IN THE SUPREME COURT OF FLORIDA

PRESSLEY BERNARD ALSTON,

Petitioner,

vs. **Case No. SC 02-1904**

STATE OF FLORIDA,

Respondent.

_____/

ON REVIEW FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Pending before the Court are the orders of the Circuit Court of the Fourth Judicial Circuit, Duval County, Florida, finding capital defendant Pressley Alston competent to proceed upon his Rule 3.850/3.851 motion, and holding that his waiver of counsel and request to dismiss his postconviction relief action was knowing, intelligent, and voluntary. This litigation originated out of Alston's petitions seeking orders directing the circuit court to take action in the postconviction proceeding. References to petitioner will be to "Alston" or "Petitioner," and references to respondent will be to "the State" or "Respondent." Citation to the records relevant to this Court's determination of the issues will be to Petitioner's Appendix with the appropriate document number as listed in petitioner's "Index To Attachments" and, where available, page citations. Thus the State citations thereto will be as follows: "App.,#_,p._." In addition, Respondent has attached to its brief its appendix including the document not included in petitioner's appendix, namely, "Motion For Durocher Hearing."[1] Reference to the circuit court's Order dated June 12, 2003

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[1]In his "Preliminary Statement" to his "Appendix," petitioner states that he also did not have available the "Letter to Judge from Proper Person" referenced in Respondent's "Response To 'Motion To Supplement The Record.'" Petitioner actually did have that document, as it is the Department of Corrections letter dated February 12, 2002. See App.,#19. Petitioner also states that he did not have available (continued...)

finding petitioner competent, as well as the transcript of the Durocher[2] hearing held on June 6, 2003, filed with this Court on June 13, 2003, will be as follows: Order (6/12/03), at p._; Transcript (6/6/03), at p._, respectively.

[1](...continued)
"Defense's Motion Of Suggestion Of Incompetency To Proceed." At the request of the undersigned, the State Attorney's Office reviewed the file maintained by the Clerk's Office for the Fourth Judicial Circuit and determined that the entry referencing such a document apparently pertained to the "Motion For Competency Determination" and the order granting that motion. Based upon the filing of petitioner's Appendix and Respondent's Appendix, the record is now complete pertaining to the issues that the Court has requested briefing.

[2]Durocher v. State, 623 So. 2d 482 (Fla. 1993).

STATEMENT OF THE CASE AND OF THE FACTS

A. Procedural History

Respondent does not dispute the procedural history as set forth by Mr. Strain in the "Amended Supplemental Initial Brief Of Petitioner's Former Counsel To Petitioner's *Pro Se* Petition For Writ Of Habeas Corpus" (hereinafter "I.B."), at 1-7.[3] In addition, Respondent notes that petitioner was specifically found to be competent to stand trial following a mental health evaluation. Alston v. State, No. 87-275, Transcript Of Record, Volume II, at 331, 292, respectively.[4]

In respect to proceedings before this Court upon Alston's petitions, this Court held in its Opinion dated December 20, 2002 as follows:

> [T]he Fourth Judicial Circuit Court is ordered to hold a hearing, within 60 days of the date of this order, at which both petitioner and his collateral counsel are present, to determine whether petitioner seeks a Durocher hearing in order to waive all further appeals or wishes to proceed with his pending postconviction proceedings.

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[3]Respondent notes that Mr. Strain also makes reference to a claim raised on direct appeal that he believes to "appear relevant to current issues concerning the Petitioner's mental health." I.B. at 7. Respondent disagrees with that characterization but does not dispute that the Court resolved the direct appeal claim as stated by Mr. Strain. See Alston v. State, 723 So. 2d 148, 157-158 (Fla. 1998).

[4]Respondent respectfully requests that the Court take judicial notice of its file in petitioner's direct appeal to this Court, Alston v. State, No.87,275. § 90.202(6), Fla. Stat.; cf. Hunt v. State, 613 So. 2d 893, 898 n.5 (Fla. 1992) (taking judicial notice of the record on appeal of the co-defendant's direct appeal).

> If petitioner seeks a Durocher hearing, the trial court is hereby ordered to conduct a hearing pursuant to *Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975),* in order to determine if petitioner understands the consequences of waiving his collateral counsel and postconviction proceedings. See *Sanchez-Velasco v. State, 702 So. 2d 224, 228 (Fla. 1997).* If the Durocher hearing demonstrates that a mental health evaluation is required, the trial court shall order a mental health evaluation and make a competency determination. Thereafter, the trial court shall proceed, if appropriate, in accord with our decisions in *Sanchez-Velasco, 702 So. 2d at 227-28,* or *Carter v. State, 706 So. 2d 873, 875-76 (Fla. 1997).*

Alston v. State, 844 So. 2d 645 (Fla. 2002).

Thereafter, the State filed its "Motion To Vacate Order Dated December 20, 2002," on the basis that "a hearing to determine whether petitioner seeks a Durocher hearing is premature, as petitioner cannot effectively waive his right to collateral counsel and the Rule 3.850 proceedings under Durocher until he is adjudged competent." Motion, at 2. Defendant was previously found incompetent to proceed in the postconviction proceedings. App.,#17,p.2. This Court denied that motion on March 17, 2003.

Following the circuit court's determination that defendant was competent to proceed and that his waiver of his right to counsel and to the postconviction proceedings was knowing, intelligent, and voluntary, App.,#33,p.2; Order (6/12/03), at 1, respectively, the circuit court transmitted to this Court its Order dated June 12, 2003 setting forth the above determination, as well as the transcript of the Durocher

hearing held on June 6, 2003. This review followed.[5]

B. Facts

1. Competency Determination

A motion to vacate judgment and sentence was filed in November, 1999. Subsequently, on July 21, 2000, counsel for petitioner sought a competency determination. App.,#10. The circuit court issued its "Order For Competency Evaluation" on November 27, 2000, appointing the following experts: Wade Cooper Myers, III, M.D., Robert M. Berland, Ph.D., and Umesh M. Mhatre, M.D. App.,#13,pp.1-2. The experts' reports, dated July 24, 2001, September 10, 2001, and February 16, 2001, respectively, were filed with the circuit court. See App.,#s14-16.

Pursuant to stipulation of the parties "to rely on the experts' reports with the consequent waiver of any further hearing on the issue of the defendant's current competence to proceed with his capital collateral proceedings," App.,#17, p.2, on October 22, 2001, the circuit court found that petitioner was not competent to proceed

[5]Respondent filed its "Motion To Dismiss Petition Without Further Proceedings" on December 24, 2003, asserting its belief that Alston's petition(s) should be summarily dismissed because no appeal was taken following the circuit court's compliance with this Court's December 20, 2002 Order. The Court to date has not ruled upon that motion.

in the postconviction proceedings. App.,#17,p.3. At that time the trial court obviously did not have before it any reports from the Department of Corrections (hereinafter "DOC") concerning petitioner's mental status.

