

**IN THE SUPREME COURT OF FLORIDA**

**MESAC DAMAS,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

---

**CASE No. SC2023-1476  
L.T. No. 2009-CF-02298  
DEATH PENALTY CASE**

**ON APPEAL FROM THE TWENTIETH  
JUDICIAL CIRCUIT COURT  
IN AND FOR COLLIER COUNTY, FLORIDA**

**ANSWER BRIEF OF APPELLEE**

**ASHLEY MOODY  
ATTORNEY GENERAL OF FLORIDA**

**TIMOTHY A. FREELAND  
SENIOR ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 539181  
3507 East Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: (813) 287-7910  
timothy.freeland@myfloridalegal.com  
capapp@myfloridalegal.com**

**COUNSEL FOR APPELLEE**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT..... vi

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF THE ARGUMENTS ..... 28

ARGUMENT ..... 29

    ISSUE I ..... 32

        A. COUNSEL’S HANDLING OF DAMAS’  
        SPURIOUS COMPETENCY CLAIM WAS NOT  
        INEFFECTIVE..... 32

        B. DAMAS’ DECISION NOT TO ATTEND THE  
        POSTCONVICTION HEARING WAS  
        VOLITIONAL AND OBSTRUCTIVE; THE  
        LOWER COURT DID NOT ABUSE ITS  
        DISCRETION IN CONTROLLING  
        OBSTRUCTIVE COURTROOM BEHAVIOR. .... 44

    ISSUE II ..... 46

        PENALTY PHASE COUNSEL’S DEVELOPMENT  
        OF MITIGATION EVIDENCE IN THE FACE OF  
        DAMAS’ PERSISTENT OBJECTION AND  
        ACTIVE OBSTRUCTION WAS NOT  
        INEFFECTIVE..... 46

    ISSUE III ..... 56

        THE PUBLIC RECORDS CLAIM..... 56

CONCLUSION ..... 61

CERTIFICATE OF SERVICE ..... 62

CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE ..... 62

## TABLE OF AUTHORITIES

### **Cases**

<u>Alexander v. Dugger</u> , 841 F.2d 371 (11th Cir. 1988) .....	44
<u>Allen v. Butterworth</u> , 756 So. 2d 52 (Fla. 2000) .....	59
<u>Asay v. State</u> , 769 So. 2d 974 (Fla. 2000) .....	30
<u>Banks v. State</u> , 150 So. 3d 797 (Fla. 2014) .....	57
<u>Barnes v. State</u> , 124 So. 3d 904 (Fla. 2013) .....	44
<u>Bobby v. Van Hook</u> , 558 U.S. 4 (2009).....	30
<u>Bounds v. Smith</u> , 430 U.S. 817 (1977) .....	58
<u>Brockman v. State</u> , 652 So. 2d 330 (Fla. 2003) .....	43
<u>Cherry v. State</u> , 781 So. 2d 1040 (Fla. 2000) .....	51, 52
<u>Damas v. State</u> , 260 So. 3d 200 (Fla. 2018) .....	16, 17, 42, 54
<u>Dessaure v. State</u> , 55 So. 2d 478 (Fla. 2010) .....	42, 46
<u>Duncan v. Moore</u> , 754 So. 2d 708 (Fla. 2000) .....	61
<u>Dusky v. United States</u> , 362 U.S. 402 (1960) .....	33
<u>Faretta v. California</u> , 422 U.S. 806 (1975) .....	17, 37, 39
<u>Harrington v. Richter</u> , 563 U.S. 86 (2011).....	31, 32

<u>In Re Commitment of Reilly,</u> 970 So. 2d 453 (Fla. 2d DCA 2007).....	34
<u>In re: Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production,</u> 683 So. 2d 475 (Fla. 1996) .....	60
<u>Indiana v. Edwards,</u> 554 U.S. 164 (2008) .....	39
<u>Johnson v. State,</u> 135 So. 3d 1002 (Fla. 2014) .....	30
<u>Knight v. State,</u> 211 So. 3d 1 (Fla. 2016) .....	30
<u>Kokal v. State,</u> 901 So. 2d 766 (Fla. 2005) .....	57
<u>Lewis v. Casey,</u> 518 U.S. 343 (1996) .....	58
<u>Martinez v. Ryan,</u> 566 U.S. 1 (2012).....	57
<u>McCray v. State,</u> 71 So. 3d 848 (Fla. 2011) .....	46
<u>Medina v. Singletary,</u> 59 F.2d 1095 (11th Cir. 1995) .....	35, 44
<u>Moore v. State,</u> 820 So. 2d 199 (Fla. 2002) .....	59
<u>Mungin v. State,</u> 932 So. 2d 986 (Fla. 2006) .....	32
<u>Murray v. Giarratano,</u> 492 U.S. 1 (1989).....	57
<u>Occhicone v. State,</u> 768 So. 2d 1037 (Fla. 2000) .....	31
<u>Peede v. State,</u> 955 So. 2d 480 (Fla. 2007) .....	33
<u>Pennsylvania v. Finley,</u> 481 U.S. 551 (1987).....	57

<u>Rodriguez v. State,</u> 919 So. 2d 1252 (Fla. 2005) .....	59
<u>Ross v. Moffitt,</u> 417 U.S. 600 (1974) .....	57
<u>Russ v. State,</u> 73 So. 3d 178 (Fla. 2011) .....	47
<u>Spencer v. State,</u> 615 So. 2d 688 (Fla. 1993) .....	43, 55
<u>Stano v. State,</u> 520 So. 2d 278 (Fla. 1988) .....	42
<u>State v. Mullens,</u> 352 So.3d 1229 (2022) .....	30
<u>Stewart v. State,</u> 37 So. 3d 243 (Fla. 2010) .....	30
<u>Strickland v. Washington,</u> 466 U.S. 668 (1984) .....	29, 30, 31
<u>Waterhouse v. State,</u> 792 So. 2d 1176 (Fla. 2001) .....	31
<u>Wong v. Belmontes,</u> 558 U.S. 15 (2009) .....	31
<u>Zakrzewski v. State,</u> 866 So. 2d 688 (Fla. 2003) .....	31
<b>Other Authorities</b>	
§ 27.7081(3), Fla. Stat. (2023) .....	59
§ 27.7081(7)(b)(1), Fla. Stat. (2023) .....	59
§ 27.7081, Fla. Stat. ....	56, 58, 59
Fla. Const. art. I § 21 .....	57
Fla. R. App. P. 9.045 .....	62
Fla. R. Crim. P. 3.851 .....	17
Fla. R. Crim. P. 3.852 .....	56, 58, 59
Fla. R. Crim. P. 3.852(g)(3)(A) .....	59
Fla. R. Crim. P. 3.852(g)(3)(D) .....	59

U.S. Const. amend. V .....	58
U.S. Const. amend. VI .....	58
U.S. Const. amend. VIII .....	58
U.S. Const. amend. XIV .....	58

## **PRELIMINARY STATEMENT**

Citations to the record on direct appeal (SC2017-2062) will be referred to by an “R” followed by the appropriate page number. Citations to the postconviction record on appeal (SC2023-1476) will be referred to as “PCR” followed by the appropriate page number.

## **STATEMENT OF THE CASE AND FACTS**

Damas was indicted on six counts of first-degree premeditated murder for the killing of his wife, Guerline, and their five children in September 2009. The names and ages of the children were Meshach (nine years old), Maven (six years old), Marven (five years old), Megan (three years old), and Morgan (nineteen months old). Damas killed the victims at their Naples home by cutting their throats after he broke into the home in the middle of the night. Damas admitted to law enforcement that he killed his wife and children. The following summary of facts comes from the Florida Supreme Court's opinion in Damas' direct appeal:

Damas and Guerline dated for many years before they married in April 2006. Meshach, Maven, Marven, and Megan were born prior to the marriage, while Morgan was born after the marriage. According to Damas, he and Guerline began to argue after the marriage. He became jealous and suspected Guerline of having an affair. He visited her job and checked her cellular telephone. On January 2, 2009, during an argument about her purported unfaithfulness, Damas slapped Guerline while she was holding infant Morgan, and Guerline dropped the child on the floor. Guerline called the police, and Damas was arrested and charged with misdemeanor battery. He was given a bond, but was ordered to have no contact with Guerline as a condition of his release. Nonetheless, he sent her flowers almost every day. Further, he would use his key to enter the residence so that he could apologize to Guerline and see the children.

According to Damas, as time passed, Guerline became concerned because the Department of Children and Families (DCF) “got involved” as a result of the domestic violence incident and was “trying to take the kids away from her.” Guerline changed the locks so that Damas could no longer enter the residence, but Damas would drive by after his restaurant shift ended at 3 a.m., using a friend's car so the police would not know he was violating the no-contact order. He would sit in the car, watching Guerline and thinking about the children. One day, when he “couldn't take it no more,” he broke a window while Guerline was home and entered the residence to see the children. Guerline and the children eventually moved out of the residence where the domestic violence incident occurred and into the townhouse where the murders occurred.

The no-contact order was subsequently lifted and, toward the end of March 2009, Guerline allowed Damas to move in with her and the children. Damas pleaded no contest to the battery charge and was placed on twelve months' probation. Although Guerline allowed Damas to move in, she told him she did not forgive him and she planned to divorce him. Guerline informed Damas that her mother stated that if she ever took Damas back, she (the mother) would never speak to Guerline again. When Damas asked Guerline if she would leave him, she stated, “I don't know what I'm going to do. My mom [is] probably right ... like I told you before I'm going to leave you. I'm going to divorce you.” Damas responded, “Baby let me tell you something.... If you ever say that again I will kill your mom. I will kill you. I will kill myself.”

