (R 787-88). The lesions are post-inflammatory, meaning that Kocaker probably had small strokes in each of these areas. (R 788). The bloods clots from these mini-strokes deprived the adjacent tissue of their blood supply and caused the death of that brain tissue. (R 792).

Dr. Wood testified that although the scans show a progression of the disease, with treatment, the disease could possibly be stopped from progressing further, however, treatment cannot repair the damage which has already occurred. (R 793).[3] Kocaker's scans do not show a "normal or typical brain," and it does suggest dysfunction and significant brain damage. (R 791).

Dr. Wood examined Kocaker and gave him a test on memory and learning, and also a test for malingering. (R 793-95). Kocaker's immediate recall memory was impaired to the 10th percentile, and his delayed memory recall to the 15th percentile. (R 795-96). His memory was very sparse with few details. (R 796). Kocaker passed the malingering test. (R 797). Dr.

[3] To date, Kocaker has received no medical treatment for this degenerative disease.

Wood also tested Kocaker's verbal recognition and verbal processing skills which were "unquestionably abnormal." (R 798-99). This is a sign of acquired brain dysfunction. (R 799). Kocaker's test results are suggestive of schizophrenia or chronic, longstanding verbal intelligence impairment, but schizophrenics routinely have lower verbal IQ than nonverbal IQ scores. (R 800). This is also consistent with Kocaker's IQ testing. (R 800).

During his personal interview with Dr. Wood, Kocaker was withdrawn and impoverished in his emotional or other expressions, his demeanor was blunted. (R 800). He reported hallucinations. (R 801). Overall, Kocaker had oddity of thinking and exhibited negative symptoms, such as an impaired ability to converse in a normal way and poverty of speech. (R 801-02). Dr. Wood diagnosed Kocaker with unspecified schizophrenia or other psychotic order. (R 802). On the schizophrenia spectrum, Kocaker was around a six or seven. (R 803).

Dr. Wood believed Kocaker was incompetent. (R 806). Kocaker is unable to assist counsel with memories of any of his trials or of the crime. (R 806). Kocaker's incapacity results form a combination of his schizophrenia and his progressive brain disease. (R 806). Dr. Wood recommended treatment for his small vessel disease and antipsychotic medication because, if Kocaker remained untreated, he would continue to decompensate. (R 807-08).

On cross, Dr. Wood testified that he estimated Kocaker's brain scans showed about twenty percent more lesions in 2015, than his 2006 scans. (R 815). This progressive vasculopathy is known to be accompanied by a gradual decline in overall intelligence which

corresponds with Dr. Eisenstein's testing. (R 819-21).

On re-direct, Dr. Wood testified that although some of the lesions from the 2006 scan have faded, that does not mean that the brain has repaired itself. (R 855). Additionally, brain lesions can aggravate schizophrenia. (R 856).

December 10, 2015 Hearing

Dr. Michael Maher, a licensed physician and psychiatrist, testified that he examined Kocaker, reviewed the brain scan results, all expert reports, and background information on Kocaker. (R. 887, 889, 894-95). Dr. Maher concluded that Kocaker suffers from a severe chronic psychiatric disorder characterized by neuro-cognitive deficits and psychosis. (R 895). His conditions impair his capacity to think logically, to rationally or logically understand his circumstances, and they are of sufficient severity to compromise his competency to proceed. (R 895).

Kocaker's ability to understand the adversarial nature of the legal process and collateral proceedings is substantially impaired. (R 904). He is subject to periods of unawareness and irrationality on an unpredictable and inconsistent basis which render him incapable of recognizing that his attorney is working for his best interest. (R 905). Kocaker's long-term memory deficit and his inability to remain rationally focused, extremely impair his ability to disclose to collateral counsel pertinent facts. (R 905-06). His recall is limited, impaired, and distorted. (R 906). His ability to recount his own history is very limited, simplistic, and concrete. (R 906). He could not remember any suicide attempts. (R 907-08). Kocaker is

incompetent to proceed. (R 895).

Dr. Maher testified that Kocaker can only answer specific questions with generalities, which is a pattern that occurs in individuals with dementia. (R 908).

Dr. Maher testified that Kocaker has deficits in memory, specifically long-term and consistency in memory. (R 896). He has deficits in his ability to relevantly and meaningfully attend to his attorney's questions. (R 896). For example, Kocaker was unable to relate what has happened in his case in the past six years since he was sentenced. (R 951-52). Kocaker's poor cognitive functioning exacerbates his psychosis. (R 897).

Dr. Maher explained that the lesions in Kocaker's brain are small circular areas where there is an absence of brain tissue. (R 899). The brain scan alone cannot identify why the brain tissue has been lost, but it does clearly show that brain tissue has been lost. (R 899-900). The lesions, or lost brain tissue, are permanent. (R 900). The additional lesions indicate a process of deterioration in the fundamental brain substance, and it indicates a brain disease and psychiatric disease that is getting worse over time. (R 900). Kocaker's prognosis is poor. (R 904).

Dr. Maher opined that it was entirely consistent with good medical and psychological practice for each doctor to arrive at a slightly different diagnosis in a complex case, such as Kocaker's, however, there is also a great deal of overlap in the experts' evaluations of Kocaker. (R 910-11). All of the testing performed by Drs. Eisenstein, Gamache, and Bursten indicates that Kocaker was not malingering. (R 945-49). The brain scans also strongly

corroborate that Kocaker is not malingering. (R 952).

On cross, Dr. Maher testified that Kocaker had decompensated even further since 2008. (R 928). Kocaker's belief that he was a helicopter pilot during the Vietnam War is a fixed delusional belief. (R 931-32). Dr. Maher's ultimate conclusion was that Kocaker suffers from a mood disorder, psychosis, and a neuro-cognitive disorder. (R 941).

Dr. Bursten is a licensed psychologist who found Kocaker was not competent to proceed. (R 955-57). Although Kocaker had a basic understanding of the procedures, he could not communicate with his attorney in a rational, reasonable manner or aid in the development of his defense. (R 957-58). He is also unable to testify relevantly. (R 958). Kocaker's inability to recount accurate facts is a delusional process which affects his ability to communicate. *Id.* He does not have the ability to recall the details of his interactions with trial counsel. (R 959). Ultimately, Kocaker has an irrational, divergent recounting of past events, memory related deficits, and a vague, limited quality of communication. (R 959-60). There is evidence of a neuro-cognitive impairment, psychotic disorder, and gross brain damage. (R 961).

Dr. Bursten opined that Kocaker was not malingering, but demonstrated a formal thought disorder. (R 964). Specifically, Kocaker displayed a vague, impoverished quality of communication. (R 964). He did report hearing voices, but did not exaggerate that symptom. (R 966-67). Dr. Bursten administered a series of four tests to Kocaker, none of which showed evidence of malingering. (R 967, 969, 971-72, 975, 980-81, 989). All prior testing by other physicians is also negative for evidence of malingering. (R 973-75).

Dr. Bursten testified that Dr. Gamache gave Kocaker a forced choice test, which Gamache created, and which is not standardized or used by the general psychological community. (R 981). Dr. Gamache also did not report Kocaker's actual score, but stated in his report that Kocaker performed at "essentially" chance level. (R 982). There also was no answer key. (R 983). That test cannot be used to determine the presence or absence of malingering. *Id*.

According to Dr. Bursten, Kocaker has a surface level awareness, but once you get below the surface, he cannot connect the dots and recollect things or put things together with any great detail which allows him to explain things to others. (R 971). The multiple diagnoses by different experts, all reveal the same thing – that there is a psychotic and a neurocognitive process that is inhibiting Kocaker. (R 987-88).

On cross examination, Dr. Bursten testified that Kocaker is incompetent and he was not manipulating his environment to present as incompetent. (R 991). Dr. Bursten factored in the possibility of manipulation and malingering into his evaluation. (R 991, 994-96, 998-99). Kocaker's psychological status has been an issue for the last ten years. (R 993). There is no evidence that Kocaker only became mentally ill after his conviction and sentence. (R 995-99). Although he previously was never formally diagnosed as mentally ill, he clearly has never been a mentally healthy individual and has legitimate impairments. (R 995; 1001).

Dr. Bursten explained that Kocaker has had little or no contact with mental health professionals while in custody. (R 1004). Since he was not presenting with outright psychotic

symptoms, they simply "breezed" over him. (R 1004-05). Dr. Bursten stated that there are a subset of individuals who are subtly and quietly psychotic. (R 1005). Finally, Dr. Bursten testified that Kocaker has information processing deficiencies which impact his competence. (R 1007). Kocaker does not have the ability to communicate with his attorneys or aide in the development of his defense. (R 1013-15). He cannot remember any interactions between himself and trial counsel. (R 1014).

Dr. Carpenter examined Kocaker for competency issues before trial in 2007, and again in 2014 during postconviction. (R 1024-26). Dr. Carpenter opined that Kocaker looked much worse in 2014 than he did in 2007 or 2008. (R 1035). He looked "20 years older to me," and "was a shadow of himself." (R 1047).

In 2008, Dr. Carpenter found Kocaker to be "marginally competent." (R 1036, 1042, 1046). At that time, he had very little data on Kocaker and had not reviewed the DOC records. (R 1036). The information he received after the competency hearing but before the *Spencer* hearing was valuable in assisting Dr. Carpenter's diagnosis of Kocaker. (R 1037). The additional records brought his attention to the neurocognitive issues Kocaker has. (R 1038). Specifically, his prison records show a history of mental illness and stays in psychiatric observation units since 1982. (R 1039-40). They also showed that in 1991, while incarcerated, Kocaker received a paranoid schizophrenia profile on the prison's MMPI test. (R 1040). Kocaker presented the same to prison staff as he did to Dr. Carpenter – refusing psychiatric treatment and claiming he was fine. (R 1040-41).

Dr. Carpenter explained that schizophrenia deteriorates the brain itself. (R 1038). Thus, Kocaker's vacuous presentation can be attributed to his vascular degenerative condition. (R 1038-39).

Dr. Carpenter testified that Kocaker does not have a sufficient ability to consult with counsel and does not have a rational or factional understanding of the pending collateral proceedings. (R 1025). During the evaluation with Dr. Carpenter, Kocaker's responses were vacuous, impoverished, flat, and vacant. (R 1027). He had no understanding of the postconviction process or what his attorneys were doing to help him. (R 1027-28). Dr. Carpenter felt Kocaker's general answers were a way to cover up his lack of understanding. (R 1028-29). He was sayings things, "but it had no real content," there was a "poverty of content." (R 1029-30). Kocaker could not even remember his own capital trial. (R 1031). Dr. Carpenter found Kocaker's answers revealed "a lack of insight," with no logic behind any of his answers. (R 1045). "It was just pretzel logic." *Id*.

