IN THE SUPREME COURT
OF THE STATE OF FLORIDA

GEORGE W. BROWN,

Appellant,

CASE NO. 02-1787

v.

STATE OF FLORIDA,

Appellee.
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APPELLANT GEORGE W. BROWN'S REPLY BRIEF

Lower Tribunal: The Circuit Court of the Tenth
Judicial Circuit, In and For Polk County, Florida

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STATEMENT OF THE CASE AND THE FACTS

Mr. Brown's disagreement with the facts as recited by the State will be discussed in the Argument portion of the instant presentation.

SUMMARY OF THE ARGUMENT

The State uses one-third of its presentation reciting the facts of the underlying case. Although it is patent that any death is a tragedy and that certain facts are of record in this case, the issues which this Court must decide can be summarized thusly: whether Mr. Brown received effective assistance of counsel at his trial and sentencing; whether he received due process at his *Huff* hearing and whether the entire post conviction process was tainted by Mr. Brown's absence at the evidentiary hearing's last day. The Record makes it clear that there were to be at least three witnesses when the evidentiary hearing reconvened: two medical experts and Mr. Brown. Instead there were no live witnesses. Three depositions were introduced.

The errors in this case began when the post conviction trial court, even after agreeing with the defense in substance on which issues should be heard at the evidentiary hearing, subsequently accepted, without analysis, the position of the State and denied an evidentiary hearing on virtually all of the issues presented by Mr. Brown.

When a post conviction trial court is making the decision on which issues

evidence will be heard, it must look not to the form of whether the general subject matter has been written about before, but the substance of whether the issue presented previously and the issue being presented in the post-trial motion speak to the same Constitutional concerns. Absent that analysis, the litigant's Constitutional rights may have been violated yet the courthouse door will be closed to him.

The prosecution of George Wallace Brown presents interrelated Constitutional violations; interrelated because we are speaking of one human being and one set of prosecution procedures.

As the evidence irrefutably established, and as conceded by the State, Mr. Brown suffers from severe physical, mental, and/or neurological problems which probably were precipitated by multiple incidents of head trauma–including Mr. Brown being shot in the head by his own father. Two of the most important of the effects of such illnesses are impulsiveness and an inability to handle frustration. A full 96% of individuals handle frustration *better than Mr. Brown; that is there are only 4% of people who handle frustration worse than he does.* (Answer Brief of Appellee at p. 5).

The gravity of his acknowledged and widely known physical and mental problems should have driven the case in a manner which would *have protected* Mr. Brown from his illness and resultant impulse and frustration-driven decisions. Instead,

the court and counsel seemed to ignore the reality of these profound medical conditions. The State's presentation ignores the true mental, emotional, neurological and other medical problems which "informed" any words spoken by Mr. Brown. It appears to take the position that his impulsiveness and his lack of ability to control his frustration are irrelevant. That is far from true: they drive all of his statements and actions.

In at least five life altering junctures in Mr. Brown's prosecution, his medical condition and its resultant manifestations were ignored to his detriment:

1. When he did not testify at trial because his counsel was afraid that Mr. Brown would lose his temper when being questioned by the prosecutor. He was silenced by his medical condition. (It is clear that Mr. Brown's entire trial defense strategy was structured around testifying in his own defense; his entire post conviction evidentiary hearing strategy was structured around his testifying in his own defense. He has never testified. It is hoped that he will soon have an opportunity to do so.
2. When counsel wavered over whether he should conduct a *full* investigation into Mr. Brown's background for sentencing purposes because Mr. Brown was the "Captain of the ship."
3. When Mr. Brown did not testify at his sentencing although his trial counsel

contemplated that Mr. Brown should *literally sing* for the jury, and later reconsidered.

4. When Mr. Brown, whose already compelling physical and mental states were exacerbated by the State action of withholding his required medications, did not testify on his own behalf at the 3.851evidentiary hearing although the Record is clear that he was the only person who *could* give certain evidence and his *counsel clearly intended for him to give that evidence.*

5. When Mr. Brown signed a document, prepared by his counsel, containing purported waiver language. This document was presented to him at Death Row, submitted to the Court one month after the first two days of the hearing and one month before the abbreviated third day on which no live testimony was presented.

ARGUMENT[1]

I. Summary denial in the Court below, without evidentiary hearing or legal argument, of issues six through twenty-one violates the instructions of *Huff V. State* which were made explicit by subsequent Amendment to Rule 3.850.