On Wednesday, September 16, 2009, Guerline informed Damas that if he struck her again, she would make sure he spent the rest of his life in prison and he would never see the children again. Contemplating Guerline leaving him for someone else and not being allowed to see his children, Damas thought about killing himself and her:

[A]nd then that's when the devil start coming out of me. He was like, "Oh, why don't you just kill yourself? Kill her and then kill yourself" you know, "Let your parents, whatever, take care of the kids." But I was like, "But I love the kids and when I die how am I going to know if they [are] okay."

Also that day, a DCF employee visited and met with Guerline without Damas. Damas recounted to the special agent his belief that "[t]hey were setting me up for failure. [Guerline] was asking her how she can divorce me.... I was so pissed off ... the fact [that] she betrayed me like that." (fourth alteration in original). That night, Guerline informed Damas she would help him finish the probation classes, and then she would divorce him.

On the morning of Thursday, September 17, 2009, Damas followed Guerline to her job, leaving the children at home alone. Guerline and the store manager threatened to call the police, but Damas said, "If you call the cops they're going to arrest me, they're going to arrest you too because both of us left the kids alone at the house. They're going to take the kids away from us. I know you love the kids too, right?" Guerline returned home after working less than four hours. She asked Damas to sign some papers that had arrived in the mail. Before she left the townhouse to return to work, she stated she would not come home that evening because she feared Damas "might push me or whatever, beat ... me." Damas responded, "Baby, I'm not going to do anything to you. I love you. You know? It's okay.... It's alright. If I touch you I go to jail; you know."

Guerline returned to the townhouse that afternoon on her work break. A friend who was visiting Damas at the time witnessed an argument between the two before Damas left for his work shift, using the friend's vehicle rather than taking his own. The friend agreed to stay and watch the children because Guerline also left to return to work. At approximately 7 p.m., Guerline arrived home, and the friend remained to speak with her. During his

shift, Damas complained of a headache and was allowed to leave early. He “clocked out” at 8:42 p.m. Damas informed the special agent that once he left the restaurant, he was considering various scenarios:

I said I would go and kill her and myself. But if I kill her[,] custody of the kids would go [to] her mom. So I wanted to kill her mom so my mom would have custody. I [was] talking to myself in my car. I said what if I kill my kids and myself? But what about her? She will marry again! What if I just kill her? But if they find me[,] they will take my kids away from me.

Around 9 p.m., Damas's friend observed his own vehicle drive past the townhouse, turn around, and leave. The friend entered Damas's Yukon and followed Damas, flashing the lights of the Yukon. When Damas stopped, the friend asked Damas what was wrong, and Damas replied that he thought Guerline was with another man. The friend and Damas swapped vehicles, and the friend observed Damas drive away. At approximately 10:30 p.m., Damas purchased duct tape, a filet knife, and chewing gum.

On Saturday, September 19, 2009, Guerline's family filed a missing person report with the Collier County Sheriff's Office and requested a welfare check for Guerline and the children. The family was concerned due to the history of domestic violence between Damas and Guerline and the children, and the fact that Guerline had not reported to work, which was out of character for her. The children also missed school on Friday. Officers met Guerline's family at the townhouse to conduct a welfare check, and the landlord unlocked the front door. Upon entry, the officers observed a red substance that appeared to be blood leaking from the closed door of a room under the stairway. Believing a violent crime had been committed and the suspect might still be present, the officers withdrew and requested backup.

Upon reentry by law enforcement, they opened the door under the stairs and found Guerline deceased, laying on the floor of a small bathroom with a large area of dried blood beneath the upper part of her body. Her head was covered with a black trash bag. Underneath the bag, her neck and mouth had been bound with duct tape. The upper half of her body was bound with so much duct tape that it was impossible to discern what she was wearing from the waist up. Her arms were behind her back and her wrists and hands, palms facing outward, were bound extensively with duct tape. Her legs were bound with duct tape from just above her knees to just above her ankles. Her torso and hands were also loosely wrapped in an electrical cord. Her throat had been cut through the duct tape.

Law enforcement proceeded to the second floor of the townhouse to check on the welfare of the children. In one bedroom, law enforcement found Meshach—the oldest child—deceased on the bed with his throat cut. The knife wounds nearly encircled his neck. The bed was broken. In another bedroom, law enforcement found the four remaining children deceased, also with their throats cut. The lacerations to five-year-old Marven's throat were so deep that he was nearly decapitated. Neither Damas nor his vehicle was at the townhouse.

Law enforcement eventually tracked Damas's vehicle to Miami International Airport, where he had entered the airport parking garage at 6:40 a.m. on September 18, 2009. Damas paid cash for a one-way ticket to Port-au-Prince, Haiti; the flight departed at 9:50 a.m. on September 18. He was subsequently apprehended in Port-au-Prince by the Haitian National Police. While being escorted by law enforcement, a reporter from the *Naples Daily News* who was in Haiti asked Damas, “Did you kill your family?” Damas replied in the affirmative. Damas also stated that he wanted “death right away” so that he could be buried with his family. When asked what led him to kill his family, Damas stated that Guerline's mother made him do it,

referencing “her mom's spirit, whatever she's—she's serving, whatever she worships.” Damas said he planned to commit suicide after the killings, but he did not have the courage to do so. Damas also stated that he intended to turn himself in, but went to Haiti to say goodbye to his family.

During his statements to the special agent and Collier County law enforcement, Damas described what happened on the night of the murders, though the stories are not identical. He stated that after swapping vehicles with his friend, Damas parked his car by the community swimming pool and proceeded to the back of the townhome. He watched Guerline through the screened-in lanai for more than one hour while she spoke on her cellular telephone. According to Damas, she was laughing and looked happy. At approximately 12:30 a.m., he tore off the screen door to the lanai and entered the townhouse through the sliding glass door, which Damas knew he could open because it was not functioning properly. When Guerline saw him, she screamed and told him not to touch her. Damas punched her and, at that time, he knew he “was gonna go to jail.” Damas stated that Guerline was fighting him in the kitchen, “trying to get out [to call] the cops or whatever. Call a neighbor.” According to Damas, at that point, he pulled her hair back and cut her throat from behind with a filet knife.

Damas bound Guerline extensively with duct tape so that she could not call out and because she was “trying to make noise with her feet that the neighbor next to us can hear” through the common wall. Because she was still struggling and he had used all the tape, he further bound her with an extension cord. According to Damas's statement to the special agent:

I said I gonna let you live ... I won't kill you but I kill all the kids in front of you! I said I will let you go but I burn the house with me and kids in it. She want to talk. I remove duct tape ... she said “I love you so much.” I said why you lying to me? She said

please don't hurt the children. I said if you go I looking at 6 years because [you] will call the cops on me.

(First and second alteration in original.) According to Damas's statement to Collier County law enforcement, he dragged Guerline into the bathroom in order to contain the blood. He then engaged in the following thought process:

And I was trying to, "What am I going to do? Run, call the cops? Say I killed my wife or something."

....

I love my children to death. I'm going to jail for life.

....

Death penalty, whatever, electric chair. I'm thinking, thinking. One o'clock in the morning, two o'clock in the morning. I'm thinking. I got the knife in my hand still. I said, "Uh I'm to slice my throat too." I said, "I'm gonna suffer before I f[\*\*\*]ing die. I can do it." I wasn't going to kill the kids, man. I still had them to survive, you know, let them live. So the devil come to me and say, "Who's going to taking care of kids?"

Damas proceeded upstairs, where, in his own words, he cut the children's throats "one by one." He first killed Megan, the three-year-old. Damas said that after he killed Megan, he heard a voice saying, "Good job in doing it." According to Damas, when he said he could not continue, a voice told him, "Yes you can. Keep doing it." He then killed Marven, the five-year-old, and Maven, the six-year-old. According to Damas, he decided he could not continue, so he started packing, planning to leave Meshach and Morgan alive. However, according to Damas, when he proceeded downstairs:

I see a bunch of blood, my wife laying down. I was like, "Oh my God." I dugged up carpet and I cover the blood. There was blood everywhere on my feet. I was like, "Oh my goodness. I'm going to jail for the rest of my life. They will give me death penalty." ... And then the voice said, "You got two more left. You're going to die anyway. You're going to leave those two behind? Her mom probably have custody of them." I said, "Hell no I don't want her mom get custody. If I have chance to kill her mom I will drive there or, whatever. Go to Haiti, kill her mom." He was like, "Well her mom is gonna get custody [of] them." I said, "Hell no" and then I went upstairs and cut the little one.

Damas stated that nineteen-month-old Morgan was "the easiest one to die." However, nine-year-old Meshach struggled. After cutting Meshach's throat, Damas watched him bleed to death.

After the murders, Damas changed his bloody clothing, placed the knife—now bent—in a nightstand in the master bedroom, finished packing a suitcase, removed money from Guerline's wallet, and drove to the Miami airport where he purchased the one-way ticket to Port-au-Prince. He stated that before he left the townhouse, he contemplated suicide again, but could not bring himself to cut his own throat. Instead, he planned to drive into the path of another vehicle. However, he ultimately continued to the airport.

Damas stated to the special agent, "I know what I did was wrong. Bad spirits made me do it." Damas stated that his mother-in-law practices Vodou, and that she "has been doing voodoo on my ass ever since we been making children." According to Damas, because he and Guerline were engaging in premarital sex, Damas was no longer allowed to be president of his church youth group, and he left the church. As a result, he did not "have any protection from my God no more. So anything can happen to me."