Dr. Carpenter strongly believed that Kocaker has schizophrenia and psychosis, along with a co-occurring neurological disorder. (R 1032-33). Kocaker has the vacuous, inadequate poverty of content symptom of psychosis, a delusional process, and a deteriorating neurological condition. (R 1033). Kocaker can manifest appropriate courtroom decorum but he cannot testify relevantly. *Id*.

On cross, Dr. Carpenter testified that Kocaker's scans revealed more lesions on his brain. (R 1055). There is no evidence to support the hypothesis that Kocaker is or was malingering.

(R 1076-77). The only explanation to his empty responses is psychiatric and neurological in nature. (R 1076, 1078-79). Kocaker has a long-term chronic psychotic illness which is documented throughout his prison records. (R 1079-80). Part of a schizophrenia diagnosis is negative symptomology – *i.e.* diminished emotional expression – which Dr. Carpenter believed DOC interpreted as depression. (R 1080-81). Kocaker's deficiencies exceed attorney coaching. (R 1101).

January 5, 2016 Hearing

Dr. Hyman testified that in the past nine years, Kocaker has deteriorated mentally and physically. (R 1220-21). He is a "shell of the individual" that he once was. (R 1221).

Dr. Eisenstein testified a recent report, based on Kocaker's brain scans, was completed by Dr. Stallworth. (R 1128). The report indicated a forty (40) percent increase in the number of lesions in Kocaker's brain from 2006 to 2015. *Id*. Both the number of lesions and sites of the lesions has increased. (R 1129). The frontal and parietal peripheral white matter, and the posterior temporal lobes bilaterally are affected. *Id*. Kocaker's entire brain has been affected by lesions, which are pockets of dead cells in various locations across the brain. *Id*. The new lesions affect temporal lobe functioning. *Id*. The temporal lobe is related to memory functioning and emotion. (R 1129-30).

Dr. Eisenstein completed both a neuropsychological examination and clinical interview with Kocaker in 2014, including an IQ test. (R 1130-31). Generally, Kocaker's scores have decreased up to two standard deviations on various different indexes on memory. (R 1131-

32). Two standard deviations is a significant decline. (R 1132).

On the Wechsler Memory Scale IV, Kocaker's scores dropped from the 42nd percentile to the 5th percentile. (R 1133-34). This subtest relates to Kocaker's auditory ability to learn new information and recall it later. (R 1134). The area of the brain this subtest is associated with is the hippocampus. *Id*. The latest MRI scan shows the hippocampus has newfound lesions. *Id*. Thus, there is a correlation between the functional testing and the areas of Kocaker's brain with organic brain damage. (R 1135).

On the Wechsler Memory Scale III, Kocaker originally scored in the 34th percentile, but on the 2014 test he scored in the 2nd percentile. (R 1136). This test is related to visual memory – one's ability to see something and recall it later. *Id*. This finding correlates with the lesions present on the right temporal lobe. *Id*. On the auditory delayed test, Kocaker's score dropped from the 63rd percentile to the 5th percentile. (R 1136-37). This correlates with the lesions on the left temporal lobe. (R 1137-38). On the visual delayed test, Kocaker's score dropped from the 50th percentile to the 5th percentile. (R 1138). This is associated with lesions in his right temporal lobe. *Id*. Kocaker's working or immediate recall memory was also impaired. (R 1139). He previously obtained a score in the 95th percentile, but in 2014 it dropped to the 34th percentile. (R 1139-40).

All of Kocaker's scores are indicative of a substantial and significant decline in his neurocognitive memory skills. (R 1141). The Wechsler Memory Scale results are consistent with an inability to disclose to collateral counsel facts pertinent to the postconviction process,

and are corroborated by the neuroimaging. *Id.*

Dr. Eisenstein testified Kocaker's overall IQ score is 74. (R 1143). He scored a 68 on the verbal comprehension section which is in the intellectually disabled range. *Id.* Kocaker is disabled in his ability to comprehend and respond to what his lawyer is talking to him about. (R 1144). His processing speed is extremely slow and in the 1st-2nd percentile range. (R 1145-46). He is "profoundly limited" in his ability to process, consolidate, retain, and recall information. (R 1146). Dr. Eisenstein strongly believed the testing indicated Kocaker was not malingering. (R 1148-57).

Dr. Eisenstein testified that there was a total breakdown in Kocaker's ability to consult with, disclose information to, and discuss with counsel, pertinent facts about his case. (R 1158). Kocaker is incompetent. (R 1160). The neuropsychological data and neuroanatomical data corroborate this finding. (R 1159).

Dr. Eisenstein testified Kocaker's prison records, prior to the commission of the crime, confirm a long history of psychiatric disturbances and psychiatric illness. (R 1161). The records also reveal that shortly before he was released from custody in 2004, Kocaker asked to be taken off the psychoactive antidepressant and other psychotic drugs he was prescribed. (R 1163). There is no evidence Kocaker was receiving any psychoactive treatment between his July 2004 release date and this crime in August 2004. *Id.*

On cross, Dr. Eisenstein opined that Kocaker looked worse in December 2015 than he did a year ago, again due to his progressive illness. (R 1175). Kocaker's ability to form new

memories is impaired. (R 1193-94). His ability to recall old memories will likely be the next cognitive function to decline. (R 1194). Dr. Eisenstein testified that his changing diagnoses for Kocaker was based on receiving new records and information which were previously unavailable. (R 1208-10).

January 20, 2016 Hearing

The State called Dr. Gamache who testified that he previously evaluated Kocaker in 2008, and found that he did not have "any diagnosable mental illness," and that he was malingering. (R 1258). Dr. Gamache did not believe that Kocaker's false personal history was a delusion because it did not have a theme which was connected to his auditory hallucinations. (R 1260-64). Dr. Gamache testified that there was no "real good evidence that he's experienced auditory hallucinations at all," despite years' worth of records to the contrary. (R 1263).

Dr. Gamache testified that schizophrenia has a typical onset age in the late teens or early twenties, but it can happen later. (R 1265-66). Dr. Gamache did not believe in 2008-2009 that Kocaker was schizophrenic. (R 1266). Dr. Gamache did not see a "material difference" between Kocaker's appearance in 2008 compared to 2015. (R 1267). Nor did Dr. Gamache believe that there is any "convincing evidence that he genuinely suffers from neurocognitive deficits." (R 1268). Dr. Gamache conceded that there was "variability of performance" on Kocaker's neuropsychological testing but he did not "know what to make of that." *Id.*

Dr. Gamache testified that the lesions on Kocaker's brain are "not meaningful from a

clinical standpoint," and the literature does reflect that people with no cognitive deficits have lesions. (R 1268-70). There is no correlation between the brain lesions and Kocaker's symptoms. (R 1270-71).

Dr. Gamache did not do any formal standardized testing on Kocaker, but he did create a test to give to Kocaker which was not normed or standardized. *Id*. Kocaker got ten questions right out of twenty. (R 1272). Dr. Gamache administered the "SIMS" test to Kocaker which is a test of malingering. (R 1282). A score of fourteen or above would indicate malingering and Kocaker scored an eight. (R 1283).

Dr. Gamache could not remember if DOC diagnosed Kocaker with any psychotic disorder. (R 1285). Dr. Gamache admitted that Kocaker was prescribed Geodon while in DOC custody which is an antipsychotic drug. (R 1286).

The State played excerpts of the video from Dr. Gamache's evaluation of Kocaker. (R 1295-1398). In the video, Kocaker did not know why the jail was giving him HIV medication (R 1304), he adamantly denied ever taking any "psych meds" (R 1305, 1354), denied ever being diagnosed with or treated for any mental health or psychological problems (R 1338, 1340, 1251, 1359), specifically denied ever swallowing razor blades (R 1354, 1391), denied ever attempting suicide (R 1311, 1391), and denied being treated for any physical problems with his body (R 1360). Kocaker believed the DOC records were either wrong or belonged to another inmate. (R 1308, 1313, 1352, 1357, 1362). He did admit to hearing voices. (R 1392-93, 1397).

Dr. Gamache testified that Kocaker's denial of these events showed "higher levels of cognitive abilities" because he could disagree with what Gamache was saying. (R 1320). Dr. Gamache also claimed that Kocaker's denial of attempting suicide was consistent with the records because, "he didn't attempt suicide" but "attempted manipulation." (R 1321).

In the video, Kocaker said that the records also incorrectly reflected his time in prison – they reported times when he was in prison when he actually was not – and also incorrectly reported his place of birth. (R 1361-62). The records incorrectly reflected where he went to school and also that he got his GED. (R 1365). He could not describe for Dr. Gamache the nature of his appeals or what legal issues his attorneys were raising. (R 1369, 1377-81). He did not know if a possible outcome was a new trial or a new sentence. (R 1372). He denied having any deceased brothers. (R 1387). Kocaker also believed he was working in a restaurant upon release from DOC custody in 2004. (R 1389).

Dr. Gamache believed that Kocaker is not so adamant and so fixed in his false beliefs and delusions as to prohibit his attorneys from putting witnesses on the stand who can discuss things contrary to his fictional beliefs. (R 1403). Thus, he can consult with counsel. *Id.* When asked if Kocaker has the ability to disclose to collateral counsel facts pertinent to the postconviction proceeding, Dr. Gamache responded "he has the capacity to disclose facts." (R 1404). Dr. Gamache believed Kocaker was competent. *Id.*

Dr. Eisenstein was called in rebuttal to Dr. Gamache's testimony. (R 1410). He testified that delusions do not necessarily need a theme according to the Diagnostic Statistical

Manual. (R 1412-13). Dr. Eisenstein also clarified that malingering includes an element of feigning worse symptoms – not denying any signs or history of mental illness as Kocaker has done repeatedly. (R 1414).

Dr. Eisenstein clarified that the literature reflects only about six (6) percent of normal individuals have lesions. (R 1417). "Normal individuals" are people without a history of HIV or other systemic disease. (R 1421). Even if Kocaker was in this group, the radiologist found the number of lesions is greater than expected and indicates an underlying vasculopathy. (R 1417).