Pursuant to the circuit court's October 22, 2001 Order, the DOC filed periodic reports pertaining to "the status of any treatment administered to the defendant including any failures or refusals by the defendant to comply with the administration of any medication under the said treatment." See App.,#17,p.3. The DOC reports are dated December 11, 2001, February 12, 2002, April 16, 2002, July 17, 2002, September 6, 2002, November 6, 2002, January 14, 2003, and March 4, 2003. App.,#s18-20, 23-24, 27, 30-31, respectively.

Also pursuant to the lower court's earlier order, petitioner was re-evaluated by Drs. Mhatre, Myers, and Berland. Their reports, dated July 19, 2002, August 1, 2002, and November 7, 2002, also were filed in the circuit court. App.,#s26(Attachments A and B), 28.

An evidentiary hearing addressing the status of petitioner's competency to proceed was held on March 20, 2003. App.,#32,p.4; see App.,#33,p.1. The following individuals testified at the hearing: the three experts that had previously evaluated petitioner (Dr. Mhatre, Dr. Myers, and Dr. Berland); Lisa Wiley, M.A., psychological specialist with the DOC; Dr. Gloria Calderon, M.D., full-time staff

psychiatrist at Union Correctional Institution; and Michael Young, administrative sergeant at Union Correctional Institution on death row. App.,#32,pp.11, 57, 85, 126, 144, 166, respectively.

Concerning the evidence before the circuit court pertaining to petitioner's competency is the following:

Dr. Wade Myers, M.D.

In respect to his first report to the court, dated July 24, 2001, Dr. Myers conducted a two-hour and ten-minute clinical interview of petitioner on January 25, 2001, and reviewed various pleadings filed by petitioner, materials provided by counsel including medical records, school records, jail records, police reports, and mental health evaluations, this Court's opinion in Alston v. State, 723 So. 2d 148 (Fla. 1998), and DOC medical records. App.,#15,p.1. Dr. Myers found petitioner to be incompetent to proceed. App.,#15,p.6.

In that first report, in pertinent part, Dr. Myers specifically found that

> Mr. Alston does appreciate the charges that have been brought against him and his sentence, being aware that he is on death row and facing execution. He appreciates the range and nature of possible outcomes in his postconviction proceedings, knowing that this could range anywhere from him being set free to getting a lesser sentence to being executed. He has a reasonable understanding of the adversarial nature of the legal process. He described having no difficulty in disclosing to his attorney facts pertinent to the proceedings at issue. However, he is having difficulty maintaining a sufficient present ability to consult with his

attorney with a reasonable degree of rational understanding because of his mood disturbance (to be described later in this report). Moreover, because of his disturbed thought process it would be challenging for him to testify relevantly (also to be described later in this report). He does appear to have the capacity to manifest appropriate courtroom behavior.

App.,#15,p.2.

Dr. Myers opined in pertinent part that

Mr. Alston is clinically functioning at a level above previous IQ testing scores. A review of recent appeals he has written by hand indicate a coherent and organized thought process. However, during this current evaluation, his mood variations and episodic bouts of a circumstantial, vague thought process were consistent with Bipolar Disorder, Hypomanic Episode. Also supportive of this state was his rapid, at times even pressured speech, and his intermittent display of grandiosity, paranoia, irritability, hyperreligiosity and inappropriate facial expressions.

Two main areas of competency are questionable in Mr. Alston. First, his mood disturbance and disturbed thought process appear to be affecting his ability to consult with his attorney with a reasonable degree of rational understanding. Although he certainly has the intellectual capabilities to understand his postconviction proceedings, his ability to relate with his attorneys has been impaired because of his mood disturbance and distorted perception of other's intentions. Second, his intermittently disturbed thought process would potentially affect his ability to testify relevantly.

The above symptoms of Bipolar Disorder illness he is having are generally mild, but nevertheless are of sufficient magnitude to influence his competency. Thus, it is my opinion that he is currently incompetent to participate in postconviction proceedings. . . .

App.,#15,p.6.

In respect to his second report to the court, dated August 1, 2002, Dr. Myers

conducted a two-hour clinical interview of petitioner on July 22, 2002, and reviewed DOC medical records as well as those records previously reviewed for the July 24, 2001 evaluation. App.,#26(Attachment B),p.2. Dr. Myers again found petitioner incompetent to proceed. App.,#26(Attachment B),p.5.

In that second report, in pertinent part, Dr. Myers opined that

> Mr. Alston continued to show evidence of Bipolar Disorder, Hypomanic Episode, with Psychotic Features. His speech was pressured, his thought process was over inclusive, tangential, shallow, and sometimes illogical, and he had mild grandiose and paranoid delusions.
>
> There is conflicting information regarding Mr. Alston's mental status. This raises the question of manipulation on his part. One explanation is that as Mr. Alston's mood cycles from hypomania or mania to a normal mood state, then different observations will be recorded by staff at UCI over the months. The nature of Bipolar Disorder is one of changing mood states.
>
> Although difficult to "measure" with any degree of certainty, both examiners felt Mr. Alston occasionally exaggerated his delusional thoughts. It was as though he sometimes would have a mild delusional thought come to consciousness, and he would then have the insight to verbalize it with embellishment. For example, at the end of the interview he stated he was the President of the United States. When questioned about this, he could not supply any information as to how this could be true. On the other hand, some of his delusional thinking appears genuine. The records indicate he has made statements and had symptoms suggesting grandiosity, hyper-religiosity, or paranoia for years. Rarely if ever does a clinician see someone with the ability to malinger with such consistency and perseverance. Moreover, his thought disorder would be extremely difficult to fake. He had the same symptoms of disturbed thought during this examination as he did a year ago, and they were abnormal for the entire length of the current interview.

> Several areas of competency appear suspect in Mr. Alston. First, his mood disturbance, disturbed thought process, and delusional thinking all impair his ability to relate to and consult with his attorney with a reasonable degree of rational understanding. Second, his disturbed thought process would negatively affect his ability to testify relevantly. Third his repeated statements to have his attorney stop the appeals process so that he can be put to death to avoid "playing games" indicate at least ambivalence on his part to help himself in the legal process.
>
> It is our opinion that Mr. Alston is currently incompetent to participate in post conviction proceedings. . . .

App.,#26(Attachment B),pp.4-5.

Dr. Myers also sent to the circuit court a letter on November 7, 2002, explaining that his subsequent review of various documents by petitioner did not change his opinion rendered on August 1, 2002. App.,#29.

Dr. Myers testified at the competency hearing on March 20, 2003. App.,#32,pp.57-84. His testimony was consistent with his earlier reports to the circuit court; in addition, Dr. Myers stated that he believed that Dr. Mhatre and he were "seeing the same patient" but that "[p]sychosis and malingering are not mutually exclusive, nor are bipolar and malingering," App.,#32,pp.63, and that he was not "necessarily disagreeing . . . ." with what Dr. Mhatre had testified to.[6] App.,#32,p.66.

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[6]The parties did not invoke "the rule" but instead permitted each of the experts to remain present throughout the hearing in order to facilitate reconciling the differences of their conclusions. See App.,#32,p.8.