The parties stipulated that the cause of Guerline's and the children's deaths was sharp force injuries to the neck, and the deaths were ruled homicides. On September 5, 2017, Damas pleaded guilty to six counts of first-degree premeditated murder, waived his right to a penalty-phase jury, and waived his right to present evidence in mitigation.

### *Sentencing Hearing*

During the sentencing hearing, the trial court first allowed the State to present evidence to establish the existence of one statutory aggravating factor beyond a reasonable doubt. The State presented Dr. Manfred Borges, the Deputy Chief Medical Examiner for the District 20 Medical Examiner's Office. Dr. Borges testified that Meshach Damas exhibited "classic defensive injuries" on his hand and sharp force injuries to his shoulders which could have been defensive injuries in the way of repelling an attack. Meshach suffered the injuries before he became unconscious, and the fact that the bed he was laying on was broken was indicative of a struggle. Dr. Borges testified that five-year-old Marven Damas exhibited superficial defensive injuries on his hands. Dr. Borges also noted a long cut down Marven's face, from the cheek almost to the jaw. He would not describe this as a defensive injury, but opined that it could have been "just an attempt to get control of the victim ... and get the bladed instrument into position."

While Dr. Borges could not state with any degree of medical certainty how long it took the victims to die from the sharp force injuries inflicted, it was not instantaneous. Nonetheless, death would have been very rapid once the blade reached the major blood vessels in the neck. Dr. Borges testified that for certain victims, "initiation of the event" to actual death could have lasted minutes. He gave as examples the extensive binding of Guerline with duct tape, during which it was assumed she was trying to defend herself, and the struggling by Meshach, who sustained "injuries all around the neck."

The State also presented Collier County crime scene investigator Jessica Gerster, who recovered a filet knife from a nightstand in the master bedroom of the townhouse where the murders occurred. Over 180 exhibits were entered into evidence, including a Pre-Sentence Investigation (PSI) evaluation, crime scene and autopsy photographs, and Damas's three statements.

The trial court concluded that, with respect to Guerline, the aggravating factors that the murder was especially heinous, atrocious, or cruel (HAC) and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) had been established beyond a reasonable doubt. With respect to the children, the court found the aggravating factors that the victims were under the age of twelve (under the age of twelve), and the victims were particularly vulnerable because Damas stood in a position of familial or custodial authority over them (familial/custodial authority) had been established beyond a reasonable doubt. Based upon these "prerequisite findings," the court determined that victim impact testimony could be presented.

Guerline's brother, Mackindy Dieu, read a victim impact statement. Dieu stated he did not want his "sister's legacy to be a domestic violence statistic." Rather, he wished for people to know "who she was to me and my family and what she could have been to this community." Dieu stated:

Family was most important to Guerline. When others had nothing, she would always give of herself to ensure everyone was taken care of and happy. No matter what struggles she went through in her own life, her thoughts were always of others first.

She had a laugh and a smile that was infectious. Her presence could fill a room with love and

kindness. When you're with Guerline, you knew you were important and loved.

Dieu described how Meshach wanted to play football, how Marven was a budding speller, how Maven was a promising artist, and how Megan and Morgan “were so young that their opportunities were limitless.” However, “[w]hat should have been a legacy of our family has been destroyed. An entire generation is gone. What could have been is gone.”

The court next afforded the defense the opportunity to present evidence that the aggravating factors presented by the State do not outweigh the mitigating circumstances. The defense presented Dr. Elizabeth McAlister, who received a Ph.D. from Yale University in American Studies, with a specialization in Caribbean religion, and Haiti in particular. Dr. McAlister testified that Haiti is the poorest country in the western hemisphere. Damas spent his early years in a small Haitian village, and he grew up during the last decade of the violent regime of Jean-Claude “Baby Doc” Duvalier. During the regime, a secret police force encouraged paranoia in the population. Individuals were routinely assassinated in the streets, people who dissented from the government disappeared, and a climate of fear permeated the country. Damas informed Dr. McAlister that both of his parents were members of this secret police force, which is unusual.

Damas explained that his father left the family to move to the United States when Damas was five years old. As a result, Damas's mother relocated the family to Port-au-Prince to live with members of both the mother's and the father's families. Damas informed Dr. McAlister that he was beaten regularly as a child by the father's brothers, and Dr. McAlister testified “corporal punishment is routinely used to create children who listen to their parents and who are respectful.” When Damas was ten years old, his mother moved to the United States, leaving him with his grandmother and his

uncles. Family members would move in and out, creating an “unstable family situation.”

According to Dr. McAlister, the blending of the families in Port-au-Prince created religious tensions. Members of the mother's family are largely practitioners of Vodou. Members of the father's family had converted to evangelical Christianity. Dr. McAlister explained that in Vodou, all living things and inanimate objects contain a spirit or spiritual force, there are a series of spirits who are available for protection and guidance, and family members inherit these spirits. The spirits are interested in justice, so when a conflict is present, spiritual force can be engaged to achieve justice. Further, individuals can use spiritual force to protect themselves and sometimes for aggressive purposes. Haitian evangelical Christians believe the Vodou spirits are real; however, instead of being inherited family spirits that can help, Haitian evangelical Christians believe the spirits are demonic. Damas's mother converted from Vodou to evangelical Christianity, and she was “very attuned to aggressive spiritual attack.... So the whole family on both his mother['s] and father['s sides] begin to see life through an evangelical lense [sic] where the devil is always trying to attack the family.”

Dr. McAlister testified there is an understanding in Vodou that an individual can “throw a force” onto others to attack them, and this force pushes those who are attacked to do things they otherwise would not have done. There is also the concept of sending the spirit of a recently deceased person to persecute and attack a person so that the person attacked self-destructs or wastes away and dies. Damas told Dr. McAlister he had been cursed by his mother-in-law and a co-worker with whom he had a dispute, who came from a Haitian village known for its “aggressive magic in the invisible world.” Dr. McAlister reiterated Damas's belief that because he left the church, he no longer had Jesus to protect him from the demonic attacks. She concluded that Damas's “fear of sorcery and malevolent magic played a huge role

in his behavior” because “he feared that people were sending evil spirits to attack him.” However, she also acknowledged that Damas informed law enforcement he killed the children because he could not accept Guerline's mother receiving custody of them.

The other witness presented by the defense was Dr. Mark Rubino, a neurologist. Dr. Rubino reviewed Magnetic Resonance Imaging (MRI) and Positron Emission Tomography (PET) scans performed on Damas in 2014. He testified the MRI revealed several abnormalities. Dr. Rubino noted portions of Damas's brain were atrophied and the ventricles of Damas's brain were larger than they should be, with the right ventricle being larger than the left. According to Dr. Rubino, the PET scan revealed decreased activity with respect to how sections of Damas's brain were using available energy in the form of glucose. Dr. Rubino testified, “Not only is the structure telling you that something is not right, you have function telling you something is not right.”

Dr. Rubino reviewed the emergency medical services (EMS) report for a 2009 car accident that occurred prior to the murders in which Damas drove off the road. He noted Damas was unconscious when discovered, so it was not clear if the accident caused a loss of consciousness or if a loss of consciousness caused the accident. Although Dr. Rubino noted the accident could have contributed to Damas's brain abnormalities, he opined there were too many abnormalities to be caused by the accident. Dr. Rubino ultimately concluded that Damas's MRI was most compatible with schizophrenia, which involves “a total misread of reality.” He further explained that the abnormalities in Damas's brain could have impacted his behavior in the form of impaired judgment, diminished impulse control, lack of planning, impaired decision making, and a diminished ability to understand what is right and wrong.

On cross-examination, Dr. Rubino acknowledged that during his earlier deposition, he did not mention schizophrenia as a potential issue. He also conceded that

he is not a neuropsychiatrist, a neuropsychologist, or a behavioral neurologist. When the State noted the hospital records from the car accident contained no indication that Damas suffered a concussion and that he was discharged after only two-and-one-half hours, Dr. Rubino responded, "The evidence [of a concussion] is within the records," in that Damas suffered "[h]eadache, spots in his vision, agitation, [and] disorientation." Finally, the State returned to Dr. Rubino's testimony that Damas's "right brain has less in it than his left [brain] because the ventricle is large." Dr. Rubino confirmed the right side of the brain controls insight, social skills, impulse control, and planning. The following dialogue then occurred:

STATE: Dr. Rubino, you indicated that the Defendant showed an example of lack of planning both based upon the date that the crime occurred and the date that he fled the United States. Do you recall that in your deposition?

DR. RUBINO: Yes. I said it [sic] *about a week or ten days [,] along those lines.*

STATE: Okay.

DR. RUBINO: *Several days.*

STATE: Murdering his wife and five children and then leaving the United States ten days later, is that indicative of lack of planning on Mr. Damas'[s] part?

DR. RUBINO: Certainly for a first-degree murder where you plan it, you also plan your get-away if you're a good planner.

(Emphasis added.)

During the Koon portion of the hearing, defense counsel stated they had discussed with Damas evidence of possible mitigating circumstances they would have presented had Damas not waived the presentation of mitigation, and described that evidence. After the presentation, Damas handed a note to counsel which stated he would not speak for three days. When the court

asked Damas if defense counsel had reviewed the additional mitigation with him and whether he desired to have it presented, Damas refused to answer. The next day, Damas still refused to verbally respond. However, Damas eventually wrote on a sheet of paper, in pertinent part, “[G]o ahead. Continue your work. May my blood be upon your shoulder. C.O.G.” (Emphasis added.) The court determined that based upon the totality of the circumstances, the requirements OF Koon had been met, and the sentencing process would proceed. When offered the opportunity to make a statement to the court, Damas remained silent. He also declined to review the PSI evaluation that had been prepared.

