IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1904
Lower Tribunal No. 95-5326-CF-A

PRESSLEY BERNARD ALSTON,

Petitioner, *Pro-Se*,

vs.

STATE OF FLORIDA,

Respondent.

AMENDED SUPPLEMENTAL INITIAL BRIEF OF PETITIONER'S FORMER COUNSEL TO PETITIONER'S *PRO-SE* PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

On July 1, 2002, the Petitioner, Pressley Bernard Alston, filed his *pro-se* Petition for Writ of Mandamus which this Court has thereafter treated as a Petition for Writ of Habeas Corpus. At the time of the filing of the petition and until June 12, 2003, Pressley Bernard Alston was represented by the Office of the Capital Collateral Regional Counsel-Middle Region.

By order of this Court dated October 15, 2003, the Office of the Capital Collateral Regional Counsel-Middle Region (CCRC-M) was requested to brief this Court regarding (1) the Fourth Judicial Circuit's determination, by an order dated March 27, 2003, that Petitioner was competent to proceed with his collateral appeals and (2) the Fourth Judicial Circuit's determination, by an order dated June 12, 2003, that Petitioner's decision to waive collateral counsel and collateral proceedings was free, voluntary, and knowing.

The Court's order of November 19, 2003, made clear that the briefs requested in this proceeding are not subject to Fla.R.App.P. 9.100(g) but are, rather, subject to Fla.R.App.P. 9.210(b). Consequently, this amended supplemental initial brief

is being filed at this time.

Under the circumstances, there is no complete postconviction record on appeal before this Court. Therefore, citations to the postconviction record will be self-explanatory or otherwise explained herein. The limited citations to the trial proceedings and its record on appeal will be referred to as "R. ___" followed by the appropriate page numbers. Counsel filed a separate motion to supplement the record before the Court simultaneously with the initial brief.

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STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY

The Petitioner was charged by way of Indictment for the charges of Murder in the First Degree, Kidnaping and Robbery. After a jury trial in the Circuit Court of Duval County, before the Honorable Aaron K. Bowden, Judge presiding, the jury returned verdicts of guilty on all counts. (R. 1396) After hearing matters in aggravation and mitigation, argument of counsel and being instructed on the law, the jury recommended a sentence of death by a majority vote of 9 to 3. (R. 1760-1761)

After hearing arguments of counsel, and weighing the aggravating and mitigating circumstances, the Court followed the jury's recommendation and sentenced the Petitioner to death and two consecutive life sentences on the remaining counts. (R. 1814, R. C511-520).

The Petitioner appealed directly to this Court which affirmed the Petitioner's conviction and sentence in *Alston v. State*, 723 So.2d 148 (1998). The Petitioner's Motion for Rehearing was denied on December 17, 1998. The mandate was issued on January 25, 1999, and the Petitioner did not seek review by the Supreme Court of the United States.

The postconviction record reflects, in part, the following. Initially, the Office of the Capital Collateral Regional Counsel-Northern Region (CCRC-N), represented the Petitioner. That office filed a Notice of Appearance on May 4, 1999, and on June 10, 1999, CCRC-N filed a Certification of Conflict of Interest. The Middle Region of CCRC was appointed to represent the Petitioner by order dated June 14, 1999. By a letter to the circuit court dated August 4, 1999, the Petitioner expressed a desire to represent himself and made reference to previously filed *pro-se* pleadings seeking to waive collateral proceedings.

An unverified "shell" Motion to Vacate Judgment was filed under Fla.R.Crim.P. 3.850 on November 5, 1999. Motions to withdraw were filed by CCRC-M in November of 1999 and February 8, 2000. Both were denied.

This Court issued an Acknowledgment of New Case, under number SC00-225 on February 7, 2000.

A motion seeking a competency determination was filed by

CCRC-M pursuant to *Carter v. State*, 706 So.2d 873 (Fla. 1997), on July 21, 2000. The court conducted a hearing on October 20, 2000, and issued its Order for Competency Evaluation on November 27, 2000. The court found the petitioner incompetent to proceed with collateral appeals by order dated October 22, 2001.

This Court issued an Acknowledgment of New Case, under number SC02-359 on February 22, 2002.

On July 1, 2002, this Court opened the present proceedings as a new case under number SC02-1904.

Following a hearing on March 20, 2003, the lower court found the Petitioner competent to proceed by order dated March 27, 2003. Following a hearing on June 6, 2003, the court discharged collateral counsel and dismissed postconviction proceedings by order dated June 12, 2003. Briefings were requested by this Court by order dated October 15, 2003.

The Petitioner remains a prisoner in custody at Union Correctional Institute under a sentence by a Court established by the Laws of Florida within the meaning of Fla.R.Crim.P. 3.850(a) and §924.066, Florida Statutes.

FACTS AT TRIAL

As summarized by this Court in its opinion on the direct appeal of the Petitioner's convictions and sentences, the following were among the facts adduced at trial:

The victim in this case, James Lee Coon, was last seen January 22, 1995, while visiting his grandmother at the University Medical Center in Jacksonville. Coon's red Honda Civic was discovered the next day abandoned behind a convenience store. A missing persons report was filed shortly thereafter.

At trial, Gwenetta Faye McIntyre testified that on January 19, 1995, appellant was living at her home when they had a disagreement and she left town. On January 23, 1995, the day after Coon's disappearance, McIntyre returned to Jacksonville. On that day, McIntyre and three of her children were in her gray Monte Carlo parked at a convenience store when appellant and Dee Ellison, appellant's half-brother, drove up in a red Honda Civic. They parked the Honda perpendicular to the Monte Carlo, blocking McIntyre's exit. Appellant got out of the Honda and approached McIntyre, who reacted by driving her car forward and backward into the store and into the Honda. Appellant took McIntyre's keys from the ignition. He then went back to the Honda and drove it around to the back of the convenience store, where he abandoned it. Appellant and Ellison then got into the Monte Carlo, and everyone left the scene together. At that time, McIntyre asked appellant about the Honda. He replied that it was stolen. McIntyre also noticed that appellant was carrying her .32 caliber revolver, which she kept at her home.

Despite their previous differences and the incident at the convenience store, appellant continued to live with McIntyre. Soon thereafter, McIntyre began seeing news broadcasts and reading news reports about Coon's disappearance and the fact that Coon drove a red Honda Civic, which was found abandoned behind a convenience store. McIntyre became suspicious of appellant. When she confronted him with her suspicions, he suggested that someone was trying to set him up. McIntyre was also concerned because the news stories contained eyewitness accounts of the red Honda being rammed by a gray Monte Carlo in the parking lot of the same convenience store behind which the Honda was found. Appellant suggested painting the Monte Carlo a different color, which appellant did on or about February 19, 1995.

McIntyre testified that she became more suspicious when appellant asked her how long it would take for a body to decompose and how long it would take for a fingerprint to evaporate from a bullet. McIntyre confided her suspicions in her minister, who eventually put her in touch with the Jacksonville Sheriff's Office. On May 25, 1995, McIntyre went to the sheriff's office to talk with several detectives, including Detectives Baxter and Roberts. After the interview with McIntyre, police secured McIntyre's consent to search her home. Police retrieved, among other things, McIntyre's .32 caliber revolver from her home.

Based on the information that McIntyre gave to detectives and the evidence gathered from her home, police arrested Ellison and later on the same day arrested appellant. At the police station, appellant was read his rights, and he signed a constitutional rights waiver form. After detectives told appellant that they knew about the incident at the convenience store, that they had the murder weapon, and that they had Ellison in custody, appellant confessed, both orally and in writing, to his involvement in the crime.