The State cites cases which stand for one of two general propositions:

1. Issues raised on direct appeal are procedurally barred, as well as its corollary: nothing raised on direct appeal can be raised to support an ineffective assistance of counsel claim, and

2. Issues which could have been raised on direct appeal are procedurally barred.

Mr. Brown is being forced to give up one Constitutional Right in order to pursue another such right. If the reasoning of the state's cited cases is to be followed[2] a litigant, situated as is Mr. Brown, is placed in a procedural box: if an issue is one appropriate for presentation on direct appeal he must present it

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[1] In compliance with Rule 9.210(d), the instant presentation is being limited to "argument in response and rebuttal to argument presented in the answer brief." Mr. Brown is attempting to respond to the most egregious or illogical arguments of the State, not *every* argument made or nuance implied. Mr. Brown waives no argument presented in his Initial Appellant's Brief. The stated issues are identical to those in the initial presentation.

[2] Mr. Brown does not suggest that the State misapprehends the status of this Court's decisional law.

on appeal or forego the issue. However, if the issue arose not only because of the trial court's error but also because of ineffective assistance of trial counsel, he is without remedy. He can raise *the trial court's error* on direct appeal but not his counsel's error. His Record is not developed–and he is probably still represented by the same counsel on appeal–so he *cannot raise the iac claim.*

Then he is faced with the preclusion of *ever raising the iac claim* ***because*** *he raised the trial court's error in his direct appeal–or should have done so.* Mr. Brown raised as Issue VII in his appeal from conviction and sentence:

> Whether the trial court erred when it failed to grant the motion to suppress statements made to Colorado authorities and subsequent statements to Colorado and Florida authorities after Miranda warnings.

In his initial presentation, Mr. Brown urged upon this Court his position that the trial court, when considering those issues upon which it would grant an evidentiary hearing, did not look beyond the labels placed upon his issues by the State. He suggested that the general principles enunciated must yield to the fact that the issue presentation in the post conviction hearing was different in focus and in substance

from the issue as presented on appeal or which could have been presented on appeal, e.g. the Fifth versus Sixth Amendment claim.

He stands on that presentation and would ask this Court to find that the fact that the Sixth Amendment is *now* at issue, Mr. Brown be permitted to have an evidentiary hearing on the precluded issues. The cases cited and their precedents for the past thirty years appear to merely restate without analysis the above general propositions. Mr. Brown invites a fresh look at the issue. This is appropriate for several reasons: no death litigant should be procedurally precluded from attacking deficiencies in his representation which rise to Sixth Amendment violations; no death litigant should be forced to forego one Constitutional right in order to take advantage of another such right; the case law of this Court does not adequately take into account the new deference given to State court factual findings and procedural rulings by the federal courts under the AEDPA.

The State cites to *Allen v. State*, 854 So.2d 1255 (Fla. 2003): "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Smith v. State*, 445 So.2d 323, 325 (Fla. 1983)." *Allen* continues, citing to *Wood v. State*, 531 So.2d 79,l82 (Fla. 1988), "Couching a [procedurally barred] claim in terms of ineffective assistance of counsel will not revive such a claim."

There is no question that these concepts are still the law of this State. *Gordon v. State*, 2003 Fla. LEXIS 2155 (December 18, 2003).

Mr. Brown respectfully suggests that, in his case where there can be no vindication of the claim of ineffectiveness other than in a post conviction motion, he be permitted an evidentiary hearing to establish his ineffective assistance of counsel claims.

The State also raises its claim that CCR counsel did not vigorously argue certain issues at the *Huff* [3] hearing, therefore those issues are waived, citing to, for instance, *Anderson v. State*, 822 So.2d 1261 (Fla. 2002).

It is respectfully suggested that Due Process under both the Florida and United States Constitutions requires that "waivers" of substantive rights be made knowingly, intelligently and voluntarily. Florida Rules of Criminal Procedure specifically provide that the defendant need not be present at a *Huff* hearing. Mr. Brown was not present. Although counsel can speak for the defendant on some non-substantive matters and bind him, for instance, on matters of scheduling, counsel has no authority to bind the defendant to, for instance, stipulations of fact, waiver of jury, entry of a guilty plea, waiver of presence or any other substantive right.

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[3] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

Here the State wishes for it to be conclusively and irrefutably established that Mr. Brown, through court appointed counsel, waived his right to be present in order to urge his counsel to proceed rather than "abandon" any of the issues upon which the petition was filed.

It is clear that Mr. Brown has the ability to enter into conversations with the Court and would have done so at the *Huff* hearing. For instance, to be discussed hereinbelow, when the litigants and the Court were considering continuing the evidentiary hearing, and all in the courtroom were ignoring Mr. Brown, his health problems, and his wishes, Mr. Brown directly addressed the trial court. R.V. 965 *et seq*.