Robert Berland, Ph.D.

Dr. Berland, in preparation for his first report to the court that was dated September 20, 2001, reviewed "documents supplied to all of the experts by the defendant's attorneys at several points during the last ten months . . . ." App.,#16,p.1. Dr. Berland evaluated petitioner on April 10, 2001, but his report does not indicate how long the interview lasted before petitioner terminated it.[7] Dr. Berland found petitioner incompetent to proceed. App.,#16,p.9.

Initially, Dr. Berland did note that "[t]here appear to be disagreements and contradictory assertions by various observers in the documents that have been supplied to me about whether the defendant is genuinely disturbed, or pretending to have mental health problems to obtain secondary gains." App.,#16,p.1.

In conclusion, Dr. Berland wrote in pertinent part that

> [i]t is my opinion that the information that I received directly from the defendant in my contact with him, by differing means of assessment, was consistent in indicating the presence of a genuine psychotic disturbance in this defendant. I believe the argument can reasonably be made that there is nothing in the records that I have reviewed (and

[7]While testifying at the competency hearing, Dr. Berland stated he spent four hours and thirteen minutes with petitioner on April 10, 2001. App.,#32,p.89. It is not clear from that testimony how much time was devoted to administering diagnostic testing and to the actual clinical interview. But see App.,#32,p.97 (testifying that he normally takes one hour to orally administer the MMPI-2 test and that typically the inmate will be permitted fifteen to twenty minutes to have lunch).

> discussed above) that would genuinely contradict the presence of a psychotic disturbance in this defendant.
>
> If, as I believe, the defendant's psychotic disturbance is genuine, the delusional thinking he displayed both in the interview with me, and in contacts with various medical and security staff, as indicated in their recorded notes about him, adversely affects his competency to proceed with his post conviction case. In terms of the standard cited in the order by Judge Bowden, I believe the defendant's delusional thinking prevents him from consulting with his attorney with a reasonable degree of rational understanding of his pending post conviction proceedings. For these reasons, I believe he meets the criteria for incompetency to proceed as of the time of my meeting with him. Because of the long-term nature of his disturbance suggested by the records I have reviewed, and the essential nature of this kind of mental illness, there is no reason to believe his condition has attained a stable remission since then that would render him competent to proceed, unless he has been aggressively treated since that time with psychotropic medication.
>
> * * * * *

App.,#16,pp.9-10.

In respect to his second report to the court, dated November 7, 2002, Dr. Berland conducted a clinical interview of petitioner on September 27, 2002, and reviewed letters and affidavits written by petitioner as well as periodic reports by UCI Psychological Specialist, Lisa D. Wiley. App.,#28,p.1. Again, Dr. Berland's report does not indicate how long his interview with petitioner lasted.[8] Dr. Berland again

[8]While testifying at the competency hearing, Dr. Berland stated he spent three hours and fifteen minutes with petitioner on September 27, 2002. App.,#32,p.89. Dr. (continued...)

found petitioner incompetent to proceed. App.,#28,p.4.

Dr. Berland first indicated that during his second meeting with petitioner,

> the defendant was pleasant and conversational, and readily cooperated with all aspects of the evaluation. This differed from his behavior the first time I evaluated him in which he cooperated for part of the time, but became very emotional and frightened and excused himself before the end of the interview.

App.,#28,p.1.

In that second report, Dr. Berland opined in pertinent part as follows:

> Despite the defendant's irrational beliefs about the nature of the current proceedings against him, and his resultant inability to consult with his attorney with a reasonable degree of rational understanding, the defendant did evidence a factual appreciation of the (theoretical) nature of the proceedings against him. In response to my questions, he talked knowledgeably about some of the rights and required procedures during an arrest. He similarly described the trial process as involving the presentation of evidence to a jury, along with exhibits, by the prosecution, and the ability of a defendant to confront or contest that evidence. He properly explained the roles of key participants in the judicial process. He also was able to explain the nature, purpose, and timing of discovery in the judicial process.
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> * * * * *
>
> The result of the DOC psychiatrists' follow-up evaluations is that no medication was offered to the defendant to assist in restoring his trial

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[8](...continued)
Berland did not specifically remember, but assumed that he spent an hour administering diagnostic testing and about one hour and forty-five minutes conducting the clinical interview. App.,#32,pp.96-97.

> competency. Rather, he was offered counseling, some of which he accepted, and some of which he declined. The form of mental illness with which this defendant is afflicted is biological in origins, and can only be controlled through medical means, i.e. with medication. . . .

App.,#28,pp.3, 4.

Dr. Berland also testified at the competency hearing on March 20, 2003. App.,#32,pp.85-126. His testimony was consistent with his previous reports to the circuit court. In addition, Dr. Berland opined for the first time that he believed "there's some evidence that [petitioner's psychiatric condition has] been complicated by brain injury some way along the line." App.,#32,p.111. While Dr. Berland concluded that petitioner experienced auditory and visual hallucinations, he did not ask petitioner during his evaluations about the frequency of those hallucinations or when they had occurred. App.,#32,pp.112-113. Finally, Dr. Berland believed that the pertinent information was before the DOC staff but they interpreted it differently. App.,#32,p.124.

Dr. Umesh Mhatre, M.D.

In respect to his first report to the court, dated February 16, 2001, Dr. Mhatre conducted a two and one-half hour clinical interview of petitioner on February 16, 2001, as well as having reviewed "[e]xtensive material provided by his attorney . . . ."

App.,#14,pp.4, 1, respectively.[9] Dr. Mhatre found petitioner competent. App.,#14,pp.4-5.

Under "Psychiatric History," Dr. Mhatre reported the following:

> He denies any prior inpatient psychiatric care, but admits that he has made numerous suicide attempts by cutting his neck (the scars are visible), taking an overdose, and attempting to shoot himself. He initially denied that he had ever attempted suicide since being incarcerated, but admits later on when confronted that he has made threats numerous times. He reports that he is not really suicidal, but he knows that when he makes threats he gets put into a special cell, whereby "I can get some peace and tranquility." Thus, he implies that his threats to kill himself are manipulative in nature and attempts to find a place away from other inmates.
>
> Since at Union Correctional Institute, he admits that he has been depressed because he is tired of being there. He cannot sleep and has decreased appetite; yet, he has refused to take medications. He reports that he is really fed up with the legal processes going on and he wants the state to "either execute me and free me or let me go home and free me."

App.,#14,p.3.

Under "Mental Status Examination," Dr. Mhatre reported in pertinent part as follows:

> Initially, Presley [sic] was somewhat uncooperative, responding to my questions with questions, asking to see the court order, as well as, wanting to know why I needed personal information. However, as the

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[9]Dr. Mhatre testified at the March 20, 2003 evidentiary hearing that it generally is his practice to date his reports the same date that he evaluated the subject, rather than the date that the report was actually typed. App.,#32,p.27.