In his written confession, appellant stated that during the week preceding Coon's disappearance, appellant had been depressed due to employment and relationship problems. He and Ellison planned to commit a robbery on Saturday, January 21, 1995, but they did not find anyone to rob. On Sunday, January 22, 1995, they saw Coon leave the hospital in his red Honda Civic. Appellant stated that he and Ellison made eye contact with Coon, and Coon "pulled up to them." Appellant and Ellison got into Coon's car. Ellison rode in the front seat and appellant in the back. After Coon drove a short distance, Ellison pointed a revolver at Coon and took Coon's watch. Appellant told Coon to continue driving. They rode out to Heckscher Drive and stopped. Ellison then took Coon's wallet, and he and appellant split the cash found inside, which totaled between $80 and $100. As appellant searched Coon's car, some people came up, so appellant, Dee, and Coon drove away. They drove to another location, where appellant and Ellison shot

Coon to death.

Following the confession, appellant agreed to show detectives the location of Coon's body. Appellant directed Detectives Baxter, Roberts, and Hinson, along with uniformed police, to a remote, densely wooded location on Cedar Point Road. Detective Baxter testified that a continuous drive from the University Medical Center to where Coon's body was found, a distance of approximately twenty miles, takes twenty-five to thirty minutes. During the ensuing search, Detective Hinson asked appellant what happened when appellant took Coon into the woods. Appellant replied, "We had robbed somebody and taken him in (the) woods, and I shot him twice in the head." Because of darkness and the thickness of the brush, police were unable to find Coon's body, and they terminated the search for the remainder of that evening.

On the way back to the police station, at appellant's request, he was taken to his mother's house. When Detective Baxter mentioned that appellant was arrested regarding the Coon investigation, appellant's mother asked appellant, "Did you kill him?" Appellant replied, "Yeah, momma." The detectives then took appellant back to the police station. By then, it was 3:30 on the morning of May 26, 1995. At that time, the detectives had to walk appellant to the jail, which is across the street from the police station. A police information officer alerted the media that a suspect in the Coon murder was about to be "walked over" to the jail. During the "walk over," which was recorded on videotape by a television news reporter, appellant made several inculpatory remarks in response to questions from reporters.

Later during the morning of May 26, 1995, Detectives Baxter and Hinson, with uniformed officers, took appellant back to the wooded area and resumed their search for Coon's body. At this time, appellant was again advised of his constitutional rights. Appellant waived his rights and directed the detectives to the area that was searched the previous day. The body was discovered within approximately ten

minutes of the group's return to the area.

The remains of Coon were skeletal. The skull was apparently moved from the rest of the skeleton by animals. Three bullets were recovered from the scene. One was found in the victim's skull. One was in the dirt where the skull would have been had it not been moved. Another was inside the victim's shirt near his pocket. Using dental records, a medical expert positively identified the remains as those of James Coon. The expert also testified that the cause of death was three gunshot wounds, two to the head and one to the torso. The expert stated that he deduced there was a wound to the torso from the bullet hole in the shirt. He explained that the absence of any flesh or soft tissue made it impossible to prove that the bullet found inside the shirt had penetrated the torso. The expert further testified that Coon was likely lying on the ground when shot in the head.

A firearm expert testified that the bullets recovered at the scene were .32 caliber, which was the same caliber as the weapon retrieved from McIntyre's home. This expert further testified that, in his opinion, there was a ninety-nine percent probability that the bullet found in the victim's skull came from McIntyre's revolver. However, because the bullet found in the dirt and the bullet found inside Coon's shirt had been exposed for such a long period, a positive link between those two bullets and McIntyre's revolver was impossible.

Later during the day that Coon's body was found, appellant contacted Detective Baxter from the jail and asked the detective to meet with him. Appellant did not make a written statement at this meeting. According to Detective Baxter's testimony, appellant stated that he did not kill Coon but that Ellison and someone named Kurt killed Coon. Appellant stated the he initially placed the blame on himself because he wanted to be "the good guy." Detective Baxter told appellant that he did not believe him and began to leave. Appellant asked Detective Baxter to stay and told him that he lied about Kurt because he heard that Ellison was placing blame on him. Appellant then stated that he shot Coon twice in the head and that

Ellison shot him once in the body.

> On June 1, 1995, appellant requested that Detectives Baxter and Roberts come to the jail. The detectives took appellant to the homicide interrogation room. Appellant was advised of his rights. Appellant then signed a constitutional rights form and gave a second written statement. In this statement, appellant stated that Ellison and Kurt initially kidnaped Coon during a robbery. Ellison sought out appellant to ask him what to do with Coon, who had been placed in the trunk of his own car. Appellant stated that when he opened the trunk, Coon was crying and he begged, "Oh, Jesus, Oh Jesus, don't let anything happen, I want to finish college." Appellant said he told Ellison that "the boy will have to be dealt with, meaning kill[ed]," because he could identify them. Kurt left and never came back. Thereafter, appellant and Ellison drove to Cedar Point Road. Once all three were out of the car, appellant gave Ellison the gun and told him, "You know what's got to be done." Ellison took the weapon, walked Coon into the woods, and shot Coon once. Appellant stated that he then walked into the brush and, wanting to ensure death, shot Coon, who was lying face down on the ground. Appellant stated that Ellison also fired another round.
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> Police eventually located the person appellant had called Kurt. After interrogating Kurt, police concluded he was not involved in Coon's murder. *Alston v. State*, 723 So.2d 148, 150-53 (Fla. 1998)(footnotes omitted).

Also reviewed by this Court on direct appeal was an aspect of the trial which appears relevant to current issues concerning the Petitioner's mental health. This Court noted, in part, that:

> In his third issue, appellant alleges that the trial court erred in denying a defense request to inform the jury that he was taking psychotropic medication. Prior to trial, defense counsel filed a

> motion pursuant to Florida Rule of Criminal Procedure 3.210 suggesting that appellant was incompetent to proceed at trial. The motion alleged that appellant was exhibiting inappropriate behavior; that appellant was extremely depressed; and that appellant was not understanding his own counsel's advice, in that appellant continued to believe that the police were his friends. Based upon these allegations, the trial court ordered appellant to be examined by two medical mental health experts. The report of the experts declared that appellant was competent to proceed to trial. Based on this report, the trial court adjudicated appellant competent to proceed to trial. *Alston*, 723 So.2d at 157.

This Court found no error in the refusal to give the requested jury instruction because the request and evidence merely showed that appellant was on psychotropic medication, not that he needed the medication to proceed at trial, and that such medication did not adversely affect the Petitioner during trial. *Alston*, 723 So.2d at 158.

FACTS AT THE COMPETENCY HEARING

The March 20, 2003, competency hearing began with an introduction of the counsel and parties with the State Attorney informing the court that the victim's mother was present. (March 20, 2003, hearing transcript, p. 5; hereafter, "TR1"). The court soon ruled that "... Mr. Alston will be permitted to address the Court if he deems it appropriate going to that issue [whether the Petitioner continues to be incompetent] and that issue alone. I am not going to permit Mr. Alston to use this as

a forum to vent his grievances as he expresses almost daily in his communications to the Court." (TR1, p. 7).

Counsel for the Petitioner reported to the court about the parties' stipulation to use the panel experts' written reports so as to expedite the oral examination of the witnesses. (TR1, p. 8). The court was also alerted to the possible issue of ordering specific treatment once and if continuing incompetency was found. (TR1, p. 9).

A panel expert, Dr. Umesh Mhatre, a psychiatrist, was called to the stand as the first witness. In utilizing his July 19, 2002, report to the court, he recalled that the Petitioner began the subject evaluation with a statement to the effect that "he wanted to either [let] the courts to go ahead and let him be executed or be set free." (TR1, p. 13). Dr. Mhatre further explained that the Petitioner "was very rational, very coherent, he was pretty focused on the conversation during the interview, did not show any hyperactivity, any pressured speech, any flight of ideas." (TR1, p. 14). The doctor further explained that "... only toward the end of the interview he began to come up with lots of talk that could appear outwardly as delusional talks. And I dismissed it as probably clear malingering because his actions and his talks were very inconsistent." The interview that day lasted "probably more" than an hour. (TR1,

p. 14).