Florida law contains no consistent, specific elements which *define the components of a waiver of a substantive or procedural right*. The State proposes that, although not present, Mr. Brown waived certain issues at the *Huff* hearing. The cost of this *presumption* to Mr. Brown may be his life and the benefit to the State and the system of absenting a death defendant from a *Huff* hearing is nil. He should have been present.

AEDPA's deference to the factual findings and procedural "defaults" of litigants in Death Penalty matters speaks to the necessity for this Court to revisit its procedures.

Wherefore, this matter should be remanded for a renewed *Huff* hearing *with Mr. Brown present to make decisions on what issues will be pursued by his counsel*, and for a full evidentiary hearing on all issues presented in the initial Motion, or in the lesser alternative on issues six through twenty-one.

II. The United States Supreme Court made clear[4] what this Court has taught for years–an attorney cannot ignore his responsibility to gather and evaluate mitigation evidence in a death case. This Court has gone farther: if a lawyer fails to investigate he cannot effectively advise the client on the impact of the mitigation, hence cannot assist in the decision to waive mitigation. Here, counsel knew of the severe physical and mental problems of his client, questioned the client's very competence to assist counsel at trial and attend court proceedings, yet failed to investigate for either the guilt or penalty phases because he believed that the defendant was the "captain of the ship." This representation defines ineffectiveness.

It is without question that Mr. Brown intended to and wished to testify at his post-conviction hearing. The Record is equally clear that he was deprived of

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[4] Mr. Brown has removed the words "mere days ago" as they no longer reflect the time period of the presentation.

medications which were medically necessary to control his many and varied medical and mental problems. This will be addressed more fully hereinbelow.

Rather than acknowledge that Mr. Brown's evidence was characterized by his counsel as relevant and important, the state utilizes dozens of pages of its Brief to attack the evidentiary position of this Record.[5] This Record is not *complete* because the testimony of at least three witnesses is missing: the two medical witnesses and Mr. Brown. Rather than recognize that there is a relationship between Mr. Brown's inability to present his evidence and the state of the Record, the state faults Mr. Brown for an incomplete evidentiary hearing. Mr. Brown wished to complete the Record but could not testify because of his health problems, which no one offered him assistance. His CCR lawyers did not present the promised medical evidence.

The trial court also acted without any input from Mr. Brown, without acknowledging its absence. It concluded that Mr. Doyel was credible on certain points *because it lacked the evidence to have been presented by Mr. Brown.*

One of the primary thrusts of Mr Brown's initial presentation was that his counsel did too little too late in preparation for mitigation. To say that Mr. Doyel

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[5] "While appellant criticizes attorney Doyel for his penalty phase representation, it is interesting to note the paucity of additional mitigating evidence presented at the hearing below by collateral counsel after months and years to review." (Answer Brief of Appellee, p. 49).

traveled to Colorado to prepare for trial or that he spent a total of 290 hours including the Winter Colorado trip (Answer Brief of Appellee at p. 48), does not speak to the virtually complete lack of preparation for the sentencing phase. Although the State gives no import to the decision of the United States Supreme Court, it is submitted that *Wiggins v. Smith*[6] is not so easily dismissed. Trial counsel *did not prepare*. He began a makeshift attempt to do so after the first day of trial and failed at that. He recycled Dr. Dee and contacted the mother who abandoned Mr. Brown rather than the family who raised him.

The State, apparently venting its frustration, commented that current counsel was complaining that Mr. Doyel did not bill enough. This is a red herring. Undersigned counsel is not objecting to the fact that Mr. Doyel billed too little–his finances are of no concern–but rather to the fact that he did nothing to prepare for the eventuality of a penalty phase in this his, first penalty phase.

The state's attachment of Mr. Doyel's bill, Exhibit A, reveals that Mr. Doyel met with his client for the first time on October 31, 1990; spoke with the client by telephone twice more before he met with the client at a hearing on November 16, 1990.

Counsel did spend one-half hour on November 26, 1990 writing to Dr. Dee and

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[6] ___U.S.___, 156 L.Ed.2d 471 (2003).

other doctors. This does not speak to penalty phase preparation. He spent some time on December 3, 1990 writing a letter to a psychologist. On the contrary the remainder of the first ten days of December was consumed by hours and hours of discussions of, preparation for, and travel to Denver.