March 28, 2016 Hearing

The trial court found Kocaker incompetent to proceed on March 28, 2016. (R 1506-36). The court ordered Kocaker to a mental health treatment facility and ordered the Department of Children and Families to file a report on Kocaker's status no later than August 26, 2016. (R 1534-35). Subsequently, the State hospital found Kocaker competent to proceed. (R 1611-12).

September 15, 2016 Hearing

Dr. Debra Kirsch is the medical director at the South Florida Evaluation and Treatment Center ("SFETC"). (R 1710). She practices in the field of psychiatry. (R 1711). Dr. Kirsch conducted a psychiatric evaluation on Kocaker's upon his admission to the SFETC in April 2016. (R 1713). The evaluation lasted approximately one hour. (R 1714). Afterwards, she or another staff member evaluated him, interviewed him, or watched him on live video feed,

about once a week. (R 1715).

The only testing Dr. Kirsch administered to Kocaker was a mini mental status exam. (R 1721). Dr. Kirsch believed that Kocaker did not have any mental illness that she could diagnose which would require treatment. (R 1722). She disagreed with the diagnosis of schizophrenia because Kocaker did not meet the "full" diagnostic criteria. (R 1722). She did not believe Kocaker's false history was a delusion. (R 1723). Kocaker could remember the television schedule. (R 1725-26).

Dr. Kirsch admitted this was her first capital postconviction client. (R 1730). She did not evaluate whether Kocaker knew what happened at trial or other circumstances regarding his case or arrest. (R 1733). She never discussed any postconviction issues with him. (R 1749). Dr. Kirsch only evaluated Kocaker to see if he had a pathology she could diagnose. (R 1733). Dr. Kirsch was not aware of the second phase or mitigation phase of a capital trial. (R 1753). She did agree that having an accurate memory about one's life was important to presenting mitigation. *Id*. Dr. Kirsch conceded a delusional self-history would affect someone's ability to assist counsel. *Id*.

Dr. Kirsch testified that Kocaker exhibited significant weakness on tasks which measure conceptual verbal thinking and reasoning skills. (R 1740). It is also a challenge for him to reproduce a story. (R 1745). Kocaker did pass every malingering test. (R 1748). Dr. Kirsch found he had "possible vascular lesions," and that Kocaker does have more lesions than an average person. (R 1750-51).

Dr. Damarys Sanchez is a licensed psychologist and does not hold any board certifications. (R 1772-73). Dr. Sanchez testified that Florida's competency requirements are the "same across the board." (R 1774). There is no difference between pre-trial and postconviction competency. *Id*. Dr. Sanchez has never testified before in a postconviction competency case. (R 1775).

Dr. Sanchez was asked to administer certain tests to Kocaker including: verbal memory test; figure memory test; grooved pegboard test; Wisconsin card sort test; memory 15 item test; Boston naming test; the validity indicator profile; and an IQ test. (R 1775; 1780-86). Kocaker did not exhibit any bizarre or odd behaviors while taking the tests. (R 1787). The testing was done in May 2016. (R 1791).

Dr. Enrique Suarez is a licensed psychologist and practicing neuropsychologist. (R 1801). He is not board certified. (R 1805). Dr. Suarez believed Kocaker's false self-history was not the result of a mental health or neurocognitive illness, and was not a delusion. (R 1816, 1820). Instead, Dr. Suarez believed that Kocaker was reciting it for the positive results it had gotten him thus far. (R 1817). Dr. Suarez testified that Kocaker's auditory hallucinations were "questionable" and not the results of a brain impairment or schizophrenia. (R 1818-20).

When Dr. Suarez asked Kocaker about case specific facts, Kocaker's recitation of the facts "[didn't] fit either the evidence or logic." (R 1823). Dr. Suarez also watched the videotapes from the other experts' evaluations of Kocaker, and found Kocaker's recitation

of the facts to them also did not make any sense. (R 1824). Kocaker does not provide "a lot of straight information." (R 1829).

Dr. Suarez administered the "Reitan Halsted Expanded Neuropsychological Test" to Kocaker. (R 1825). Kocaker scored in the low-average range with an IQ score of 80, which is the 9th percentile. (R 1827). Kocaker's verbal comprehension score and his ability to reason verbally is low. *Id*. His test scores did not show malingering. (R 1831-32, 1859-62).

Dr. Suarez believed that Kocaker was competent. (R 1829, 1835). Dr. Suarez opined that competency is the ability to know who the players are – that the prosecutor is against you and your attorney is not. (R 1829). Kocaker is not able to say what went right or wrong in his trial. *Id*. He frequently claims to not remember things. (R 1830). For example, he could not describe the book he was reading. (R 1830).

Dr. Suarez testified Kocaker tried to complete his competency training quickly, and frequently told people that he "wanted to do whatever he needed to do so he could get out of there." (R 1834). In Dr. Suarez's opinion, Kocaker does have the ability to consult with counsel with a reasonable degree of rational understanding. (R 1834). He also has a factual understanding of the pending collateral proceedings. (R 1835).

On cross examination, Dr. Suarez testified Kocaker did not provide any information related to mitigation. (R 1837). Dr. Suarez only had the direct appeal opinion and did not have a copy of Kocaker's postconviction motion. (R 1838). Dr. Suarez did not query Kocaker about what issues he might be able to assist counsel with in his postconviction

proceeding. *Id.*

Dr. Suarez testified that Kocaker's testing showed statistically significant differences across his sub-scores. (R 1839). Kocaker scored in the 2nd percentile in the verbal comprehension section which measures conceptual, verbal thinking, and reasoning. (R 1840). He scored in the 4th percentile in the processing speed index. *Id.* On the Figure Memory Test, Kocaker claimed he could not remember anything, a first in Dr. Suarez's forty-two years of practice. (R 1855-58).

Dr. Bursten found Kocaker incompetent to proceed. (R 1869). Dr. Bursten testified there was a pattern in Kocaker's neuropsychological testing which reflected marked discrepancies between his sub-test scores. (R 1869-70). Usually a person shows a consistent level of ability or inability. (R 1870). However, when someone, like Kocaker, shows "scatter" in their test scores, this correlates with a "misfiring in certain areas of information processing," and indicates a neurocognitive disorder. (R 1870-71, 1873-74). For example, a score of 10 is average, and Kocaker's scores ranged from 11 to 4. (R 1871). This is not normal and signals Kocaker has problems with his information processing abilities. *Id.* Dr. Bursten explained that although everyone has some discrepancies in their scoring, it is the extent of those discrepancies that matters. (R 1871-72). Kocaker's scores reflect significant discrepancies which indicates a neuropsychological impairment. (R 1872, 1879).

Dr. Bursten also clarified that all of the testing reflected no indications of malingering, thus, clinicians cannot assume that Kocaker's weak scores are him "not trying." (R 1872,

1878). They must be attributed to a legitimate impairment. (R 1873, 1878, 1880, 1882, 1905). Dr. Bursten analyzed Dr. Suarez's MMPI results using a more sophisticated report and found that the results did not indicate malingering, but a possible neuropsychological impairment. (R 1885-87).

Dr. Bursten reiterated that Kocaker does show a surface level of functioning – he can repeat what he is charged with and the roles of the prosecutor, judge, and defense counsel. (R 1875). He is also compliant, and thus, watching him via a live video feed will show him being benign, quiet. (R 1874). However, as soon as you get into more detailed information pertinent to his case or the postconviction procedures, Kocaker's impairments manifest themselves and he cannot deal with complex information which requires memory or recall. (R 1875). Kocaker also has a delusional self-history and cannot communicate with his attorney to aid his case or testify relevantly. (R 1875-76).

Dr. Bursten explained that brain impairments can cause auditory hallucinations. (R 1882). Patients often report hearing voices and not responding to those hallucinations. *Id.* Hearing voices in another language is not atypical and not an indication of malingering. (R 1883, 1901-02).

On cross examination, Dr. Bursten reiterated that Kocaker was very vacuous, very vague, and "a quiet, milk toast kind of person now." (R 1891). His inability to elaborate, go into details, or recall things without getting confused is legitimate and is reflected in his impaired test data. (R 1909). Dr. Bursten spent roughly five hours with Kocaker and only forty-five

minutes of it involved testing, the rest was spent conversing. (R 1890; 1893). Conversely, most of Dr. Suarez's time with Kocaker was very structured and involved neuropsychological testing. (R 1893).

October 11, 2016 Hearing

Dr. Gamache reevaluated Kocaker in July 2016. (R 1925). The two discussed his stay at the SFETC. (R 1927-28). Kocaker could not explain to Dr. Gamache what a postconviction hearing was. (R 1929). Dr. Gamache testified that Kocaker has made statements inconsistent with record evidence which raised concerns, but that these statements are not derived from a psychological condition. (R 1931). He has no concerns with Kocaker's capacity to have a rational or factual understanding of the proceedings. (R 1931, 1942). There is no evidence of a mental illness or cognitive disorder. (R 1931-32).

Dr. Gamache testified that Dr. Suarez's testing showed no "significant cognitive impairment." (R 1936). He explained that when testing a normal control subject, up to five (5) percent of the sub-scores may fall into the borderline range. (R 1936). This does not indicate neuropsychological impairment. (R 1937). Dr. Gamache did not rely on any literature or other reputed source for this proposition, just his "general knowledge" of neuropsychology. (R 1943).

According to Dr. Gamache, the MMPI administered by Dr. Suarez was invalid because Kocaker endorsed atypical symptoms of mental illness, even though Kocaker did pass every malingering assessment. (R 1938-39).

Dr. Carpenter testified that he reevaluated Kocaker for the fifth time in July 2016. (R 1946-47). Although Kocaker looked physically healthier, Dr. Carpenter noted no improvements in his mental capacity. (R 1947). In Dr. Carpenter's thirty-five years of practicing psychology, he has never heard that, on average, normal adults have up to five percent of their sub-scores in the below average range. (R 1950-51). Regardless, Kocaker had over five percent of his sub-scores in the below average range. (R 1951).

Looking at all of Kocaker's scores, the most relevant are his consistently low verbal comprehension scores, low processing speed scores, and low similarities score. (1953-54). There is no indication that Kocaker gave anything but his best effort and there is no evidence of malingering. (R 1957-58). Kocaker has never amplified his mental illness, but consistently tries to minimize his mental health treatment. (R 1963). Dr. Carpenter agreed with Dr. Bursten's interpretation of Kocaker's MMPI scores. (R 1968).