In reviewing his copies of certain medical records from the prison, Dr. Mhatre later explained that he "wanted to see if there is anywhere in there some concerns for some of his delusional talks and I wanted to review those." (TR1, p. 17). In responding to a question concerning his reported reference to the Petitioner refusing to take medication, the doctor explained that:

> I think in one record there might be some report that he has refused to take it. The reason I said I find it interesting is that any time a person is suffering from a mental illness most of the time they want to get better. It's not unusual for people to say 'I don't want the medicine,' but every time they do that I do find it's of interest, especially in a person who is using his mental illness to delay his execution. (TR1, p. 18).

Dr. Mhatre eventually clarified his understanding by stating that: "Well, I don't know whether they have refused to prescribe medication because he refused it but all I know is that he was not prescribed any medicine and he had refused to take it." (TR1, pp. 21-22).

Later questioning of the panel expert referred to the Petitioner talking to the doctor more about the Lonnie Miller case than his own and of the statements concerning the Petitioner finding a cure for AIDS and breast cancer. (TR1, p. 24). Dr. Mhatre responded by explaining his views that the

Petitioner's delusional statements did not fit into any known mental illness, such as Bipolar Manic Disorder or Bipolar Affective Disorder, because of the lack of other symptoms. He noted further, as before, that "his actions and words were not matching at all." (TR1, pp. 25-26).

In contrasting the Bipolar Affective Disorder diagnosis of Dr. Myers with his own observations, Dr. Mhatre indicated that he never saw evidence that would support that diagnosis. (TR1, p. 29). In particular, Dr. Mhatre explained that while the Petitioner showed him some delusions, there was "[n]othing else to go with the delusions. It's quite possible that when I saw him that he was not either in a manic phase or in a depressed phase, that's possible. But he was giving me only some symptoms of delusion with nothing else. That would be very difficult ... I cannot see why a person would simply produce delusion of grandiose yet not show any elated mood, no pressured speech, flight of ideas, physical hyperactivity to go with it. And that's the serious discrepancy which led me to believe at least at the time I was examining him that he did not suffer from Bipolar Affective Disorder ... Doctor Myers will have to account for his own findings, but quite [sic] possible that his findings are different than mine in a true case of Bipolar Affective Disorder." (TR1, pp. 30-31).

On cross examination, Dr. Mhatre explained that the Petitioner "very clearly, very rationally" understood that his competency was in question and that he wanted to dismiss his attorneys and appeals as a way to end his "agony" about his collateral case. (TR1, p. 35). Dr. Mhatre found it "highly unusual" for the Petitioner to carry on a conversation in a "very rational, coherent" way and then suddenly become delusional at the end of the interview with an "affect [that] really changed." (TR1, p. 36).

Further, Dr. Mhatre testified that he found it interesting that the Petitioner knows so much about the law, showing a "very high level of functioning, very coherent and rational thinking" (TR1 p. 37) and having "full control over his behavior" even while expressing delusions (TR1, p. 41). Dr. Mhatre also noted that he found it unusual for the Petitioner to describe different delusions to different examiners or others (TR1, p. 38). These manifestations led Dr. Mhatre to believe that the Petitioner was not delusional – instead, the doctor said "... I don't think these are delusions, I think he's faking it and he's making it up." (TR1, p. 41). Dr. Mhatre, in responding to a question about Dr. Myers' finding of hypomania, further indicated that the Petitioner could be delusional and still be

competent under the legal criteria for competency. (TR1, p. 44).

The next expert called to testify was Dr. Wade C. Myers, a psychiatrist who, as with Dr. Mhatre, was a member of the court-appointed panel. Dr. Myers interviewed the Petitioner for two hours for the subject evaluation. (TR1, p. 59). He explained that his diagnosis was Bipolar Affective Disorder with a hypomanic episode with some psychotic features. (TR1, p. 60).

Dr. Myers testified that his two evaluations in 2001 and 2002 were "very consistent;" namely:

> ... [h]e had signs of irritability; he had low frustration tolerance; he had increased volume of speech; some times it was pressure, meaning very hard to interrupt him; he had inflated sense of self worth; there was inappropriate facial expressions, he some times laughed at things that were very serious; he at times was hyper-religiosity or excessively religious; some times he would express paranoia, and when I say "some times" throughout both the interviews a theme of paranoia would come up; also he had disturbance in his thought process or how he formed thoughts in your mind in that there was a poverty of content to those thoughts, there was a superficialness to it where it was hard to understand what he was saying." (TR1, pp. 60-61).

Dr. Myers further explained that persons with Bipolar Affective Disorder "tend to fluctuate between episodes of very high elevated mood and also with periods of depression ... they will cycle up and own." (TR1, p. 62). As to comparing his observations with those of Dr. Mhatre's, Dr. Myers said:

> I think in some ways Doctor Mhatre and myself are seeing the same patient. Doctor Mhatre did bring up clinical material that would suggest grandiosity and also some material that would suggest paranoia. And Doctor Mhatre did mention toward the end of the interview that Mr. Alston became excitable which to me was consistent with how he was a good deal of the time with us. But Doctor Mhatre did mention the word excitable, so I think there some overlap.
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> Doctor Mhatre also mentioned malingering and there seemed to be some element of malingering of Mr. Alston, but I did not think that was [the] primary explanation for his symptoms. And somebody with bipolar or hypomanic episode or even somebody psychotic can malinger. Psychosis and malingering are not mutually exclusive, nor are bipolar and malingering. (TR1, p. 63).

The Petitioner's occasional inappropriate smiles, smirks and laughing were seen as based on several motivations; namely, "partly due to hypomania, partly due to malingering and [partly] for fun." (TR1, p. 65). Dr. Myers also recognized that the trial record for the Petitioner reflected treatment and medication for Bipolar Disorder with DOC records showing the prescription of an antidepressant within the last several years. (TR1, pp. 66-67). The doctor referred to his recommended treatment of the Petitioner with medication (TR1, p. 67) and to the fact that Bipolar Affective Disorder is "almost always a chronic illness." (TR1, p. 68). He made reference to the Petitioner having persecutory ideations, signs of depression and a thinking disorder being documented back to 1994. (TR1, p. 68).

As to the competency criteria, Dr. Myers testified that he found the Petitioner would be unable to consult with his attorneys with a reasonable degree of rational understanding and that the Petitioner would not be able to testify relevantly. (TR1, pp. 70-71). Dr. Myers concluded direct examination by stating that the Petitioner's "appropriate" behavior in court during the hearing was "not inconsistent for him to be in a state of hypomania .. This is how he appeared during our evaluations of him, but what you see when you begin to talk to him is an increased amount of mental or psychic energy ..." (TR1, p. 75).

On cross examination, Dr. Myers again outlined his observations of the Petitioner's hypomania symptoms and explained their relationship to the criteria in the Diagnostic Statistical Manual (TR1, p. 77); related his expectations that non-treatment would lead the petitioner back down to a state of depression (TR1, p. 79); and stated that the Petitioner's irritability was marked with "intensity" and "persistence" (TR1, p. 80). He further testified that the Petitioner's additional signs of Antisocial Personality Disorder and paranoia would tend to explain the Petitioner's aversion to taking medication (TR1, p. 81); that absent an unlikely cycle back to a more normal period (TR1, p. 81), medication could stabilize the Petitioner

within two or three months (TR1, p. 82); and that the Petitioner would not qualify for involuntary treatment (TR1, p. 83).

The next panel member to testify was Dr. Robert Berland, a psychologist. He reported spending more than three hours with the Petitioner for the current interview and psychological testing. (TR1, p. 89). Dr. Berland gave his opinion that the Petitioner suffers from a chronic psychotic disturbance, that the symptoms he observed were similar to those seen by Dr. Myers, and that there was "great consistency" in the Petitioner's delusions as shown by the Petitioner's writings, the DOC reports and the two evaluations he conducted as a panel member. (TR1, p. 89).