Some portion of one hour was spent on January 18, 1991, discussing Dr. Dee with Mr. Doyel's staff. He spent another two hours reviewing a psychologist's report and a pathologist's report on February 2, 1991

He spent some part of .80 hours speaking with Mr. Brown's aunt and making a call to Mr. Brown's mother on February 4, 1991. On April 4, 1991, within the context of many other matters attended to by counsel, Mr. Doyel accepted a call from Mr. Brown's mother. Mr. Doyel also spent some undifferentiated time on the first day of trial, while preparing for and conducting his first death penalty trial, preparing for the penalty phase; more time the next day and on May 1–all as part and parcel of preparation for and conduct of a jury trial where a man's life was at stake. Logic would dictate that counsel's emphasis during the trial was confronting the fact witnesses and preparing for the summation rather than mitigation. There was no second chair.

It is respectfully submitted that *Wiggins* does not stand for the proposition that penalty phase preparation is to be sandwiched in on trial days as an afterthought as it

most surely was here. Also, as more fully discussed hereinbelow, the preparation for the trial and the sentencing were driven by counsel's belief that Mr. Brown was the Captain of the ship. Counsel was driven by his client, and did not permit his own professional expertise to intervene when Mr. Brown–an acknowledged impulsive personality who had virtually no equal in his inability to handle frustration–purportedly gave him instructions to do or not to do something. Of course, we do not have Mr. Brown's side of the story because he had to choose between testifying and receiving his medication.

For instance, Mr. Brown clearly had two distinct families, yet his counsel, speaking expansively, stated that he was restricted in his presentation by Mr. Brown because Mr. Brown did not want to involve his family. Trial counsel apparently saw no distinction between these two non-intersecting families. One side knew Mr. Brown and one side did not. One side could illuminate the jury from direct knowledge about Mr. Brown's tragic life and one could not. His loving stepmother Mrs. Stabler was not contacted. His step sister, Ms. Kay, was not contacted. Unfortunately because Mr. Brown's counsel did not recognize the distinction the only family member who he put on the stand was the one with probably the least knowledge–his mother who abandoned him to a cruel life under the hand of a cruel father.

Setting aside counsel's lack of knowledge of relevant mitigating evidence for a

moment, trial counsel would have us believe that he unfailingly bowed to his client's wishes.

There is a subtle shifting of emphasis which inures solely to the detriment of Mr. Brown. Trial counsel would have us believe that he pursued two distinct roads in order to fulfill his duty: he forged ahead and contacted Mr. Brown's mother in spite of the "Captain of the ship" analogy. The State submits that this fulfills the obligations of *Wiggins*. When counsel *failed to investigate for instance Mr. Brown's stepmother*, it is justified as the Captain having refused him permission. That apparently is submitted as also fulfilling the *Wiggins'* duty. If we were to follow that reasoning, there is no act and no failure to act which cannot be justified.

The State's explanation of counsel's inaction at the guilt phase was that utilizing a voluntary intoxication defense would have been inconsistent with Mr. Brown's "protests of innocence." (Answer Brief of Appellee, p. 39). The State continues that "counsel could hardly argue a position that would be short-circuited by appellant's expected testimony of innocence." *Id.* Mr. Brown never testified at trial and due to the withholding of his medication he did not testify at the evidentiary hearing. There is no Record evidence from Mr. Brown about any potential defenses.

The State points out the testimony of Mr. Doyel that Mr. Brown forbade a defense that perhaps the victim had been involved in homosexual activities, killed by

that partner *and therefore Mr. Brown* could not have been the killer. Since the time of death was unable to be precisely established and since the State's position was that Mr. Brown traveled from the area, this was a viable defense. No court has ever heard from Mr. Brown on this.

The State cites to a string of cases in which this Court has wrestled with the factual scenario where a client is obstreperous and uncooperative with his counsel. Here, the situation is different. Mr. Brown presented evidence that he was hospitalized as early as 1974 for mental problems, probably caused by physical blows, that he suffered from epilepsy, had an Organic Brain Syndrome, and suffered from alcoholism. Mr. Brown, in the one small chance he had to speak aloud, made it clear that he had to take medications, that those medications were essential to his very life and that they were being withheld.

There is no evidence that Mr. Brown was insistent, rude or adamant about his instructions to his counsel and counsel's young assistant. In fact, it is clear that when counsel really wished something, Mr. Brown acceded, e.g. introduction of Dr. Dee and Mrs. Lamey at sentencing in spite of the fact that Mr. Doyel was "ordered" not to contact family or to present evidence. Mr. Brown did not thwart his own defense, his defense counsel was deficient.

The State characterized certain failings of Mr. Doyel as "strategy." Fortunately,

that label does not automatically exonerate a lawyer from his professional duties. *Wiggins* requires that counsel fully investigate if only to fully inform his client's decision on how to proceed.