> interview proceeded he settled down and for the next 2 ½ hours. He [sic] was fairly cooperative and gave me the necessary information. His mood is mildly depressed, but is in range of a person on death row and being incarcerated. His affect is appropriate. There was no evidence to auditory or visual hallucinations; though, there has been some claims that he may have had hallucinations in the past. He is not exhibiting any pressured speech, flight of ideas, or thought blocking. His speech was coherent, logical, and goal oriented. He was very good at expressing his feelings and his thoughts about his current status. He repeatedly expressed anger towards the representation by his current attorney.
>
> * * * * *

App.,#14,p.4.

> In conclusion, in his first report to the circuit court, Dr. Mhatre opined that
>
> Pressley, in my medical opinion, is not clinically depressed at this present time. The despair and despondency he is experiencing at this present time is consistent with a person whose freedom has been taken away and is on death row. His decisions appear to be logical, well thought out, and with a purpose. It is therefore, in my medical opinion, he **SHOULD BE CONSIDERED COMPETENT TO PROCEED** in a post conviction phase.

App.,#14,p.5) (emphasis in original).

In respect to his second report to the court, dated July 19, 2002, Dr. Mhatre re-evaluated petitioner on that date, App.,#26(Attachment A),p.1[10]; the report does not indicate the length of that interview.[11] Dr. Mhatre again found petitioner competent to

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[10]See supra, at 15 n.9.

[11]Dr. Mhatre testified at the evidentiary hearing on March 20, 2003 that he (continued...)

proceed. App.,#26(Attachment A),p.3.

In that report, Dr. Mhatre wrote in pertinent part as follows:

> His formal Mental Status Examination showed him to be fairly appropriate in his conversation. His mood was slightly depressed and his affect was appropriate. There was no evidence to auditory or visual hallucinations. From time to time, he makes grandiose claims, but I truly believe that he's malingering and I do not think they reach the level of paranoia or even delusions at this time. He is oriented to time, place, and person. His memory is intact for immediate, recent, remote events. He is neither suicidal nor homicidal.
>
> The issue at this time is whether Mr. Alston is competent to proceed. Even though I do not have a copy of Dr. Berland's report, Mr. Alston was able to provide me a copy of Dr. Wade Myers' report which I have reviewed. It appears at the time of Dr. Myers examination, Mr. Alston exhibited some behaviors appearing to be a result of Bipolar Affective Disorder. However, Dr. Myers also had strongly suspected malingering. Interestingly, today his mental status shows no evidence of Bipolar Affective Disorder. Even though from time to time, he exhibited some rapid speech it was due to excitement and he, himself, was able to recognize it and repeatedly stated "I'm getting loud, let me slow down" and was able to do so. His behavior did not show any evidence whatsoever to Bipolar Affective Disorder. Rather, the symptomatology he presents today could be interpreted to some extent as being paranoid and delusional which is an entirely different clinical presentation. Changing clinical presentation such as this is often a sign of malingering.
>
> Even if one was to accept the claims of having found a cure for AIDS and breast cancer as true delusions of grandeur and even if we were to accept that his claims of FDLE, Jacksonville law enforcement, and

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[11](...continued)
believed he spent "definitely more than an hour, probably more" with petitioner on July 19, 2001. App.,#32,p.14.

> undercover agents are following him, they do not rise to the level of affecting his competency. In my opinion, he has clearly admitted to his own guilt in the trial for which he's convicted of, even though he disagrees with receiving the death penalty, he is capable of assisting you in his defense. Rather, during the interview, he showed enough knowledge of the legal system to discuss his appeal strategies. He is capable of exhibiting appropriate courtroom behavior, as well as, challenging prosecutor's witnesses. It is therefore my medical opinion that he should be considered **COMPETENT TO PROCEED** in a post conviction phase.
>
> I continue to feel that Mr. Alston is suffering from Antisocial Personality Disorder. He possibly does have a mild degree of depression consistent with anyone on death row and obviously he's also malingering.
>
> * * * * *

App.,#26,pp.2-3 (emphasis in original).

Dr. Mhatre testified at the competency hearing on March 20, 2003. App.,#32,pp.11-56. That testimony was consistent with his reports to the court. In addition, Dr. Mhatre testified in pertinent part that

> And all this conversation that [petitioner] was doing 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.
>
> As the interview began to wind down -- at times he would get a little bit excited and those excitements were very appropriate to the subject and topic he was discussing. And then he would catch himself and say, "Well I'm getting a little bit loud, let me slow down," and he would slow down and control himself. He was in full control of his emotions, his thinking was pretty rational, very coherent; 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.
>
> * * * * *

App.,#32,p.14; see also App.,#32,pp.40-41. Dr. Mhatre further noted that petitioner's "delusions change from physician to physician, too, which is highly unusual." App.,#32,p.38. In addition, Dr. Mhatre explained that even if petitioner were delusional,

> he is still able to carry on very rational conversation with his attorney, was able to make legal points and discuss it with the attorney. And the point here that we are discussing is he able to assist in his defense? He knows what he wants to do, he knows where the penalty phase is, he knows what different phases are. And he really showed very impressive knowledge of the legal system.

App.,#32,p.44.

Lisa D. Wiley, M.A.

DOC Psychological Specialist Lisa D. Wiley, M.A., working at the Union Correctional Institution, prepared numerous reports, dated from December 11, 2001 to March 4, 2003, for the circuit court concerning the status of petitioner's mental health and any treatment thereof. Those reports, in summary, provide that petitioner had been evaluated by DOC psychiatrists who offered the diagnoses of Adjustment Disorder With Mixed Features and Antisocial Personality Disorder, App.,#s18-19, 24;

opined that there was no evidence of psychotic psychopathology, App.,#s18-19, 23; that his thinking was rational, App.,#s20, 24, 27, 30-31, but at times he had a tendency to ramble, App.,#s20, 24, 27; and that on numerous occasions petitioner refused to discuss treatment or to be evaluated. App.,#s18-20, 23, 30-31.

Ms. Wiley testified at the evidentiary hearing on March 20, 2003. App.,#32,pp.126-143. Ms. Wiley summarized what the DOC medical records reflected pertaining to petitioner having been on medication, including that he last received psychiatric medicine briefly in 2000, and that it was discontinued due to petitioner's lack of desire to continue with it. App.,#32,p.130. Ms. Wiley further advised the court that she had scheduled one interview per month with petitioner unless he requested to be seen more often, and that when petitioner kept his appointments, she saw him from thirty to forty-five minutes. App.,#32,pp.131, 133. Ms. Wiley also testified that she reviews confinement reports and that if indicated, an inmate would be referred for an additional evaluation. App.,#32,pp.137-138. Petitioner had no such referral. See App.,#32,pp.139-140.

Dr. Gloria Calderon, M.D.

Dr. Calderon, an in-house psychiatrist for the DOC, testified at the evidentiary hearing concerning petitioner's competency. App.,#32,pp.144-165. Dr. Calderon

testified that she had seen petitioner three or four times since 2000 and "all those evaluations the diagnosis has been pretty much adjustment disorders of some times with behavior or just purely emotional features." App.,#32,p.148. Dr. Calderon also advised the court that following the determination of incompetency, she had reviewed Dr. Myers' report and evaluated petitioner for forty-five minutes to one hour but did not see the symptoms of Bipolar Disorder. App.,#32,pp.151-152, 164; see also App.,#32,p.157. Dr. Calderon did not believe that petitioner suffered from any type of psychotic disorder. App.,#32,p.160.