#### *Sentencing Order*

On October 27, 2017, the trial court imposed six sentences of death for the murders of Guerline, Meshach, Maven, Marven, Megan, and Morgan. With respect to the six victims, the trial court found the prior violent felony and CCP aggravators, and afforded both great weight. The trial court found the HAC aggravating factor with respect to Guerline, Meshach, and Marven, and gave great weight to the aggravator. In addition to other facts, the court noted that Damas bound Guerline with nearly fifty-five yards of duct tape to keep her from fighting back and stated, “That act required time.” With respect to the five children, the trial court found the under the age of twelve and familial/custodial authority aggravating factors, and afforded both great weight.

With respect to the mitigating circumstances asserted by the defense, the trial court issued the following findings: (1) the murders were committed while under the influence of an extreme mental or emotional disturbance (not supported by the greater weight of the evidence); (2) capacity to appreciate the criminality of conduct or to conform conduct to the requirements of the law was substantially impaired (not supported by the greater weight of the evidence); (3) history of mental illness (some weight, but noting “[t]here is nothing in the record to support a finding that Defendant had ‘a long

and well-documented' history of mental illness before the murders"); (4) never received treatment for his mental illness (some weight, but finding "it is more likely than not that Defendant behaved purposefully during ... evaluations ... so as to be found incompetent"); (5) provided information leading to resolution of the case (some weight); (6) positive qualities, including being a hard worker, taking responsibility, and expressing some remorse (some weight); (7) amenable to rehabilitation and a productive life in prison (little weight); (8) childhood and background of poverty, domestic abuse, and parental abandonment (moderate weight); (9) prior involvement in the Haitian Baptist Church; worked diligently to become a United States citizen; showed improved understanding of parenting techniques and successfully completed a parenting class at the David Lawrence Center; previously noted by DCF to be a good and interactive father; positive role model to other inmates; easily managed in prison; and loves parents, who love him (collectively given some weight); (10) mutually combative relationship with Guerline (not mitigating); (11) impact of execution on Damas's parents (some weight); and (12) DCF and the David Lawrence Center failed Damas by not recognizing mental health issues and providing services to him (little weight, and citing previous findings with respect to Damas's "alleged mental illnesses").

Damas v. State, 260 So. 3d 200 (Fla. 2018).

### **Direct Appeal**

Damas raised the following three issues on direct appeal:

1. Under the Sixth Amendment, the trial court deprived Mr. Damas of his constitutional right to self-representation when it denied his request to represent

himself on the basis that he “failed to adequately articulate his answers to the Court’s Faretta<sup>1</sup> colloquy and failed to demonstrate sufficient understanding of the legal process in order to represent himself.”

2. The trial court fundamentally erred by finding the existence of two aggravating circumstances where both aggravators were based upon the tender ages of the child victims.

3. Under the Eighth Amendment, the trial court violated Mr. Damas’ constitutional rights by sentencing him to death because capital punishment is inherently cruel and unusual punishment.

The Florida Supreme Court affirmed Damas’ multiple convictions and sentences in Damas v. State, 260 So. 3d 200 (Fla. 2018). Damas did not seek certiorari review in the United States Supreme Court.

Damas filed his amended motion for postconviction relief under Fla. R. Crim. P. 3.851 on August 16, 2021 in which he claimed (1) that counsel was ineffective in failing to adequately

---

<sup>1</sup> Faretta v. California, 422 U.S. 806 (1975).

explore Damas' competency; (2) counsel ineffectively failed to investigate and secure available mitigation; (3) that Florida law regulating capital defendants' access to public records violated the United States Constitution; and (4) that the Covid pandemic presented obstacles to postconviction counsel's ability to represent Damas thereby rendering postconviction counsel ineffective. The court granted an evidentiary hearing on claims one and two and summarily denied claims three and four. An evidentiary hearing was held on November 15, 17 and 18, 2022 (PCR 2883-3490). Written closing arguments were filed on June 2, 2023 (PCR 3520, 3560). The court entered its final Order denying relief as to all claims July 28, 2023 (PCR 3665). The instant appeal followed.

### **Summary of Evidence Presented**

Attorney Michael Orlando was Damas' first witness. He described his early involvement in this case and noted that Damas "wasn't rational" because of his extreme focus on religious matters (PCR 2885). He knew he would need a mental health expert and because of what this witness described as "cultural issues" he hoped to find someone knowledgeable in Haitian culture (PCR 2887). Mr. Orlando represented Damas for approximately 9 months

(PCR 2891).

Dr. Bushan Agharkar is a psychiatrist who has testified in criminal cases more than 100 times, approximately half of that being in capital cases, and always for the defense (PCR 2910-2912). Upon review of the records he received, this witness believed Damas suffered from brain damage, but this was based on a CT scan alone; he believed that an MRI and PET were necessary, an opinion that he expressed to defense counsel Ermacora in 2016. He met with Damas several times, spending a total of between four and six hours with him. Damas did not respond to questions appropriately, tending to quote Bible verses that were unhelpful. Dr. Agharkar felt Damas was paranoid and suffered from some form of schizophrenia (PCR 2918, 2924). He did no testing of Damas; he merely observed him. He was aware that Dr. Mandelblatt felt Damas was malingering, but he preferred to characterize Damas' behavior as "uncooperative," which he said is not the same as malingering (PCR 2927-2928).

Dr. Elizabeth McAlister was hired by the defense because of her knowledge of Haitian culture and the Vodou religion (PCR 2947-2949), and to help the defense build a working theory of mitigation.

This witness said that Donna Murray assisted her in preparing for trial (PCR 2954) and described the extent of her investigation while in Haiti, which she agreed was “remarkable” in terms of the wealth of mitigating information she collected for the defense team (PCR 2959).

Neil McLoughlin was co-chair representing Damas during that period of time when the public defender’s office was appointed. His memory of specific events was poor because he had no access to the files from that time. He recalled that Damas was a religious fanatic, and that he had been evaluated for competency multiple times. This witness was responsible for guilt phase issues and had little knowledge of what was being done in terms of mitigation. His office filed a motion seeking to declare Damas incompetent in 2011; Mr. McLoughlin attended the hearing but had no independent recollection of the event. He agreed that a second competency motion was filed in 2014 but other than knowing that Damas (who had been found incompetent by the Court) was sent to Geocare for a period of time had no other specific knowledge of the outcome or what drugs Damas was taking during his stay at Geocare. When Damas returned, this witness had no recollection of the 2014

hearing during which he purportedly “stipulated” to his client’s competency (PCR 2976-3000).

The Court made a finding, on request of the State, that Damas had voluntarily absented himself from the proceeding up to this point because of his obstructive behavior and refusal to respond to inquiry by the Court (PCR 3001-3003).

Dr. Robert Ouaou specializes in neuropsychiatry. He attempted to test Damas on four different occasions, but Damas refused to see him at all. Dr. Ouaou understood that he was to assist the defense in preparing mitigation for penalty phase (PCR 3005-3019).

Kathleen Fitzgeorge worked with Mr. McLaughlin in representing Damas before the public defender’s office withdrew due to conflict of interest. She immediately began to focus on developing mitigation. She worked with Dr. Merikangas to investigate possible brain damage, and ultimately filed a motion challenging Damas’ competency. The Court appointed Drs. Schaerf, Silver and Herkov (spelled “Hurkoff” in the transcript) and while Damas was deemed competent in 2011, his behavioral issues continued. The question of competency was revisited in 2014; this

time the Court found him incompetent, and Damas was sent to Treasure Coast facility. When he returned from treatment, he was re-evaluated by the court-appointed experts and the defense advised the Court that they had no objection to the Court relying on the reports in lieu of live testimony. The Court rendered its Order finding Damas competent on October 20, 2014 (R. 585-588). This witness did not recall noticing that the Order states that the parties had stipulated to Defendant's competency and did not make any effort to ask the Court to correct this language.

A conflict of interest developed and the public defender's office withdrew from representing Damas and a memorandum of the work done in the case thus far was prepared and delivered to the new attorneys. This included a summary of the experts and their work as well as possible mitigators that might be used during penalty phase (PCR 3035-3079).

James Ermacora was appointed to represent Damas after the public defender's office withdrew. Damas was his first capital case and his role was to develop mitigation for the penalty phase. Shortly after his appointment, this witness hired Donna Murray as a mitigation specialist. He was aware that Damas had previously been

deemed incompetent, but at the time of his appointment Damas' competency had been restored. This witness saw no indication that Damas lacked competency, and it was only when Damas began asking to enter a plea of guilty and waive mitigation that, in an abundance of caution, a new round of evaluations was conducted.

In March of 2017, the defense hired three expert witness- Drs. Wu, Ouaou, and Rubino to assist with mental health mitigation. Mr. Ermacora recounted an event where he travelled to death row to facilitate an evaluation by Dr. Ouaou only to have Damas refuse to participate, which (he said) reflected Damas' decision not to advance any evidence in mitigation. Dr. Wu was based in California and the trial court denied the defense request for travel funds for him to testify during penalty phase. As a result, the defense used Dr. Rubino instead, which was an acceptable alternative. The defense also sought additional brain scans but that request was denied (R. 1873-1874). When challenged regarding the timing of this request, counsel responded that Damas' decision to enter a plea on September 5 was unexpected; had they proceeded to trial, Dr. Ouaou had assured them that testing would be completed in time for penalty phase; the trial was expected to last at least a

month (PCR 3094-3219).