Dr. Berland described his opinion that the Petitioner was not faking his mental illness, made reference to his previous experience with malingerers at the State Hospital and said that in 24 years he had "never seen anyone who could successfully fake the thought process disturbance that this defendant shows ..." (TR1, p. 90). He found the Petitioner to be "agitated, restless, pressured [but] not hyperactive ..." which amounted to evidence of a "significant mood disturbance." (TR1, p.91).

Dr. Berland described the MMPI 2 testing and indicated that it showed the Petitioner "was trying in a very primitive and psychotic way to hide his mental illness because he did not want

to be considered as mentally ill." (TR1, p. 94). There were raw scores on several scales that showed evidence of symptoms involving mental illness, paranoid delusional thinking, schizophrenia and mania, all leading the expert to term the Petitioner as "very disturbed." (TR1, p. 95). The raw scores, furthermore, indicated that the Petitioner was in the "chronic range" of being psychotic – meaning for at least two years and that "he['s] sort of used to it." (TR1, p. 96). This testing, both currently and previously under the panel orders, showed "no evidence of faking or exaggeration, quite the contrary, there is – there are also several indicators including L in both ones that indicate he was trying to minimize his problems and was still unsuccessful in hiding them because of that ... leakage." (TR1, p. 96). Dr. Berland subsequently explained that:

> ... [the Petitioner's] condition is consistent in September of 2002 with what I saw in April of 2001. Basically the same severely mentally ill person who is making concerted effort to look normal. The consistency between the material that I got from him and the delusions that you see in all of his writings and his reports to DOC staff would also, to me, be another indicator you could add to the list of the genuineness of his mental illness. But besides that, the testing and the interviews are the most significant data that I have. (TR1, pp. 97-98).

As to analyzing expressed delusions in terms of genuineness or faking, Dr. Berland explained that "... the number of delusions that a defendant expresses is limited by the kinds of

questions you ask and the kind of setting you create in terms of your willingness to listen to their own thinking as opposed to controlling the direction and content of the interview ... so there will be differences among experts depending on that interview style difference." (TR1, pp. 99-100). While it is "kind of a difficult thing" to determine the genuineness of delusions, Dr. Berland said he found the Petitioner's expressions to be "consistent, spontaneous, and genuine in my opinion." (TR1, p.100).

In describing Bipolar Disorder as "primarily inherited," Dr. Berland also indicated that the Petitioner's thought disorder could be consistent with brain damage. (TR1, pp. 101-02). Additionally, Dr. Berland referred to the "contradictory" notions that the Petitioner is malingering while at the same time indicating he wants to dismiss collateral counsel and appeals: "... if you take his statements at face value, that he doesn't want to prolong these proceedings, then it makes it far less likely that he would be malingering so you just have two concepts that are fairly incompatible with one another." (TR1, p. 102). In explaining the Petitioner's demeanor in the courtroom during the hearing and whenever Dr. Mhatre saw him, Dr. Berland said that the behavior was not inconsistent with someone who is manic and added that "I can only say that if I

were able to question him myself in front of you and get him going on his delusional beliefs, you would see that mania blossom." (TR1, p. 103). He also indicated that mentally ill and delusional people can also be manipulative so that the two are "not mutually incompatible." (TR1, p. 104).

Dr. Berland then pointed to the volume of the Petitioner's *pro-se* writings as "symptomatic of his manic disturbance" (TR1, p. 104) due to the evidence of "thinking disturbance" contained in his writings. (TR1, p. 105).

As to finding that the Petitioner remains incompetent, his opinions led Dr. Berland to again conclude that the Petitioner is "severely compromised in rational appreciation of [these] proceedings" and that he did not "believe that he can consult with his attorney with a reasonable degree of rational understanding." The transcript reflects that the Petitioner immediately interjected by stating "[B]ecause of the conflict, sir." (TR1, p. 106).

The direct examination of Dr. Berland was concluded with a discussion likely relating in part to Dr. Mhatre's earlier testimony. Dr. Berland disagreed that "if someone were truly mentally ill they would want to get better" because he felt that the majority of mentally ill people "don't believe" they need their medication due to "not believing that they're mentally

ill." (TR1, pp. 106-07). As to the Petitioner, Dr. Berland said that "... the basic internal biological process is going to be there and the adverse affect that it has, particularly on this person's thinking, is going to be significant if he's not medicated consistently." (TR1, p. 109).

On cross examination, Dr. Berland acknowledged that his reports and testimony did not set forth an actual diagnosis. (TR1, p. 109). When asked to provide a diagnosis, Dr. Berland stated, in sum, that the Petitioner "is psychotic that subsumes manic depressive or Bipolar Disorder[,] schizophrenia, schizo affective disorder" (TR1, p. 110) with the later the "best diagnosis." (TR1, p. 111).

The State followed with questioning about Dr. Berland's references to the Petitioner's hallucinations. Dr. Berland responded by noting that the Petitioner's statements regarding auditory and visual hallucinations were left without further inquiry or elaboration because "it was tangential to what I was doing" and due to the testing providing "objective evidence" that the Petitioner was hallucinating "around the time" of the evaluation (TR1, p. 113) with the second evaluation showing Petitioner "not as severely disturbed." (TR1, pp. 113-14).

Dr. Berland subsequently explained that it is always a "difficult question" to opine about the length of time before

competency could be restored with treatment, including medically prescribed medication but surmised that the Petitioner could be "stabilized within about three months." (TR1, pp. 118-19). He acknowledged his opinion that the Petitioner met the criteria for involuntary hospitalization and noted that long term injections could solve the prospect of forced medication. (TR1, p. 120).

In response to questioning about the disparities between his opinions and those of the DOC personnel, Dr. Berland hypothesized that huge case loads and limited time for individual evaluations could explain the differences. (TR1, pp. 121-22; 123). He added that it would be a mistake to "think that because someone can talk with you in a brief conversation coherently that they're not mentally ill..." (TR1, p. 123). The expert provided one example of DOC records reflecting "bizarre behavior" by the Petitioner – that of color referencing fear of the Petitioner's life – when cross examination concluded. (TR1, p. 124). Redirect examination was limited to a discussion of possible DOC hospital placements with Dr. Berland noting that a clinical setting was more likely best for any treatment. (TR1, p. 125).

The next witness was Lisa Wiley, the Department of Corrections Psychological Specialist who prepared and filed the

bimonthly reports as required in the court's October 22, 2001, order. (TR1, pp. 127-28). She acknowledged, upon questioning, that there had been no medications prescribed by DOC doctors since the time of that order (TR1, p. 128) and that the records reflected medication previously being prescribed to the Petitioner back in 1998 and 2000. (TR1, pp. 1128-30).

Ms. Wiley testified that she observes all the inmates on Death Row every week but without interviews. As for the Petitioner, Ms. Wiley had been scheduling one interview per month for the past several years except for daily visits during his brief inpatient stays around 2000. (TR1, p. 131). She was aware of only one reason for the Petitioner's one-year plus placement in Disciplinary Confinement – that being "mail violations" and "probably disrespecting officials." (TR1, p. 131).

Ms. Wiley explained that her reports would and did note any of her observations of the Petitioner "rambling." (TR1, pp. 132-33). She would spend 30 to 45 minutes with the Petitioner if he kept his appointments but only five or ten minutes if she had to go to his cell upon refusals of call outs. (TR1, p. 133). This procedure was based on the classification of the Petitioner as a "psychiatric grade two" which meant that he was not under regular observation and care of a staff psychiatrist.

(TR1, pp. 133-34).

