IN THE SUPREME COURT OF FLORIDA
CASE NUMBER: SC2023-1476
LOWER TRIBUNAL CASE NUMBER: 11-2009-CF-002298

MESAC DAMAS,
APPELLANT,
v.

STATE OF FLORIDA,
APPELLEE.
_____/

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR COLLIER COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY TO STATEMENT OF CASE FACTS

The State's brief relied on this Court's statement of the facts from the opinion affirming Mr. Damas' conviction and sentence. (AB-1-16). The "facts" that appear on the record on appeal lack the reliability that comes from adversarial testing and confrontation through Sixth Amendment guaranteed counsel. Moreover, Mr. Damas was denied the narrowing and individualized sentencing required by the Eighth Amendment and Fourteenth Amendments.

Postconviction has shown that the assumptions about Mr. Damas' case were premised on an incomplete understanding of Mr. Damas. Mr. Damas never had adversarial testing because he waived rights while incompetent and did not have effective counsel throughout all of the proceedings against him.

To the extent possible, with Mr. Damas' incompetence still being an issue in postconviction, he presented more facts that increase the level of understanding needed to decide his issues. Most importantly, postconviction has showed that the weighing process was distorted and inadequate to decide whether Mr. Damas should be executed. Not only were aggravating factors essentially unquestioned, the full weight of Mr. Damas' mitigation was unpresented or limited. Mr.

Damas was and remains mentally ill, which should have been seen during the proceedings against him that lead to his death sentence. More than "alleged," Mr. Damas' mental illness was persistent and rendered him defenseless to the State's case seeking death.

Appeal

As argued in Mr. Damas' State habeas petition, Mr. Damas' appeal failed to render the proceeding below valid. This Court was denied the benefit of essential legal arguments that showed Mr. Damas' death sentence was not worthy of confidence. This will be addressed further in the Reply to the State's Response to his habeas petition. However, the appellate process did nothing to ensure that Mr. Damas' death sentence was both fairly determined and constitutional.

REPLY ARGUMENT

I. MR. DAMAS HAS BEEN INCOMPETENT SINCE HIS ARREST. HIS CONVICTION AND DEATH SENTENCE WERE UNCONSTITUTIONAL BECAUSE TRIAL COUNSEL WERE INEFFECTIVE AND FAILED TO CHALLENGE HIS COMPETENCY FULLY AND WHEN NECESSARY, THUS VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Damas was incompetent during the proceedings against him in the lower court. While he was found incompetent, temporarily, the court found him competent and pushed him through the system. None of his counsel challenged his competency again and, as a result, an incompetent man was sentenced to death.

Mr. Damas remains incompetent today. Despite numerous attempts and letters, Mr. Damas has refused to meet with the undersigned, as he did with counsel's predecessors. Mr. Damas should not be sentenced to death when he was not competent during the proceedings that led to his death sentence and in postconviction.

A. THE PROCEEDINGS AGAINST MR. DAMAS TOOK PLACE WHILE HE WAS INCOMPETENT BECAUSE TRIAL COUNSEL WERE INEFFECTIVE WHILE CHALLENGING MR. DAMAS' COMPETENCY TO PROCEED, AND FOR FAILING TO MOVE FOR A COMPETENCY HEARING PRIOR TO THE SENTENCING HEARING, THUS ALLOWING AN INCOMPETENT PERSON TO BE FOUND GUILTY AND SENTENCED TO DEATH. MR. DAMAS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

There was nothing volitional about Mr. Damas' incompetency. He could no more chose his actions than a disabled person can chose to walk. Counsel had a duty to challenge his competency fully and effectively. Counsel was deficient because they failed to challenge Mr. Damas' competency despite having numerous opportunities. This prejudiced Mr. Damas because he could not aid counsel in presenting mitigation because his mental illness rendered him incapable of working with counsel.

Two experts found Mr. Damas incompetent to proceed before he was sent to GEO Care. There was no miraculous cure where Mr. Damas went from incompetent and in need of restoration, to competent, simply by staying for a short period at GEO Care. Mr. Damas returned from GEO Care the same as when he went, unable to interact with counsel in a meaningful way and unable to

participate in the proceedings against him.

