

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1965

L.T. No. CF-97-06806A-XX

MICAH NELSON

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE 10TH JUDICIAL CIRCUIT FOR POLK COUNTY,
STATE OF FLORIDA

APPELLANT'S REPLY TO PETITION FOR WRIT OF HABEAS CORPUS
RESPONSE OF APPELLEE

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PRELIMINARY STATEMENT

This pleading addresses Claim II of Mr. Nelson's Petition for Writ of Habeas Corpus. As to all other claims, Mr. Nelson relies on his Petition for Writ of Habeas Corpus. Reference to the trial transcript will be: (FSC ROA Vol. ___p.#). The post-conviction record shall be referenced as: (PCR Vol. ___p.#).

STATE HABEAS CLAIM II

**PETITIONER'S CLAIM OF INCOMPETENCY IS
IMPROPERLY RAISED IN THE INSTANT HABEAS
PETITION. (As stated by Appellee).**

The evidence introduced at the evidentiary hearing demonstrates that Mr. Nelson is incompetent to proceed. The long-established test for a defendant's competency is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational

as well as factual understanding of the proceedings against him.” Peede v. State, 955So.2d 480, 488(Fla 2007)(quoting Dusky v. United States, 362 U.S. 402,402,80 S.Ct. 788,4 L.Ed.2d 824 (1960)). The standard for competence to proceed in post-conviction proceedings is the same as the standard for competence to proceed to trial. See Alston v. State, 894 So.2d 46, 54 (Fla. 2004)(stating that “the criteria for determining competence to proceed is whether the prisoner has sufficient present ability to consult with counsel with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the pending collateral proceedings.)(internal quotations omitted).

In order to substantiate a finding of incompetence, Mr. Nelson must establish, by a preponderance of the evidence, that he is without the sufficient

present ability to consult with counsel with a reasonable degree of rational understanding and lacks a rational as well as factual understanding of the pending collateral proceedings. See Cooper v. Oklahoma, 517 U.S. 348 (1996). (It is a violation of a defendant's Due process rights to require him to prove his incompetency by clear and convincing evidence; the burden for proving incompetence to stand trial is a preponderance of the evidence). Therefore, fundamental fairness and due process require that the defendant's burden of proof in a capital post-conviction incompetency proceeding is a preponderance of the evidence.

Mr. Nelson should not continue in post-conviction matters because he cannot consult with his attorneys. His mental illness is such that he has no rational understanding of the post-conviction proceedings or the substance of the

claims raised by his attorneys. Mr. Nelson does not know who the judge was that sentenced him, his trial attorney, or why he is even incarcerated. Given his condition, Mr. Nelson is incompetent to proceed. Proceeding in this matter would be a denial of Mr. Nelson's constitutional rights. Fuse v. State, 642 So.2d 1142, 1146 (1994). CCRC-M thoroughly detailed the evidentiary testimony of Dr. Mark Ashby, MD, Dr. Henry Dee, and Dr. Michael Maher in his initial Petition for Writ of Habeas Corpus. All three of these doctors detailed Mr. Nelson's schizoaffective disorder. Doctors Dee and Maher explained how Mr. Nelson was incompetent to proceed during their last evaluations of him in 2006 and 2004 respectively. (PCR Vol. I p. 126) (PCR Vol. II p. 230-32, 263). Mr. Nelson remains incompetent to proceed and is of no aid to his post-conviction attorneys.

Dr. Maher did not testify at the last competency hearing on September 27,

2006, so the trial court did not have the benefit of his testimony when it issued its prior order of competency. At this latest hearing, Dr. Maher testified that Mr. Nelson is incompetent to proceed now. (PCR, Vol II. 263). Dr. Maher also testified in great detail how and why Dr. Ralph Dolente was incorrect in his determination that Mr. Nelson is, or was malingering. (PCR, Vol II 227, 263). In response to The Post-conviction Court's intuitive questioning, Dr. Maher explained how Mr. Nelson may someday be able to regain competency if he was properly medicated in a hospital setting. (PCR, Vol II 230-232).

Fla.R.Crim.Pro. 3.851 (g) (3) states:

(3) If, at any stage of a postconviction proceeding, the court determines that there are reasonable grounds to believe that a death-sentenced prisoner is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the prisoner's input, a judicial determination of incompetency is

required.

The statute is clear the issue of competency can be raised at “any stage” of the post-conviction proceedings. The State’s reliance on Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987) is misplaced because we are not alleging ineffective assistance of counsel with this claim. Moreover, Blanco does not deal with the issue of competency which can be raised at any stage in capital post-conviction proceedings. Relief is necessary and proper.

CONCLUSION

Wherefore, in light of the facts and arguments presented in this Appellants Petition for Writ of Habeas Corpus, Mr. Nelson hereby moves this Honorable Court to:

1. Vacate the judgments and sentences in particular, the sentence

of death.

2. Order a competency evaluation.
3. Order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Petition For Writ Of Habeas Corpus Response Of Appellee has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March _____, 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing **Reply to**
Petition For Writ Of Habeas Corpus response Of Appellee, was generated in a
Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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