In Dr. Carpenter's opinion, the Story Memory Test best exemplifies Kocaker's deficiencies. (R 1958). That test examines a person's ability to learn and recall information – similar to when an attorney explains to a client the postconviction process and what to expect. (R 1959). Kocaker scored in the first percentile. (R 1959). Similarly, when Dr. Kirsch asked Kocaker about the book he was reading, he could not recall any details or even tell her the general subject of the book. (R 1960). Kocaker cannot retain information. (R 1961). This problem is rooted in a mental and neurocognitive disorder which is worsening over time. (R 1961).

Dr. Carpenter testified that the SFETC also only looked at basic pre-trial competency. (R 1964-65). In Dr. Carpenter's opinion, Kocaker had schizophrenia first, and then later developed a neurocognitive disorder. (R 1966-67). Based on these two deficiencies, Kocaker continues to be incompetent to proceed. (R 1967).

During cross examination, the State tried to claim that Kocaker did have an adequate recall in understanding his initial trial because Kocaker remembered he had money. (R 1970). Dr. Carpenter explained that Kocaker only remembered he had money, but he did not understand the relevance of that fact or how it related to his guilt / innocence. (R 1971). Kocaker could not draw the connection between the State's theory that the victim was robbed, and the fact that he was found with money. (R 1972). He could not grasp why having money was important. (R 1972-73).

Kocaker did not remember testifying at his original trial. (R 1979-80). He could not discuss anything about his trial lawyers, the witnesses at trial, or his sentencing phase. (R 1980). He could not remember or integrate details from prior evaluations. (R 1987). He did not understand how the jury reached a verdict of guilty. (R 1997).

Dr. Maher reevaluated Kocaker in 2015 and 2016, and also reviewed the SFETC's records. (R 2008). Dr. Maher testified that Kocaker is able to superficially appear to function unimpaired in an institutional environment like a prison or state hospital. (R 2009).

In his most recent evaluation of Kocaker, Dr. Maher found his cognitive impairments, including dementia and encephalopathy, to be more relevant than Kocaker's underlying

psychiatric disorder. (R 2010). If one "took away" Kocaker's psychosis, he would still be incompetent due to his brain disease. (R 2010). Dr. Maher placed a greater emphasis on Kocaker's brain scans which show vascular disease than Dr. Kirsch. (R 2010). Dr. Maher also has more experience in evaluating individuals in this context than Dr. Kirsch. (R 2011).

Unlike Dr. Kirsch, Dr. Maher was able to observe Kocaker interact with his attorney. (R 2011). Dr. Maher observed that Kocaker was not able to meaningfully engage or interact with his attorney on relevant issues. (R 2012). The SFETC's doctors never observed how Kocaker performed on activities, mental or physical, which are directly relevant to his postconviction competency. (R 2012).

Dr. Maher opined that Kocaker now has "a practiced ability to respond in a socially conventional manner to circumstances where he has very little understanding, appreciation, or memory of what is really going on." (R 2013). Kocaker has a developed response to parrot things like, "yea, we were talking about that in court," or "yea, my lawyer said that," which are general answers which avoid the issue of him revealing that he really has no idea what the details or specifics are related to those issues. (R 2013). Dr. Maher testified that this is a common practice in people who suffer from chronic, progressive, dementing illness because they understand it would be odd to continually respond with "I don't know." (R 2013). Instead, they develop a pattern of responding generally, which does not reveal the depth of their lack of understanding. (R 2014). Dr. Maher stated that it is a response which helps them feel less anxious, uncomfortable, and incompetent. (R 2014).

Dr. Maher testified that there was no evidence of malingering. (R 2015, 2019). The cognitive testing from the SFETC revealed "scatter shot" scores, with some average and some very poor. (R 2015). In contrast, a person who malingers, diminishes their scores across the board. (R 2016). Second, the testing reveals severe impairments in some areas, consistent with his brain disease, and some areas of the brain which are preserved and functioning. (R 2016). Dr. Maher testified this is confirmed by the brain scans which show lesions, or holes, scattered throughout Kocaker's brain. (R 2016-17).

Dr. Maher testified that Kocaker is a unique case due to his major psychiatric illness, his institutionalized behavior, sexually transmitted disease, and vascular disease, which is confirmed by the brain scans. (R 2020). His positive HIV status could also contribute to the encephalopathy. (R 2020-21). Dr. Maher opined Kocaker's cognitive deterioration would continue. (R 2022). There is no known treatment which could improve Kocaker's brain function. (R 2025).

On cross examination, Dr. Maher testified that Kocaker does not have a reasonable, consistent understanding regarding the postconviction motion his attorney filed. (R 2030). Kocaker does not understand that one of the possible outcomes of a successful postconviction process, is that he would get a new trial, even after repeated explanations by his attorney. (R 2031-32, 2037-38). Dr. Maher explained that Kocaker does not have the ability to respond to questions with anything other than old, repetitive, fixed knowledge with no understanding of the relevant issues. (R 2036, 2038-39). He can only respond in a non-

thoughtful and unaware manner. (R 2036).

October 13, 2016 Hearing

Dr. Eisenstein reevaluated Kocaker in July 2016. (R 2058). He testified that the deficits reflected in the SFETC's neuropsychological testing were similar to the deficits found in previous testing. (R 2060). Dr. Eisenstein explained that the specific tests given by the SFETC are known to minimize brain damage findings. (R 2068, 72-73). Still, the test results showed that Kocaker's verbal comprehension and information skills were in the 2nd percentile. (R 2074). This involves his ability to communicate, clearly understand concepts, understand the issues at hand, and verbally express ideas. (R 2075). The SFETC's results were virtually identical to the testing Dr. Eisenstein administered two years earlier. (R 2076).

The SFETC testing also showed Kocaker had deficits in his verbal and visual memory. (R 2077-84). The tactual performance test indicated significant brain impairment. (R 2084-86). Dr. Eisenstein agreed with Dr. Bursten's findings on the MMPI, which showed a possible neuropsychological impairment. (R 2095-2100). Dr. Eisenstein opined that Kocaker's neurocognitive impairments alone render him incompetent. (R 2095).

The trial court found Kocaker competent to proceed on December 16, 2017. (R 2309-20).

SUMMARY OF ARGUMENT

The lower court erred in finding Kocaker competent to proceed. Kocaker has a well-documented, thirty year history of severe mental health issues. Additionally, neuroimaging

confirms that Kocaker has a deteriorating vascular brain disease for which there is no cure. As a result, Kocaker's suffers from a chronic psychiatric disorder comorbid with neuro-cognitive deficits. Together or separately, his conditions impair his capacity to think logically, to rationally or logically understand his circumstances, and are of sufficient severity to compromise his competency to proceed. The lower court erred in summarily denying his remaining claims.

ARGUMENT

ARGUMENT I: The postconviction court erred in finding Kocaker competent to proceed in postconviction in violation of his due process rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, and the corresponding provisions of the Florida Constitution.

The lower court improperly found Kocaker competent to proceed in postconviction. Kocaker's decades-long history of mental illness coupled with his undisputed neurocognitive disease, make clear that Kocaker is currently incompetent to proceed. Kocaker is unable to assist in the factual development of his case, and unable to understand the adversarial nature of the legal process and collateral proceedings. Despite multiple experts conclusions to the contrary, the lower court found Kocaker competent to proceed. This ruling was an unreasonable determination of the facts.

The right to be competent during the postconviction process is a fundamental right rooted in considerations of due process under the United States and Florida Constitutions. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975) and *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). "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 postconviction proceedings themselves, would be practically meaningless." *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997). This right is guaranteed regardless of any prior determination of competency. *Nowitzke v. State*, 572 So. 2d 1346, 1349 (Fla. 1990). *See also Pridgen v. State*, 531 So. 2d 951 (Fla. 1988) (holding that even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial).

Where there is conflicting testimony as to the defendant's competency, it is the trial court's responsibility to consider all of the evidence relevant to competency and resolve the factual dispute. *See generally Mora v. State*, 814 So. 2d 322 (Fla. 2002). The decision of the trial court must be upheld absent an abuse of discretion. *Id.* The abuse of discretion standard is not insurmountable. *See Washington v. State*, 162 So. 3d 284 (Fla. 4th DCA 2015) (reversing a lower court finding of competence). Kocaker has sufficient evidence to overcome this presumption.

A. The Court's December 16, 2016, Determination That Kocaker Was Competent Is Unreasonable.

1. The Legal Standard for Competency.

Competency to proceed requires satisfying a two prong test. That test is met upon a

showing of whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960). The *Dusky* standard is applicable in capital postconviction proceedings, when a defendant's competency is suspect. *Carter v. State*, 706 So. 2d 873 (Fla. 1997).[4]

2. The Lower Court's Erroneous Determination.

The lower court's determination that Kocaker is competent was unreasonable in light of the testimony produced at the competency hearings. The court concluded that Kocaker does not have "a mental illness or neurocognitive condition which affects his memory," and that Kocaker remembered "a remarkable amount of information" about the offense, contrary to the evidence. (R 2319). The court further concluded that Kocaker "has a rational understanding of the pending collateral proceedings and has sufficient present ability to consult with counsel with a reasonable degree of rational understanding." (R 2319-20). The court's conclusions are not reasonable in light of the facts presented and amounts to an abuse of discretion.

a. The lower court erred in failing to consider Dr. Maher's testimony.

In its written order, the lower court held three experts opined that Kocaker was

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[4] Florida Rule of Criminal Procedure 3.851(g)(8)(B) lists the factors to be considered by a lower court when determining competency: (i) the defendant's capacity to understand the adversary nature of the legal process and the collateral proceedings; and (ii) the defendant's ability to disclose to collateral counsel facts pertinent to the postconviction proceeding at issue.

competent, and three experts determined that he was incompetent. (R 2318). It then proceeded to evaluate their testimony (R 2318-19), however, the court failed to consider or weigh Dr. Maher's testimony at all. Nowhere in the lower court's order does it evaluate the weight or credibility of Dr. Maher's testimony. The court erroneously found that "*three* experts opined that Defendant is incompetent," when in reality there was *four* experts with Dr. Maher. (R 2318).[5]

This Court should vacate the lower court's competency determination and remand this case for the lower court to consider and include findings of fact regarding Dr. Maher's testimony. At the very least, this Court should consider Dr. Maher's testimony *de novo*.