The lower court knew that it was impossible to interact with Mr. Damas. This is why the lower court forced counsel on him. By doing so, the lower court avoided dealing with Mr. Damas and could move the case along with the help of his ineffective counsel. Throughout the proceedings against Mr. Damas, counsel had numerous opportunities to raise further competency challenges. Despite the State's arguments to the contrary, counsel was ineffective for not doing so.

1. October 8, 2014 Hearing

When Mr. Damas returned from GEO Care, the lower court had Dr. Herkov and Dr. Schaerf reevaluate Mr. Damas. Mr. Damas had received minimal treatment for his condition and no psychotropic medication - - treatment that both Dr. Herkov and Dr. Schaerf had noted would be necessary for Mr. Damas to return to competency. (R-3658, 3662). There was nothing in the report that overcame the original findings of Dr. Herkov and Dr. Schaerf, especially not Dr. Mandelblatt's condemnation.

The State argued that "Dr. Mandelblatt's damning opinion provided the clearest evidence that rather than being incompetent,

Damas was malingering and attempting to game the system." (AB-37). Mr. Damas, in "gaming the system" continued to be unable to work with his attorneys so that they could develop his Eighth Amendment guaranteed mitigation and the court could decide whether Mr. Damas could constitutionally be sentenced to death.

The notion of Mr. Damas "gaming the system" is nonsensical. Mr. Damas initially wanted to plead guilty and waive everything. If he was gaming the system, it was the worst gaming ever. If Mr. Damas' "game" were not allowed to be played, he would have received a life sentence. Mr. Damas never moved for a competency evaluation. He wanted to proceed as quickly as possible as evidenced by his statement that "this could have happened the first day I got arrested or maybe in the first week. But there was a lot of things, process, process. What I don't understand is the law over here, because I am not from here. I came here when I was 20 years old, so I don't even know a lot of things about the laws over here." (R-2899).

Mr. Damas waived his right to a jury trial on the issue of his guilt despite incorrectly believing that he had already pleaded guilty. (R-2823-2835, 2856-2859). There would be no determination of guilt or sanity at the time of offense. Considering the nature of Mr. Damas'

crime and his mental illness, his volitional soiling of himself and lack of cooperation provided him with far less "game" than an insanity defense. Mr. Damas next waived his right to a penalty phase jury (R-2875, 2883) and to present mitigation (R-2836). These waivers were hardly indicative of someone volitionally trying to avoid death. Mr. Damas' waiver of these rights was a product of his mental illness and without any rationale.

"Gaming the system" necessitates an endgame. The State, let alone Dr. Mandelblatt, failed to define Mr. Damas' endgame. Under the State's gaming theory, what was the conclusion that Mr. Damas sought? He certainly did not seek to be found incompetent, although he was throughout the proceedings. Pleading guilty was a poor strategy because he was found guilty, despite the possibility of an insanity defense. Mr. Damas' obsessive religious thoughts and self-soiling led to the same end, him being adjudicated guilty, and death becoming a possibility.

The notion of volitional gaming becomes even more absurd when Mr. Damas' waiver of mitigation and a penalty phase jury is considered. As far as the penalty phase jury is concerned, the odds of avoiding a death sentence were infinitely better with a jury than

with Mr. Damas' "gaming." At the time of Mr. Damas' proceedings, Mr. Damas only had to convince one juror to not vote for death. This was highly likely with effective trial attorneys whom skillfully selected a jury. Instead, Mr. Damas decided to waive a penalty phase jury and mitigation. As such, he had his fate decided by one judge with whatever mitigation counsel could sneak in at the *Spencer*[1] hearing.

The only legitimate analysis of Mr. Damas' so-called "gaming" was that he was trying to "take a dive" or lose the game. Mr. Damas was so mentally ill that he wanted to ensure that the State killed him. Far from "gaming" the system, Mr. Damas was incompetently using the system to speed up his death. This was not volitional but instead, the product of his mental illness and determinative proof that he was incompetent.

A well-qualified expert could have also explained that Dr. Mandelblatt's report that Mr. Damas was allegedly seen "acting normally" was irrelevant. It is as if Dr. Mandelblatt was unfamiliar with the concept of a lucid interval. Mentally ill individuals such as Mr. Damas do not experience symptoms continuously and without

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

ceasing. Many individuals' conditions lie in wait for an encounter with stress or unfamiliar experience before attacking. Even someone with a chronic illness will have periods of time where the symptoms abate. At some level, individuals may be able to conduct routine activities such as banking and "mundane" activities. *See* (AB-35).