Sgt. Michael Young

Sgt. Young testified at the competency hearing that he had worked on death row for ten years since it had opened at U.C.I., and is responsible for the day-to-day operations. App.,#32,p.166. Sgt. Young sees petitioner "on a daily basis, some times two or three times a day." App.,#32,p.167. Sgt. Young explained that petitioner had been on Disciplinary Confinement over the approximately two years by choice, and that he thought petitioner preferred that because he was then isolated from the general death row population. App.,#32,p.168; see also App.,#32,pp.174-175, 178. Regarding any bizarre or inappropriate behavior on petitioner's part, Sgt. Young testified that he believed it "was just a show . . .," an "attention getter," and that

petitioner was able to turn on and off such behavior. App.,#32,pp.169, 176-177.

Petitioner thereafter advised the circuit court that he believed that he was competent to proceed and that he wanted a Durocher hearing in order that he could waive all further postconviction proceedings. App.,#32,pp.182, 183-186.

Thereafter, the circuit court found petitioner competent. App.,#32,pp.186-187, and on March 27, 2003, entered its "Order Declaring Defendant Competent To Proceed." App.,#33. In that Order, the court found as follows:

> 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 "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 Department of Corrections who works at Union Correctional [Institution] 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.

> Over objection of his lawyer, Pressley Alston, made a statement to the court. He requested that the court find him competent to proceed. He further requested that the court schedule a hearing wherein he can waive his right to counsel, waive his right to collateral proceedings and request that the sentence of the court be carried out. In fact, he wanted a hearing on that matter right then but the court declined, explaining to Pressley Alston that the court preferred to enter an order on his competency and then proceed in an orderly fashion on his request.
>
> *The court is confident in its conclusion that Pressley Alston is competent to proceed. He has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and he has a rational as well as a factual understanding of the pending collateral proceedings.*

App.,#33,pp.1-2 (emphasis added).

2. Waiver of Counsel and of Postconviction Proceedings

Following the determination that petitioner was competent to proceed, the circuit court set a hearing date on petitioner's request to discharge counsel and waive his postconviction relief proceedings. The hearing was held on June 6, 2003. Transcript (6/6/03), at 1.

Before questioning petitioner, the circuit court stated the relevant standard:

> Obviously we all have the same interest here, and that is to assure ourselves, and in particular the court, that whatever it is that Mr. Alston decides is a free and voluntary act on his part and something that he deems to be in his best interest.

We all know by dictate of the Florida Supreme Court that a death sentence prisoner has every right to reject counsel and proceed either pro se or waive post-conviction proceedings and request that the judgment of the law be carried out. That is the law of the State of Florida.

So the first exercise I see is for Mr. Alston to determine whether he wishes to discharge counsel, and then we will go from there.

Transcript (6/6/03), at 4-5.

The court thereafter advised petitioner of his options:

I see, Mr. Alston, that you have three options. Your first option would be -- is to stay where you are legally; that is, let CCR counsel prosecute your post-conviction matters that are now pending and just let things take ordinary course. That's your one option.

The second option is for you to discharge CCR, proceed on your own without benefit of counsel, with the caveat that if CCR counsel is discharged another lawyer will not be appointed for you, you would be on your own.

The third alternative, as I see it, is to discharge CCR, waive post-conviction proceedings. Of course, you can waive CCR and prosecute your post-conviction proceedings on your own, of course, without assistance of counsel.

THE DEFENDANT: Yes, sir.

THE COURT: But if you waive your post-conviction proceedings, the court will not only discharge counsel, but will also enter an order dismissing with prejudice any motions that you have under rule 3.851 or any other post-conviction rules.

Now, with prejudice means that you can never refile those matters, that once they are dismissed, they're over and all of your collateral remedies are foreclosed. Then it is logical to assume that if you do that,

that ultimately the judgment of the law will be carried out and you will be put to death as ordered by this court.

* * * * *

Transcript (6/6/03), at 6-7.

The circuit court thereafter held the following colloquy with petitioner:

THE COURT: All right. How old are you today?

THE DEFENDANT: 32, sir.

THE COURT: How long have you been in either jail or prison, approximately?

THE DEFENDANT: Since 1996, March, I've been on Florida's death row at Florida State Prison, and I was transported and transferred over to Union Correctional Institution; that is Union C.I., abbreviated U.C.I.

THE COURT: And how far did you go in school? I forget.

THE DEFENDANT: 12th grade education, sir.

THE COURT: So you have a high school diploma, do you?

THE DEFENDANT: Yes, sir.

THE COURT: Or equivalency diploma?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. I know that you read and write the English language because you send me many messages, correct?

THE DEFENDANT: Yes, sir.

THE COURT: You're comfortable in the English language?

THE DEFENDANT: Yes, sir.

THE COURT: Are you comfortable here today; that is, physically are you in good health?

THE DEFENDANT: Yes, sir.

THE COURT: Are you under any medication?

THE DEFENDANT: No, sir.

THE COURT: None whatsoever?

THE DEFENDANT: No, sir, not at all.

THE COURT: So you have a clear head?

THE DEFENDANT: Yes, sir.

THE COURT: You know why we're here?

THE DEFENDANT: Yes, sir.

THE COURT: You know that it's at your request?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. What do you wish to do?

THE DEFENDANT: As you ordered and declared that I am competent to proceed, today I would like to -- as you say, a third option is by representing myself pro se. I would like to waive all collateral proceedings and post-conviction proceedings and have the judgment of the law carried out, meaning on January 11th, this court imposed the sentence of death for State of Florida versus Pressley Alston, and that is

what I'm here for today seeking, to have the court –

THE COURT: Okay.

THE DEFENDANT: -- abide by the -- you know, stay with this judgment that was entered on January 11th, 1996.

THE COURT: Very well.

Well, I know you've been fussing for a long time, and I don't mean that in a disparaging manner, but you have fussed a little bit about some of the things that have been done on your behalf. You have expressed some displeasure with counsel. We've resolved some personality conflicts that you've had with counsel before.

You know that these two lawyers sitting with you are available to assist you in any way that you deem appropriate? You know that, don't you?

THE DEFENDANT: Yes, sir.

THE COURT: You know that they have a repository or a reservoir of research and case law that could assist you in your post-conviction proceedings?

THE DEFENDANT: Yes, sir.

THE COURT: Will you concede that they are better equipped to deal with post-conviction proceedings than you are?

THE DEFENDANT: No, sir, because I desire to waive all remaining post-conviction proceedings, appeals, and everything as a collateral attack. The only thing I want to refer to was what you ruled March 20th, 2003. You said here in court on the record that I would be able to address the things that you said that I've been filing and –

THE COURT: I'm going to let you do that, but I've got to do

what I've got to do first, okay?