On cross examination, Ms. Wiley explained that her reported references to “case management interviews” were summaries of an inmate’s progress or lack of progress from mental heath treatment – for the Petitioner, “we have not really made progress toward working on therapeutic goals.” (TR1, pp. 134-35). She further testified that petitioner being in the “grade two” category was based on the diagnoses of “adjustment disorder” by Doctors McKinsey and Calderon. (TR1, p. 135). “Confinement evaluations” were described as mental status examinations routinely performed and done monthly for the Petitioner due to the court order. (TR1, pp. 135-36). The Petitioner’s refusals to be evaluated were usually expressed without elaboration. (TR1, 136). Ms. Wiley further explained that she watched for changes in behavior or mood as to making referrals to the psychiatrists for the inmates. (TR1, p. 137).

In responding to a question about whether she received reports from other personnel about the Petitioner’s behavior or thought process requiring a psychiatric referral, Ms. Wiley answered that “No, but in fairness to the other witnesses who have had opinions and testimonies different, I would say at Union Correctional Institution that we are all familiar with inmate Alston’s discussion of code colors and secret agent and

what not. I would say in fairness to the other experts that you've heard, Your Honor, that this would not be – not substitute someone referring Mr. Alston to me. Now if he increased that or appeared to be – to be suffering, not eating, not sleeping, yes, then they would refer him." (TR1, pp. 138-39). The transcript reflects that the court briefly interjected with a question to the Petitioner, asking whether he was "agitated about something" and being admonished to "behave yourself." (TR1, p. 139).

Ms. Wiley stated that her observations and the records reflect that the Petitioner is able to handle his daily living activities, was not in danger of harming himself or being a danger to others. (TR1, pp. 139-40). She concluded cross examination with her personal opinion that, based on her own training and experience, the Petitioner is able to "turn on and off his symptoms at will" when she "redirects" him to a rational conversation unlike others diagnosed with Bipolar Disorder with psychotic symptoms. (TR1, p. 140). In responding to the court's final questions, Ms. Wiley explained that her position solely involves assignment to UCI's Death Row and its 300-plus inmates, that she has had "lots" of one-on-one sessions with the Petitioner and that his DC wing is not always directly staffed with personnel "on" the wing." (TR1, pp.141-42).

The final mental health witness was Dr. Gloria Calderon, a staff psychiatrist at UCI. Her background included working with Dr. Berland at Florida State Hospital in the late 1970's and early 1980's. (TR1, p. 146-47). Dr. Calderon testified that her August 7, 2002, evaluation of the Petitioner resulted in a diagnosis of "adjustment disorder with mixed disturbance of emotion and conduct." (TR1, p. 147). She previously saw the Petitioner three or four times in 2000 for "emergency" situations involving "threats of hurting himself," and one time each in 2001 and 2002. (TR1, p. 148). She also reported that other doctors, namely Doctors McKinsey and Aurora, had likewise seen the Petitioner. In the August evaluation, the Petitioner was "very pleasant, cooperative, and his affect was appropriate..." (TR1, p 148). This was in contrast to the situation in 2000 when the Petitioner was "agitated and needed to be observed," a situation that required force to remove him from his cell. (TR1, p. 149).

Dr. Calderon explained she reviewed Dr. Myers' 2002 report (TR1, p. 151) and that she evaluated the Petitioner as a result but did not see the symptoms of Bipolar Disorder. (TR1, p. 152). She clarified that the Petitioner's stabilization after 2000 and his call out refusals led her, in part, to classify the Petitioner as "psyche two." (TR1, p. 153). Dr. Calderon said

the Petitioner's medical histories, reports and evaluations from the time of trial were "seven thick volumes." (TR1, p. 154). She reported that "time restrictions," high but manageable case loads and security factors often limit her ability to review a patients complete case charts. (TR1, p. 155). While not seeing Bipolar Disorder symptoms in the Petitioner, she testified that she agreed with the panel experts that people with Bipolar Disorder show "up and down or waxing and waning of their manifestations." (TR1, p. 157).

Dr. Calderon, on direct examination, said her two evaluations for the court, including that in 2002, would have combined for "almost an hour" with the petitioner. (TR1, p. 158). On cross examination, she indicated that the August, 2002, evaluation would have been forty-five minutes to an hour." (TR1, p. 164). On re-direct examination, she clarified that her 2002 evaluation was "not necessarily for the purpose of determining the competency" but, since she believed it was court ordered, she was "wanting to see if there is anything that can be done for somebody who's supposedly psychotic." (TR1, p. 165).

Sergeant Michael Young from UCI was the last witness called to testify at the hearing. He described his position as being the administrative sergeant for the basic, day to day operations

of Death Row. (TR1, p. 166). Sgt. Young explained that he sees the Petitioner more than anyone else, at least on a daily basis and works “a great deal” with administrative matters brought to him by the Petitioner. (TR1, p. 167).

As to observed behavior, Sgt. Young testified that the Petitioner acts differently while out of the cell or in the cell and “can turn it off at a whim.” (TR1, p. 167). He agreed that Ms. Wiley’s testimony “was pretty accurate,” (TR1, p. 167); said that the Petitioner has been in DC for “closer” to two years due to the Petitioner’s perceived preference in being isolated away from the general population on Death Row (TR1, p. 168); and said that he has never seen the Petitioner exhibit “bizarre behavior.” (TR1, p. 169).

Regarding his knowledge of the Petitioner scaling the exercise yard fence two years ago, Sgt. Young opined that it “was just a show ... an attention getter” for the Petitioner to stand on top of the fence while threatening to jump. (TR1, p. 169). Sgt. Young also described the restrictions on the Petitioner’s out-going mail and correspondence which “are numerous, I mean, three to four a day he sends out to different dignitaries, government agencies, state agencies, et cetera.” (TR1, p. 171). In what Sgt. Young described as a “passive protest,” he related that the Petitioner, some two years

previously, had to be "gassed" while being extracted for refusing to return his food tray. (TR1, pp. 173-74).

On cross examination, Sgt. Young elaborated on his beliefs that the Petitioner prefers to stay on the DC wing (TR1, pp. 174-75); stated that he believes the Petitioner performs "theatrics" when outside his cell which stop "when the lights are out" upon returning to his cell (TR1, 177); and stated that he agreed with Dr. Mhatre that the Petitioner is malingering. (TR1, p. 181).

The hearing concluded with the Petitioner addressing the court and reiterating his desires to be found competent as he was at the time of trial and wanting to waive collateral counsel and appeals. (TR1, pp. 181-86).

FACTS AT THE *DUROCHER* HEARING

After swearing-in the Petitioner, the court initiated the June 6, 2003, hearing by outlining for the Petitioner what the court saw as the petitioner's options. The first option was to let collateral counsel proceed with postconviction matters on behalf of the Petitioner. It was explained, secondly, that the Petitioner could proceed on his own without counsel with the court informing the Petitioner that it would not appoint other counsel to replace CCR. The third option was explained as constituting a discharging of CCR and waiving postconviction

proceedings. To this explanation, the Petitioner responded with a “yes sir.” (June 6, 2003, hearing transcript, p. 6; hereafter, “TR2").

The court thereafter emphasized to the Petitioner that any waiver of postconviction proceedings would be carried out by the court dismissing with prejudice any motions under Rule 3.851 or any other postconviction rules. The court explained that this would thereby foreclose any collateral remedies and the imposition of the death sentence would be carried out with the Petitioner being put to death as previously ordered by the court. (TR2, pp. 6-7).

A colloquy subsequently followed the court’s introduction with the Petitioner indicating he wanted to address the court. The Petitioner responded to the court’s inquiries by explaining that he was 32 years old, that he has been in jail or prison since March of 1996 and that he completed a twelve grade equivalency high school diploma. The Petitioner further answered that he could read and write in English, was physically in good health, and was not under any medication. (TR2, pp.7-8).

The Petitioner then reminded the court that it had previously found him competent and told the court that he wanted to follow the court’s third option – namely, he wanted to

represent himself *pro-se*, wanted to waive all collateral proceedings and have the sentence of death carried out. (TR2, p. 9).