The State and Dr. Mandelblatt offer Mr. Damas' "interacting violently" at GEO Care as concrete proof that Mr. Damas was competent. (AB-35). This is at best, peculiar, and at worst disingenuous. Mr. Damas had as much of a right to self-defense as anyone in Florida. The State offers no context for the alleged "violent interactions." Was Mr. Damas acting in self-defense? He certainly could have been the victim of an attack because his preaching was overwhelming to another possibly mentally ill and violent fellow inmate. The State, like Dr. Mandelblatt, took ambiguous behavior and misappropriated it to justify the trial of a severely mentally ill and brain damaged man.

The State does not overcome Mr. Damas' presumption of incompetence, which was established in 2014. The State essentially omits that counsel could not stipulate to competency after Mr. Damas was found incompetent. In *Dougherty v. State*, 149 So. 3d

673, 678 (Fla. 2014), this Court held that "nothing in our precedent or the State's argument persuades us that a defendant can stipulate to the ultimate issue of competency, even where the written reports reach the same conclusion."

This Court noted in *Dougherty* that, "[e]ven in a situation where all the experts opine that a defendant is competent, the trial court could presumably disagree based on other evidence such as the defendant's courtroom behavior or attorney representations." *Id.* This Court determined that "the language of rule 3.212(c)(7) and rule 3.212(b), which governs competency in criminal cases, does not allow parties to stipulate to the issue of competency." *Id.* (internal citations omitted). Moreover, this Court held that where the trial court has previously concluded that a defendant is incompetent and his competency has yet to be restored, a defendant cannot stipulate that he is competent. *Id.* at 678. Under Florida law at the time of the October 8, 2014 hearing, the court had not found Mr. Damas competent, thus counsel was forbidden to stipulate to Mr. Damas' competency.

Counsel stipulated to competency when the law did not allow them to do so. In denying relief on this claim, the lower court found

the language of the October 21, 2014 order to be "imprecise." (PCR-3676). When viewed in the context of the October 8, 2014 hearing, the actions of trial counsel, and subsequent pleadings, the language of the order showed exactly what counsel stipulated.

The October 21, 2014 order states that "1. The parties stipulated to the finding of competency based on the reports of Dr. Herkov and Dr. Kling." While the language of the order may be subject to different interpretations, trial counsel's representation at the October 8 hearing was clear.

Ms. Fitzgeorge, on October 8, 2014 agreed not only to the court considering the experts' reports, she agreed to their findings:

> Your Honor, the defense would agree that **we have no objection to the findings**, the report of Dr. Mandelblatt dated April 23rd of this year and the reports of Drs. Herkov and Sharrif [sic], both dated October 6th, also 2014. [ ].
>
> THE COURT: So, you would agree to the Court making a finding of competency at this time?
>
> MS. FITZGEORGE: Yes, Your Honor.

(PCR-1099-1100).[2] (Emphasis added).

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[2] This appears in the postconviction record because postconviction counsel moved the postconviction court to place this transcript in the postconviction record. It was omitted from the Record on Appeal.

Trial counsel's postconviction evidentiary hearing testimony showed that counsel stipulated to competency. Both Mr. McLoughlin and Ms. Fitzgeorge testified at the evidentiary hearing that it was their practice to review court orders and correct any mistakes. (PCR-2995). Neither found it necessary to inform the Court of any error in the October 21, 2014 order. Had trial counsel believed the language of the order was "imprecise," they should have sought clarification. Effective counsel should have known they could not stipulate to competency after Mr. Damas was found incompetent. Mr. Damas was prejudiced because the false finding of competency forced to him to proceed while incompetent and while he could not defend himself.

Then counsel, Mr. McLoughlin, testified that he had experience in approximately 40 cases where competency was at issue and he had previously stipulated to competency in several cases. His misunderstanding of Florida law regarding stipulating to competency -- and the fact that he did not feel it necessary to seek correction or clarification of the court's order -- demonstrate that counsel stipulated that Mr. Damas was competent, as he had done in past cases.