Mr. Ermacora explained that Donna Murray was primarily responsible for doing the legwork and largely through her efforts, the defense team developed a list of 47 possible mitigators to be presented at penalty phase. Counsel talked to Damas multiple times, but Damas took no interest. Damas expected to be reunited with his family when he died, which was why he refused to cooperate with his attorneys; he not only understood that he was facing the death penalty, he wanted to be put to death. While counsel had no specific memory of discussing mitigation with Damas, he believed that any attempt to do so would have been fruitless as Damas did not cooperate in anything the defense was attempting to do on his behalf. Counsel was instructed by Judge Greider to go over all the mitigation with Damas and that was done (PCR 3201). At the sentencing hearing held in October of 2017, the defense not only presented a summary of all the available mitigation, they presented testimony from Dr. McAlister and Dr. Rubino. Counsel wanted to make sure Damas understood the mitigation that he was waiving (PCR 3204).

Dr. Rubino explained what testing was done, what was

discovered through testing, and why additional testing had been recommended. The additional tests were not completed. He met with Damas but was unsuccessful in interviewing him; Damas would not cooperate. Dr. Rubino suggested that while he was not a psychiatrist, he believed that based on the available brain scans Damas suffered from schizophrenia (PCR 3222-3245).

Psychiatrist James Merikangas examined the MRI and PET scans of the defendant. He wrote a letter to the public defender's office describing the brain damage that was apparent from the records made available to him. This witness also described the types of additional tests that he would likely have recommended. He had no memory of speaking with the attorneys, however, and the additional testing he spoke of on direct examination is not mentioned in the letter. Dr. Merikangas indicated that recommendation of additional tests would have been "routine" (PCR 3246-3256).

Psychiatrist Joseph Wu was contacted by attorney Ermacora in September of 2016. He reviewed some of Damas' medical records and recommended additional, more detailed testing that he believed would have supported a diagnosis of schizophrenia. (PCR 3258-

3276, 3333-3356).

Mitigation specialist Donna Murray obtained school records, interviewed Damas' co-workers and family members, and facilitated Dr. McAlister's trip to Haiti. She also assisted in preparing a spreadsheet showing proposed mitigation (R. 2025-2026). She was unsure whether Damas ever saw the spreadsheet. This witness agreed that many of the items included on the spreadsheet were offered at the sentencing hearing through testimony (PCR 3291-3328).

Kevin Shirley was appointed to represent Damas and while he supervised co-counsel's work, his primary focus was on guilt phase issues. He noted that the facts of this case precluded insanity as a defense. He was aware of the mitigation being developed by co-counsel and was aware of his client's mental health issues, but his primary focus was trying to find some aspect of the criminal investigation that might benefit him in guilt phase. Damas persistently refused to assist the defense team. This witness saw nothing in his client's behavior to suggest incompetence. Much of what the defense attempted to do was crippled by the client's refusal to cooperate; this included use of expert witnesses to

advance mitigation.

When questioned regarding the defense decision to stipulate to the Court's reliance on expert reports in lieu of live testimony at the competency hearing, this witness agreed it was theoretically possible to have challenged the reports, but he doubted his ability to effectively impeach the expert's credibility with the court (PCR 3374-3423).

### **Postconviction Order Denying Relief**

The postconviction Court denied relief on all claims. The court found with regard to Claim One that Appellant's competency was "extensively documented" (PCR 3675). Attorneys Ermacora and Shirley (who represented Damas at the time he entered his plea) both testified that they saw no grounds for raising new competency claims (PCR 3189, 3418-3417). Moreover, the court found, Damas failed to present clear and convincing evidence of a real, substantial, and legitimate doubt as to his competency (PCR 3677).

As to Claim Two, the Court found that counsel's development of cultural as well as mental health mitigation was adequate and not ineffective. While there may have been additional mitigation that could have been developed, this was stymied because Damas

refused to cooperate with defense counsel and defense expert witnesses. Even if counsel had started developing their mitigation case earlier, the Court found that there was no real probability, given the extremely strong aggravators established in this case, that Damas would have established additional mitigation sufficient to result in a life sentence. To the extent that Damas claimed that counsel should have done more to establish better rapport with him, the Court found that Damas was unlikely to cooperate with any attorney (PCR 3688-3689).

Finally, the Court denied Damas' claim that restrictions on access to public records violated his constitutional rights (PCR 3689). The instant appeal followed.

### **SUMMARY OF THE ARGUMENTS**

**ISSUE I:** Damas failed to establish that counsel's management of Damas' competency claim was ineffective. While Damas was initially deemed incompetent, the Court ordered that he be housed at a treatment facility. After five weeks of observation, Doctor Mandelblatt concluded that Damas was malingering and that his bizarre behavior was volitional. Counsel subsequently noted no legitimate basis to question Damas' competence.

**ISSUE II:** Damas did not wish counsel to present any mitigation and actively obstructed their efforts to do so. Despite this, counsel was able to amass a significant amount of mitigation material. Damas failed to prove that counsel was ineffective in preparing for penalty phase.

**ISSUE III:** The postconviction court correctly determined that Florida law regulating a capital defendant's access to public records during postconviction did not violate the United States Constitution.

## **ARGUMENT**

### **Ineffective Assistance of Counsel**

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984) promulgated a two-pronged test to determine whether counsel's assistance was so defective as to require a reversal of a verdict or sentence. First, the defendant must show counsel's performance was deficient. Second, the defendant must show counsel's errors resulted in prejudice.

To prove deficient performance, the defendant must establish that his counsel made errors so serious that he was deprived of "counsel" as contemplated by the Sixth Amendment. Reviewing

courts must keep in mind that “the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.” Bobby v. Van Hook, 558 U.S. 4 (2009). Further, courts must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. . . .” Strickland, 466 U.S. at 689 (quotation marks omitted).

Defense counsel is entitled to rely on the advice of qualified experts. Johnson v. State, 135 So. 3d 1002, 1030 (Fla. 2014); see also Stewart v. State, 37 So. 3d 243, 252–53 (Fla. 2010) (“[T]rial counsel's reliance on his retained experts is not proven unreasonable simply because another expert . . . questions the thoroughness of the prior evaluations.”). Furthermore, trial counsel is not deficient because the defendant is able to find postconviction experts that reach “different and more favorable conclusions” than the experts trial counsel consulted. Asay v. State, 769 So. 2d 974, 986 (Fla. 2000); see also Knight v. State, 211 So. 3d 1, 10 (Fla. 2016).; State v. Mullens, 352 So. 3d 1229 (Fla. 2022), (stating “we and other courts have made clear that counsel is entitled to rely on a qualified expert's opinion, and that such reliance is not rendered unreasonable just because a new expert in postconviction

proceedings disagrees with trial counsel's expert.)

The appropriate test for prejudice is whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694 The defendant bears the burden of proving a “substantial,” not just “conceivable,” likelihood of a different result. Harrington v. Richter, 563 U.S. 86, 112 (2011); Wong v. Belmontes, 558 U.S. 15 (2009) (quoting Strickland, 466 U.S. at 694). To establish prejudice as a result of deficient performance during a capital penalty phase, the defendant must show that the sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000) (citations omitted); Strickland, 466 U.S. at 694.

Because a successful ineffective assistance of counsel claim requires proof of both deficient performance and prejudice “[w]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong.” Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

Both prongs of the Strickland test present mixed questions of law and fact. Therefore, on appellate review, this Court must accept the postconviction court’s factual findings so long as they are supported by competent, substantial evidence; but review the postconviction court’s application of the law to the facts *de novo*. Mungin v. State, 932 So. 2d 986, 998 (Fla. 2006). However, “[e]ven under *de novo* review, the standard for judging counsel’s representation is a most deferential one.” Harrington v. Richter, 562 U.S. 86, 105 (2011). “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” Id., quoting Strickland, 466 U.S. at 690.

## **ISSUE I**

### **A. COUNSEL’S HANDLING OF DAMAS’ SPURIOUS COMPETENCY CLAIM WAS NOT INEFFECTIVE.**

#### **October 8, 2014 Hearing**

Damas first directs our attention to the hearing held October 8, 2014 and the Order finding him competent (R. 585-588). He

contends that counsel<sup>2</sup> should have done more to challenge the expert reports relied on by the trial court in finding him competent. The record supports the trial court's Order reflecting that the parties stipulated that the court could consider the expert reports in lieu of live testimony from the experts, who now unanimously deemed Damas competent. Given the complete absence of expert opinion to the contrary, counsel was not ineffective in failing to more aggressively assert that Damas was not competent.

In assessing a defendant's competency, the trial court is required to determine "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). The Courts have focused on the fact that determination of the defendant's *present* ability is what is necessary. Peede v. State, 955 So. 2d 480 (Fla. 2007). Thus, stale reports are deemed less relevant; indeed, even a report that is four months old has been deemed too dated to be relevant to a

---

<sup>2</sup> As noted earlier, Damas' defense team at this earlier stage of the proceedings was Public Defenders Fitzgeorge, McGloughlin, and Orlando.

defendant's present ability to consult with and understand the proceedings. See, e.g., In Re Commitment of Reilly, 970 So. 2d 453 (Fla. 2d DCA 2007). Damas asserts that counsel was obligated to challenge the opinions of the three experts who now agreed Damas was competent by bringing to the court's attention Damas' continued preoccupation with religion, the fact that both Drs. Herkov and Schaerf had previously found Damas incompetent, and his continued unusual, even bizarre, behavior while housed at the Collier County Jail. But by the time of the 2014 hearing, the experts all concluded that his oppositional and bizarre behavior was volitional, not a product of mental illness. Argument by counsel in this regard would have gained little ground.

