**IN THE SUPREME COURT OF FLORIDA**
**CASE NO. SC08-589**
**L.T. No. CF-97-06806A-XX**

**MICAH NELSON**
**Appellant,**
**v.**
**STATE OF FLORIDA**
**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT**
**OF THE 10$^{TH}$ JUDICIAL CIRCUIT FOR POLK COUNTY,**
**STATE OF FLORIDA**

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# AMENDED REPLY TO ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

This pleading addresses Issue I and II of Mr. Nelson's initial brief. As to all other claims, Mr. Nelson relies on his Initial Brief. Reference to the trial transcript will be: (FSC ROA Vol.___p.#). The post-conviction record shall be referenced as: (PCR Vol. ___p.#).

## ISSUE I

**THE TRIAL COURT PROPERLY REJECTED APPELLANT'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM BASED ON COUNSEL'S FAILURE TO MOVE FOR A DETERMINATION OF COMPETENCY PRIOR TO TRIAL AND PROPERLY FOUND THAT THE TRIAL COURT WAS NOT REQUIRED TO *SUA SPONTE* ORDER A COMPETENCY HEARING. ( as stated by Appellee)**

Page 27 of Appellee's answer brief incorrectly contends that this sub-claim is procedurally barred due to the misplaced reliance of outdated case law.

In Massaro v. United States, 123 S.Ct. 1690 (2003) The Supreme Court of the United States held:

> The procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. We conclude that requiring a criminal defendant to bring ineffective-assistance - of -counsel claims on direct appeal does not promote these objectives. As Judge Easterbrook has noted, "[rules] of procedure should be designed to induce litigants to present their contentions to

> the right tribunal at the right time. Applying the usual procedural default rule to ineffective assistance claims would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim. Furthermore, the issue would be raised for the first time in a forum not best suited to assess those facts.
> Id at 1694.

Furthermore, there was ample evidence which should have alerted the trial court that Mr. Nelson's competency to proceed was at issue. The statements by Mr. Mack that one expert had found Nelson to be "marginally competent" and that defense counsel was seeking the evaluation of a second expert should have prompted the trial court to order sua sponte that a second expert be appointed (See FSC ROA Vol. I p. 52-53). Dr. Ashby testified that Nelson has had auditory hallucinations and was hearing voices (See FSC ROA Vol. XV p. 1439-1440). That testimony alone should have prompted the trial court or the prosecutor to ask: has this defendant been examined for competency to proceed and if not, why not? This was not done in Mr. Nelson's case. In Drope v. Missouri, 420 U.S. 162, 174 95 S.Ct. 896, 904 (1975) 43 L.Ed. 103, the United States Supreme Court held:

> In the present case there is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court prior to trial and thereafter. Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry

> into petitioner's competence to stand trial, denied him a fair trial. In such circumstances we believe it is 'incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured'. Id. at 174-5 *905.

In Mr. Nelson's case, the undisputed facts are that: (1) trial counsel's own expert found Nelson to be "marginally competent"; (2) the expert recommended that the competency question be further explored; (3) Nelson demonstrated bizarre actions during the crime and awaiting trial (the suicide attempt); and (4) the evidence of Nelson's psychosis clearly demonstrate, according to Drope, that the failure to make further inquiry into his competence to stand trial denied him a fundamental constitutional right to a fair trial. Mr. Nelson did not have the benefit of an analysis of these facts in order that his appropriate federal rights were assured. Instead, he was tried and convicted without proper and legal inquiry as to whether he was even competent to proceed to trial. Pursuant to Massaro, Dr. Ashby's testimony at the evidentiary hearing further clarified Micah Nelson's state of mind at the time of the crime and shortly after his arrest.

> Q. Doctor, you testified on page 1439 that prior to December 6th the day of your Court testimony that you treated Mr. Nelson at the jail. Do you remember treating him?
> A. I have a recollection of it.
> Q. Well, sir, do you remember diagnosing Mr. Nelson with schizo affective disorder?
> A. Yes, I do.