Likewise, Ms. Fitzgeorge testified that it was her normal practice to review all court orders following hearings and that she believed she had done so following the October 8, 2014 hearing. Ms. Fitzgeorge confirmed that she did not request any correction or clarification of the Court's October 21 order. (PCR-3069). Further, Ms. Fitzgeorge's November 24, 2014 Motion In Limine eliminates any doubt that counsel stipulated to competency. In that motion, Ms. Fitzgeorge stated:

> 7. Following Defendant's return to Collier County, the competency issues were resolved when, on October 8, 2014, Judge Manalich adjudged Defendant competent to proceed based upon the reports of experts **and stipulation of State and Defense.**

(R-590-91)(emphasis added). Thus, it is apparent that trial counsel believed that they had stipulated that their client was competent.

There was no strategic reason to stipulate to Dr. Herkov's and Dr. Schaerf's finding of competency. There was no strategic reason to stipulate to anything Dr. Mandelblatt said. Counsel was accordingly deficient in doing so. Mr. Damas was prejudiced because he was found competent when he clearly could not even remotely interact with counsel, and despite the presumption of incompetency that he held having been found incompetent. *Dougherty*, 149 So. 3d at 678.

Most importantly, at the required hearing, the lower court could have heard evidence from a well-qualified expert like Dr. Agharkar. A qualified expert such as Dr. Agharkar could have refuted the character attack on Mr. Damas made by Dr. Mandelblatt as seen by Dr. Agharkar's testimony at the evidentiary hearing:

> [W]e have to distinguish between being uncooperative versus malingering. In my opinion, he's certainly uncooperative, but that's not the same thing as malingering. I think I believe it to be a product of the mental illness as to why he might have been, but I can see why another practitioner might have said malingering, but I did not think he was malingering.

(PCR-2928). Such testimony would have refuted the notion that Mr. Damas was volitionally "faking" and "the trial court could presumably disagree [with Dr. Mandelblatt's opinion] based on other evidence such as the defendant's courtroom behavior or attorney representations." *Dougherty*, 149 So. 3d at 678.

Counsel was ineffective. Rather than hold the State to its burden of showing Mr. Damas was competent, trial counsel acquiesced to the finding of competency. Because of counsel's ineffectiveness, Mr. Damas proceeded while incompetent, thus waiving important rights, and ultimately ensuring his death sentence. The lower court sentenced a severely mentally ill man to

death when he was incompetent. If counsel were not deficient, Mr. Damas could have been restored to competency and received all of the protections that the United States Constitution safeguards. The outcome would have been far different if counsel were not deficient because it is reasonably probable that a relevant sentencer would have found death was not appropriate. This Court should reverse.

2. August 18, 2017 Hearing, September 5, 2017 Hearing, October 23-24, 2017 Hearing.

While counsel had a critical opportunity to contest Mr. Damas' competency as detailed above, because Mr. Damas remained incompetent in fact, counsel had an ongoing obligation to raise his competency when it continued to render him unable to be represented in this death case. Dr. Mandelblatt's "damning opinion" did not become objective and accurate as time progressed. The continued reliance on Dr. Mandelblatt's "damning opinion" only grew staler and more inadequate as time progressed. *See Brockman v. State*, 852 So. 2d 330, 333-34 (Fla. 2d DCA 2003); *See also Washington v. State*, 162 So. 3d 284, 289 (Fla. 4th DCA 2015) (holding competency evaluations that were six months to one year old were stale and did not constitute competent, substantial evidence

of competency); *see also In re Commitment of Reilly*, 970 So. 2d 453, 456 (Fla. 2d DCA 2007). This Court should note that the State incorrectly refers to Dr. Herkov having "the benefit of the new report from Dr. Mandelblatt, whose clinic had housed Damas and observed his behavior for five weeks." (AB-41). There was nothing new about Dr. Mandelblatt's report; it was the same "damning" report from 2014 and obviously stale and unreliable.