The court followed with a dialog with the Petitioner in which the court recognized the Petitioner's previous expressions of dissatisfaction with his collateral counsel. The court noted a resolution with some previous personality conflicts and had the Petitioner confirm that he knew collateral counsel were available to assist him in any way he deemed appropriate. (TR2, p. 10).

However, the Petitioner declined to concede that collateral counsel were better equipped to deal with postconviction proceedings than he was himself by indicating that he desired to waive all remaining postconviction proceedings. The Petitioner then reminded the court about the court's promise (from the March, 2003, competency hearing) that the court would allow him to address the issues he had raised in assorted *pro-se* filings. The court responded by indicating the Petitioner could so address the court after the waiver hearing. (TR2, pp. 10-11).

The court next informed the Petitioner that the court would probably be forwarding a transcript of the hearing to this Court and that it would likely follow that the governor would issue a death warrant for the Petitioner. The Petitioner told the court

he understood. (TR2, p. 11).

Following that dialogue, the court inquired whether the Petitioner gets along with the then-assigned collateral counsel. The Petitioner responded in the negative. While indicating that apologies had been made, the Petitioner seemed to remind the court that he had been trying to waive counsel and proceedings since the time of his convictions and sentences and of the affirmance by this Court on direct appeal. (TR2, pp. 11-12).

Thereafter, the court and the Petitioner exchanged a discussion about the Petitioner's reading and legal research while on death row. When responding to the court's inquiry as to why the Petitioner reads law books if he wants to waive all of his rights, the Petitioner stated that he had never had an "attorney-client" relationship with his direct appeal and postconviction attorneys, presumably meaning that he never had what he felt was a good or proper relationship with his attorneys. He mentioned that he had only one, brief visit with his direct appeal attorney and thought that some postconviction attorneys had "falsified the signature" on some paperwork. The Petitioner, consequently, agreed that his legal research was in an effort to "see what to do about those things" and, additionally, said that his research was to have knowledge of the appellate process. (TR2, pp. 12-14).

The court then turned questioning of the Petitioner over to counsel. Upon inquiry from collateral counsel, the Petitioner responded with an explanation of the consequences of dismissing collateral counsel. In particular, the Petitioner said that the consequences would involve "the death sentence" and that he would not have the services or assistance of CCRC and its attorneys regarding anything he tried to file in collateral proceedings. (TR2, pp.17-18).

Furthermore, the Petitioner said he was not under any drugs or medication during the hearing or for the two weeks preceding the hearing. The Petitioner's response to a question about whether he had ever been diagnosed and treated for mental illness seemed to focus only upon the most current competency issues during the time of postconviction because he said he was never treated for any mental illness "at all" following "the" competency evaluations. (TR2, p. 18).

When next responding to questioning about whether he remembered any of the experts' diagnoses, Petitioner instead talked about some of his post-competency hearing communications. The communications involved, he stated, his concerns that the some of the competency hearing testimony left him with the feeling of being subject to a "smear campaign or some type of character attack" in front of the victim's mother (who was

present at the hearing). The Petitioner said he saw no paradox in accepting the court's finding of competency at the same time as wanting to cross-examine, *pro-se*, some of the doctors because of the "bad or negative" things to which the doctors had testified in front of the victim's mother. (TR2, pp.18-19).

The Petitioner subsequently testified that he understood there are no steps in the case after waiving collateral counsel and proceedings. He further said that he would no longer file *pro-se* pleadings because "there is no need" due to the expected review of the waivers by this Court. The Petitioner indicated he would never file anything to the court again regarding his trial prosecutor nor about a fellow death row inmate about whom, presumably, he once thought was working for the State of Florida as an "agent." (TR2, pp.21-22).

On the subject of the Petitioner's *pro-se* filings with other courts, the Petitioner attempted to explain his belief that the "statute of limitations" for the filing of his Rule 3.850 motion had been missed; consequently, it appears he was trying to explain a belief that there is no legal basis for state court postconviction proceedings due to the missed filing deadline–all of which results in an exhaustion of his state remedies. (TR2, pp. 23-24).

The Petitioner also, subsequently, seemed to reflect an

understanding from questioning that a late filing of a Rule 3.850 motion could arguably be accepted because of the time he spent under the court's incompetency order and that he could request counsel in the future, each legal step depending on how a court would rule on such filings. That understanding was buttressed by the Petitioner repeating his desires to waive counsel and proceedings. (TR2, pp.25-26).

In repeating his explanation for past *pro-se* filings, at the least, the Petitioner then repeated his belief that state postconviction proceedings had been exhausted so that federal habeas filings and petitions with this Court were not contradictions in stating his desires for the collateral waivers. (TR2, pp.26-28).

As to final questioning from collateral counsel, the Petitioner explained his understanding of the meaning of having the court's sentence of execution being carried out upon any waiving of collateral counsel and pleadings. The Petitioner explained that this Court would review the waivers, the governor would subsequently sign a death warrant and that he would be dead upon the execution of the sentence. (TR2, p.29).

When questioned by counsel for the State of Florida, the Petitioner answered in the affirmative as to understanding his

right to have counsel file an amended postconviction motion; that an evidentiary hearing could be requested for constitutional claims regarding his convictions and sentences; and that he did not want counsel to request an evidentiary hearing even with his right to call witnesses for such a hearing. (TR2, pp. 30-31).

As to an inquiry by the State whether his stated conflict with collateral counsel was based upon a desire to waive, the Petitioner gave a lengthy and somewhat non-responsive statement that is difficult to follow at times. He made references to his direct appeal and apparent confusion regarding the case number for the appeal. He made references to his belief that the trial prosecutor was using undercover agents on death row to interfere with his prison mail. He made references to “living in fear” of his life and “living in danger” as a result of the work of prison undercover agents because of a criminal investigation regarding the murder of a Jacksonville detective. (TR2, pp. 31-33).

The Petitioner also continued his response by stating that conflicts with collateral counsel were disrespectful, time-consuming and a waste of time while indicating, again, that he wanted court permission to speak to the victim’s mother. He further expressed a conclusion in several ways, including that

"[a]nything I do in the case, nothing has happened." The Petitioner stated that "they just using me as a stool pigeon" and that his letters to the court, attorney general, governor and prosecutor have "just been a waste of time." (TR2, p. 33). The Petitioner concluded his questioning by the State by affirming his wishes not to proceed with his postconviction case. (TR2, p. 34).

The court concluded the *Durocher* hearing by finding that the Petitioner knowingly, intelligently and voluntarily waived his right to counsel and discharged CCRC as counsel for the Petitioner.

Thereafter, there was one final question by the State to which the Petitioner affirmed his understanding that the State would oppose any attempt of the Petitioner to re-invoke collateral proceedings.

The court subsequently found that the Petitioner had again knowingly, intelligently and voluntarily waived further postconviction proceedings and was, in effect, requesting the imposition of his death sentence. (TR2, pp. 36-37).

As stated above, the Petitioner had reminded the court about the court's promise (from the March, 2003, competency hearing) that the court would allow him to address the issues he had raised in assorted *pro-se* filings. The court responded by

indicating the Petitioner could so address the court after the waiver hearing. (TR2, pp. 10-11).

The hearing transcript reflects that the Petitioner addressed the court, in part, as follows:

> I'm throwing myself on the breast of this court right now addressing the court *pro se.* I don't know if you will allow me to call [the prosecutor] to the witness stand, and the reason I said that and – my reason for saying that is because, as I said, she was working as an agent and investigator...[s]he was working as an agent, and I believe that my bare essentials, meaning my body – [the prosecutor], she saw my body at times bare while I was in prison. She did that because she was investigating the murder of [a] Jacksonville police detective...[s]he did that without any formality. Also, she has said that she wanted to marry me. She has made statements to [the Sheriff's Office] that one of the reasons I was put on death row was because she wanted to marry me and if she couldn't have me no one else could...[i]f she did say she put me on death row because she wanted to marry me, then she should testify to that... (TR2, pp. 40-42).

