ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1353

ROBERT TREASE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR SARASOTA COUNTY, STATE OF FLORIDA

APPELLANT'S DISCHARGED ATTORNEYS' AMENDED INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's Order After *Durocher* Hearing granting Mr. Trease's request to dismiss undersigned appellate counsel and to end all further appeals. During the pendency of this mandatory appeal, Mr. Trease has now indicated that he wants his post-conviction appeal to proceed and that he wants undersigned counsel to represent him. The trial and direct appeal record will be referred to as "R. ___" or "Trial Transcript ___;" the post-conviction record will be referred to as "PC __;" and the *Durocher* hearing will be referred to as "DH __."

REQUEST FOR ORAL ARGUMENT

Mr. Trease has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999). A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Trease, through counsel, accordingly urges that the Court permit oral argument.

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I. INTRODUCTION

Since the *Durocher* hearing in the lower court, Mr. Trease has unequivocally stated that he wants his Rule 3.850 appeal to go forward and he wants undersigned counsel to represent him. He has documented that in *pro se* letters to undersigned counsel, opposing counsel, the lower court and this Court. Undersigned counsel has met with Mr. Trease at Florida State Prison to discuss his desire to go forward with his Rule 3.850 appeal and he is adamant that he wants to proceed with his appeal represented by undersigned counsel. In short, Mr. Trease has repudiated his statements made at the *Durocher* hearing that he wanted to dismiss his appeal and discharge counsel. Based on Mr. Trease's clear intent that his appeal go forward and that he be represented by undersigned counsel, this Court should hear Mr. Trease's appeal to the denial of his Rule 3.850 motion and order the Appellee to respond to the issues raised in Mr. Trease's Initial Brief. At a minimum, this Court should remand the case for further proceedings under Rule 3.851(i).

II. STATEMENT OF THE CASE

1. The Circuit Court of the Twelfth Judicial Circuit, Sarasota County, Florida, entered the judgments of convictions and sentences under consideration.

2. On September 25, 1995, a Sarasota County grand jury indicted Mr.

Trease for First Degree Murder. (R. 31-32.) On February 14, 1996, Mr. Trease was charged by information with armed burglary and robbery with a firearm. (R. 137-38.)

3. After a jury trial, Mr. Trease was found guilty on December 11, 1996. (R. 1846-47.)

4. On December 19, 1996, the jury recommended a sentence of death. (R. 1884-85.)

5. On January 22, 1997, the trial court imposed a sentence of death. (R. 2235.)

6. On direct appeal, this Court affirmed Mr. Trease's convictions and sentences. *Trease v. State*, 768 So.2d 1050 (Fla. 2000).

7. On May 22, 2001, Capital Collateral Counsel-Middle Region (CCC-MR) filed a Motion to Vacate Judgment of Conviction and Sentence on behalf of Mr. Trease. Mr. Trease filed a motion to dismiss counsel and on May 30, 2001, following hearing on the matter, this Court entered an order dismissing CCC-MR as counsel of record and dismissing the Motion to Vacate filed on his behalf. Governor Bush subsequently signed a death warrant setting Mr. Trease's execution for February 6, 2002. During ensuing litigation this Court held that CCC-MR had no obligation or authority to file pleadings on Mr. Trease's behalf.

The Governor stayed Mr. Trease's execution *sua sponte* on February 5, 2002, in light of the United States Supreme Court's grant of certiorari in *Ring v. Arizona* 536 U.S., 122 S.Ct. 2428, 153 L.Ed 2d 556 (2002).

8. On June 18, 2002, Mr. Trease filed a Motion to Reinstate Previously Filed Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend.

9. This Court reinstated Mr. Trease's previously filed Motion to Vacate on October 1, 2002.

10. This Court entered an Order appointing undersigned counsel as registry counsel for Mr. Trease for the purposes of costs on December 8, 2005.

11. An amended Rule 3.850 motion was filed March 21, 2006. The lower court held a *Huff*[1] hearing on October 5, 2006. Thereafter, on October 11, 2006, *the trial court denied an evidentiary hearing on all claims raised in the amended motion except for the claim of ineffective assistance of counsel at sentencing.* PC. 887-912.

12. An evidentiary haring was held on the single sentencing claim December 12, 2006. The lower court denied relief in an order entered May 11, 2007. PC 2836-62. A motion for rehearing was denied June 6, 2007. A notice of

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

appeal was filed July 5, 2007.