Trial counsel should never have acquiesced to the court appointed experts in the face of Mr. Damas' incompetent lack of participation. Counsel should have aggressively litigated his competence when the court sua sponte raised it, and should have filed a motion to determine competency every time Mr. Damas' mental illness rendered him unable to defend himself. On one level, Mr. Damas might be seen as merely difficult or culturally different. The State goes as far as to claim: "To those not familiar with it, being possessed by a demon is irrational." (AB-38-39).[3] Nevertheless, when

[3] While mental issues have been explained as "demon possession," the State's brief surely is not arguing that Mr. Damas was actually possessed by demons. Without any actual proof of demons, or evidence that Mr. Damas was possessed by them, it was an irrational belief brought on by Mr. Damas' mental illness.

the difficulties that rendered Mr. Damas incompetent were the result of Mr. Damas' mental illness and brain damage, and not "demons," that is a legal matter, not a spiritual one. Experts, such as Dr. Agharkar, are able to distinguish between a religious belief and pathology. This Court need look no further than Dr. Agharkar's postconviction testimony to see this point, where he explained his lack of diagnosis and the need for testing:

> I don't think I was ever specifically asked, and I think that, as I mentioned, I was seeing things in the schizophrenia spectrum. Whether he was schizoaffective, whether he was schizophrenic, those things don't really matter. I mean, it's a name. But what we're describing though is symptoms, clearly a break from reality, very paranoid, may have been hallucinating at one point, hyper-religious - - I mean, I saw a lot of those types of symptoms, and so I would have made those kind of recommendations, but I don't think I reached a definitive conclusion. I wasn't asked.
>
> Q. Would additional testing have helped you make a conclusion?
>
> A. Yes, it certainly, - - it certainly would have helped to know whether this was organic, first, in other words, did brain damage cause this, in other words, does he have an organic psychosis, because people who have brain damage can then develop psychotic symptoms? Or does he have a primary psychotic condition, and then - - he also has brain damage also, which would make him impulsive, irritable, be more likely to - - to act out, things like that, so - - and cause mood swings and such? So, yes, that would have been very helpful.

(PCR-2924-25). As the initial brief and below makes clear, counsel simply did not do much while Mr. Damas continued to decompensate. Counsel certainly could have obtained the additional testing that Dr. Wu, Dr. Merikangas, Dr. Rubino, and Dr. Agharkar felt was necessary. Scans would have shown Mr. Damas was schizophrenic and brain damaged but counsel failed to move for the scans until Mr. Damas' fate was all but sealed with his waiver of mitigation, trial, and a jury. While the lower court should have granted the motion for additional scans, it would have been more likely to have granted the request if counsel did not wait until the very last minute after Mr. Damas waived mitigation. Of course, there was a point where Mr. Damas saw experts, such as when Dr. Agharkar met with him as well as Dr. McAlister. That opportunity was fleeting and should have been acted on by counsel having an independent expert and moving for a competency hearing.

In the end, counsel violated a fundamental principle of criminal defense - - evidence and opinions can always be challenged. The Sixth Amendment required that Mr. Damas had counsel that did this rather than simply give up in the wake of incorrect opinions by the court appointed experts.

Finally, the State refers to this issue as being procedurally barred regarding the August 18, 2017 hearing, arguing: "To the extent that Damas challenges the competency assessment itself, this claim is procedurally barred as it could have been raised on direct appeal." (AB-41). Mr. Damas could not have challenged any of counsel's failures regarding competency on appeal, because trial counsel, starting with the stipulation to competency in 2014, through the conclusion of the case, repeatedly failed to challenge his competency. There was no record for this Court to review on appeal because counsel did nothing to challenge the incorrect findings of competency adequately. Counsel's mere acquiescence to competency made it possible for Mr. Damas to be pushed through the death penalty process without proper evaluations and the full mitigation investigation that the Constitution required. This ineffectiveness allowed the court to sentence an incompetent man to death.

There was yet even further prejudice that Mr. Damas suffered. Omitted by the State, (*see* AB-41 citing *Damas v. State*, 260 So. 3d 200 (Fla. 2018); *Stano v. State*, 520 So. 2d 278, 281 (Fla. 1988)) was that this Court's review of the voluntariness of Mr. Damas' waivers was without this Court knowing the full extent of Mr. Damas' mental

illness, brain damage, and how it impacted his decision making. This Court had no testimony from important experts like Dr. Agharkar, Dr. Merikangas, and Dr. Ouaou, which would have shown the involuntariness of Mr. Damas' waivers. While in some cases this Court can review a transcript and decide the voluntariness of a waiver, such was not the case with Mr. Damas. To understand Mr. Damas' involuntary actions, this Court needed to evaluate what well established mental health experts found in evaluating Mr. Damas' mental health and brain damage. Because counsel did not challenge competency, this Court was denied this critical information to make a decision of the utmost constitutional importance.