The court thereafter denied the Petitioner's request to question the prosecutor as a witness. (TR2, p. 42).

The post-hearing statements from the Petitioner to the court also included his inquiry to the court as to whether the court had "seen it on the local TV news stations here – I don't know how it happened...I don't know if you administered any oaths for any agents or investigators, but I was reported as being judicially nominated, and I wanted to know apart from anything that deals with any pleadings here, any motions here, can I

still send anything out as far as legal mail in that regard?" The court responded to the statement and question by advising the Petitioner that the Petitioner was subject to Department of Corrections' regulations. The court then concluded the discussion and recessed. (TR2, pp. 43-44).

SUMMARY OF ARGUMENT

1. As to the competency proceeding and order, the trial court arguably failed to consider all the evidence relevant to competency and resolve the factual disputes from the contrasting testimony and reports of the witnesses presented at the hearing.

The court's references to the conclusions and diagnoses of Doctors Myers and Berland were very brief and summary in fashion. The court's order did not mention any consideration of the fact that time constraints affect the evaluations of DOC staff psychiatrist Gloria Calderon.

The court's order did not mention that DOC specialist Lisa Wiley reported and testified about the Petitioner's rambling and the widely observed delusional discussions by the Petitioner. The court's order did not mention Sergeant Young's contradiction in describing the Petitioner's food tray incidents.

The court's order did not mention how it reconciled the use of virtually identical reports from the panel experts to achieve totally opposite findings regarding competency or incompetency in 2003 versus 2001 and it does not contain copies of the reports of the examining experts nor the DOC periodic reports regarding the Petitioner's mental state as required by Fla.R.Crim.P. 3.851(g)(12).

Because of these matters, it can be argued that the court abused its discretion in finding the Petitioner competent to proceed with his collateral appeals.

2. As to the *Durocher* proceeding and order, the full day's testimony, taken as a whole, shows that Petitioner was not consistently coherent and logical.

Because the petitioner arguably remains delusional as to the reason for his incarceration on death row, along with other matters involving his controlled life since 1996, it can be argued that the court below abused its discretion in finding that the Petitioner validly waived collateral counsel and proceedings.

ISSUE I

WHETHER THE POSTCONVICTION COURT ABUSED ITS DISCRETION IN FINDING THAT PETITIONER WAS COMPETENT TO PROCEED WITH HIS COLLATERAL PROCEEDINGS?

In reviewing a lower court's findings regarding a capital defendant's competency to proceed with collateral proceedings, this Court applies the abuse of discretion standard. *Ferguson v. State*, 789 So.2d 306, 314 (Fla. 2001). During a competency hearing, where there is conflicting expert testimony regarding the defendant's competency, it is the trial court' s responsibility to consider all the evidence relevant to competency and resolve the factual disputes. *Hardy v. State*, 716 So.2d 761, 764 (Fla. 1998).

As the court below stated in its March 27, 2003, order, the hearing on March 20, 2003, was held for the purpose of determining whether the Petitioner remained incompetent to proceed with collateral appeals. This review was the first of a periodic hearing anticipated during a January 9, 2003, status hearing and provided for in the initial order of October 22, 2001, that found the Petitioner incompetent and by which the original panel of experts was re-appointed for future evaluations. The court below was also subject to this Court's order of December 20, 2002, to hold a hearing in order to determine if the Petitioner was seeking a *Durocher* hearing.

At first glance, it appears that the court considered all

the conflicting expert testimony because it wrote:

> By stipulation of the parties, the reports of the examining experts were admitted into evidence in order to expedite the oral testimony of the witnesses. In addition, the periodic reports from the Department of Corrections were admitted into evidence. Dr. Umesh Mhatre, a psychiatrist, found that Pressley Alston is competent to proceed and attributes his idiosyncracies to malingering. Dr. Wade Myers, also a psychiatrist, believes that the defendant is not competent to proceed as he suffers from a "mild" form of mental illness. Dr. Robert Berland, a clinical psychologist, had the opinion that the defendant suffers from a "severe" mental illness.
>
> Lisa Wiley, a psychological specialist with the Department of Corrections who submitted the periodic reports to the court, had an opportunity to observe Pressley Alston regularly as she is the Department of Corrections employee who renders psychological services to all death-row inmates housed at Union Correctional Institution. She observed no behavior on his part which suggested mental illness. Dr. Calderon is a staff psychiatrist with the Department who works at Union Correctional and she also found no evidence of mental illness. Also testifying was Sergeant Mike Young who is the supervising Department of Corrections employee assigned to death row at Union Correctional Institution. He sees the defendant five days a week and knows him well. His observations lead him to conclude that Alston is a manipulative inmate who is malingering. (Order d. March 27, 2003; pp.1-2).

Also at first glance, the facts here would seem close to those reviewed in *Ferguson v. State*. There, the trial court had to deal with conflicting expert testimony as to the genuineness of Ferguson's condition. This Court approved the lower court's rejection of the testimony from the defense experts, under the *Hardy* standards, because the rejection was supported by the

opposing testimony of the State's experts who opined that Ferguson was malingering and exaggerating his condition. Those findings were found to be further supported by the testimony of correctional officers who bolstered the malingering opinions. With a neurological evaluation showing no organic brain disease, there was no error in the trial court's findings. *Ferguson*, 789 So.2d at 315.

However, the present case seems distinguishable from *Ferguson* in a number of respects. First, while the court's references to the conclusions and diagnoses of Doctors Myers and Berland seem to show a consideration of their reports and testimony, the court did
so in a very brief and summary fashion. There was no background given about the multitude of details reflected in the two experts' reports and testimony as opposed to that of the third panel expert, Dr. Mhatre. There was no reference to the relative thoroughness in the reports and testimony of Doctors Myers and Berland in contrast to that of the third panel expert, Dr. Mhatre.

The order contains no mention of the contrasting times each panel expert spent with the petitioner during the respective evaluations (one hour for Dr. Mhatre; two hours for Dr. Myers; three hours and fifteen minutes for Dr. Berland)(TR1, pp. 14, 59

and 89). The court's order did not mention any consideration of the fact that time constraints affect the evaluations of DOC staff psychiatrist Gloria Calderon, who testified she largely bases non-emergency evaluations on impressions made at the time an inmate is evaluated, as opposed to studying the records and diagnoses from the time of trial. (TR1; pp. 152-56). The court's order did not mention any consideration of the fact that Dr. Calderon's spent less than an hour with the Petitioner for the two evaluations for the court. (TR1; p. 158).

The court's order did not mention that DOC specialist Lisa Wiley reported and testified about the Petitioner's rambling (TR1, p. 132) and the widely observed discussions by the Petitioner of "code colors and secret agent and what not." (TR1, pp. 138 and 140). The court's order did not mention Sergeant Young's contradiction in describing the Petitioner's food tray incidents as "passive protests" not involving violence, yet later acknowledging that the guards had to use extraction maneuvers to retrieve the trays whereby Petitioner was "gassed" with pepper spray. (TR1, p. 173).

The court's order did not mention how it reconciled the use of virtually identical reports from the panel experts to achieve totally opposite findings regarding competency or incompetency in 2003 versus 2001. The court's March 27, 2003, order does

not contain copies of the reports of the examining experts nor the DOC periodic reports regarding the Petitioner's mental state as required by Fla.R.Crim.P. 3.851(g)(12).

Because of these matters, it can be argued that the court abused its discretion in finding the Petitioner competent to proceed with his collateral appeals.

ISSUE II

WHETHER THE POSTCONVICTION COURT ABUSED ITS DISCRETION IN FINDING THAT PETITIONER WAS COMPETENT TO WAIVE COLLATERAL COUNSEL AND COLLATERAL PROCEEDINGS?