Dr. Maher's testimony is critical evidence and necessary for a proper determination of Kocaker's competency status. Dr. Maher is a licensed physician and psychiatrist, and was the only expert whose practice included working with dementia patients. (R 2007). His perspective is unique compared to the other psychologists and neuropsychologists. Dr. Maher also has more experience in evaluating individuals in this context than the SFETC psychiatrist, Dr. Kirsch. (R 2011).

b. The lower court erred in finding that Kocaker does not suffer from any demonstrable mental illness.

Postconviction counsel provided ample evidence that Kocaker suffers from an obvious mental illness for at least the last thirty years, and that his mental illness has progressed in

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[5] However, five experts found Kocaker incompetent if one also includes Dr. Frank Wood's testimony from the first postconviction competency proceedings in 2015.

severity rendering him incompetent to proceed. First, the record evidence conclusively shows that Kocaker has a documented history of mental illness and stays in psychiatric observation units since at least 1982. (R 1039-40). Dr. Carpenter testified that Kocaker's prison records reveal that in 1991, while incarcerated, Kocaker received a paranoid schizophrenia profile on the prison's MMPI test. (R 1040).[6] Dr. Eisenstein also testified that Kocaker's prison records, prior to the commission of the crime, confirm a long history of psychiatric disturbances and psychiatric illness. (R 1161). The records also reveal that shortly before he was released from custody in 2004, Kocaker was prescribed a psychoactive antidepressant and other antipsychotic medication by DOC. (R 1163).

Second, the testimonial evidence given by Drs. Eisenstein, Carpenter, Wood, Bursten, and Maher also proves that Kocaker has a demonstrable mental illness. Dr. Wood diagnosed Kocaker with unspecified schizophrenia or other psychotic order. (R 802). Dr. Maher concluded that Kocaker suffers from a severe chronic psychiatric disorder characterized by neuro-cognitive deficits and psychosis. (R 895, 2010). Dr. Bursten testified that Kocaker suffers from a psychotic disorder. (R 961). Dr. Carpenter testified that Kocaker has schizophrenia and psychosis, along with a co-occurring neurological disorder. (R 1032-33, 1966-67). Dr. Eisenstein found that Kocaker had a severe psychiatric disturbance. (R 1161).

[6] Since Dr. Maher, Dr. Bursten, Dr. Carpenter and Dr. Eisenstein all testified that there was no change in Kocaker's mental status between their first and second postconviction competency evaluations of Kocaker, their testimony from both postconviction competency proceedings will be referenced interchangeably. (R 1868, 1947, 2010, 2060, 2103).

All five experts found Kocaker incompetent. (R 806, 895, 991, 1025, 1160, 1869, 1947, 2010, 2095).

The lower court erroneously concluded that Drs. Kirsch, Suarez, and Gamache's testified that Kocaker has no "demonstrable mental illness." Dr. Kirsch only testified that Kocaker did not have any mental illness that she could diagnose which *"would require any psychiatric treatment*." (R 1722). Dr. Kirsch did *not* testify that Kocaker suffered from no mental illness at all. Dr. Suarez testified that he believed Kocaker's delusional personal history was not the result of a mental illness. (R 1816-17).

The lower court also gave more weight to Dr. Kirsch and Dr. Suarez's testimony because they observed Kocaker "daily…over several weeks." (R 2319). This finding is incorrect and not supported by competent substantial evidence. Dr. Kirsch testified that she spent one hour with Kocaker. (R 1714). Afterwards, she *or another staff member* evaluated Kocaker, interviewed him, or watched him on live video feed, *about once a week*. (R 1715). Dr. Kirsch never testified about how many times she personally evaluated, interviewed, or watched Kocaker's progress after that short, initial interview. Dr. Suarez testified that he spent seven hours with Kocaker during which he administered a comprehensive neuropsychological evaluation. (R 1808-10).

A single, one hour interview, and a single seven hour interview is a far cry from evaluating Kocaker's progression daily, over several weeks. In contrast, the five experts who did find that Kocaker had a mental illness spent considerably more time with Kocaker over

several years as compared to the SFETC doctors. Dr. Eisenstein evaluated Kocaker at least three times for multiple hours over ten years (TR 20:41-43; R 1130-31, 2058); Dr. Carpenter evaluated Kocaker five times over nine years (TR 20:96; 21:11; R 1024-26, 1946-47); Dr. Maher evaluated Kocaker twice over two years (R 895, 2008); and Dr. Bursten evaluated Kocaker twice over two years (R 1868). These experts spent much more time with Kocaker both in quantity and quality. For example, Dr. Bursten specifically testified that of the five hours he spent with Kocaker, only forty-five minutes of it involved testing, in contrast to Dr. Suarez's time with Kocaker which involved very structured testing interactions.

The lower court also relied on the fact that Kocaker read books, played cards, and learned the television schedule at the SFETC to discredit any conclusion of psychosis, brain damage, or dementia. (R 2319). This finding is also unsupported by the evidence. Drs. Suarez and Carpenter agreed that though Kocaker claimed to have read books, he could not describe the book he was reading at all. (R 1830). Kocaker could not recall any details or even recall the general subject of the book. (R 1960). This testimony points to Kocaker's inability to retain information – not competency. (R 1961).

Additionally, Dr. Maher's testimony conclusively refuted the lower court's finding that dementia patients could not play cards. (R 2007, 2010, 2023-25). Dr. Maher brought playing cards with him to his evaluation of Kocaker. (R 2023). Although he observed Kocaker playing Solitaire, Dr. Maher explained that this does not mean that Kocaker does not have dementia as Solitaire is not a sophisticated or multiplayer game. (R 2023-24). Dr. Bursten

also agreed with this conclusion. (R 1912). Playing Solitaire is not proof of competency, or that Kocaker suffers from no mental illness. The lower court's conclusion that Kocaker does not suffer from any demonstrable mental illness was error.

c. The lower court erred in finding that any cognitive deficits Kocaker has are within the normal range of functioning.

There was ample evidence, both in the original postconviction competency proceedings and in the second set of hearings held in 2016, which supports the conclusion that Kocaker suffers from a debilitating cognitive deficit. The lower court found that the "totality of the testing now before the Court belies a finding that Defendant suffers from a mental illness or neurocognitive condition that affects his memory." (R 2319). This finding is erroneous and clearly unreasonable.

Dr. Wood testified that the 2006 and 2015 MRI results showed several white spots in both hemispheres of the brain which were diagnosed as a small vessel brain disease. (R 786). These lesions are dead brain tissue, and have increased in number and location between 2006 and 2015. (R 787-88; 792). Dr. Maher concluded that Kocaker suffers from a severe chronic psychiatric disorder characterized by neuro-cognitive deficits and psychosis. (R 895). Dr. Maher explained that the lesions in Kocaker's brain are small circular areas where there is an absence of brain tissue. (R 899). The lesions are permanent. (R 900). The presence of additional lesions indicates a process of deterioration in the fundamental brain substance, and it indicates a brain disease and psychiatric disease that is getting worse. (R 900). Dr. Maher found Kocaker's cognitive impairments, including dementia and encephalopathy, to be more

relevant than Kocaker's underlying psychiatric disorder. (R 2010). Dr. Bursten opined that there is evidence of a neuro-cognitive impairment, psychotic disorder, and gross brain damage. (R 961, 1870-71, 1873-74). Dr. Carpenter strongly believed that Kocaker has schizophrenia and psychosis, along with a co-occurring neurological disorder. (R 1032-33, 1966-67). Dr. Eisenstein opined that Kocaker's neurocognitive impairments alone are enough to render him incompetent. (R 2095).

Dr. Kirsch's testimony that Kocaker had "possible vascular lesions" is simply not credible. (R 1750). Both the 2006 and 2015 brain scans conclusively show that Kocaker has lesions which are a small vessel brain disease. (R 786-88). Dr. Suarez's testimony did not address this point. Dr. Gamache's 2016 testimony was only that there is "no credible evidence that he suffers from a psychological disorder." (R 1932). Again, this is steadfastly refuted by the MRI scans and corresponding neuropsychological testing.

If the lower court was relying on Dr. Gamche's outlying opinion from the first round of postconviction competency hearings, this too is error. Dr. Gamache testified that he "[didn't] honestly know what to make" of Kocaker's variable performance on the neuropsychological testing. (R 1268). He further testified that the lesions in the MRI results were "incidental findings," and common in normal patients. (R 1268-69). All five other experts, as discussed below, found that Kocaker's variable performance on the neuropsychological correlated with his brain lesions, and evidenced abnormal brain functioning. Second, Dr. Eisenstein explained that Dr. Gamache's opinion that the brain lesions were "incidental" was flawed.

(R 1417-18). The recognized scientific literature found in normal aging patients, a 4-6% increase in lesions is normal. (R 1417). The radiologist found Kocaker had a 40% increase in brain lesions. *Id*. Further, the number of lesions present since the first brain imaging far exceeds what is normally expected for Kocaker's age group. (R 1418).

Additionally, Dr. Wood testified that the MRI results do not show a "normal or typical brain," and it does suggest dysfunction and significant brain damage. (R 791). Testing showed Kocaker's immediate recall memory was impaired to the 10th percentile, and his delayed memory recall to the 15th percentile. (R 795-96). His memory was very sparse with few details. (R 796). Kocaker's verbal recognition and verbal processing scores were also "unquestionably abnormal." (R 798-99). This is a sign of acquired brain dysfunction. (R 799). Thus, the neuroimaging and neuropsychological testing both show brain dysfunction and damage.

Second, Dr. Maher concluded that Kocaker suffers from a severe, chronic psychiatric disorder characterized by neuro-cognitive deficits and psychosis. (R 895). Dr. Maher explained the testing reveals Kocaker has severe impairments in some areas, consistent with his brain disease, and has some areas of the brain which are preserved and functioning. (R 2016). Dr. Maher testified this is confirmed by the brain scans which show lesions, or holes, scattered throughout Kocaker's brain. (R 2016-17). These "holes" are areas in the brain where there should be neurological tissue, but where there is no tissue. (R 2017).

Third, Dr. Bursten testified there was a pattern in Kocaker's neuropsychological testing

which reflected marked discrepancies between his sub-test scores. (R 1869-70). Usually a person shows a consistent level of ability or inability, however, when someone, like Kocaker, shows "scatter" in their test scores, this correlates with a "misfiring in certain areas of information processing," and indicates a neurocognitive disorder. (R 1870-71, 1873-74). For example, Kocaker's test scores reveal problems with his information processing abilities. (R 1871). Dr. Bursten explained that although everyone has some discrepancies in their scoring, it is the extent of those discrepancies that matters. (R 1871-72). Kocaker's scores reflect significant discrepancies which indicates a neuropsychological impairment. (R 1872, 1879).