Mr. Damas could have challenged his competency at all stages but when counsel merely goes along, to get along, an incompetent man gets sentenced to death. All of this could have been avoided if counsel were not deficient and properly litigated competency. Mr. Damas was prejudiced. He was forced to proceed on a death case when he was incapable of interacting with counsel to develop mitigation. He made multiple harmful decisions despite not being competent to waive his concordant rights. Counsel's ineffectiveness rendered Mr. Damas defenseless against the overwhelming power of

the State and ensured that there would not be a proper individualized sentencing of Mr. Damas in this death case. The end result was that Mr. Damas remains sentenced to death and housed on death row, when it is by no means certain that he even understands how he got there. This cannot stand. This Court should reverse.

B. MR. DAMAS WAS INCOMPETENT DURING POSTCONVICTION VIOLATING HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND DENIED A REMEDY FOR VIOLATIONS OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Damas was incompetent when this Court appointed postconviction counsel and remains so to this day. He could not assist his counsel in developing postconviction claims. His incompetency led to his refusal to meet with counsel or to be evaluated by experts for postconviction claims. He could not tell his attorneys anything about the sentencing proceedings because his mental illness caused him to refuse to speak to counsel.

While modern postconviction under Rule 3.851 is a creation of statute, it is enshrined in the Florida and United States Constitutions. Mr. Damas, facing the death penalty, could not fairly and fully challenge his death sentence, or the procedure that led to

it. Unlike almost every other individual sentenced to death, his execution will come without the testing that postconviction provides. The execution of Mr. Damas requires more scrutiny to determine whether his death sentence was obtained constitutionally.

According to the State, Mr. Damas merely continued his volitional gaming, going so far as to be placed in an uncomfortable restraint chair. Having long abandoned hope due to his mental illness, he could have avoided coming to the courtroom or viewed the proceedings from the jail. Later he would be taken to the hospital and kept overnight for heart problems. While certainly the court had the duty to control the courtroom and acting out is not to be tolerated, so is forcing a mentally ill man to proceed through postconviction while incompetent.

II. TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO CONDUCT A TIMELY AND ADEQUATE MITIGATION INVESTIGATION THUS DENYING MR. DAMAS' RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State attempts to blame counsel's deficient performance on Mr. Damas. According to the State, Mr. Damas obstructed counsel's

efforts to develop mitigation. (AB-46). What the State calls obstruction was actually Mr. Damas' incompetency, mental illness, and brain damage. Had counsel acted effectively and timely, Mr. Damas would not have waived the presentation of mitigation or, at the very least, counsel could have presented mitigation during the *Spencer* hearing as counsel did with Dr. McAlister and Dr. Rubino.

Mr. Damas was, and remains, a severely mentally ill and brain damaged individual. As such, he was outside the class of individuals that could be sentenced to death, because of the extent of the compelling mitigation, which could have been presented. Consideration of mitigation is constitutionally required to narrow the application of the death penalty under the Eighth Amendment. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Counsel had an opportunity to present such evidence at the *Spencer* hearing. Indeed, if counsel were able to present Dr. McAlister and Dr. Rubino, there was no reason why they

could not present Dr. Wu, Dr. Ouaou, Dr. Merikangas, or any other relevant expert.

What counsel did present was given virtually no consideration by the trial court. Instead, the trial court unreasonably discounted the mitigation. *Porter v. McCollum*, 558 U.S. 30 (2009) held that relief was appropriate because the court below failed to "engage with" Mr. Porter's mitigation. The postconviction court and the trial court both violated this principle when both courts failed to consider, adequately, the evidence that counsel did present, and that which they did not because of counsel's ineffectiveness.

This Court needs to look no further than the opinion from direct appeal to see the lack of mitigation presented by trial counsel. As reproduced in the State's Answer:

> 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").

(AB-53-54) citing *Damas v. State*, 260 So. 3d 200, 211 (Fla. 2018). The lower court was able to disregard the mitigation that counsel did present but would not have been able to had counsel only been effective. Indeed, the lower court was required to consider all mitigation, whether statutory or nonstatutory. The United States Supreme Court has made this clear:

> Thus, the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg v. Georgia,* supra, at 197, [ ], the rule in *Lockett* recognizes that "justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55 [ ](1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency.

Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Moreover:

> [T]he Constitution requires that "'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.'" *Id.* (quoting *Eddings*, 455 U.S. at 112)
>
> The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases. Its constitutional infirmities can best be understood by comparing it with the statutes upheld in *Gregg, Proffitt*, and *Jurek*.

Lockett v. Ohio, 438 U.S. 586, 606 (1978). There was little individualized consideration of Mr. Damas' relevant mitigating factors as required by *Eddings* and *Lockett*. Counsel never completed a mitigation investigation that would satisfy *Koon*[4], let alone the

[4] *Koon v. Dugger,* 619 So. 2d 246 (Fla. 1993)

Eighth Amendment of the United States Constitution. There was overwhelming mitigating evidence that counsel could have presented at the *Spencer*/Sentencing hearing. Mr. Damas was schizophrenic and brain damaged, but the lower court essentially ignored his infirmities because counsel failed to develop and present mitigation through relevant experts. This was deficient. The lower court sentenced Mr. Damas to death with no legitimate Eighth Amendment narrowing being conducted.

Failure to conduct a timely and adequate mitigation investigation and fully advise Mr. Damas prior to his eventual guilty pleas, waivers, and sentencing

The State ignores the evidence of trial counsel's last minute scrambling and dilatory work. By the time that trial counsel tried to develop mitigation it was far too late to engage Mr. Damas and far too late to obtain the necessary evaluations Mr. Damas needed. Counsel's last minute attempt to gather mitigation to present at the hearing and for his waiver came after Mr. Damas had decompensated to the point that he would refuse most evaluations. This, however, was not always the case.

Trial counsel, as made clear in the initial brief, waited too long to complete a mitigation investigation and develop such mitigation.

They also waited too long to get funding from the court for the needed medical scans.

Mr. Damas met and spoke to a number of experts throughout the course of his case and had brain scans in 2014. This included not just the experts previous counsel retained but also a number of experts that were appointed for competency. Mr. Damas would only stop speaking to some experts later in the case when he had decompensated to the point of not participating. While this was evidence of his incompetence, it also showed that Mr. Damas, to some extent participated in his case. Notably, he even spoke to Dr. McAlister right before the hearing.

At AB-52, the State argues: "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." Mr. Damas, however, *is* arguing that

counsel failed to have him evaluated and fully develop his mitigation.

The State offers no citation to where in the initial brief this argument was supposedly made. Mr. Damas does discuss double-edged swords but this is in his Habeas Petition. The State has the two documents and the context confused. There is no argument that counsel's decision to have Mr. Damas evaluated was ineffective. Dr. Mandelblatt was not retained by counsel, and hiring her would have been absolutely the worst expenditure of expert funds that this Court has ever encountered. Counsel should have moved earlier to have Mr. Damas evaluated by competent mental health professionals that could have confirmed his schizophrenia and brain damage and called these experts at the *Spencer* hearing. Dr. McAlister was a fine expert. Dr. Rubino also offered highly mitigating evidence, although he lacked the expertise necessary to diagnose schizophrenia.

When it came time for the *Spencer* hearing, counsel presented two experts that offered mitigation, but not the entirety of mitigation that counsel could have presented for Mr. Damas. While this mitigation was convincing, the sentencing court failed to engage with it. Regarding Dr. McAlister, the court made short shrift of her testimony in the sentencing order. The court denied the extreme

mental or emotional disturbance mitigating factor (Fla. Stat. § 921.141(b)) because it was not convinced of it by the testimony of Dr. McAlister "a professor in African American Studies and Religion." (R-2073). With such a serious mitigating factor at issue, an expert in psychology, or Dr. Wu a psychiatrist, was necessary. It was unfair for the court to find that the further scans were not necessary and then find that whatever Dr. McAlister testified to was merely based on Mr. Damas' and his family's report and thus biased. (R-2073). While Dr. McAlister's testimony was highly mitigating, she lacked the necessary expertise that Dr. Wu could have offered, especially with the requested scans.

It was no better with Dr. Rubino. While Dr. Rubino was a good expert and testified authoritatively, he lacked the background of Dr. Wu. Trial counsel argued for the mitigating factor "the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law was substantially impaired." Fla. Stat. § 921.141(f).The lower court found that Dr. Rubino "was not a psychiatrist or psychologist able to diagnose schizophrenia." (R-2074-75). Dr. Rubino could not testify with certainty on this diagnosis. The court ultimately found that this

mitigating factor was not established. (R-2075). Mr. Damas was severely mentally ill and brain damaged but this was written off as "alleged mental illnesses." (R-2077).