Q. When was he diagnosed, sir?
A. That would have been when I initially evaluated him in the jail.
Q. As a practice do you initially evaluate people as soon after arrest as humanly possible?
A. Yes we, depending on the severity of the symptoms and the history they present with, we generally try to get them seen within probably a period of less than a week.
Q. Less than a week? Okay, so you saw him relatively early to his incarceration, that lasting approximately two years. You saw him, you would say within a week after his arrest?
A. Probably.
Q. What exactly is, sir schizo affective disorder?
A. You could look at that as a combination of schizophrenia and depression superimposed on each other. Primarily it is a psychotic disorder involving impairment in processing thoughts. Typically delusions and hallucination, such as auditory hallucinations, hearing voices. There would be a significant depression component to it also, feelings of sadness, lack of energy, and lack of interest in things. But mostly importantly it would be a thought disorder which is characterized by unusual associations, idiosyncratic associations.
Q. What is idiosyncratic associations, sir?
A. Well it would only mean something to the individual. They would not have a logic that ordinary society would make any sense of.
Q. You got to forgive me, Doctor, I don't have a background in psychology and I'm going to have to ask you to define?
A. I could say for instance, you are wearing a red tie, therefore you must be from Russia. That would be an idiosyncratic association that wouldn't make sense to the rest of us. And often there might be a glint of some logic to it. Perhaps, yes, the Russians have a red flag, but you wouldn't necessarily get that part that this person would be operating under the premise that everybody with red ties

were Russians.

Q. I see. Sir, basically, in layman's term what is psychosis, is that a break with reality or not?

A. Yes, that would be summing it up quite well. Impairment in reality testing.

Q. You break with reality?

A. Yes.

Q. Doctor, you testified on page 1440 that initially you prescribed one hundred milligrams of Mellaril twice a day for Mr. Nelson. What does Mellaril do?

A. Mellaril is an antipsychotic medication, specifically it blocks the chemical of dopamine in the brain which is believed that an excess of that chemical causes the hallucinations. So it would be primarily for the purpose for stopping hallucinations.

Q. So is it safe to say that the more dopamine that enters the brain the more serious the psychosis would be?

A. Yes, you could say.

Q. Would you consider 100-milligrams of Mellaril twice a day a small dose? Standard dose? Or a large dose?

A. Um, probably for that patient consider it as a moderate to large starting dose. The maximum dose for Mellaril is 800 milligrams. But of course that is unusual that would you would start anybody on a maximum dose right off the bat. We want to see how he reacts to a medicine.

Q. Do you remember how he reacted on the Mellaril?

A. No, I don't.

Q. I had you also prescribe a drug called, Imipramine, I-M-I-P-A-M-I-N-E?

A. Yes and that's an antidepressant.

Q. Doctor, as part of your diagnosis of schizo affective disorder did you find that Mr. Nelson suffers from auditory hallucinations?

A. Yes, that was one of the symptoms that led me to form that diagnosis.

Q. What were some of the other symptoms that led you to form that diagnosis.

A. The thought disorder. A blunted affect, not showing an emotional response to things would be a way to summarize the particular symptom. His processing of information, like we made allusion to the idiosyncratic references, overall his processing of information seem to be deficient.

Q. As he sits here today does he appear to exhibit any symptoms of schizo affective disorder?

A. It is hard to say. He looks a bit withdrawn. I would have to examine him in more detail to tell you what is going on with him.

Q. Um, how about visual hallucination, is that endemic with schizo affective disorder?

A. More prominently usually more auditory, hearing voices, but visual can be a part of it.

Q. Doctor, except for appearing in court December 6th, 1999 were you ever deposed by the State or the Defense prior to December 6th?

A. Not that I'm aware of.

Q. Is it safe to say that your participation in this case is limited to your testimony of December 6th 1999?

A. Yes.

Q. Now, someone with schizo affective disorder, sir, is it possible to have that condition and also be lucid at times?

A. Yes. There would be sustained periods of illness, but also possibly intervening periods of relatively asymptomatic.

Q. And, even with the prescription of Mellaril Imipramine–

A. Imipramine.

Q. I know how to say it, I just wanted to make sure you knew how to say that. In addition to that, could he also be intermittently lucid and intermittently psychotic?

A. The medications ideally would ameliorate some or most of the symptoms and restore him to being reasonably stable.

Q. Well, if he was not on Mellaril at the time of his trial, can you say with any degree of medical certainty that he

was not suffering from auditory hallucinations during the trial?

THE COURT: Suffering from what?

Q. Auditory hallucinations, sir?

A. There's a couple of double negatives to work through on that one, but if I understand correctly, let me say the likelihood of those symptoms manifesting in the absence of medication would certainly be higher and it would be quite possible for him to have experienced auditory hallucinations off of medicine.