THE DEFENDANT: Okay. Yes, sir.

THE COURT: All right. But I've also cautioned you I'm not going to let you use the courtroom as a forum just to give a speech –

THE DEFENDANT: Yes, sir.

THE COURT: -- because this is serious business.

THE DEFENDANT: Yes, sir.

THE COURT: All right?

And you know that this transcript of what we do or whatever comes out of this will probably be reviewed by the Supreme Court to be sure that everything is done properly?

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And once that's taken place, it is likely that the governor will issue a warrant calling for your death.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, Mr. Strain has been with him for a while. You get along with him, don't you?

THE DEFENDANT: No, sir. Yesterday I shook his hand and as we ended up interview session, I apologized to him because we had irreconcilable conflict. And at times -- and he admitted yesterday we had some arguments. And I told him yesterday that I apologize and I was

sorry because I felt as though I had disrespected him.

But I think that when you look at since 1996 and when you look at 1998 after the Supreme Court affirmed the sentence of death, that's what I've been doing, is seeking this court to waive all –

THE COURT: Okay.

THE DEFENDANT: -- further –

THE COURT: You are very impressive in your desire to treat your case in the manner that you have outlined.

THE DEFENDANT: Thank you, sir.

THE COURT: You've done some legal research on your own. I know that.

THE DEFENDANT: Yes, sir.

THE COURT: You've done a lot of reading since you've been in prison, haven't you?

THE DEFENDANT: I try to, sir.

THE COURT: What other things do you read other than law books?

THE DEFENDANT: Just the Holy Scriptures as written in the Bible, that's it, and any other religious material or the newspaper, sometimes magazines.

THE COURT: Okay. What kind of law literature do you read?

THE DEFENDANT: Everything that is accessible and available in the written room library at Union C.I.

THE COURT: Why are you reading these law books if you want to waive all of your rights?

THE DEFENDANT: I thought that when you have a -- I thought that I was supposed to have attorney-client privilege, and that never happened since I've been on appeal.

When the case was appealed to the Florida Supreme Court -- as I filed to this court when I had attorney Teresa J. Sopp, I only saw her one time for about eight minutes. I never took part in the appellate process.

And then I had conflict with C.C.R.C. There were things I filed against them here in this court wherein I thought they falsified the signature on some of the paperwork that I received.

THE COURT: All right. So you were trying to see what to do about those things?

THE DEFENDANT: Yes, sir.

THE COURT: That's why you were reading the law books, right?

THE DEFENDANT: Yes, sir, to have knowledge of the court process while on appeal.

* * * * *

Transcript (6/6/03), at 7-14.

Petitioner and his attorney then engaged in the following colloquy, pertinent to

the Faretta[12] inquiry:

> Q [by Mr. Strain] Mr. Alston, if I may ask you, how would you explain to the court what the consequences of dismissing my office are as far as any post-conviction proceedings?
>
> A [by petitioner] The consequences is the death sentence that this court imposed, as I said earlier, on January 11th, 1996, the consequences of waiving all collateral proceedings, CCR, Capital Collateral Regional Counsel Middle Region today would be that I would not have an attorney -- I would not have the attorney's services or any representatives of C.C.R.C. middle region to help me or assist me in anything that I try to file to this court as a collateral attack or post-conviction relief.
>
> And that is not what -- that's not what I'm going to do. I will not have any assistance or help from C.C.R.C. at all. That is my understanding.
>
> Q Mr. Alston, are you under any drugs or medication at the present time?
>
> A No, sir.
>
> Q Have you been taking any drugs or medication in the last two weeks?
>
> A No, sir, not at all.
>
> Q Mr. Alston, have you -- have you ever been diagnosed and treated for mental illness?
>
> A No, sir. Only thing, I went through the competency evaluations, but I never been treated for any mental illnesses at all.

---

[12]Faretta v. California, 422 U.S. 806 (1975).

Q Do you remember any of the specific diagnoses that some of the witnesses testified to before?

A No, sir. . . .

* * * * *

Q Mr. Alston, assuming the judge finds today that you are making a knowing and voluntary and intelligent waiver of counsel, do you understand that it's whole -- as the judge explained earlier -- that it's a whole second step whether or not you're going to waive any post-conviction proceedings?

A Yes, sir, there is -- I believe that -- I believe that there is no second step after I knowingly and intelligently and voluntary waive all further appeals and collateral proceedings and post-conviction proceedings in this case.

* * * * *

Q Well, if I -- sorry to interrupt.

If I advised you today, Mr. Alston, that it's my strong legal opinion that we would have a very good argument to file a fully pled and investigated 3.850 today despite the fact that it was not filed within the one-year period of your initial appeal, would that make a difference in any waiver that you intend to tell the judge you want to go with?

A No. My intentions are still the same.

Q Mr. Alston, do you understand that if the Robert Trease death warrant case is any precedent, that any time after today, assuming the judge dismisses my office, that if you change your mind and request counsel, even up to the day before any execution is carried out, you would still be able to communicate and ask to be -- have counsel reappointed for you?

A You informed me about that case yesterday. I can't really remember. I just remember the name.

Q Do you understand that fact today, that if you change your mind again, that you can request counsel and it'd be up to the court then to decide how that would fit in at a later time?

A I understand that, but I will not change my mind.

* * * * *

Q Mr. Alston, if you will explain to me and the court in very clear terms what it means when the court's sentence of execution is going to be carried out, if those are your desires by waiving counsel and waiving post-conviction proceedings.

A That is my desire, to have the court's sentence and judgment carried out by law.

Q And what's going to happen when that is carried out?

A I believe that after today and Judge Bowden's court orders and ruling, as he said, that he will send down to the Supreme Court and the Supreme Court will review it and send it to the governor's office and subsequently a death warrant will be signed.

Q Okay. But what happens when U.C.I. personnel take you over to F.S.P. to the death chamber, as it's often called in the newspapers? What happens when the execution is carried out, Mr. Alston?

A Death; I will be dead.

* * * * *

Transcript (6/6/03), at 17-18, 20, 25-26, 29.

The State then made the following inquiry of petitioner, in pertinent part:

Q [by Ms. Dolgin] Mr. Alston, you understand that you have the right to counsel to file an amended post-conviction motion?

A [by petitioner] Yes, ma'am.

Q And you understand that if you retain counsel, Mr. Strain, that he could request an evidentiary hearing on your claims that your conviction was either unconstitutional or your sentence is unconstitutional?

A I understand that.

Q Are you telling this court that you do not want counsel to file an amended motion?

A Yes, ma'am.

Q And are you telling the court that you don't want counsel to request an evidentiary hearing?

A Yes, ma'am.

Q You also understand, Mr. Alston, that you would -- if you filed an amended post-conviction motion, that you have the right to have counsel call witnesses at an evidentiary hearing?

A Yes, ma'am.

Q Are you telling this court that you do not want counsel to request a hearing so that you can put on witnesses?

A Yes, ma'am.