Fourth, Dr. Carpenter found that Kocaker's neuropsychological testing showed a significant number of below average scores. (R 1951). Kocaker's poor performance is rooted in a mental and neurocognitive disorder which is worsening over time. (R 1961). Dr. Carpenter explained Kocaker's answers revealed "a lack of insight," with no logic behind any of his answers. (R 1045). "It was just pretzel logic." (R 1045).

Lastly, all of Kocaker's scores are indicative of a substantial and significant decline in his neurocognitive memory skills. (R 1141). This finding correlates with the new lesions on his brain which affect temporal lobe functioning. (R 1129). The temporal lobe is related to memory functioning and emotion. (R 1129-30).

Even Dr. Suarez's neuropsychological testing is consistent with these findings. Dr. Suarez testified that Kocaker's testing showed statistically significant differences across his sub-scores. (R 1839). Kocaker scored in the 2nd percentile in the verbal comprehension

section which measures conceptual, verbal thinking, and reasoning. (R 1840). He scored in the 4th percentile in the processing speed index. (R 1840). On the Figure Memory Testy, Kocaker's score was lowest Dr. Suarez had seen in his forty-two years of practice. (R 1855-58). Contrary to the lower court's finding, all of this evidence confirms Kocaker suffers from both a mental illness and a neurocognitive disorder that affects his memory.

The lower court's finding that Kocaker has "normal functioning," and had "no observable symptomatology indicative of psychosis, brain damage, or dementia" while at the SFETC is not supported by competent substantial evidence. (R 2318-19).

Dr. Bursten explained that there are a subset of individuals who are subtly and quietly psychotic. (R 1005). This explains why Kocaker has had little or no contact with mental health professionals while in custody. (R 1004). Since he was not presenting with outright psychotic symptoms, they simply "breezed" over him. (R 1004-05). The same could be said for when the professionals only observed Kocaker over a live video feed. Kocaker is compliant, and thus, watching him via a live video feed will show him being benign, quiet. (R 1874). This does not mean that Kocaker is not psychotic. Second, Dr. Carpenter testified that part of a schizophrenia diagnosis is negative symptomology – *i.e.* diminished emotional expression – which can interpreted as depression. (R 1081-81). Dr. Maher testified that Kocaker is able to "function in a manner that superficially appears unimpaired in an institutional environment, particularly an institutional environment," but, this does not change his diagnosis that Kocaker is psychotic. (R 2009-10).

Moreover, Kocaker's debilitating brain disease is more pressing and also depresses his chronic psychosis. (R 2010). Dr. Wood testified that Kocaker was withdrawn and impoverished in his emotional or other expressions, his demeanor was blunted. (R 800). During the evaluation with Dr. Carpenter, Kocaker's responses were vacuous, impoverished, flat, and vacant. (R 1027). Dr. Eisenstein described Kocaker as a "shell of the individual" that he once was. (R 1221). Dr. Bursten described Kocaker as very vacuous, very vague, and "a quiet, milk toast kind of person now." (R 1891).

Thus, the bulk of the expert testimony, and all of the neuropsychological testing, shows that Kocaker suffers from a cognitive deficit which is not within the normal range of functioning. The lower court's finding to the contrary was unreasonable and not supported by competent substantial evidence.

d. The lower court erred in finding that all of the testing "belies a finding that Defendant suffers from a mental illness or neurocognitive condition that affects his memory."

All of the evidence presented during the competency proceedings signals that Kocaker suffers from a neurocognitive condition that affects his memory.

Dr. Wood found that Kocaker's immediate recall memory was impaired to the 10th percentile, and his delayed memory recall to the 15th percentile. (R 795-96). His memory was very sparse with few details. (R 796). Dr. Wood found Kocaker was withdrawn and impoverished in his emotional or other expressions, his demeanor was blunted. (R 800).

Dr. Maher testified that Kocaker has deficits in memory, specifically long-term and

consistency in memory. (R 896). His recall is limited, impaired, and distorted. (R 906). His ability to recount his own history is very limited, simplistic and concrete. (R 906). He could not remember any suicide attempts. (R 907-08). Dr. Maher attested that this is a common practice in people who suffer from chronic, progressive, dementing illness because they understand it would be odd to continually respond with “I don’t know.” (R 2013). Instead, they develop a pattern of responding generally, which does not reveal the depth of their lack of understanding. (R 2014). Dr. Maher stated that it is a response which helps them feel less anxious, uncomfortable, and incompetent. (R 2014). Dr. Maher explained that Kocaker does not have the ability to respond to questions with anything other than old, repetitive, fixed knowledge with no understanding of the relevant issues. (R 2036, 2038-39). He can only respond in a non-thoughtful and unaware manner. (R 2036).

Dr. Bursten found Kocaker has an inability to recount accurate facts which results from a delusional process which affects his ability to communicate. (R 958). Kocaker does not have the ability to recall the details of his interactions with trial counsel (R 959). Ultimately, Kocaker has an irrational, divergent recounting of past events, memory related deficits, and vague, limited quality of communication. (R 959-60).

During the evaluation with Dr. Carpenter, Kocaker had no understanding of the postconviction process or what his attorneys were doing to help him. (R 1027-28). Dr. Carpenter felt Kocaker’s general answers were a way to cover up his lack of understanding. (R 1028-29). He was sayings things, “but it had no real content,” there was a “poverty of

content." (R 1029-30). Kocaker could not even remember his own capital trial. (R 1031). Dr. Carpenter testified that Kocaker cannot retain information and this problem is rooted in a mental and neurocognitive disorder which is worsening over time. (R 1961).

As discussed *supra*, Dr. Eisenstein testified to Kocaker's substantially impaired neuropsychological test scores on the Wechsler Memory Scale.

The State played excerpts of the video from Dr. Gamache's evaluation of Kocaker which also showed substantial memory problems. (R 1295-1398). In the video, Kocaker did not know why the jail was giving him HIV medication (R 1304), he adamantly denied ever taking any "psych meds" (R 1305; 1354), denied ever being diagnosed with or treated for any mental health or psychological problems (R 1338; 1340; 1251; 1359), specifically denied ever swallowing razor blades (R 1354; 1391), denied ever attempting suicide (R 1311; 1391), and denied being treated for any physical problems with his body (R 1360). Kocaker believed the DOC records were either wrong or not his. (R 1308; 1313; 1352; 1357; 1362). Dr. Gamache conceded that Kocaker has made statements inconsistent with record evidence which raised concerns. (R 1931).

Dr. Kirsch did not query Kocaker about the facts of his case, arrest, or trial. (R 1733). Dr. Kirsch did concede that "it's a challenge for [Kocaker] to reproduce a story." (R 1745).

Dr. Suarez testified that when he asked Kocaker about case specific facts, Kocaker's recitation of the facts "[didn't] fit either the evidence or logic." (R 1823). Dr. Suarez also watched the videotapes from the other experts' evaluations of Kocaker, and found Kocaker's

recitation of the facts to them also did not make any sense. (R 1824).

Thus, all of the expert testimony is consistent in portraying Kocaker as someone with a mental illness or neurocognitive condition that significantly affects his memory.[7] The lower court's finding to the contrary is error and is unsupported by competent, substantial evidence.

e. The lower court erroneously found that Kocaker has a rational understanding of the pending collateral proceedings.

Due to his severe mental illness and diagnosed brain impairments, Kocaker does not have a rational understating of the pending collateral proceedings.

Dr. Kirsch admitted Kocaker was her first capital postconviction client. (R 1730). She did not evaluate whether Kocaker knew what happened at trial or other circumstances regarding his case or arrest. (R 1733). Dr. Kirsch did not even know that there were two phases in a capital trial. (R 1753). She never discussed any postconviction issues with him. (R 1749). Dr. Kirsch only evaluated Kocaker to see if he had a pathology she could diagnose.

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[7] Many courts have recognized that memory impairments may render a defendant incompetent to stand trial. *United States v. Andrews*, 469 F. 3d 1113, 1119 (7th Cir. 2006) ("a defendant's lack of memory could lead a district court to find a defendant incompetent to stand trial"); *United States v. Rinchack*, 820 F. 2d 1557, 1569 (11th Cir. 1987) (affirming case-by-case examination of whether memory deficits render defendant incompetent to stand trial); *Wilson v. United States*, 391 F. 2d 460, 463 (D.C. Cir. 1968) (rejecting contention that memory deficits can never provide grounds for incompetence to stand trial, favoring case-by-case approach); *People v. Palmer*, 31 P. 3d 863, 870 (Colo. 2001) (en banc) ("[I]f a defendant's amnesia renders him unable to understand the proceedings against him or to assist in his own defense then he must be found incompetent."); *State v. Garcia*, 998 P. 2d 186, 189-91 (N.M. Ct. App. 2000) (affirming finding of incompetence to stand trial of defendant with "dementia, secondary to diabetes" and "mild to moderate mental retardation, which was likely connected to his dementia").

(R 1733). Her testimony is not relevant as to whether or not Kocaker understands the collateral process.

Dr. Suarez only questioned Kocaker regarding pre-trial competency issues and specifically opined that competency is the ability to know who the players are – that the prosecutor is against you and your attorney is not. (R 1829). Dr. Suarez testified Kocaker was not able to say what went right or wrong in his trial. (R 1829). On cross examination, Dr. Suarez testified Kocaker did not provide any information related to mitigation. (R 1837). Dr. Suarez did not query Kocaker about what issues he might be able to assist counsel with in his postconviction proceeding. (R 1838). Dr. Suarez's testimony only points to Kocaker's inability to remember his trial and what he believes went right or wrong. Dr. Suarez did not question Kocaker at all regarding the postconviction process. His "competency" evaluation was surface level at best.

Dr. Gamache testified that Kocaker could not explain to him what a postconviction hearing was. (R 1929). Dr. Gamache testified that Kocaker has made statements inconsistent with record evidence which raised concerns, however, Dr. Gamache had no concerns with Kocaker's capacity to have a rational or factual understanding of the proceedings. (R 1931, 1942). It is inconceivable how Kocaker could not explain what the postconviction was, but still have a rational or factual understanding of that process. Six years into the postconviction process, Kocaker still could not verbalize what stage of the proceedings he was in.