Significant to the trial court's Order was the fact that Damas was held in a psychiatric facility for a period of weeks while being observed by experts and clinicians. His behavior there revealed far more than what might have been assessed by attempting to test an uncooperative Damas for a few hours, as had been the case with every evaluation conducted thus far. At the inpatient facility, long-term observation demonstrated Appellant's ability to communicate with those he wished to speak with. And while he referred to

himself as “Child of God,” he could use his real name when it came to using the banking system to get money that he needed. He interacted, sometimes violently, with other inmates who disrespected him, and otherwise showed that his expressed preoccupation with religion could give way to mundane matters where it was necessary to accomplish something he desired. These are not the actions of a person who lacks competency, Dr. Mandelblatt explained (R. 3664-3680). Drs. Herkov and Schaerf both now agreed that he was competent (R. 3653-3658, 3659-3663).

### **Deficient Performance**

Despite Damas’ complaints regarding counsel’s failure to remind the court that his behavior was essentially unchanged, irrational or bizarre behavior does not necessarily equate to a lack of competency. Medina v. Singletary, 59 F.2d 1095 at 1107 (11th Cir. 1995). That Dr. Mandelblatt found Damas was likely feigning psychosis is reasonably supported by a showing that he was capable of normal interaction outside of court proceedings. Dr. Mandelblatt had five weeks to observe Damas in a variety of settings and concluded that regardless of what the previous experts

observed, Damas was not exhibiting evidence to support lack of competence. Damas' suggestion that he nevertheless might not be able to understand court proceedings or the charges against him is conclusory and not supported by the experts. Damas clearly understood that he had killed his wife and family and that he was facing punishment for having done so, as he indicated to the court at the time he entered his plea of guilty to all counts (R. 2855-2860).

A similar argument applies to Damas' claim that counsel could have established his lack of competence by arguing that his preoccupation with religion had not changed. He admits that all three experts were aware of these records, yet inexplicably asserts that counsel could have used the same information to discredit their conclusions. Preaching in a loud voice, deliberately choosing not to eat, not to shower or soiling oneself is the type of behavior Dr. Mandelblatt was referring to as volitional; a person might well do all of these things without necessarily being incompetent to stand trial. Counsel was not deficient for electing not to challenge the expert opinions, because to do so would have been fruitless. In terms of prejudice, there is no evidence to support a real, legitimate

and substantial doubt that he lacked competence, much less clear and convincing proof. Dr. Mandelblatt's damning opinion provided the clearest evidence that rather than being incompetent, Damas was malingering and attempting to game the system. And, as the lower court noted in its Order denying postconviction relief, after Damas returned from Treasure Coast with his competency restored, none of the attorneys representing Damas saw any basis for renewing the competency challenge (PCR 3677).

### **August 18, 2017 Hearing**

This hearing was scheduled because Damas had earlier expressed the desire to discharge counsel<sup>3</sup> and enter a plea of guilty. The trial court denied Damas' request to represent himself because he failed to respond properly to the court's questioning as part of a Faretta hearing. (R. 1358-1360). And because Damas indicated a desire to plead, the Court appointed Drs. Kling and Herkov to assess whether Damas was competent to enter a plea with the assistance of counsel.

Both experts concluded that Damas was competent. At the

---

<sup>3</sup> At this point Damas was represented by two new attorneys-Shirley and Ermacora. The Public Defender had successfully moved to withdraw because of a conflict of interest.

August 18, 2017 hearing, the trial court accepted the new reports by stipulation of the parties and found Damas competent to proceed (R. 3798). As he did in challenging counsel's performance at the October 8, 2014 hearing, Damas now asserts that trial counsel was ineffective for failing to do more to establish his lack of competence. He specifically directs our attention to the June 23, 2017 and July 21, 2017 hearings and contends that counsel was obligated to bring what he views as Damas' irrational behavior to the court's attention.

Initially, because the events to which Damas refers were court proceedings for which transcripts exist, the court was already aware of the events Damas now asserts should have been mentioned. Second, whether Damas acted irrationally, as he now asserts, is not a foregone conclusion. He complained to the court that his hand was crushed by one of the guards and asked the court to do something about it (R. 1288-1289). His lamentation that he was not a good Christian and as a result was possessed by demons that made him kill his wife and children (R. 1290-1291) is merely a part of Damas' belief system, arising out of the Vodou culture in which he was raised. To those not familiar with it, being possessed by a

demon is irrational. But Dr. McAlister, an expert in Haitian culture, explained that one of the basic tenets of Haitian Vodou, a recognized religion in that country, includes belief in demonic spirits that influence and sometimes even control one's actions (R. 3024).

Next, Damas directs our attention to the Faretta hearing held July 21, 2017. Damas expressed his desire to discharge counsel, waive jury trial, and enter a plea of guilty. The court ultimately denied Damas' request to represent himself because Damas failed to respond adequately to many of the court's questions. The trial court correctly noted in its Order that it is possible for a defendant to lack capacity to represent himself while still being competent to proceed to trial with the assistance of counsel. See Indiana v. Edwards, 554 U.S. 164, 178 (2008). Damas contends that counsel was ineffective for failing to challenge the trial court's conclusion that his reason for entering a plea was due to his "cultural frame of reference," by which the court meant Damas' belief in Haitian Vodou religion and his personal religious belief that his sins had been absolved once he decided to devote himself to Christianity. Damas asserts that these behaviors reflect delusional thinking, but

Dr. Herkov expressly interpreted them as being directly related to how Damas dealt with the guilt and general unpleasantness associated with facing trial for killing his wife and five children (R. 3629). The extreme violence of the offense is counterbalanced by the strength of Damas' devotion to his religious beliefs. This is not evidence of delusional thinking but is a rational approach to the circumstances Damas was facing. Counsel was not ineffective for failing to raise the challenge now preferred by Damas.

Next, Damas asserts that counsel should have challenged the reports of the two experts, Drs. Kling and Herkov. He contends that Dr. Kling should have been attacked by arguing that he conducted no new psychological tests but relied upon previous work in determining Damas to be competent. This argument is vague and conclusory, as Damas fails to identify what testing should have been conducted and how such testing would have resulted in a different outcome in terms of assessing Damas' competency. It was not unreasonable that Dr. Kling should rely upon new documented information from a reliable source in developing his opinion, and no rational argument counsel could have advanced would have altered the outcome.

Damas advances a similar argument in regard to Dr. Herkov's report. Despite Damas' claim to the contrary, Dr. Herkov reviewed the new report from Dr. Mandelblatt, whose clinic had housed Damas and observed his behavior for five weeks. Evidence that Damas was manipulative and capable of interacting appropriately and communicating with those whom he wished to communicate undercut Dr. Herkov's previous conclusions, and he correctly concluded that this new information showed that Damas no longer lacked competency. There is no indication that had counsel advanced the arguments proposed by Damas the trial court would have reached a different conclusion and certainly no showing by clear and convincing evidence that Damas lacked competence.

Finally, with regard to this particular hearing, Damas asserts that defense counsel's ineffectiveness resulted in the trial court's failure to conduct an adequate analysis of Damas' competency. To the extent that Damas challenges the competency assessment itself, this claim is procedurally barred as it could have been raised on direct appeal. While counsel might have advanced the arguments Damas presently makes, they are largely conclusory and there is no indication that, given that all three experts agreed that Damas was

competent, the trial court would have altered its findings in this regard.

### **September 5, 2017 Hearing**

Next, Damas contends that defense counsel should have more vigorously contested Damas' competency during the plea colloquy that occurred on September 5, 2017. He correctly recognizes the presumption that flows from the trial court's previous Order finding Damas competent to stand trial, but nevertheless vaguely asserts that counsel should have raised the issue of competency despite the absence of any clear evidence sufficient to overcome the presumption. At the hearing, Damas initially refused to answer questions or speak to the court (R. 2822), but soon relented and engaged in a full plea colloquy (R. 2848-2900). To the extent that Damas alleges that his plea was not knowing, intelligent or voluntary, that issue was affirmed on direct appeal and is now procedurally barred. Damas v. State, 260 So. 3d 200 (Fla. 2018); Stano v. State, 520 So. 2d 278, 281 (Fla. 1988). Counsel's failure to challenge competency was not ineffective where there was no bona fide question as to that. Dessaure v. State, 55 So. 2d 478, 482-83 (Fla. 2010). Significantly, the Florida Supreme Court found his plea

knowing, intelligent and voluntary.

### **October 23-24 *Spencer*/Sentencing Hearing**

With regard to Damas' complaints about the Spencer<sup>4</sup>/Sentencing hearing, once the trial court found him competent in October of 2017, Damas was presumed to remain competent; counsel is only deemed ineffective if there was a bona fide question regarding competency that counsel failed to raise. Damas asserts that his long history of alleged mental illness was sufficient to merit revisiting his competency, but given Dr. Mandelblatt's conclusion that Damas was malingering, this seems doubtful.

Damas' claim that counsel was obliged to seek a new evaluation because the last one was stale is incorrect. By the time of his Spencer/Sentencing hearing, counsel was entitled to rely upon the presumption of competence in the absence of bona fide evidence that Damas lacked competency; the age of the last documented evaluation in this situation is irrelevant. Brockman v. State, 652 So. 2d 330 (Fla. 2d DCA 2003). Damas' decision not to engage by remaining silent is merely odd behavior and does not

---

<sup>4</sup> Spencer v. State, 615 So. 2d 688 (Fla. 1993).

necessarily mean he lacked competence. Medina v. Singletary, 59 F.2d 1095 at 1107 (11th Cir. 1995).