* * * * *

Q So when you say nothing is happening, you're saying your death sentence has not been carried out?

A I'm saying that the death sentence has not been carried out. Nothing as far as post-conviction relief hasn't even taken place.

Q Well, you understand, though, that you do have the right to proceed with the post-conviction if you wish?

A I do not wish that.

* * * * *

Q Mr. Alston, you understand that if the court finds that you knowingly, intelligently, and voluntarily waive your right to post-conviction proceedings, that in the future if you should change your mind and attempt to re-invoke those proceedings, that the state will oppose any such motion?

A I understand, Ms. Dolgin.

* * * * *

Transcript (6/6/03), at 30-31, 34, 36.

The circuit court thereafter found that

Mr. Alston has again knowingly, intelligently, and voluntarily indicated his desire to waive further post-conviction proceedings. He has knowingly, intelligently, and voluntarily requested that the judgment of the court be carried out. He realizes the ultimate penalty will be exacted if his wish is followed, and the court will enter an order to that effect.

Transcript (6/6/03), at 37.

On June 12, 2003, the circuit court entered its Order Discharging Capital

Collateral Counsel And Dismissing With Prejudice Post-Conviction Proceedings. Order (6/12/03). In that Order, the court found in pertinent part as follows:

> 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 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 (6/12/03), at 1.

The circuit court's Order dated June 12, 2003 and the transcript of the proceedings held on June 6, 2003 were filed in this Court on June 13, 2003.

SUMMARY OF THE ARGUMENT

I.

The circuit court properly exercised its discretion in finding that petitioner was competent to proceed in his postconviction action. The court's ruling is amply supported by the record and there is no basis to overturn that decision.

II.

The circuit court properly exercised its discretion in finding that petitioner was competent to waive his right to postconviction counsel and to further postconviction relief proceedings and in determining that petitioner did so knowingly, intelligently, and voluntarily. The court's ruling is amply supported by the record and there is no basis to overturn that decision.

ARGUMENTS

I.

THE TRIAL COURT PROPERLY HELD THAT ALSTON WAS COMPETENT TO PROCEED IN HIS POSTCONVICTION RELIEF PROCEEDINGS.

This Court reviews for an abuse of discretion a trial court's finding regarding a defendant's competency. Ferguson v. State, 789 So. 2d 306, 315 (Fla. 2001). Moreover, because the motion court made factual findings following an evidentiary hearing on the question of petitioner's competency, the standard of review is whether there was substantial, competent evidence presented to support the findings. Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) ("As long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.") (internal quotation marks and citation omitted); Mason v. State, 597 So. 2d 776, 779 (Fla. 1992) (competent, substantial evidence supported the trial court's finding that defendant was competent to stand trial). In addition, "[i]t is the duty of the trial court to determine what weight should be given to conflicting testimony." Id.; see also Hunter v. State, 660 So. 2d 244, 247 (Fla. 1995) ("[E]ven when the experts' reports conflict, it is the function of the trial court to resolve such factual disputes."), cert.

denied, 516 U.S. 1128 (1996).

The standard for competency to proceed in a postconviction proceeding, as set forth in Rule 3.851(g)(8)(A) of the Florida Rules of Criminal Procedure, is "whether the prisoner has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the prisoner has a rational as well as factual understanding of the pending collateral proceedings." Cf. Dusky v. United States, 362 U.S. 402 (1960); Godinez v. Moran, 509 U.S. 389, 399 (1993) (Dusky standard applicable for defendant who chooses to plead guilty and waive right to counsel).

While Mr. Strain takes exception to the fact that the circuit court only briefly commented on the reports by Drs. Myers and Berland, made no mention of the differing times each expert spent with petitioner[13], did not mention various conduct observed by DOC personnel, and did not reconcile the use of nearly identical reports

[13]In actuality, there is not a significant differential in the times that the panel of experts spent clinically evaluating petitioner. That is, Dr. Myers spent two hours and ten minutes and two hours interviewing petitioner during his two evaluations, App.,#15,p.1; App.,#26(Attachment B),p.2, respectively. Dr. Mhatre spent two hours and thirty minutes and at least one hour during his two evaluations of petitioner, App.,#14,p.4; App.,#32,p.14, respectively. Finally, Dr. Berland spent approximately two hours and forty-three minutes and one hour and forty-five minutes with petitioner, excluding the time that he estimated he took to administer the MMPI-2 to petitioner. See App.,#32,p.89; App.,#32,pp.96-97, respectively.

to arrive at an opposite result, I.B. at 40-41, he fails to cite any authority that requires the trial court to set forth such express findings or discussion in making its credibility determinations.

In any event, the record does, however, clearly reflect that the circuit court considered all of the conflicting evidence. See supra, at 22-23 (quoting App.,#33,pp.1-2). While Mr. Strain apparently believes that the circuit court should have given greater weight to Dr. Berland's conclusions, see I.B. at 40, there is substantial evidence supporting the lower court's findings. In addition to Dr. Mhatre's consistent conclusions that petitioner was competent, it is apparent in light of the court's order that the court was persuaded by the additional testimony of DOC personnel, including individuals trained to provide mental health services as well as a lay person with ten years experience on death row who had daily interaction with petitioner over the last two years. While the DOC experts consistently diagnosed petitioner as Adjustment Disorder With Mixed Features and Antisocial Personality Disorder without psychotic pathology, App.,#s18-19, 23-24), Sgt. Young testified that he only observed petitioner acting in a manner which he might describe as delusional "only when he is out of his cell and he's got a forum or audience," App.,#32,p.168, and that it was his opinion that petitioner would engage in additional conduct in order to remain in disciplinary confinement. App.,#32,pp.174-175. It thus is not surprising

or otherwise incongruent that the circuit court reached a different conclusion from that in 2001, given that the court then did not have the benefit of that additional evidence.[14]

Moreover, various aspects of Dr. Berland's reports and testimony are inconsistent with the facts and even conflict with Dr. Myers' conclusions. For example, only Dr. Berland concluded that petitioner was experiencing hallucinations, App.,#16,p.5; App.,#32,pp.91, 112-113, and that petitioner is "very disturbed" and "severely mentally ill." App.,#32,p.95; App.,#32,p.97, respectively. Indeed, while Dr. Myers concluded that petitioner's mental illness was "mild," App.,#15,p.6, he testified that he was not necessarily disagreeing with Dr. Mhatre's testimony. App.,#32,p.66. And according to Dr. Berland, because of the longstanding nature of petitioner's condition, he could not attain competency unless "aggressively treated" with psychotropic medication. App.,#16,pp.9-10; App.,#28,p.4. Yet Dr. Berland's characterization of petitioner's condition failed to account for the fact that while he saw petitioner within a couple of months of the other panel experts, petitioner was not considered so ill when evaluated by Drs. Myers or ill at all when evaluated by Dr. Mhatre, notwithstanding the fact and that petitioner had not received medication in the

[14]In reaching its conclusion in 2001, the parties had agreed for the court to rely solely upon the reports without conducting an evidentiary hearing. See supra, at 5 (quoting App.,#17,p.2). The State did not appeal from that earlier competency determination.

interim.