It is respectfully suggested that *Wiggins* requires much, much more at sentencing; due process requires much more at trial, and that, because of the failure to prepare for the guilt and penalty phases, this case must be remanded for retrial because Mr. Brown received ineffective assistance of counsel.

III. Death is different. The law is clear: Before the right to be present and to testify on one's own behalf–guaranteed by the Florida and United States Constitutions–can be knowingly, intelligently, and voluntarily waived, it is necessary for a citizen to understand the exact nature of what is being waived and the waiver's potential consequences. It is the duty of the court to assure itself, before accepting any waiver, that the defendant (1) is capable of and actually comprehends what is being waived; (2) knows the consequences of the waiver; and (3) being accurately advised of the nature and consequences of the waiver. It is only a clear, voluntary, knowing, and intelligent abandonment of the right which can pass Constitutional muster. The evidence here fails to establish a waiver.

Mr. Brown challenges a system through which he can "waive" his presence and his testimony without the court advising him in clear and uncertain terms what he is waiving and the consequences of that waiver.

This Court might not be able to discern from a reading of the State's Brief that there was no "waiver" hearing at all, merely discussion–initiated by Mr. Brown–and driven by the jail's failure to provide him with required medication. Although there were things said in this discussion, it is the conclusion which matters. The State would have this Court focus instead on words spoken in the middle of the discussion.

This is like the teenaged boy approaching the object of his affections and talking to her about what a nice outfit she had on. Then he asks her how her brother is. Then he asks if she would like to go out some time. She replies that she isn't sure. They talk about football and he asks again about going to a movie. She says that she probably would say yes but she isn't sure. They talk about school. He asks her if she would like to go out Friday night. She says NO. The fact that she once said that she wasn't sure and that she probably would say yes is nothing. It is the NO which counts.

Here, the State began by telling us that:

1. Mr. Brown announced that he would like to waive his presence at the next hearing.
2. Mr. Brown knew that he had the right to testify

3. Counsel wanted Mr. Brown to testify last.

4. Mr. Brown at one point said, “So, I’m not going to testify, period.”

5. The court “carefully explained” that Mr. Brown initially had to be there because the law required his presence.

6. Mr. Brown was said to have mentioned the “convenience” of his medicine at the prison–hardly a word used by Mr. Brown nor a concept conveyed by him.

7. Mr. Brown directly addressed the prosecutor, telling him that since his counsel said that he could not testify that day because they had other witnesses to put on, he was not making the trip again

8. Appellant stated that he wanted to put the matter in abeyance.

(Answer Brief of Appellee at p. 55-56).

The State then proceeded to announce that there was a written waiver which was filed one month later.

Much more happened and much more must be considered.

Firstly, the colloquy between Mr. Brown and the Court was had because the other participants were ignoring Mr. Brown and his urgent health needs. This was not a matter of “convenience” but one of Mr. Brown’s very health.

Secondly, the Court was well aware of the physical and mental health problems suffered by Mr. Brown.

Thirdly, the court was informed *directly by* Mr. Brown twice about his health concerns:

> THE DEFENDANT: Well, the situation being the way it is up in State prison and my medical conditions, it's like I didn't even get my medication yesterday morning or this morning. I need–I have to have my mediation. I'm only getting half of what I'm supposed to get to start with, and I'm not going to put myself in this thing so I'll get all messed up again and again and again, okay? So if they want me to testify, I would say they better get me up there today because if they don't, I'm leaving.

R.V 961-2.

Then there ensued a confusing exchange between Mr. Brown and the prosecutor which, itself, should have put the court on notice that this was not a knowing, intelligent, informed and voluntary waiver of anything. Mr. Brown said that he didn't want to testify if he had to return to court again. The prosecutor offered to have Mr. Brown testify that afternoon. Mr. Brown then bluntly told the prosecutor that he was "waiving." Immediately thereafter when the court asked Mr.

Brown: "You are not testifying?" R.V. 962. Mr. Brown's response made it clear that confusion reigned in the courtroom

> THE DEFENDANT: I am not coming back to testify. They say I can't testify because they got these other witnesses to put on, and they don't want me to testify until these other witnesses are put on, and I am saying *I am not making this trip again.*

R.V. 962. (Emphasis supplied).

The court answered an inquiry from the prosecutor who "summarized" that Mr. Brown did not want to return that afternoon and testify or to come back to another hearing. "He didn't say anything about not coming back this afternoon. All he's saying is he has, since he arrived here in Tampa, changed his mind about testifying for a couple of reasons, okay? He's entitled to change his mind if he wants to." R.V. 962. Of course the only reason was health. He wanted and needed to testify. His lawyer wanted him to testify. Why the trial court reached this conclusion is not apparent from the record.