Q. So, if he was not treated for this condition it is possible it could reoccur?

A. Possible yes and maybe even probable.

Q. Well if this is untreated what happens to the patient?

A. It is generally considered to be a progressive deteriorating illness, and one of the criterial would be a progressive decline in social and occupational functions. They become more withdrawn, have less motivation, and less energy, and less ability to focus and function in society. Um, the newer medicines that we have now for the most part seem to at least arrest the situation. The older ones that were in vogue, even as recently as the 90's including Mellaril, didn't seem to do that all that much. They stopped the hallucinations but the disease would still progress in terms of decline and function.

Q. Well, now, what do you think would happen to someone who was medicated in 1997 with Mellaril but subsequent to the year 1999 was on no medication for anything whatsoever?

A. Well, the likelihood would be the symptoms and the disease would progress and they would have the same symptoms that occurred or that were there before we start the medication.

Q. Would he be worse?

A. Possibly. (PCR Vol. I p. 79-85).

Dr. Dee's evidentiary hearing testimony also demonstrated that Dr. Dee had noted

that Micah Nelson had a long history of psychiatric treatment. (PCR Vol. I p. 103-04). Dr. Dee was so concerned with Micah Nelson's mental condition that he advised that Micah Nelson be sent to the "State Hospital" because Nelson continued to show evidence of psychosis and hallucinations. (PCR Vol. I 106-07). Dr. Dee also expressed to Nelson's attorneys his concerns regarding Micah Nelson's competence on several occasions. (PCR Vol. I p. 108).

At the evidentiary hearing, Julia Williamson, Micah Nelson's attorney testified that the theory of defense that she built was based on law enforcement information not information from Mr. Nelson. (PCR Vol. I p. 136). Williamson further testified that Micah Nelson would not talk, and he was introverted. On other occasions she tried to talk to him and he just would not talk. Mr. Nelson was of no help in aiding his attorneys in the preparation of his own defense. Williamson further testified that in retrospect she should have ordered a competency evaluation of Mr. Nelson. (PCR Vol. I p. 136-39).

In is clear from the excerpt by Mr. Mack, the testimony of Dr. Ashby, the testimony of Dr. Dee regarding his recommendation that Nelson be sent to the State Hospital for treatment and the testimony of Julia Williamson that Micah Nelson is in no way was capable of aiding his attorneys in the preparation of his defense; that a competency evaluation should have been ordered. Relief is necessary and proper.

## ISSUE II

**APPELLANT'S SUBSTANTIVE DUE PROCESS CLAIM THAT HE WAS TRIED AND CONVICTED WHILE MENTALLY INCOMPETENT IS WITHOUT MERIT. ( as stated by Appellee)**

Mr. Nelson, at the evidentiary hearing, proved that: (1) Dr. Dee recommended that Mr. Nelson be treated at the State Hospital because he was not responding to medication given to him at the jail; (2) Mr. Trogolo was concerned that Mr. Nelson stay on medication for courtroom behavior and to "help him maybe understand a little more of what was going on"; (3) Mr. Nelson was acutely depressed and that was the reason for the suicide attempt. The evidence presented at the evidentiary hearing raises a substantial doubt as to Mr. Nelson's competency to stand trial.

On page 34 of the Appellee's answer brief, they incorrectly state that, "Dr. Dee also opined that **Appellant was competent to proceed**." (emphasis added). This assertion is a misstatement of fact, or at the least fails to explain Dr. Dee's overall impression.

Dr. Dee had never appeared in court to address competency issues regarding Mr. Nelson, but Dr. Dee was concerned and suggested that he be sent to the State Hospital more than once. Dr. Dee opined that sometimes he was better than others, when he was at his worst he was unresponsive and mute and at other times seemed to be responding to or having internal stimuli. At times when he seemed open and

easy to talk, those were times where Dr. Dee would deem him to be somewhat competent, and at other times when he was reticent and mute it appeared to Dee that he was incompetent to stand trial. Dr. Dee had expressed his concerns regarding Nelson's competence to his attorneys. He expressed his concerns to the attorneys several times. (PCR Vol. I p. 106-108).

Dr. Dee testified that he did have actual face to face meetings with the attorneys, and while there he discussed the issues of competency, the insanity defense, and what he felt could be testified to in terms of mitigation. However, regarding opinions, Dr. Dee considered this case a rather difficult case because Mr. Nelson "waxed and waned". At some times he seemed quite competent and at other times incompetent. Dee further testified that he communicated this to the defense team. (PCR Vol. I p. 112).