As is evident from the foregoing, the circuit court resolved the dispute concerning conflicting testimony regarding petitioner's competency, as was its duty. Castro v. State, 744 So. 2d 986, 989 (Fla. 1999). Thus the case here is similar to the situation in Ferguson, where some experts concluded that the postconviction movant was incompetent, while others reached the contrary conclusion supported by testimony from DOC personnel. That is, given the record, there is "no basis to quarrel with the trial court's determination." Id., 789 So. 2d at 315; accord Hunter, 660 So. 2d at 248 ("After considering the evidence and observing Hunter's behavior in court, the trial court found Hunter competent to stand trial. Although there was conflicting opinions from the experts on the issue of competency, it was within the sound discretion of the court to resolve the dispute. There is evidence to support that resolution. Therefore the trial court did not abuse its discretion in finding Hunter competent to stand trial.") (internal footnote omitted).

Based upon the foregoing, as the circuit court conducted an evidentiary hearing, considered the evidence before it, applied the proper standard, and there is substantial evidence in the record to sustain its determination, there is no basis for vacating the lower court's March 27, 2003 Order.

II.

THE TRIAL COURT PROPERLY FOUND THAT ALSTON WAS COMPETENT TO WAIVE HIS RIGHTS TO RULE 3.850 COUNSEL AND TO FURTHER POSTCONVICTION RELIEF PROCEEDINGS, AND THAT SAID WAIVER WAS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.

This Court reviews for an abuse of discretion a trial court's finding regarding a defendant's competency to waive collateral counsel and proceedings and the determination as to the validity of that waiver. Slawson v. State, 796 So. 2d 491, 502 (Fla. 2001); Holland v. State, 773 So. 2d 1065, 1069 (Fla. 2000), cert. denied, 534 U.S. 834 (2001). Moreover, because the motion court made factual findings following an evidentiary hearing on the question of petitioner's competency, the standard of review is whether there was substantial, competent evidence presented to support the findings. Blanco, 702 So. 2d at 1252. "[T]he party challenging the defendant's waiver request bears the burden of proving that the defendant is incompetent." Slawson, 796 So. 2d at 502.[15]

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[15]It bears noting that there is no challenge to petitioner's competency and decision to forego his postconviction relief proceedings. As the State raised the matter in its "Motion To Dismiss Without Further Proceeding," no appeal was taken from the circuit court's orders and no one has sought and been accorded next friend status. Respondent therefore reasserts its belief that the pending action should be dismissed, as petitioner received the Durocher hearing he had sought in petitioning this (continued...)

As this Court stated in Durocher v. State, 623 So. 2d 482 (Fla. 1993), "[c]ompetent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose." Id. at 483 (citing Faretta v. California, 422 U.S. 806 (1975)). There is no basis for a contrary result involving waiver of a statutory right to counsel where a defendant has a constitutional right to waive his constitutional right to counsel. See Durocher, 623 So. 2d at 483. This right exists irrespective of the feelings as to what the Court might do in similar circumstances, as petitioner has the "right to control his destiny to whatever extent remains." Id. at 484. Indeed, "'[r]egardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent him or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.'" Holland, 773 So. 2d at 1069 (quoting Fla. R. Crim. P. 3.111(d)(3)). Thus "it is within the defendant's rights, if he or she so chooses, to sit mute and mount no defense at all." State v. Bowen, 698 So. 2d 248, 251 (Fla. 1997), cert. denied, 522 U.S. 1081 (1998).

In Slawson, this Court reiterated the relevant test for competency to waive

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[15](...continued)
Court. See Durocher v. Singletary, 626 So. 2d 204 (Fla. 1993).

collateral counsel and postconviction proceedings: "whether the person seeking waiver has the capacity to 'understand the consequences of waiving collateral counsel and proceedings.'" Id., 796 So. 2d at 502. "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself. Godinez, 509 U.S. at 399 (emphasis in original). On the other hand, in making the determination as to the validity of the waiver of counsel, this Court has stated that "'a trial court should inquire into, among other things: defendant's age, mental status, and lack of knowledge and experience in criminal proceedings.'" Holland, 773 So. 2d at 1069 (quoting Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986)).

Consistent with the foregoing standard, the circuit court did just that. See supra, at 25-30 (quoting Transcript (6/6/03), at 7-14), see also supra, at 30-35 (quoting Transcript (6/6/03), at 17-18, 20, 25-26, 29, 30-31, 34, 36). In addition, not only did petitioner testify that he had a twelfth grade education, but that he was an avid reader. Transcript (6/6/03), at 7-8, 12-13. Moreover, petitioner, presumptively competent following the court's prior determination of competency, see Durocher, 623 So. 2d at 484 ("A presumption of competence attaches from a determination of competency

to stand trial."),[16] unequivocally and exactingly explained to the court that while he understood that he had the right to counsel and that postconviction counsel would be responsible for filing an amended motion, seeking an evidentiary hearing and if granted, putting on witnesses on petitioner's behalf, petitioner did not want to be so represented and desired to discharge counsel and waive any further postconviction proceedings. See supra, at 26-28 (quoting Transcript (6/6/03), at 8-11). Indeed, petitioner also demonstrated his understanding of the consequences of his decision to waive further postconviction proceedings. See supra, at 31-33 (quoting Transcript (6/6/03), at 17-18, 20, 25-26, 29). That petitioner may possibly suffer from a mental illness rather than Antisocial Personality Disorder does not detract from the evidence that he was nonetheless competent and understood the consequences of waiving collateral counsel and the postconviction proceedings. Nor does petitioner's frustration with the postconviction proceedings negate his ability to waive counsel and those proceedings. See Slawson, 796 So. 2d at 502-503 ("[D]isenchant[ment] with the perceived inadequacy of the representation being provided to him by CCRC-M . . . does not [alone] negate [Slawson's] ability to waive both collateral counsel and collateral proceedings."). Rather, "[t]he record conclusively shows that [petitioner]

[16]Petitioner was found to be competent to stand trial following an evaluation. Direct appeal Transcript Of Record, Volume II, at 331.

'was literate, competent, and understanding, and that he was voluntarily exercising his informed free will.'" Bowen, 698 So. 2d at 251 (quoting Faretta, 422 U.S. at 835).

Based upon the foregoing, as the circuit court conducted a hearing and made the appropriate inquiry, applied the proper standard, and there is substantial evidence in the record to sustain its determination, there is no basis for vacating the lower court's June 12, 2003 Order.

CONCLUSION

Based on the foregoing arguments and authorities, the petition should be summarily dismissed, or in the alternative, should be denied.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of January, 2004, to:

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IN THE SUPREME COURT OF FLORIDA

PRESSLEY BERNARD ALSTON,

Petitioner,

vs. **Case No. SC 02-1904**

STATE OF FLORIDA,

Respondent.
_____/

ON REVIEW FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

RESPONDENT'S APPENDIX

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