At that point Mr. Brown's counsel was asked to comment. Mr. Brody said that Mr. Brown had "been pretty upset. I'm not sure they do have his medicine right over there." The Court replied: "We hear that all of the time." R.V. 963.

It was at this point that the "waiver" discussion was called to a halt by Mr. Brown himself who asked to have the matter put in abeyance to discuss the other

witnesses and to let him decide "then." R.V. 963.

Three things must be kept in mind: Mr. Brown traveled under the order of the court that he could not waive unless he was face-to-face with the court, so "then" must have meant when he returned to court; the witnesses who were the cause of the delay were two doctors, surely important witnesses; and no question exists as to the importance of Mr. Brown's testimony. "Just let me say there are certain things that only Mr. Brown can testify to, but he'll just have to come back again after–because the other witnesses are going to bring up other things that he may have to testify to. So I was going to put him on last and then discuss what he would testify to if he wants to at that time. But it's my counsel to him that he go last to avoid having to come down and testify twice." R. V. 958-959.

The State posits that the document purporting to be a waiver is dispositive. It is not complete and there is also no Record evidence that Mr. Brown was competent at the time of the purported waiver or that he in any way knew the ramifications of the waiver.

Interestingly, when one turns to the written waiver, certain things must be considered:

- It was typewritten, so obviously prepared ahead of time by counsel.
- It was signed by Mr. Brown who has been diagnosed with an extreme problem

with impulsiveness and an almost total inability to handle frustration one month after the hearing and yet there was no reference to his state of mind in the waiver or by counsel.

- It does not speak to anything but Mr. Brown's presence and testimony. It would seem logical that counsel would have informed Mr. Brown at this meeting that they had decided to virtually concede the hearing–he wasn't to testify, the two doctors and their testimony was abandoned, and they were going to introduce evidence that one of their own witnesses–Goodwin–was a liar. The waiver does not encompass these ramifications or others.
- There is absolutely no evidence that the court or counsel made any efforts to require the jail to properly administer medication when he returned to testify and it is in this context that Mr. Brown signed a pre-written, ineffective, incomplete and uninformed waiver.

Mr. Brown was confronted by a defense team who could not protect him or his health, a court who acknowledged the medication problem existed, but did not rectify it, and a decision not to pursue any medical evidence. Is there any wonder that Mr. Brown signed the document?

The waiver was filed one month prior to the continuation of the hearing. The court never writted Mr. Brown for the hearing so it apparently did not evaluate the

adequacy of the waiver it believed that the bare bones out-of-court words were sufficient. They were conclusory, not informative.

When they returned for the December 15 hearing, it was clear that no one gave any consideration to certain important areas:

- Why wasn't Mr. Brown writted to engage in the waiver colloquy where he could be advised of the ramification of his waiver?
- What was Mr. Brown's state of mind when he signed the waiver?
- Was the waiver a product of his lack of impulse control or frustration?
- Why did the words of the court that a waiver had to be done in person not carry through–certainly not because there had been a complete waiver hearing in court.
- Whether Mr. Brown had been informed–as he surely was not–that his medications would be taken care of if he returned to testify.

No, rather than address these issues, CCR advised that a "waiver" had been signed. As to the surrounding circumstances including Mr. Brown's health, the court was told: "We advised him of the ups and downs and pros and cons of that, and he did not want to come." R.VI, 967. The court made no further inquiry.

This entire process denigrated Mr. Brown as an individual, his health problems, his very life and was not conducted in such a manner as to bring honor to our system.

Next we turn to the procedural bar argument. It is *pro forma* for the State to argue that virtually everything is barred but this situation is without parallel.

The State first states that Mr. Brown did not complain of denial of his right to attend the remainder of the hearing. At what proceeding or through what mechanism could this have been accomplished?

The State tells us that Mr. Brown was adamant when he told the prosecutor that he didn't want to be present and testify. That is not accurate.

At the end of the colloquy with the court Mr. Brown asked to have the matter held in abeyance. The Court recognized this when it told Mr. Aguero, in answer to his question, that Mr. Brown did not say that he did not want to return to court in the afternoon but that Mr. Brown had totally changed his mind about testifying. The court appears to have misapprehended the thrust of the statements of Mr. Brown. He *did* want to testify, just not at a time which his lawyer told him was not the best for the case.