13. On April 7, 2008, Appellant filed a Motion to Vacate Conviction or For Remand Based On New Evidence of Junk Science and Innocence which this Court denied on April 18, 2008.

14. On April 25, 2008, Appellant filed his Initial Brief.

15. On May 5, 2008, Mr. Trease filed am Emergency Motion to Dismiss Appellant Counsel and End All Further Appeals.

16. On May 9, 2008, the State filed a Motion to Relinquish Jurisdiction to conduct a *Durocher* hearing. The Court granted the motion on June 19. 2008.

17. On October 6, 2008, the lower conducted a *Durocher* hearing. On October 23, 2008, the lower Court entered an Order After *Durocher* Hearing granting Mr. Trease's motions. Undersigned counsel filed a timely notice of appeal.

18. On January 28, 2009, undersigned counsel filed their Initial Brief.

19. On February 5, 2009, Appellee filed a Motion to Strike Discharged Attorneys' Initial Brief.

20. On February 18, undersigned counsel filed Discharged Attorneys' Response to Motion to Strike Discharged Attorneys' Initial Brief and Supplemental Proffer in Support Thereof .

21. On February 25, 2009, this Court entered an Order granting Appellee's motion to strike and directing undersigned counsel to file an amended brief addressing: 1) "whether the trial court abused its discretion in granting Mr. Trease's *pro se* Motion to Dismiss Appellate Counsel and End All Further Appellate Review;" and 2) "whether this Court should consider Mr. Trease's *pro se* letter to Tom Hall dated February 10, 2009 and, if this Court should consider it, what effect it should be given."

22. In accordance with this Court's Order and with Mr. Trease's express approval, undersigned counsel file this Amended Initial Brief.

III. SUMMARY OF ARGUMENT

1. Mr. Trease has now unequivocally expressed his desire that his Rule 3.850 appeal go forward and that undersigned counsel represent him. In light of Mr. Trease's clear desire to proceed, this Court should hear Mr. Trease's appeal to the denial of his Rule 3.850 motion and order the Appellee to respond to the issues raised in Mr. Trease's Initial Brief. At a minimum, this Court should remand the case for further proceedings under *Durocher*.

2. Mr. Trease's repudiation of his stated desires to dismiss his appeal and discharge undersigned counsel while professing his innocence establishes that his actions before the lower court were the direct result of his organic brain

damage and not the result of a knowing, intelligent and voluntary waiver. Undersigned counsel predicted that Mr. Trease would change his mind because his brain damage "is very likely to result in outbursts of anger, outbursts of destructiveness, outbursts of behavior that the person otherwise can't explain, an I-don't -know-why-I-did-that type of phenomenon." (Testimony of Dr. Sidney Merin, trial defense mental health expert at P.C. 57). In short, Mr. Trease's flip-flopping is a result of his impaired brain which undermines his ability to deal with the stress of postconviction litigation and the conditions of his confinement.

3. Mr. Trease is innocent. His execution would violate due process and the Eighth Amendment because his action in the lower court were the direct result of his organic brain damage. "[S]ociety's duty to see that executions do not become a vehicle by which a person could commit suicide," demands that this Court decide Mr. Trease's appeal from the denial of his Rule 3.850 Motion.

IV. STANDARD OF REVIEW

With respect to all of the claims upon which the lower court denied an evidentiary hearing, the facts presented in this appeal must be taken as true. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989). All of the arguments presented in this appeal are constitutional issues involving mixed

questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999).

V. ARGUMENT

I. This Court Must Consider Mr. Trease's *Pro Se* Letters Repudiating His Stated Desires in the Lower Court By Expressly Declaring that He Wants His Appeal to Go Forward With Undersigned Counsel, and, Based on These Statements, This Court Must Allow Mr. Trease's the Appeal to Go Forward

A. Mr. Trease wants his appeal to go forward represented by undersigned counsel.

Since the *Durocher* hearing in the lower court, Mr. Trease has unequivocally stated that he wants his Rule 3.850 appeal to go forward and he wants undersigned counsel to represent him. He has documented that in *pro se* letters to undersigned counsel, opposing counsel, the lower court and this Court.[2] In his letter to the lower court, Mr. Trease wrote "after reading Olive and Dunn's