In contrast, Dr. Bursten testified that Kocaker does show a surface level of functioning –

he can repeat what he is charged with and the roles of the prosecutor, judge, and defense counsel, however, as soon as you get into more detailed information pertinent to his case or the postconviction procedures, Kocaker's impairments manifest themselves and he cannot deal with complex information which requires memory or recall. (R 1875). His inability to elaborate, go into details, or recall things without getting confused is legitimate and is reflected in his impaired test data. (R 1909).

Dr. Maher testified that Kocaker does not have a reasonable, consistent understanding regarding the postconviction motion his attorney filed. (R 2030). Kocaker does not understand that one of the possible outcomes of a successful postconviction process is that he would get a new trial, even after repeated explanations by his attorney. (R 2031-32, 2037-38). Dr. Maher explained that Kocaker does not have the ability to respond to questions with anything other than old, repetitive, fixed knowledge with no understanding of the relevant issues. (R 2036, 2038-39). He can only respond in a non-thoughtful and unaware manner. (R 2036).

Dr. Carpenter testified that the SFETC also only looked at basic pre-trial competency. (R 1964-65). In Dr. Carpenter's opinion, Kocaker had no understanding of the postconviction process or what his attorneys were doing to help him. (R 1027-28). Dr. Eisenstein echoed this diagnosis and found Kocaker incompetent to proceed. (R 2095).

Thus, the clear bulk of the testimony, reflected a consensus that Kocaker is incompetent to proceed because he has no rational understanding of the pending collateral proceedings.

f. The lower court erroneously found that Kocaker has a sufficient present ability to "consult with counsel with a reasonable degree of rational understanding."

The lower court's finding is erroneous for two reasons. First, the lower court used the wrong standard. The correct standard as laid out in Fl. R. Crim. P. 3.851(g)(8)(B)(ii), is whether the defendant has the "ability to disclose to collateral counsel facts pertinent to the postconviction proceeding at issue." Second, even if the lower court used the correct standard, Kocaker does not have the ability to consult with counsel with a reasonable degree of rational understanding.

Dr. Maher testified that Kocaker's long-term memory deficit and his inability to remain rationally focused, extremely impair his ability to disclose to collateral counsel pertinent facts. (R 905-06). He has deficits in his ability to relevantly and meaningfully attend to his attorney's questions. (R 896). For example, Kocaker was unable to relate what has happened in his case in the past six years since he was sentenced. (R 951-52). Also, unlike the SFETC doctors, Dr. Maher was able to observe Kocaker interact with his attorney. (R 2011). Dr. Maher observed that Kocaker was not able to meaningfully engage or interact with his attorney on any relevant issues. (R 2012).

Dr. Bursten found that Kocaker could not communicate with his attorney in a rational, reasonable manner or aid in the development of his defense. (R 957-58; 1013-15; 1875-76). Dr. Carpenter testified that Kocaker does not have a sufficient ability to consult with counsel, and does not have a rational or factional understanding of the pending collateral proceedings.

(R 1025). Kocaker had no understanding of the postconviction process or what his attorneys were doing to help him. (R 1027-28). Dr. Eisenstein testified that there was a total breakdown in Kocaker's ability to consult with, disclose information to, and discuss with counsel, pertinent facts about his case. (R 1158).

In contrast, Dr. Gamache believed that Kocaker is not so adamant and so fixed in his false beliefs and delusions as to prohibit his attorneys from putting witnesses on the stand who can discuss things contrary to his fictional beliefs. (R 1403). Thus, he can consult with counsel. (R 1403). This is not the standard. It is precisely because of Kocaker's false beliefs, delusions, and impaired memory that he cannot disclose to collateral counsel facts pertinent to the postconviction proceeding – whether or not Kocaker would object to truthful testimony is not the standard.

As a result, the totality of the evidence demonstrates that Kocaker is unable to discuss matters related to his conviction and sentence. When he is confronted with this subject, Kocaker can only provide a practiced, routine set of responses which evidence a void of understanding, appreciation, or memory of what is really going on. His incompetence inhibits his ability to discuss anything pertinent to his case.

This Court has recognized the importance of a defendant's ability to confer with his postconviction counsel regarding factual matters.

> 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 defendant is able to assist counsel by relaying such information, the right to collateral counsel, as well as

postconviction proceedings themselves would be practically meaningless.

Florida Dept. of Corr. v. Watts, 800 So. 2d 225, 230 (Fla. 2001) (quoting *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997)). As in trial situations, the need for a defendant's assistance assures that the proceedings are fair and, "ultimately serves to protect both the defendant and society against erroneous convictions." *Watts v. Singletary*, 87 F.3d 1282 (11th Cir. 1996).

Kocaker's inability to deal with the facts of his case makes him incompetent to assist his postconviction counsel. He is unable to help ensure that his trial was just and free of unconstitutional infringements upon his rights. Finding Kocaker competent, even though his mental instability and brain disease renders him unable to relevantly and meaningfully attend to his attorney's questions and incapable of disclosing to postconviction counsel pertinent facts, violates the protections established in *Carter*. *See Stanley v. Chappell,* No. 3:07-CV-04727-EMC, 2013 WL 3811205, at *1 (N.D. Cal. July 16, 2013) (finding death-row prisoner incompetent to be executed due to dementia caused, at least in part, by encephalomalacia); *Mays v. State*, 476 S.W. 3d 454, 462 (Tex. Ct. App. 2015) (holding that death row prisoner made substantial showing of incompetence to be executed in part because of dementia and impaired memory); *Poteat v. Guardianship of Poteat*, 771 So. 2d 569, 571 (Fla. 4th DCA 2000) (holding that Poteat was incapacitated to exercise her right to contract due to a vascular disease); *Dep't of Child. & Fam. v. Garcia*, -- So. 3d – 2018 WL 1915782 at *1 (Fla. 3rd DCA Apr. 24, 2018) (finding defendant with dementia incompetent to proceed to trial); *Dep't of Child. & Fam. v. Gilliland*, 947 So. 2d 1262, 1262 (Fla. 5th DCA

2007) (finding defendant mentally incompetent to proceed to trial because Defendant suffers from dementia which will become progressively worse); *Erickson v. Olsen*, 844 N.W. 2d 585, 589 (ND 2014) (finding plaintiff who suffered from a neurological impairment similar to dementia incompetent); and *U.S. v. Musto*, 3:10-CR-338, 2014 WL 47351, at *5 (M.D. Pa. Jan. 7, 2014) (holding that a defendant's psychiatric and cognitive impairments rendered him incompetent).

ARGUMENT II: The Lower Court Erred In Denying An Evidentiary Hearing On Kocaker's Claim That The State Violated The Constitutional Requirements Of *Brady v. Maryland*, Thus Denying Kocaker Of His Right To Due Process And A Fair Trial Under The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution and the corresponding provisions of the Florida Constitution.

During the case management conference, Kocaker made a facially sufficient claim that required further factual development. An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *Owen v. State*, 986 So. 2d 534 (Fla. 2008); Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). "Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v.*

State, 684 So. 2d 726, 728 (Fla. 1996).

A. The Legal Standard.

In order to ensure that a constitutionally sufficient adversarial testing, and hence a fair trial occur, certain obligations are imposed upon the prosecuting attorney. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999). It is reasonable for defense counsel to rely on the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence." *Id*. at 284.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. *See Garcia v. State*, 622 So. 2d 1325, 1330-1 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S.

419, 434 (1995).

This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. *See Young v. State*, 739 So. 2d 553 (Fla. 1999). If it did, and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial. In making this determination, "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." *Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001). This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." *Kyles*, 514 U.S. at 446.

B. Kocaker made a legally and factually sufficient showing that prosecutor's failed to disclose a deal with Antoine Powell in exchange for his trial testimony against Kocaker.

In the prosecutor's files for this case, there is a note referencing a conversation between a relative of Antoine Powell's and the State Attorney's Office regarding a plea deal between the State and Powell in exchange for Powell's testimony against Kocaker. The note reads, "wants us to help Powell out w/ charges, told her that we won't be able to discuss that until after trial." (R 2400). Postconviction counsel was prepared to submit a copy of the file with the note had an evidentiary hearing been granted. This note clearly reveals that the expectation for a deal was there, the specifics of which would be discussed after trial. However, at Kocaker's capital trial, Antoine Powell testified that he had not been promised

anything on his five pending criminal charges in exchange for testifying against Kocaker. (TR 28:629-31). He was not testifying "for good looks" but because it was "just the right thing to do." (TR 28:631, 648). This is false. Although perhaps no deal had been "finalized," the expectation of one was there and he had been told to wait by the State.

Significantly, evidence uncovered in postconviction shows that Powell did receive a deal in exchange for his trial testimony. Powell received a lenient sentence of twenty-six days credit time served for his pending charges, even though he scored 55-80 months in prison as a habitual offender. Postconviction counsel was prepared to submit a copy of Powell's criminal file in support of this claim had an evidentiary hearing been granted. (R 2777, 3028).

The note in the prosecutor's file demonstrates that Powell expected a deal, and specifically asked for one. The prosecutor's response – that a deal would be discussed after trial – was a clear signal to Powell that he could expect something later. The prosecutor delivered on that promise after Kocaker's capital trial by accepting a plea deal to credit time served. The State's failure to disclose this information undoubtedly "handicapped the defendant's ability to investigate or present other aspects of the case," (*Rogers*, 782 So. 2d at 385), by unconstitutionally restricting the trial counsel's ability to cross examine Mr. Powell.

Powell's trial testimony that he was not looking for a deal is false. He was clearly looking for a deal, as evidenced by the phone call and note. The State knew this testimony was false because Powell had called their office looking for a deal, and it was material because it inhibited trial counsel's cross examination of Powell. The State's response that one would

be discussed *after* trial instead of prior to trial does not negate the State's responsibility to disclose this information to trial counsel. Nor does it relieve the State of its burden to correct Powell's testimony that he was not expecting a deal, as he most certainly was expecting one, the specifics of which would be discussed after trial.

The lower court pointed to Powell's trial testimony that he did not receive a deal as conclusive proof that he, in fact, did not receive such a deal, in summarily denying this claim. This is error. Powell's trial testimony is simply further proof that an evidentiary hearing should have been granted because there is a conflict in the evidence, as evidenced by Powell's extremely lenient plea deal and the note, which needed to be resolved.