Certainly the Appellee won't dispute the fact the Mr. Nelson was never sent to the State Hospital despite the pretrial recommendations of Dr. Dee. Dr. Dee described his diagnosis as follows:

> Q. Did your review indicate that Micah Nelson was brain damaged?
>
> A. Yes it did. Based on the testing I had and history I had he showed certain features that looked to me that he has sustained brain damage as a boy, and might have helped account

> for his current state, although it was difficult to know how they interact always. He was also suffering I believed a form of schizophrenia, schizo effective disorder but I know that he would have met all the specific criteria....(PCR, Vol. I. 104-105).

Dr. Dee felt that the Defendant's condition was so serious, he recommended that he be sent to the State Hospital. (PCR, Vol. I. 106). Dr. Dee further testified about his opinion of Mr. Nelson's marginal competency in 1998 as follows:

> Q. And you have testified regarding competency in other cases, of course, correct?
> A. Yes, many cases.
> Q. And what was the basis of your - -
> A. May - - maybe I'm not finished with that response. The more adequate response is, yes, I was concerned about his competency and suggested he be sent to the State Hospital more than once. But let me also say his presentation was confusing because it waxed and waned. This is often the case. Sometimes he was better than others, when he was at his worse he was unresponsive and mute and at other times seemed to be responding to or having internal stimuli. Other times he was open and easy to talk to. (PCR, Vol. I. 107).

> Q. And at other times when he was reticent and mute it appeared to you that he was incompetent to stand trial?
> A. Correct. (PCR, Vol. I. 108).

Dr. Dee was very clearly uncertain about Mr. Nelson's competency at the pretrial level, and described him as being competent at times, and incompetent at other

times. By clearly recommending that Mr. Nelson be sent to the State Hospital, Mr. Trogolo should have been tipped off that there were questions regarding Mr. Nelson's competency. When a defendant is sent to the State Hospital at the pretrial level, it is for the purpose of restoring his or her competency. Mr. Trogolo testified that he was aware that Dr. Dee wanted Mr. Nelson to go to the State Hospital for treatment. (PCR Vol. I p. 47). As the Appellee mentioned on page 35 of the answer brief, Mr. Trogolo was advised that Mr. Nelson was marginally competent to proceed. Marginally competent is not the same as competent, and taking this information in consideration in the context of Dr. Dee opining that Mr. Nelson needed to be sent to the State Hospital, the Appellant submits that he was forced to go to trial while mentally incompetent to proceed.

The evidentiary hearing testimony of Julia Williamson also gives credence to the fact that Mr. Nelson was convicted while incompetent. Ms. Williamson testified that Micah Nelson would not talk, and he was introverted. On occasions she tried to talk to him and he just would not talk. Mr. Nelson was of no help in aiding his attorneys in the preparation of his own defense. Ms. Williamson testified that she had to prepare the guilt phase strategy based on information provided in the police reports. Williamson further testified that in retrospect she should have ordered a competency evaluation of Mr. Nelson. (PCR Vol. I p. 136-39).

The Due Process Clause of the Fourteenth Amendment prohibits the states from trying and convicting a mentally incompetent defendant. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788,789 4 L.Ed.2d 824 (1960). In Dusky, the Supreme Court of the United States held:

> [I]t is not enough for the district judge to find that 'the defendant (is) oriented to time and place and (has) some recollection of events,' but that the 'test must be 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.'
>
> In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent. It is so ordered. Id. at 403 *789.

Mr. Nelson presents clear and convincing evidence, particularly through the testimony of Dr. Dee and Julia Williamson, to create a real, substantial, and legitimate doubt as to his competency to stand trial at the time of the trial. It is the State's burden to prove that Mr. Nelson was competent at the time of trial. Mr. Nelson has been on Florida's death row since his conviction on these charges. His date of commitment was March 22, 2000. If the Supreme Court of the United

States can acknowledge the doubts and ambiguities inherent in a retrospective determination of a defendant's competency of "more than a year ago," surely, a similar determination of competency in Mr. Nelson's case would be even more doubtful and ambiguous. The only remedy to Mr. Nelson, pursuant to Dusky, would be a competency evaluation and a retrial. Relief is necessary and proper.

## CONCLUSION

Wherefore, in light of the facts and arguments presented in this Reply and the facts and arguments presented in Appellants Initial Brief, 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 Amended Reply to Answer Brief 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 Amended **Reply to Answer Brief of Appellee,** was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.


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