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[2]In a letter to counsel dated February 10, 2009, Mr. Trease wrote: "After reading your brief I wish to go forward with my 3.850." (Attached to Discharged Attorneys' Response to Motion to Strike Discharged Attorneys' Initial Brief and Supplemental Proffer in Support Thereof, Doc. Entry 02/18/09). Mr. Trease wrote to Counsel for Appellee, Stephen D. Ake, stating that: "after reading their brief – I've changed my mind, I wish to go forward with my 3.850. I want to my case to go forward." (Doc. Entry 02/20/09). Mr. Trease wrote a similar letter to the lower court. (Doc. Entry 02/25/09). Finally, Mr. Trease wrote this Court's Clerk of Court indicating that he wanted his appeal to go forward. (Doc. Entry 02/16/09).

durocher appeal brief. I now want to go forward with my 3.850 appeal. Could you send it up to the Florida Supreme Court for consideration. I'm sorry I wasted the courts and your time. Can we do as much proceedings by phone as possible. I do not want to die." Doc. Entry 02/25/09. Undersigned counsel has met with Mr. Trease at Florida State Prison to discuss his desire to go forward with his Rule 3.850 appeal and he is adamant that he wants to proceed with his appeal with undersigned counsel representing him. As late as Friday, March 13, 2009, counsel spoke again with Mr. Trease on the telephone concerning the filing of this brief and Mr. Trease implored counsel to inform this Court that he wanted undersigned counsel to represent him and for his appeal to go forward. In short, Mr. Trease has repudiated his statements made at the *Durocher* hearing that he wanted to dismiss his appeal and discharge counsel. Mr. Trease's clear intent is that his postconviction appeal go forward and that he be represented by undersigned counsel.

B. Under Rule 3.851(i), this Court must consider Mr. Trease's letters.

This Court remanded Mr. Trease's case for a hearing pursuant to Fla. R. Crim. Procedure, Rule 3.851(i). This Court adopted Rule 3.851(i) "to set forth a procedure whereby death-sentenced prisoners can dismiss post-conviction proceedings and discharge counsel." *In Re AMENDMENTS TO FLORIDA RULES*

OF CRIMINAL PROCEDURE 3.851 AND 3.590, 945 So.2d 1124, 1125 (Fla. 2006). The Court explained that "[t]he present amendment renders the rule consistent with the Court's precedent in this area." *Id.* at 1126.

According to Rule 3.851(i)(1), "this subdivision applies only when a prisoner seeks to both dismiss pending postconviction proceedings and to discharge collateral counsel." Although Mr. Trease before the lower court stated his fleeting desire to dismiss postconviction proceedings and to discharge counsel, he clearly no longer wants to dismiss postconviction proceedings and to discharge counsel. Pursuant to Rule 3.851(i)(8)(B), undersigned counsel filed a mandatory appeal of the lower court's order dismissing Mr. Trease's postconviction proceedings and discharging undersigned counsel. Counsel further complied with section (8)(B) by filing an initial brief. Doc. Entry 01/28/09.

Under Rule 3.851(i)(8)(B),Mr. Trease, like the State, has the right to file a responsive brief.[3] This Rule does not limit the nature of the prisoner's responsive brief. After reading Discharged Attorney's Initial Brief, Mr. Trease filed *pro se* letters indicating he wanted to go forward with his appeal. Mr. Trease's response to undersigned counsel's brief was "I now want to go forward with my appeal" – "I want to live." Pursuant to Rule 3.851(i)(8)(B), this Court must consider Mr.

[3]Rule 3.851(i)(8)(B) provides that: "Both the prisoner and the state may serve responsive briefs."

Trease's *pro se* response to undersigned counsel's brief. In fact, this Court's precedent – prior to the establishment of the mandatory appellate procedure set forth in Rule 3.851(i)(8)(B) – clearly recognized that a prisoner who states at a *Durocher* hearing that he wants to dismiss his postconviction proceedings and to discharge counsel, may change his mind during the period of time with in which such a determination may be appealed. *See James v. State*, 974 So.2d 365 (2008).