C. Kocaker made a legally & factually sufficient showing that prosecutor's failed to disclose a deal with Stephanie Brzoska in exchange for his trial testimony against Kocaker.

The State withheld evidence that Stephanie Brzoska also received a deal in exchange for her trial testimony, and allowed her to testify falsely that she received no benefit in exchange for her testimony. The Pinellas County Clerk's file in Case No. 2007-CF-028162 and 2007-CF-0257563 demonstrates that in October 2008, after Brzoska testified as a witness for the State in Kocaker's trial, Brzoska received time served for her probation violation – even though she was facing twenty-nine to thirty months in prison. Postconviction counsel was prepared to submit a copy of Brzoska's criminal file in support of this claim had an evidentiary hearing been granted. (R 2777). Brzoska's probation was also terminated and she was allowed to leave the State of Florida that very night. Brzoska was on probation for

two separate felony offenses – possession of cocaine and sale of cocaine – and violated both terms of probation.

The State offered no credible evidence to explain how Brzoska would get such a deal absent a benefit for her work in being a State's witness, especially since she was only on probation for four months before she violated.

Stephanie Brzoska testified at Kocaker's trial that she "in no way, shape or form" was hoping for a favorable recommendation to the judge from the State Attorney's Office in exchange for her testimony at Kocaker's trial. (TR 29:718). Yet, four months later, Brzoska received credit time served and had her probation terminated despite scoring two and a half years of prison time. Witness credibility with the jury was central to the state's case against Kocaker. There was no physical evidence linking Kocaker to the crime. Thus, the entire case rested on the credibility of eyewitness testimony. The nature and weight of this impeachment evidence is great and was not disclosed to trial counsel.

D. Conclusion

The lower court's denial of an evidentiary hearing on this claim cut off any further factual development. This claim was not procedurally barred and was facially sufficient to warrant a hearing. There is no evidence that trial counsel knew of these deals but failed to ask Powell or Brzoska about it. Since there is no factual basis in the record which conclusively refutes this claim, the lower court should have granted an evidentiary hearing.

The State's reliance on *State v. Woodel*, 145 So. 3d 782 (Fla. 2014), *Floyd v. State,* 18

So. 3d 432 (Fla. 2009), and *Lamarca v. State*, 931 So. 2d 838 (Fla. 2006), is misplaced. Woodel, Floyd and Lamarca all received an evidentiary hearing on their *Brady*/*Giglio* claims. Kocaker did not. It was not until *after* the evidentiary that their claims were denied. Kocaker was never given a similar opportunity to present further evidence on his *Brady* claim.

Additionally, this Court denied Woodel's *Brady* claim because it was based solely on an inference that an habitual felony offender would not receive a lenient sentence absent a deal in exchange for his testimony. *Woodel*, 145 So. 3d at 806. No further evidence was presented at the evidentiary hearing. In contrast, Kocaker has shown a lenient plea deal in connection with a note in the prosecutor's own file about a possible plea deal. Yet, no evidentiary hearing was granted. Similarly, in *Floyd*, this Court denied Floyd's *Brady*/*Giglio* claim because no evidence had been presented *at the evidentiary hearing* tying the nolle prosequi of a witness's charges to her trial testimony. *Floyd*, 18 So. 3d 452. *See also Lamarca*, 931 So. 2d at 853 (denying Lamarca's *Brady* claim because the assistant state attorney testified at the evidentiary hearing that he never made a deal with the witness). The lower court erred in denying an evidentiary hearing on this claim.

ARGUMENT III: The lower Court Erred In Denying An Evidentiary Hearing as required by Fla. R. Crim. P. 3.851(5)(B) On Kocaker's Claim That He Was Denied The Effective Assistance Of Counsel At The Pretrial And Guilt Phase Of His Capital Trial In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution and the corresponding provisions of the Florida Constitution.

In his Rule 3.851 motion, Kocaker alleged that that he was denied his Sixth Amendment

right to the effective assistance of counsel due to his trial counsel's failure to investigate his capital case and to test the State's evidence through proper argument, objections, available impeachment evidence, and effective cross examination.

The United States Supreme Court has explained that "[a] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the results of the proceeding are rendered unreliable. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 384-88 (1986); *Henderson v. Sargent*, 926 F. 2d 706 (8th Cir. 1991). The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

Kocaker alleged that a critical analysis of all the evidence that was available to trial counsel multiple revealed instances where they failed to investigate obvious red flags and /or present available evidence necessary to their defense. An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination.

Owen v. State, 986 So. 2d 534 (Fla. 2008); Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). "Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852, 868 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

A. Kocaker has alleged that he was deprived of his Sixth Amendment right to effective assistance of counsel due to trial counsel's failure to test the State's evidence during the guilt phase of his capital trial.

Trial counsel failed to adequately cross examine Heidi Kalous or to develop any other evidence which would have assisted in Kocaker's defense. Specifically, trial counsel failed to cross Kalous on the knife that was in Kocaker's hotel room. Kalous stated:

Q: Okay. And did [Kocaker] say anything when he left the room?
A: Yes.
Q: What did he say?
A: If I need anything – need anything, if anything happened, there's a knife under the bed.
Q: Okay. He said there's a knife under the bed, how did you react to that?
A: I was disturbed about it –
Q: Okay.

A: Because I didn't know him. I mean, I don't expect to go anywhere and a knife be under the bed.

(TR 29:684). The insinuation by the prosecution is clear – that Kocaker had a knife prior to the murder and later, that this knife was used to stab the victim.

However, the defense failed to cross Kalous on the fact that two other girls, who were also with Mr. Kocaker that night, do not remember Kocaker stating he had a knife under the bed. Instead, Toni Haynes and Stephanie Brzoska both testified in their sworn depositions, that after Kocaker left the hotel room, one of the girls went snooping and found a knife under the motel bed. (R 2611, 2664). Brzoska also stated that it was a habit for the girls to "always check the rooms because we've found guns and all kinds of stuff under the mattress. You don't want to be in a room where you don't know something is in there." (R 2664). Kocaker never testified that the knife belonged to him.

As a result, trial counsel forfeited the opportunity to argue that the knife was not Kocaker's and had been left in the motel room by the previous occupant. This prejudiced Kocaker, as it allowed the State to argue evidence of premeditation.

Second, trial counsel failed to adequately cross examine Stephanie Brzoska. During Brzoska's initial statement to law enforcement she never mentioned seeing any blood on Kocaker when she and Powell picked up Kocaker from the Walgreens' parking lot on the night of the crime. Additionally, during her deposition testimony Brzoska was specifically asked about the presence of blood on Kocaker:

Q: And did you notice any blood or anything like that on –

A: Honestly I really wasn't paying attention.
Q: So you did not notice anything?
A: Nothing, no.
(R 2641).

Trial counsel failed to ask Brzoska about this during her trial testimony even though the State's theory at trial was that Kocaker left the crime scene and called Powell to pick him up from the Walgreens' parking lot. Whether or not Kocaker was seen wearing bloody clothes on the night of the murder was a point of contention at trial. Trial counsel's failure to point out that Brzoska – who picked up and transported Kocaker allegedly right after the murder occurred – did not see any blood on Kocaker was ineffective and prejudicial to Kocaker.

Lastly, trial counsel failed to adequately cross examine Antione Powell. At trial, Powell testified that when he picked up Kocaker for the second time on the night of the crime that he "wasn't wearing the same clothes. He wore different clothes [than before]." (TR 28:613). However, in Powell's original statement to law enforcement, four years earlier and within weeks of the crime, he failed to mention this detail. Powell also testified that Kocaker had changed into a "blue shirt and dark pants." (TR 28:614). This detail was never provided originally to law enforcement.

Additionally, Powell testified at trial that "when he [Kocaker] got in the car, I turned this way, and I noticed the bag with shoes, shirt and pants in the bag." *Id*. This detail is important because the State later argued that the clothes in this bag were the clothes that Kocaker wore when he killed the victim. The State also argued that Kocaker disposed of this bag, full of clothes, at a local 7-11 gas station. The trial court also used this fact to discount the "inability

to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law" statutory mitigator because it showed that Kocaker appreciated his wrongful conduct and tried to conceal his culpability. Yet, in Powell's original statement to the police, just a little over two weeks after the incident, he told detectives:

> AP: I didn't – I didn't notice, I noticed the bag as he was walking, but I didn't look back to see what was – what as (sic) in the bag, I knew he had a bag in my car, you know what I'm saying?
> DJ: Can you describe the bag that you saw?
> AP: I just saw, uh, the bag was plastic, it could have been a Walmart bag, uh, I can go as far as saying the bag was blue.

(R 2682).

Powell also testified that he drove Kocaker to the 7-11 where he disappeared behind the dumpster for "not even a minute, two minutes tops." (TR 28:615). Kocaker then emerged without the plastic bag. *Id*. However, in his statement from September 16, 2004, Powell told the detectives that Kocaker was by the dumpster "for like at least like maybe five, six, seven minutes, maybe," and makes no mention of Kocaker returning without a bag. (R 2683).

This change in testimony contradicted his earlier statement and directly benefited the State. Defense counsel never impeached Powell with these inconsistencies.

Powell's credibility with the jury was central to the state's case against Kocaker. There was no physical evidence linking Kocaker to the crime. Thus, the entire case rested on the credibility of eyewitness testimony. The valuable information that could have been presented through the cross examination of the witness was unreasonably forfeited by trial counsel.

B. The lower court's summary denial of this claim was error.

The lower court summarily denied Kocaker's claim. (R 2802). The court determined that this claim could be resolved based solely upon the law and the record. *Id*. Kocaker's rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Kocaker's claim and that an evidentiary hearing is required.

ARGUMENT IV: Cumulative Error.

Kocaker did not receive the fundamentally fair trial to which he was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991); *Rose v. Lundy*, 455 U.S. 509, 531 (1982). Repeated instances of ineffective assistance of counsel and prosecutorial misconduct significantly tainted Kocaker's guilt phase.These errors cannot be harmless. Under Florida and federal law, the cumulative effect of these errors denied Kocaker his fundamental rights under the United States and the Florida Constitutions. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Ray v. State*, 403 So. 2d 956 (Fla. 1981).

CONCLUSION AND RELIEF SOUGHT

The lower court improperly denied Kocaker relief. This Court should vacate his conviction and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

WE hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Christina Pacheco, Assistant Attorney General, capapp@myfloridalegal.com and christina.pacheco@myfloridalegal.com, on this 5th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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