### **Prejudice**

Damas misstates the measure of prejudice. Rather than requiring proof of a reasonable probability that a psychological evaluation would have revealed that he was incompetent, Alexander v. Dugger, 841 F.2d 371, 375 (11th Cir. 1988), the actual test is much more stringent. Prejudice in this context requires clear and convincing evidence of a real, substantial and legitimate doubt as to competency. Barnes v. State, 124 So. 3d 904, 912 (Fla. 2013). Dr. Mandelblatt opined that Damas' unusual behavior was volitional and not due to any definable mental illness (R. 3676). Even if we agree that counsel should have more vigorously contested Damas' competency, there is clearly no prejudice, as the lower court found (PCR 3677).

### **B. DAMAS' DECISION NOT TO ATTEND THE POSTCONVICTION HEARING WAS VOLITIONAL AND OBSTRUCTIVE; THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN CONTROLLING OBSTRUCTIVE COURTROOM BEHAVIOR.**

Finally, Damas contends that he is entitled to relief because he was not present for most of his postconviction hearing. The

record, however, makes clear that Damas refused to attend (PCR 2836). When an inmate's presence is required and that inmate does not wish to attend court, Officer Capo (a Sheriff's sergeant responsible for courtroom security, PCR 2849) explained that security officers would use a "management chair" and shackle that inmate (PCR 2851). This is the fashion in which Damas' presence was ultimately secured. Damas did not respond when the court inquired as to whether he wished to waive his presence. The court then attempted to hold the hearing, but Damas began shouting to the point where the court ordered his removal (PCR 2865-2875).

Damas contends that his behavior at the postconviction hearing demonstrated that he lacked competence; being forced to proceed with the hearing while incompetent, in Damas' view, violated his constitutional rights. The State does not necessarily disagree that lack of competence should be a consideration where there is evidence to support it. But the postconviction court held a competency hearing and entered an Order in April of 2021 finding Damas competent (PCR 1507-1513). And, as the lower court correctly noted, once a finding of competence is entered the defendant is presumed competent until a bona fide question as to

the defendant's competency is raised (PCR 3668). Dessaure v. State, 55 So. 3d 478, 483 (Fla. 2010). Damas may disagree with the lower court's findings but there is no substance to his present claim that he was incompetent to proceed.

Moreover, Damas was given the opportunity to waive his presence prior to the postconviction hearing but remained silent when the court asked him directly whether he wished to waive his presence (PCR 2627). The State does not disagree that Damas had the right to attend, but the trial court has the discretion to control its courtroom (PCR 3032). McCray v. State, 71 So. 3d 848, 876 (Fla. 2011). A defendant who persists in engaging in disruptive behavior, as Damas did in the present case, does not have the right to obstruct necessary court proceedings.

This Court should affirm the denial of relief.

## **ISSUE II**

### **PENALTY PHASE COUNSEL'S DEVELOPMENT OF MITIGATION EVIDENCE IN THE FACE OF DAMAS' PERSISTENT OBJECTION AND ACTIVE OBSTRUCTION WAS NOT INEFFECTIVE**

Damas next complains that defense counsel's preparation for penalty phase was inadequate, both in terms of the number of

witnesses as well as when the investigation was completed. The State does not disagree with Damas' explication of the law which requires the defense, even where the client waives it, to investigate available mitigation while keeping the client informed. This is necessary to ensure that the defendant's waiver is knowing and intelligent. Russ v. State, 73 So. 3d 178, 190 (Fla. 2011). The record, however, shows that the defense team conducted a thorough investigation even though Damas actively obstructed their efforts. They also timely informed their client about what mitigation was being developed. And despite their client's obstructive behavior, the defense team developed a reasonably thorough presentation of his harsh family background, education, and medical and mental health mitigators. They hired mitigation specialist Donna Murray who had extensive mitigation experience (PCR 3292). Neurologist Dr. Rubino was another very experienced expert witness, having testified previously in ten capital cases (R. 3058-3059). And the defense lined up Ronald McAndrew. While he was challenged by the State and ultimately stricken as a witness, Dr. McAndrew was an expert with vast prison experience who frequently testified around Florida about prison conditions generally (R. 2981-2992). Finally,

Dr. Elizabeth McAlister was surprisingly successful in travelling to Haiti, still suffering from extensive earthquake damage that occurred after Damas was arrested and indicted, and somehow was able to locate and interview Damas' relatives there, despite the absence of records and little to go on in terms of finding where they lived (R. 3000-3052). These things must be remembered when assessing the strength of the defense team's mitigation efforts, which clearly were not minimal but rather, given the many obstacles, surprisingly thorough regardless of perspective.

At the penalty phase, the defense presented two witnesses. Neurologist Dr. Mark Rubino (R. 3056-3123) testified that Damas suffers from organic brain damage, some of which may have been caused by a car crash that occurred shortly before the events that resulted in Damas' arrest. Dr. Rubino explained how the brain damage, which was extensive, would affect Damas' behavior. He said that in addition to having poor judgment, planning, and impulse control, Damas would have difficulty understanding the difference between right and wrong. Moreover, the brain damage he observed was consistent with someone who suffers from schizophrenia (R. 3086).

The second defense witness was Dr. Elizabeth McAlister, a cultural expert with specialized knowledge of Haitian Vodou (as it is termed in French) religion. She visited the town where Damas was raised, spoke to his family there, and gave detailed information about the overlapping religious groups in Haiti. She said that Damas was raised an Evangelical Protestant, but at one point he lived with his grandmother, a higher level Vodou priestess (R. 3021). She indicated that Damas' grandmother was the likely source of Damas' belief that he was possessed by a demon when he killed his wife and children; demonic possession is an accepted part of the Haitian Vodou religion. Dr. McAlister also reported on the crippling poverty in Haiti, the fact that Damas' parents abandoned him at an early age, how corporal punishment is widely used in Haiti to discipline children, was used to punish Damas, and that the practice, while accepted in Haiti, would be considered abusive in America (R. 3000-3055).

Following the conclusion of penalty phase testimony, defense counsel recited the available mitigation that could have been presented but for Damas' decision to waive and refusal to cooperate. This included using a mitigation specialist, hiring several

medical experts (Drs. Maher, Ouao, and Wu, R. 3133) who were not used because Damas declined to see them (R. 3137, 3155), a fact which was also considered by the postconviction court in denying relief as to this claim (PCR 3688). Defense counsel reported spending 800 hours developing mitigation for the penalty phase and told the court that more could have been developed if Damas had only cooperated (R. 3135). The day before the penalty phase, counsel showed Damas a list of 47 possible mitigators that he was prepared to establish if Damas elected to cooperate and not waive them. A copy of that list, reduced to 37 after counsel culled out those the defense could not reasonably prove, is attached to the defendant's sentencing memorandum (R. 2025-2026). The various mitigators included on that list were discussed with Damas prior to his waiver (R. 3149). Finally, the defense attempted to introduce jail expert Ronald McAndrew who would have testified regarding prison conditions in the event Damas were sentenced to life. This witness was excluded after the court sustained the State's relevancy objection (R. 2992).

In short, despite Damas' express waiver of mitigation and persistent efforts to sabotage their efforts, counsel conducted a

thorough and reasonably complete investigation of available mitigators. Some of the more powerful mental health mitigators could not be established without the cooperation of the defendant. Consequently, Damas' present disenchantment with counsel's penalty phase strategy fails to establish deficiency. This is particularly true because counsel's failure to adduce more mitigation was largely due to Damas' own obstructive behavior. Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000).

Nevertheless, counsel was able to present evidence of Damas' bleak childhood and family life in Haiti, as well as evidence that he suffers from organic brain damage and mental illness. This is tempered, unfortunately, by the unanimous opinion of the three experts, appointed by the court to assess his competency, that the behavior which led the experts to conclude Damas lacked competence was entirely volitional, and Damas was malingering. The impact of this finding is reflected in the court's sentencing order (R. 2040-2080) where the court rejected both statutory

mitigators<sup>5</sup> based on Damas' obstructive behavior, manipulation of the system, and deceitfulness.

Oddly, Damas claims that counsel's decision to have him evaluated somehow amounted to ineffective assistance because Dr. Mandelblatt's report finding him competent and malingering was used by the sentencing court, as noted earlier, to discount certain of his mitigators. He correctly notes that using mental illness as a basis for mitigation is frequently a two-edged sword. But had counsel ignored his bizarre behavior we would now be addressing whether counsel's failure to have him evaluated amounted to ineffectiveness. In truth, counsel had no real choice. Damas has not shown that counsel was deficient under the circumstances and no relief is warranted here.

In terms of prejudice, Damas is required to "demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

Cherry, 781 So. 2d at 1048. In this case, even assuming that trial

---

<sup>5</sup> That Damas was acting under extreme mental or emotional disturbance, and lacked the capacity to appreciate the criminality of his conduct.

counsel had presented everything that collateral counsel now claims should have been presented, there is no reasonable probability that the outcome of the penalty phase would have been any different. The trial court found five aggravating factors had been proven- Damas was convicted of a prior violent felony, the murders were especially cold, cruel and premeditated, the murders were especially heinous, atrocious and cruel, and that the child victims were under the age of 12 and Damas held a position of familial authority over them.