In *James*, the trial court conducted a hearing in accordance with *Durocher* and "entered an order discharging counsel and allowing James to withdraw his postconviction motion." *Id.* at 366. This Court then emphasized that: "In the order, the trial court also notified James he had thirty days to appeal the order, and further warned that the time for filing relief in the federal court might be affected by the dismissal of state proceedings. ***No appeal was filed."*** *Id.* (emphasis added). Despite being advised of his right to appeal, James did not file a timely appeal. Instead, James waited more than two and a half years and then asked the trial court to allow him to change his mind.[4] This Court's emphasis that James did not file a timely appeal acknowledges that James had the right to appeal his own

[4]In *James*, this Court discussed James' failure to file a notice of appeal after the first *Durocher* hearing held in April 2003 which is relevant to Mr. Trease's current posture. This Court then went on to discuss the fact that James' appeal from the lower court's denial to reinstate his postconviction proceedings in November 2005 failed to assert why the initial *Durocher* determination was invalid.

momentary lapse of judgment by filing a notice of appeal and announcing his change of mind within the time allowed. Unlike James, Mr. Trease did timely assert his change of mind during the mandatory appellate review period as contemplated by Rule 3.851(i). Under Rule 3.851(i)(8)(B), Mr. Trease has timely repudiated his waiver and asked the Court to reinstate his appeal.

C. Because Mr. Trease's repudiation of his waivers was during the pendency of the mandatory appellate review, this Court must allow him to reinstate his appeal as the State has not been harmed.

Under Rule 3.851(i), Mr. Trease has timely repudiated his waivers. This Court should allow Mr. Trease to reinstate his appeal. At a minimum, this Court should remand the case to the lower court for further proceedings pursuant to Rule 3.851(i). Undersigned counsel has already filed an Initial Brief in Mr. Trease's appeal of the denial of his Rule 3.850. The State will suffer no harm by the reinstatement of Mr. Trease's postconviction appeal.

In fact, in October of 2007, the State's position on Mr. Trease's request to waive his appeals was that Mr. Trease was just "manipulating the justice system to delay the instant proceeding." Doc. Entry Dated 10/15/07 at p.5. However, the State's position suddenly changed within days, if not hours, of counsel for the State receiving evidence of Mr. Trease's innocence from the United States

Department of Justice.[5] *See* Doc. Entry Dated 5/9/09.

Mr. Trease timely repudiated his waivers and the State has suffered no harm. This Court must allow Mr. Trease to reinstate his appeal and discharged counsel. At a minimum, this Court should remand the case for further proceedings under Rule 3.851(i).

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[5]On May 5, 2008, Lon S. Arend, an Assistant State Attorney in the Twelfth Judicial Circuit, sent a letter to the Assistant Attorney General in this case, Mr. Stephen Ake, enclosing "a letter dated April 28, 2008 from Melissa Ann Smrz of the FBI in reference to" Robert Trease. Attachment 1, Discharged Attorney's Initial Brief, Doc. Entry 01/28/09. Smrz was the Acting Assistant Director of the FBI. In her letter Ms. Smrz referred to FBI compositional bullet lead analysis (CBLA) expert testimony that had been introduced at Mr. Trease's trial and wrote that "as you may know, the FBI suspended performing bullet lead analysis in 2004 and ceased all examinations and testimony on bullet lead analysis in 2005." Attachment 2, Discharged Attorney's Initial Brief, Doc. Entry 01/28/09. The FBI was "conducting a review of testimony previously provided" nationwide "to determine whether examiners correctly stated the significance of a match between the elemental composition of bullet fragments and the composition of bullets known to be associated with a defendant." *Id.*

The Acting Assistant Director of the FBI wrote that "after reviewing the testimony" *in Mr. Trease's* case "it is the opinion of the FBI Laboratory" that

> the examiner did not provide any information to the jury that would allow them to understand the large number of bullets made from a single melt of lead. Without this knowledge, ***the jury may have misunderstood the probative value of this evidence.***

Id. (emphasis added).

II. Mr. Trease's Repudiation of His Stated Desires to Dismiss His Appeal and Discharge Counsel While Professing His Innocence, Establishes That His Actions Before the Lower Court Were the Result of His Organic Brain Damage and Not the Result of a Knowing, Intelligent and Voluntary Waiver.