The proposition which the State would have this Court act upon is that when certain errors are not protected in a *trial court* record, they cannot be raised on direct appeal, citing, *inter alia,* to *Griffin v. State* 820 So.2d 906 (Fla. 2002). One must look to the *reason* for such a rule: a criminal defendant has the ability to file a collateral motion in which he can develop the facts which are absent from the appellate Record

in order that the Court may evaluate the claim.

The State gives short shrift to *Thibault v. State* __So.2d__, 28 Fla. L.Weekly S. 486 (Fla. 2003). Although *Thibault* was at a different stage of proceedings, there were multiple appearances of that defendant where the fact of his proceeding without a penalty phase jury was discussed and he voiced neither objection nor assent. This Court found that silence could not be a waiver. Here, there was at most a discussion which did not come to conclusion with the trial court. There was no decision. There were no admonitions. There was no advisement by the court of the nature of the right being waived and the consequences thereof. In fact, Mr. Brown was affirmatively told that he could *not* enter into a waiver unless he was before the court, yet the court accepted the document which is now being called a waiver.

The State raises other straw issues. It dwells on the fact that one can waive presence. Surely that is true. The focus of Mr. Brown is *what is required of the court when it elicits a waiver*? See, for instance, *Henry v. State*, 613 So.2d 429 (Fla. 1992). Certainly more than is contained in this Record.

To say that Mr. Brown knowingly waived his right to testify and to be present and to present medical evidence is to ignore the totality of the facts. To say that he waived the claim because he didn't raise it below ignores the procedural posture of the case at the time of the hearing.

The Order denying post conviction relief to Mr. Brown must be reversed and he must be permitted a new trial or in a lesser alternative a new opportunity to file and litigate a post conviction motion.

IV. The trial court denied due process to Mr. Brown under both the Constitutions of Florida and the United States and abused its discretion when it failed to permit a request for argument submitted by Mr. Brown's counsel.

The State is correct that CCR counsel made remarks at the December 15th hearing after an off-the-record discussion with the court. R.VI, 4. Perhaps it was the completeness of the argument which should have been at issue. No caselaw was cited. No questions were asked by the trial court when Mr. Brody spoke or thereafter. R.VI, 981. The trial court had just been given depositions of two detectives and one officer which in effect characterized defense witness Goodwin as a liar who lied about the two deponents and who had an affair with the lead detective investigating the case. The deponents spoke to the belief that the affair took place earlier than Ms. Goodwin and Mr. Ore admitted.

It was clear that no transcript of the two days of the hearing was either prepared or being referred to during these short remarks. Generalized argument was made without specific reference to exact words or exact exhibits.

Mr. Brown asserted as error the denial of his requests to hold the lower court's

ruling on the matter in abeyance until new CCR counsel could review and brief the issues– with the benefit of a transcript–and to permit supplemental oral argument. 1st Supp. Vol.VI., 934, 937. The State objected.

As was stated in the earlier presentation, no case was encountered where such supplemental pleading and argument was denied, particularly in a case where timeframes were not at issue and where the matter had been under submission for some time.

The refusal of a full briefing with appropriate record citation requires reversal of the trial court's finding and remand for a new evidentiary hearing.

V. It is undisputed that the conviction of Mr. Brown rested on no eyewitness nor forensic evidence, but solely on circumstantial evidence, to wit, Mr. Brown's connections with certain belongings of the victim, equally consistent with those items being a gift or taken. Where the evidence is purely circumstantial, any "tangible" evidence which can be touched and felt by the jury assumes disproportionate importance. Here, the gaps in the case were filled with the unauthenticated note, checks and handwriting expert testimony. The "tangible" evidence in this case was unreliable because of lack of evidentiary foundation, the mishandling of the exemplars, the tentativeness of

the expert opinion, and an invader in the defense camp.

The State tells us that sufficiency of the evidence is not before this Court. We agree *but* the State misapprehends the argument. Mr. Brown asserts that in a circumstantial case where there is little tangible evidence introduced at the trial, the evidence received has to be super-reliable. Here the evidence was not reliable and, as if in a plot from a novel, there was an invader in the defense camp. The court-paid-legal-assistant Ms. Goodwin, who at some juncture no later than right after trial, had an affair with the detective in the case, rendered the handwriting evidence totally inadmissible.[7]

Where did the checks in evidence come from and why was the lack of evidentiary foundation ignored? It is now conceded that Mr. Ore was not there when he swore he was, so he cannot tell us. Neither can he be the originator in a chain of custody. The handwriting exemplars had been taken by his now-deceased partner. The checks in evidence are not examples of Mr. Brown's signature. This issue is of