The contrasting mitigators and respective weights assigned by the trial court were summarized by the court on direct appeal thusly:

With respect to the mitigating circumstances asserted by the defense, the trial court issued the following findings: (1) the murders were committed while under the influence of an extreme mental or emotional disturbance (not supported by the greater weight of the evidence); (2) capacity to appreciate the criminality of conduct or to conform conduct to the requirements of the law was substantially impaired (not supported by the greater weight of the evidence); (3) history of mental illness (some weight, but noting “[t]here is nothing in the record to support a finding that Defendant had ‘a long and well-documented’ history of mental illness before the murders”); (4) never received treatment for his mental illness (some weight, but finding “it is more likely than not that Defendant behaved purposefully during ...

evaluations ... so as to be found incompetent”); (5) provided information leading to resolution of the case (some weight); (6) positive qualities, including being a hard worker, taking responsibility, and expressing some remorse (some weight); (7) amenable to rehabilitation and a productive life in prison (little weight); (8) childhood and background of poverty, domestic abuse, and parental abandonment (moderate weight); (9) prior involvement in the Haitian Baptist Church; worked diligently to become a United States citizen; showed improved understanding of parenting techniques and successfully completed a parenting class at the David Lawrence Center; previously noted by DCF to be a good and interactive father; positive role model to other inmates; easily managed in prison; and loves parents, who love him (collectively given some weight); (10) mutually combative relationship with Guerline (not mitigating); (11) impact of execution on Damas's parents (some weight); and (12) DCF and the David Lawrence Center failed Damas by not recognizing mental health issues and providing services to him (little weight, and citing previous findings with respect to Damas's “alleged mental illnesses”).

Damas v. State, 260 So. 3d 200, 211 (Fla. 2018).

At the sentencing hearing, Dr. Rubino reported that a PET scan and MRI showed substantial organic brain damage and, based on the location of the injury, would have rendered Damas less likely to be able to control his impulses, less able to understand the difference between right and wrong, less able to plan. Additional expert testimony, even if it were available, would have been introduced for the purpose of amplifying Dr. Rubino’s expert

opinions. Any suggestion that Damas might have become more cooperative had counsel succeeded in securing the experts he now prefers is not only speculative but spurious, particularly since the primary reason why those experts failed to develop any opinions was due to Damas' refusal to cooperate.

Given the substantial and weighty aggravating factors present in this case in comparison with relatively weak mitigation, there is no reasonable probability that the additional mitigation evidence now preferred by Damas would have resulted in a life sentence even if it were available. Accordingly, this Court should affirm the lower court's denial of Claim II.

Damas also claims that his waiver of mitigation was not intelligent because he was never told what mitigators were available before he decided to waive them. The record, however, shows that at the time he elected to waive presentation of mitigators, defense counsel advised the court that he had previously discussed the available mitigation, which was extensive, with Damas. Some weeks later at the Spencer/Sentencing hearing counsel detailed 37 different mitigators developed by the defense team, and again confirmed that full disclosure of those mitigators had been provided

to Damas long before he decided to waive their presentation on September 5, 2017 (R. 3132-3153). Accordingly, not only was his decision to waive mitigation knowing and voluntary, but he failed to establish that counsel's investigation and development of mitigation was ineffective. The lower court should be affirmed.

### **ISSUE III**

#### **THE PUBLIC RECORDS CLAIM**

Finally, Damas complains that he was denied access to public records in violation of his rights to due process, equal protection, and the effective assistance of counsel. He essentially argues that Florida Rule of Criminal Procedure 3.852 and Florida Statutes section 27.7081 unconstitutionally restrict his right to public records under the Florida and United States Constitutions. In Damas' view, requiring that his demand for public records not be overly broad or unduly burdensome, and that he must certify that he has first made his own search for records, is constitutionally impermissible. This type of claim has been raised and rejected before and therefore lacks merit.

Initially, Damas erroneously asserts that he has a federal constitutional right to the effective assistance of counsel being

impeded by the rules governing access to public records. The United States Supreme Court has previously rejected the notion that a convicted defendant, even where the sentence is death, retains a Fifth Amendment right to due process nor any right relating either to appointment or effective assistance of counsel under the Sixth or Eighth Amendments when seeking to advance a postconviction challenge to a presumptively valid judgment and sentence. Pennsylvania v. Finley, 481 U.S. 551 (1987) (due process), Ross v. Moffitt, 417 U.S. 600 (1974) (Sixth Amendment), Murray v. Giarratano, 492 U.S. 1 (1989) (Eighth Amendment). Whatever right Damas may have flows instead from Florida law mandating appointment of postconviction counsel, which this Court has held is dictated by the State constitution's guarantee of access to courts. Kokal v. State, 901 So. 2d 766, 778 (Fla. 2005), Fla. Const. article 1 sec. 21. Banks v. State, 150 So. 3d 797 (Fla. 2014) (claim alleging ineffective assistance of postconviction counsel is not cognizable).<sup>6</sup>

In addressing meaningful access to courts, the United States

---

<sup>6</sup> The State recognizes that Martinez v. Ryan, 566 U.S. 1 (2012) authorizes review of the effectiveness of collateral counsel in a federal habeas corpus petition; this Court has declined to extend Martinez to State postconviction claims. Banks, id.

Supreme Court has agreed that it is properly met where, for example, a state affords access to a law library or through “adequate assistance from persons trained in the law.” Bounds v. Smith, 430 U.S. 817, 828 (1977) But see Lewis v. Casey, 518 U.S. 343, 351 (1996) (Bounds did not create an inmate’s “abstract, freestanding right to a law library or legal assistance” but merely affirmed a right to “reasonably adequate” access to the courts). In short, the State does not dispute that Damas has the right to request documentation in the course of exploring various postconviction challenges. His suggestion that the State’s mechanism for securing and maintaining relevant documents in a centralized location while also requiring him to justify requests for documents not available through the repository somehow violates the Fifth, Sixth, Eighth and Fourteenth Amendments is simply incorrect.

Section 27.7081 and Rule 3.852 pertain only to the production of records for capital postconviction defendants. These provisions do not prevent a capital defendant from making postconviction public records requests. In fact, upon the issuance of the Florida Supreme Court's mandate, records relating to a capital defendant's

case are automatically required to be delivered to the postconviction repository. See § 27.7081(7)(b)(1), (3), Fla. Stat. (2023), (D) Should the agency receiving an additional request object, a hearing will be conducted at which the agency will explain why it cannot comply and what narrowing information would be required in order to comply with such a request. See Moore v. State, 820 So. 2d 199, 204 (Fla. 2002) (“When a capital defendant claims that a state agency is withholding pertinent public records, the trial court should hold a hearing regarding such claims.”). A defendant seeking additional records must plead with specificity the outstanding public records he seeks to obtain. Rodriguez v. State, 919 So. 2d 1252, 1273 (Fla. 2005).

Rule 3.852 (and, for that matter, Section 27.7081) is not intended to authorize a fishing expedition for records unrelated to a colorable claim for postconviction relief. Moore, 820 So. 2d at 204. Requiring that a capital defendant's additional request be timely made after a diligent search and that this request not be overly broad or unduly burdensome is reasonable. See Allen v. Butterworth, 756 So. 2d 52, 66 (Fla. 2000). Because a capital defendant's additional request follows the State agencies' initial

delivery to the repository, surely the requirement that a defendant make a diligent search through records already produced to narrow the request and reduce the burden of multiple records requests to the agency from which counsel seeks information is reasonable in the context of capital postconviction claims.

Nor was Damas deprived of due process as the Statute and Rule both provide for a procedure to secure public records that are not on file in the repository. That the court denies the defendant's motion is not a denial of due process, no matter how much the defense abhors the outcome. Moreover, in adopting the present rules governing production of public records, this Court expressly found that to the extent a defendant believes that access to records is being unfairly limited, the rule does not violate any statutory or constitutional rights of the defendant. In re: Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 683 So. 2d 475 (Fla. 1996).

Similarly, Damas was not being deprived of equal protection. He contends that he, unlike any other seeker of public records, is required to demonstrate that he has made his own search, that his requests are relevant, and that his requests are not overbroad or

burdensome. However, Damas, unlike any other member of the public who seeks public records, is given an attorney to obtain them, a special central repository to store them, and is provided copies at no charge. His equal protection challenge fails because Damas and the ordinary citizen seeking public records are not similarly situated. Duncan v. Moore, 754 So. 2d 708 (Fla. 2000).

Finally, because Damas has a reasonable mechanism for accessing necessary public records, and the rules regulating that access have previously been approved by this Court, his assertion that his Sixth Amendment right to effective counsel has been violated is clearly without merit. The rules require him to look in the repository first; failing that, he must identify a colorable related claim before turning to the agency for production of the records in question. This does not by any stretch interfere with access to courts or, if he had any such Sixth Amendment right, to postconviction counsel. This Court should affirm.

### **CONCLUSION**

Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26th day of June, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal which will send a notice of electronic filing to the following: James Driscoll and Levi Harris, Assistants CCRC-South, Capital Collateral Regional Counsel-South, 110 SE Sixth Street, Suite 701, Ft. Lauderdale, Florida 33301, **driscollj@ccsr.state.fl.us** and **harrisl@ccsr.state.fl.us**.

**CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, and the word count is 13,815 words in compliance with Fla. R. App. P. 9.045.

Respectfully submitted,

ASHLEY MOODY  
ATTORNEY GENERAL OF FLORIDA

/s/ Timothy A. Freeland  
TIMOTHY A. FREELAND  
Senior Assistant Attorney General  
Florida Bar No. 539181  
Office of the Attorney General  
3507 East Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: 813-287-7910  
timothy.freeland@myfloridalegal.com  
capapp@myfloridalegal.com

COUNSEL FOR APPELLEE