A. In the lower court, Mr. Trease adamantly maintained his innocence while asking to be executed.

At the *Durocher* hearing below, Mr. Trease was adamant that he was innocent of the crimes for which he was convicted and sentenced to death. *Durocher* Hearing, October 2, 2008 (*hereinafter* DH) at 13. He did not kill Paul Edeson. *Id.* He did not enter his house on the night of the murder. *Id.* He did not assault him, shoot him, or cut him. *Id.* He is innocent. Mr. Trease has continually, consistently and vigorously denied guilt and professed his innocence since he was arrested. P.C. 151-2 (testimony of trial counsel Frederick Mecurio). He understands the issues involved in his case and admits: "There are good issues. I probably have the . . . the best death row case that you will ever see." DH. 19. When the lower court asked him if he understood that if his postconviction proceedings were successful he could get a new trial or resentencing, Mr. Trease responded: "yes, I'm well aware of that and well aware of that I would more likely win, seeing that I'm not guilty." DH. 8. When asked about undersigned counsel, Mr. Trease replied that "you and I both know that I have extremely good attorneys.

I have no problem with my attorneys." DH. 7. In light of Mr. Trease's continued denial of guilt, his satisfaction with his counsel and his understanding of the compelling constitutional claims supporting his innocence, his request to dismiss his postconviction proceedings and discharge counsel were inexplicable – unless you consider his significant mental impairments.

B. Mr. Trease's actions before the lower court were the result of his brain damage and not the result of a knowing, intelligent and voluntary waiver of his rights.

In the lower court, Mr. Trease's professed desire to die resulted from his brain damage and the conditions of his confinement. Mr. Trease does not have an intact, normal, functioning brain, through no fault of his own. There was no dispute about it in the hearing before the lower court – Mr. Trease suffers from brain damage. A mental health professional in the United States Marine Corps found that Mr. Trease suffered either from a developing thought disorder or organic brain damage at age seventeen (P.C. 236); an EEG taken at the Sarasota Medical Center in 1996 showed that Mr. Trease had an abnormal brain (P.C. 233); and the defense mental health expert at trial, Dr. Merin, performed neurological testing and also found that Mr. Trease had brain damage. The State offered no refutation of this evidence.

Dr. Merin testified in these postconviction proceedings regarding the results

of neuropsychological tests he administered to Mr. Trease pretrial in 1996. (P.C. 42). The testing results revealed that Mr. Trease was very much impaired in his ability to comprehend a logical sequence of human behavior and also impaired in new learning, *i.e.*, adapting to a new situation. (P.C. 44). Mr. Trease is impaired in "decision-making capabilities," "making judgments," and "understanding consequences of behavior." (*Id.* at 52). Dr. Merin testified before the lower court that Mr. Trease's "prefrontal lobe–the entire brain, the thinking part of the brain was simply not functioning as rapidly as it would in the average personality or even a person with low average intelligence," like Mr. Trease. (P.C. at 53).

Dr. Merin noted that the EEG showed "some sort of inappropriate activity particularly on the right side of the brain, particularly in the temporal lobe area." (P.C. 54; 75). He testified that an impaired right temporal lobe "is very likely to result in outbursts of anger, outbursts of destructiveness, outbursts of behavior that the person otherwise can't explain, an I-don't -know-why-I-did-that type of phenomenon." (P.C. 57). Dr. Merin testified that Mr. Trease had reduced "ability to develop principles, test hypotheses, [and] modify behavior based upon prefrontal lobe" damage. (P.C. 61).[6] Dr. Merin also testified that Mr. Trease's brain damage was likely the result of heredity and the horrendous abuse he

[6]Dr. Merin also testified that Mr. Trease's "prefrontal lobe did not grow right; "there's clearly something wrong with it." (P.C. 75)

suffered growing up. He concluded that Mr. Trease's social history, upbringing, and brain impairment were all directly related to his conduct in this case. (P.C. 63).

Dr. Barry Crown is an expert in forensic psychology and neuropsychology. (P.C. 107). He performed neuropsychological testing on Mr. Trease in 2006. He too concluded that Mr. Trease suffers from organic brain damage. He testified that Mr. Trease's brain was compromised and thus "the underlying functional behavior would also be compromised and that would include reasoning, judgment, understanding the long-term consequences of immediate behavior, control and modulation of impulsive behavior, and also storing information in memory." (P.C. 111). He also testified that the affects of the damage would be exacerbated if the damaged person used substances like drugs and alcohol (P.C. 112), and that such a damaged person would be more likely to use drugs and alcohol. He testified that Mr. Trease's abuse as a child resulted in a panic disorder and heightened vigilance, and that Mr. Trease's substance abuse was in fact self-medication for anxiety. (P.C. 116.) Dr. Crown also testified that the statutory mitigating circumstances of "extreme emotional distress" and "diminished ability to conform behavior" applied because of the combined affects of Mr. Trease's incredibly horrific traumatic childhood and his brain damage. (P.C. 126).