A determination of the validity of the Petitioner's waiver of collateral counsel and collateral appeals must start with this Court's recognition that "competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose." *Durocher v. Singletary*, 623 So.2d 482, 483 (Fla. 1993) (citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) and *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). Further, a death row inmate may waive representation by collateral counsel and collateral counsel has no duty or right to represent that inmate without his permission. *Durocher*, 623 So.2d at 485.

This Court has also discussed the requirements involving waivers of death row inmates:

> A waiver of collateral counsel and proceedings must be knowing, intelligent, and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Durocher v. Singletary*, 623 So.2d 482, 485 (Fla. 1993). ...[U]nder *Durocher*, when a defendant expresses a desire to dismiss his or her collateral counsel and proceedings, the trial judge must conduct a *Faretta*-type evaluation to determine that the defendant understands the consequences of his or her request. *Id*. at 485. If the *Faretta*-type evaluation raises a doubt in the judge's mind as to the defendant's competency, the judge may order a mental health evaluation and determine competency thereafter. *Id.* If the *Faretta*-type evaluation raises no doubt in the judge's mind as to the defendant's competency, no mental health evaluation is necessary for the competency determination. *Id*. *Sanchez-Velasco v. State*, 702 So.2d 224, 228 (Fla. 1997).

These requirements were similarly contained in this Court's order of December 20, 2002, regarding instructions to the circuit court to hold *Durocher* and *Faretta* hearings if sought by the Petitioner.

In *Slawson v. State*, 796 So.2d 491 (Fla. 2001), this Court made it clear that "the relevant test for competency in the context of waiving collateral counsel and collateral proceedings in Florida is whether the person seeking waiver has the capacity to 'understand [] the consequences of waiving collateral counsel and proceedings.' Further, ... [any] party challenging the defendant's waiver request bears the burden of proving that the defendant is incompetent." *Slawson*, 796 So.2d at 502.

In the proceedings below, the Petitioner appeared at the

June, 2003, waiver hearing with a presumption of competence. There is, initially, a presumption of competence that attaches from a determination of competency to stand trial. *Durocher*, 623 So.2d at 484. By affirming the Petitioner's convictions on direct appeal, this Court affirmed the trial court's determination of his competency at trial. *Id*. Furthermore, the Petitioner arrived at the postconviction waiver hearing with a presumption of competence attributable to the March, 2003, determination of his competency. *Sanchez-Velasco*, 702 So.2d at 228.

Finally, as to this Court's review of the waiver, an abuse of discretion standard applies when reviewing a postconviction court's determination regarding a capital defendant's competency to waive collateral counsel and proceedings. *Slawson*, 796 So.2d at 502.

In its June 12, 2003, order discharging collateral counsel for the Petitioner and dismissing with prejudice any and all postconviction proceedings and pleadings, the court below stated as follows:

> Pressley Alston was before the court on June 6, 2003 on his request to discharge Capital Collateral Regional Counsel (CCR) and his request to waive post-conviction relief. Two CCR lawyers were present representing the defendant and two lawyers were present on behalf of the State of Florida. The court placed the defendant under oath and thereafter the

> court inquired as to his wishes. Mr. Alston made it clear that he wanted to discharge counsel and waive post-conviction or collateral relief.
>
> After the court's interrogation the lawyers for the parties inquired of the defendant to be sure that his decision was free, voluntary and knowing. Although the defendant has a tendency to ramble somewhat at times, his responses to the court's and counsel's questions were coherent and logical. His decision was knowing, intelligent and voluntary. (Order d. June 12, 2003; p.1).

Again, the postconviction court found, in part, that "[a]lthough the defendant has a tendency to ramble somewhat at times, his responses to the court's and counsel's questions were coherent and logical." (Order d. June 12, 2003; p.1). If the court's finding about "coherent and logical" responses is limited to the times where narrow and precise questions were asked about understanding the consequences of waiving, as required by the test outlined in *Slawson*, 796 So.2d at 502, then an argument can be made that there was no abuse of discretion by the court with that finding.

However, it can be argued that at least one of the Petitioner's responses to the State was hardly "coherent and logical." In fact, as outlined above, it would seem that the Petitioner was being extremely incoherent and illogical when asked by the State whether his stated conflict with collateral counsel was based upon a desire to waive.

The question is raised, therefore, whether the details of the Petitioner's incoherent and illogical response reflects a lack of capacity to understand the consequences of his waiver requests. Such lengthy and non-responsive references to his direct appeal and apparent confusion regarding the case number for the appeal; the references to his belief that the trial prosecutor was using undercover agents on death row to interfere with his prison mail; and his references to "living in fear" of his life and "living in danger" as a result of the work of prison undercover agents because of a criminal investigation regarding the murder of a Jacksonville detective (TR2, pp. 31-33) might be more reflective of the Petitioner's delusional mental condition during the time he was under the court's incompetency ruling.

Perhaps the court's stated awareness of the Petitioner's "tendency to ramble somewhat at times" was a comment of the remainder of the Petitioner's response to the State when he stated that conflicts with collateral counsel were disrespectful, time-consuming and a waste of time while, at the same time, indicating that he wanted court permission to speak to the victim's mother; that "they just using me as a stool pigeon" and that his letters to the court, attorney general, governor and prosecutor have "just been a waste of time." (TR2,

p. 33).

Additionally, the court's waiver order makes no mention of the other example of the incoherent and illogical thinking of the Petitioner that was expressed to the court after the conclusion of the *Durocher* hearing. As noted, without any understandable "motive" to malinger, the Petitioner [a] asked the court to question the prosecutor about her alleged marriage proposal and its rejection by the Petitioner; [b] alleged that the prosecutor saw his "bare" body while in prison; and [c] alleged that television newscasts reported about his "judicial nomination." (TR2, pp. 40-44).

Consequently, the validity of the Petitioner's waiver of collateral counsel and collateral proceedings seems to turn on the court's handling of the non-responsive statements of the Petitioner on June 6, 2003 that arguably were incoherent, illogical and likely delusional. As to a death row defendant's contradictions between claims that postconviction counsel was ineffective and a request to withdraw his appeal, this Court found "that, to the extent such a contradiction may exist, it does not in and of itself lead us to doubt [the defendant's] competence in the face of at least ten evaluations determining him to be competent." *Sanchez-Velasco*, 702 So.2d at 228. Here, there were six evaluations performed by the court's panel of

experts over the course of the postconviction proceedings with four of those evaluations opining that the Petitioner was and remains incompetent.

CONCLUSION

As noted above, by the time of the March, 2003, competency hearing, the court's panel of experts performed six evaluations over the period of approximately two years and four of those evaluations opined that the Petitioner was and remains incompetent. If this Court determines that the court below abused its discretion in finding the Petitioner competent, the case should be remanded for a new determination of competency.

If the day's testimony of the Petitioner is taken as a whole, Petitioner was not consistently coherent and logical at the *Durocher* proceeding. If the petitioner remains delusional as to the reason for his incarceration on death row, along with other matters involving his controlled life since 1996, then it can be argued that the court below abused its discretion in finding that the Petitioner had validly waived collateral counsel and proceedings. If this Court determines that the postconviction court abused its discretion in finding that the Petitioner understood the consequences of waiving collateral counsel and proceedings, this case should be remanded with that

finding reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Initial Brief of Petitioner's Former Counsel to Petitioner's *Pro-se* Petition for Writ of Habeas Corpus has been furnished by U.S. Mail, first class postage prepaid, to Cassandra K. Dolgin, Esq., Assistant Attorney General, Office of the Attorney General, 400 South Monroe Street, #PL-01, Tallahassee, Florida 32399-6536 and Pressley Bernard Alston, DOC# 709795; P4103S, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this _____ day of December, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fla.R.App.P. 9.210 that the foregoing Initial Brief of Petitioner's Former Counsel to Petitioner's *Pro-se* Petition for Writ of Habeas Corpus was generated in Courier New 12-point font.

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