Mr. Damas was schizophrenic and brain damaged, but trial counsel did virtually nothing to establish these highly mitigating infirmities. Counsel waited until after Mr. Damas' waived mitigation to ask the court for the funding for proper brain scans to show, objectively, this mitigation. Rather than just opinion or self-report, the additional brain scans would have objectively shown Mr. Damas mental condition and brain damage at the time of the offense and during his incompetency.

Trial counsel had a long time to develop Mr. Damas' mitigation. Previous counsel had taken the steps to begin developing this mitigation. Dr. Agharkar, Dr. Merikangas, and Dr. Wu were all retained prior to the last counsel. Multiple experts told counsel that further scans were needed to finish the mitigation investigation and development. Counsel waited to Mr. Damas had pleaded to seek these scans and have these experts evaluate Mr. Damas. "Oddly" counsel did nothing of substance until the very end. This was deficient. Mr. Damas was prejudiced because the court never

weighed his overwhelming, yet undeveloped, mitigation. Had this been presented, there was a reasonable probability that he would have been sentenced to life by a fair sentencer. This Court should reverse.

III. MR. DAMAS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW BECAUSE HE WAS DENIED ACCESS TO PUBLIC RECORDS.

Mr. Damas needed to and, had a right to, investigate his case by reviewing all sorts of records. The division of records into public versus non-public is a legal distinction imposed by State law, not based on the probative value of the records.

Mr. Damas is severely mentally ill. In such condition, he was unable to assist his postconviction counsel by pointing towards potential areas of investigation. Because Mr. Damas was in such a state, records have greater importance. The question also arises of just what is contained in the in camera reviewed records that they needed to be withheld from Mr. Damas. The lower court reviewed the records and found that some of the records were exempt and that there was no *Brady* material in the records. *See* (PCR-648-50).

The State's argument strategically mischaracterizes Mr. Damas' assertion of right as a postconviction counsel effectiveness claim. (AB-56-57). Mr. Damas did not assert a freestanding right to the effective assistance of postconviction counsel. Rather, Mr. Damas asserted that he had the right to seek a remedy under state and federal law for any violation of his rights. There must be at least one forum for Mr. Damas to challenge the denial of such rights as the right to the effective assistance of counsel and *Brady*. Mr. Damas argued:

> Without a meaningful opportunity for discovery, virtually no defendant would be granted a new trial for violations of *Brady v. Maryland*, 373 U.S. 83 (1963).
>
> Without the requested records, Mr. Damas is denied the full panoply of armaments to challenge his conviction and sentence. *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). This denied Mr. Damas his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Mr. Damas is entitled to challenge the violations under the U.S. and Florida Constitutions. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988). Due to the denial of public records, Mr. Damas was denied a full and fair postconviction process, and accordingly, due process.

(IB-121). Mr. Damas cannot enforce the rights guaranteed to him by the Florida and United States Constitution if he is denied the very evidence needed to raise such claims.

The State's brief failed to acknowledge that meaningful access to the courts is impossible if Mr. Damas was denied the information necessary to plead all of the constitutional violations that occurred in his case. The State then argued that Mr. Damas was not denied equal protection. (AB-60-61). The State was correct in one of its assertions: ". . . Damas and the ordinary citizen seeking public records are not similarly situated." (AB-61). Mr. Damas was denied his right to equal protection in comparison to others who receive records to challenge their convictions and death sentences, not the straw citizen seeking records out of curiosity. Mr. Damas is different from the average citizen seeking records because the State seeks his execution. The importance of the records is at its apex because he seeks to overturn an unconstitutional conviction and death sentence in postconviction. Whatever procedures were required of him to receive these records are beside the point; the point is that he was denied the records that may have shown a violation of the Constitution. Along with Mr. Damas' incompetency throughout postconviction, and counsel's ineffectiveness, this cannot stand.

CONCLUSION AND RELIEF SOUGHT

This Court should reverse.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to opposing counsel by e-filing through the portal.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable word count and font requirements contained Florida Rule of Appellate Procedure Rule 9.045. The reply brief contains 6,927 words of the allotted 10,000 and uses Bookman Old Style 14-point font.

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