In short, Mr. Trease's vacillation about his appeals are a direct result of his organic brain impairment. His impairments from childhood trauma and brain damage are further exacerbated by being under a continuous death warrant since 2000. H. 10. For the past eight years, he has been denied many of the normal privileges given to death sentenced inmates in Florida, such as contact visits with family and friends and yard privileges with other inmates. H. 11-12. Mr. Tease explained "it is a question of how long one wants to be endured living the life I have to live. . . . I'm essentially tired of living the life that I'm living, and I'm just not going to do it any longer." H. 7.

At the *Durocher* hearing, counsel argued to the lower court that Mr. Trease was not competent, that he needed to be medicated and that his brain damage was interfering with his judgment. Neither the State nor the lower court ever addressed undersigned counsel's concerns about Mr. Trease's significant mental impairments. The evidence before the lower established that Mr. Trease was significantly impaired and that those impairments affected his judgment. The State offered no refutation of this evidence. This evidence that Mr Trease was significantly impaired alone should have caused the lower court to have a mental health expert conduct another evaluation of Mr. Trease in conjunction with the *Durocher* hearing. *See* Rule 3.851(i)(4)(requiring the court to appoint no fewer

than two experts to evaluate the prisoner if there are reasonable grounds to question his competence). Nevertheless, the lower court totally ignored further red flags that Mr. Trease was not exercising sound judgment consistent with a knowing, intelligent and voluntary waiver. Mr. Trease asserted that he was innocent, understood that he had "winning" issues and was satisfied with his attorneys, still Mr. Trease was taking the irreconcilable position that he wanted to dismiss his postconviction proceeding so that he could be executed. Undersigned counsel provided the lower court with the only explanation that could reconcile these diametrically opposed positions – Mr. Trease's mental impairments. Rather than investigating further whether Mr. Trease's judgment was adversely affected by mental illness which Rule 3.851(i) contemplates, the lower court simply ignored the issue as if it did not exist. This was an abuse of discretion

C. Mr. Trease's *pro se* letters repudiating his waivers are further evidence that his waivers were the result of his brain damage.

In fact, at the *Durocher* hearing, undersigned counsel predicted that Mr. Trease would change his mind again about his postconviction proceedings because of his brain damage. DH. 24-5. Mr. Trease has again changed his mind because he can not help it – it is his brain damage and not his judgment that controls this. Dr. Merin explained to the lower court that Mr. Trease's brain damage "is very

likely to result in outbursts of anger, outbursts of destructiveness, outbursts of behavior that the person otherwise can't explain, an I-don't -know-why-I-did-that type of phenomenon." (Testimony of Dr. Sidney Merin, trial defense mental health expert at P.C. 57). When undersigned counsel recently visited Mr. Trease, he expressed, in his own words, "the I-don't -know-why-I-did-that type of phenomenon" discussed by Dr. Merin with regards to his request that the lower court dismiss his appeal. Similarly, Dr Crown explained that Mr. Trease's brain was compromised and thus "the underlying functional behavior would also be compromised and that would include reasoning, judgment, understanding the long-term consequences of immediate behavior, control and modulation of impulsive behavior, and also storing information in memory." (P.C. 111). In short, Drs. Merin and Crown provide the only rational explanation for Mr. Trease's flip-flopping – his impaired brain.

Mr. Trease has now again clearly expressed his desire to proceed with the appeal of his Rule 3.850 motion. His most recent change of heart refutes the lower court's finding that Mr. Trease's earlier flip-flopping about his appeals was to manipulate the system so he could be executed. *See* Order After *Durocher* Hearing, p. 5 fn 3, Docket Entry 10/28/08. The lower court abused its discretion by failing to explore further whether Mr. Trease's desire to waive were a product

of his brain impairments. This Court should reinstate Mr. Trease's appeal to the denial of his Rule 3.850 motion and order the Appellee to respond to the issues raised in Mr. Trease's Initial Brief. At a minimum, this Court should remand the case for further proceedings under Rule 3.851(i).