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[7] The ultimate confusion over the check evidence itself requires reversal in this case. The evidence given by Messrs. Doyel and Ore and Ms. Goodwin conflicted with each other and with logic. As a lawyer speaking to a court, now-Judge Doyel told the trial court that Ore was not present when exemplars were taken from Mr. Brown. R.VI.1038. Ore believes that he was present. *The state concedes that Ore was not there:* "Obviously, there was no obscuring the fact Ore was not present since Doyel told Judge Strickland that Ore was not present R. Vol. VI; DAR 1537)" (Answer Brief of Appellee, p. 71-2, n 19.

paramount importance. Mr. Brown's testimony was needed by his counsel on issues of importance on which only he could testify. It is reasonable to assume that the testimony of Mr. Brown would have been dispositive on this issue.

If Mr. Ore is now conceded by the State to have not been at the exemplar session, his testimony that he was present and active undermines his credibility and totally undermines the credibility of the evidence produced on the handwriting issue. Mr. Ore and Ms. Goodwin had an affair. The only contest about this admitted fact is whether it was during or after trial. Ms. Goodwin took exemplars from Mr. Brown herself and filed them with the court. Mr. Doyel couldn't explain it even though it was his receptionist who notarized Ms. Goodwin's signature and the language of the Goodwin Affidavit carefully tracked language in a letter from the prosecutor to Mr. Doyel. R.1006 The only person who could have and reasonably should have presented the truth–the checks in evidence were not signed by Mr. Brown--was Mr. Brown. He did not testify because no one could assure him that his health would be cared for and certainly no one advised him that this information would never be presented if he did not testify. For this reason alone, his purported waiver was unknowing and the court was presented with a body of evidence for which it had no support and upon which it can be presumed the jury relied.

There is no question but that the trial court took Mr. Brown's failure to present

evidence on this and many other points into account. For instance, the Order stated: "More importantly, as previously discussed, Mr. Brown never denied signing any of the things that he allegedly signed." (1st Supp. R. I, 115). He did not testify at trial because of fear that his mental and neurological illnesses would impair him. He did not testify at the hearing because he was not present.

The State attempted to ignore the handwriting issue, relying on the testimony of Mr. Doyel that he felt no reason to challenge the exemplars or the expert because the evidence corroborated Mr. Brown's conversations with him.

Firstly, this speaks once again to testimony which would have logically been addressed by Mr. Brown had his testimony taken place. Secondly, defense counsel has a duty to hold the State to its burden so this confusing area where the only documentary evidence was being introduced in a case with very thin evidence surely should have been addressed. To permit rank, and if believed, prejudicial hearsay to come into evidence is ineffective assistance of counsel.

The State proffers the question of whether a trial judge should base his decisions on facts and sworn testimony. Of course, he or she should, but only when the testimony is reliable and *when the defendant has a full and fair opportunity to counter it.* To repeat, Mr. Brown was not given his required medications. He has substantial illnesses which threaten his mental stability and his life. Neither the State

nor the Court offered him the one logical alternative when he voiced his desire to testify but for his medical maltreatment: we will assure you that the jailer will give you the proper medication or we will have you placed in a different institution. There was nothing more important than hearing the testimony of Mr. Brown. It was silenced.

VI. The order based its finding on incomplete evidence with regard to the book and song deal.

Once again, Mr. Brown is told by the trial court that his issue must fail because he presented no evidence that he and Mr. Doyel were negotiating for a book or song deal while Mr. Doyel was actively representing him. He did not testify at the evidentiary hearing because he was being denied his medication and no one made an effort to assure that he would receive them. When confronted with the lack of medicine issue, the court assured listeners that he heard that complaint a great deal. 1st Supp. I, 107.

The State cites to a string of cases which speak to the proposition that the trial court is in the better position to evaluate the credibility of witnesses. *Demps v. State*, 462 So.2d 1074 (Fla. 1984); *State v. Spaziano*, 692 So.2d 174 (Fla. 1997). As a general proposition, Mr. Brown agrees. *However*, this trial court had no ability to evaluate the credibility of *all of the relevant* individuals: Mr. Brown was not present.

On the legal issue, Mr. Brown persists in his reliance upon *Cuyler v. Sullivan*, 446 U.S. 668 (1984), and invites this Court to look to the reasoning and holding of *Beets v.*

Scott, 65 F.3d 1258 (5th Cir. 1995)(en banc).

Because of the conflict of interest between trial counsel and his client, Mr. Brown's motion should have been granted. Particularly in light of the absence of Mr. Brown at the hearing and his inability to testify, Mr. Brown asks this Court to reverse the Order of the trial court and grant him leave to file and to litigate a new post conviction motion.