III. Because Mr. Trease Is Innocent and Brain Damaged, His Execution Would Violate Due Process and the Eighth Amendment.

In the Initial Brief, undersigned counsel properly raised significant factual and constitutional issues concerning the propriety of allowing Mr. Trease to discharge his postconviction attorneys and his desire to be executed. This Court granted the Appellee's motion to strike that brief. Nevertheless, undersigned counsel incorporates herein the additional grounds set forth in their Initial Brief as further reason why this Court must hear Mr. Trease's appeal. By asserting those arguments, counsel was not asking this Court to reconsider *Durocher v. Singletary,* 623 So.2d 482, 483 (Fla. 1993), nor were we asking this Court to extend the holding in *Klokoc v. State,* 589 So.2d 219, 221-2 (Fla. 1991). Rather, counsel were asking, in good faith, that this Court uphold "society's duty to see that executions do not become a vehicle by which a person could commit suicide," *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), and to recognize that although this

Court has held that capital defendants can knowingly, intelligently and voluntarily waive the right to postconviction counsel and postconviction proceedings, *see Durocher*, Mr. Trease's unique case questions the outer limits of that rule within the context of the Eighth and Fourteenth Amendments.

Mr. Trease's case presents a compelling case of innocence and stark new evidence that the State used junk science to wrongfully convict and sentence Mr. Trease to death in violation of due process and the ban against cruel and unusual punishment. Appellee wants nothing more than to avoid discussion, analysis and review of these issues – an absolute about-face-position from Appellee's previous reactions to Mr. Trease's desire to end his post-conviction challenges and drop his appeal.[7] To avoid review of Mr. Trease's innocence, the State's own misconduct and the troubling constitutional implications of these issues, Appellee desperately asked this Court to strike Discharged Attorney's Initial Brief. Undersigned counsel fulfilled their professional and ethical duties to Mr. Trease and this Court

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[7]In October of 2007, the State's position on Mr. Trease's request to waive his appeals was that Mr. Trease was just "manipulating the justice system to delay the instant proceeding." Doc. Entry Dated 10/15/07at p.5. However, on May 9th, 2008 – after receiving the FBI letter regarding problems with compositional bullet lead analysis (CBLA) expert testimony used in Mr. Trease's trial – the State's position was that this Court should relinquish jurisdiction to the trial court for a hearing pursuant to *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993). The State changed its position because suddenly there were unassailable factual and constitutional problems with Mr. Trease's conviction and sentence of death.

by raising significant factual and constitutional issues which go to the core of our criminal justice system and Mr. Trease's case: ***Can society allow an innocent man to be executed, as long as he knowingly, voluntarily and intelligently consents to his execution.*** To the contrary, this Court has previously recognized "society's duty to see that executions do not become a vehicle by which a person could commit suicide," *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). The unique facts and circumstances of Mr. Trease's case presents this Court with that societal duty backed by the constitutional requirements of due process and the Eighth Amendment.

Mr. Trease is not only innocent, he is also a very mentally impaired man. Mr. Trease does not have an intact, normal, functioning brain, through no fault of his own. A prisoner with mental retardation or a prisoner who was sixteen at the time of the capital murders were committed could not be executed, even if they wanted to die. *See Atkins v. Virginia,* 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). With equal force, an prisoner who was innocent could not be executed, even if he wanted to die. *Herrera v. Collins*, 506 U.S. 390 (1993). If the execution of an innocent person is the paradigm of a fundamental miscarriage of justice, what is the execution of a mentally impaired person who is also innocent. Under the unique circumstances presented in this case, this Court

address the due process and Eighth Amendment claims concerning the execution of someone who is innocent.

VI. CONCLUSION

Appellant's Discharged Attorneys respectfully requests that this Court allow counsel to continue to represent Mr. Trease on appeal before this Court and that this Court adjudicate Mr. Trease's appeal from the denial of his Rule 3.850 motion.

Respectfully submitted,

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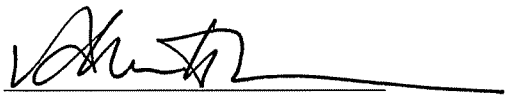
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Thomas H. Dunn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished vie email and U.S. Mail, first class postage prepaid, to all counsel of record, this 17th day of February, 2009.



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