IN THE SUPREME COURT OF FLORIDA

PEDRO HERNANDEZ-ALBERTO,

Appellant,

v. **CASE NO. SC10-2471**
L.T. No. 99-00117 CFAWS

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

References to the direct appeal record (SC02-1617) will be designated as follows: DAR followed by the appropriate volume number and record page or transcript page #.

References to the instant post-conviction record on appeal (SC10-2471), will be designated as PCR, followed by the appropriate Vol. #/page #.

STATEMENT OF THE CASE AND FACTS

The Murders

In *Hernandez-Alberto v. State*, 889 So. 2d 721 (Fla. 2004), this Court set forth the following summary of the evidence presented at trial regarding the murders committed by Hernandez-Alberto in 1999 and his arrest in Texas, while *en route* to Mexico:

> Pedro Hernandez-Alberto and Maria Gonzalez were married in 1996 after a courtship of several years. Maria had an adult son, Salvatore Gonzalez, an adult daughter, Isela Gonzalez, and a minor daughter, Donna Berezovsky. Hernandez-Alberto and Maria had one child together, Gabriella, who was an infant at the time of the homicides. Prior to and during their marriage, Maria lived with her children in her home in Apollo Beach, Florida, and she owned and operated a family business known as the Apollo Beach Family Restaurant.
>
> On the morning of January 3, 1999, Hernandez-Alberto and Maria continued an ongoing argument about ownership of the home and business. Previously, Hernandez-Alberto insisted that Maria place his name on the title to the home and the business, which she had solely owned prior to their marriage. After continuing to deny his demands, Maria left the home to go to work at the restaurant. Upon her departure, Hernandez-Alberto put Gabriella in a back bedroom and then confronted his eleven-year-old stepdaughter, Donna, in the family room. He told Donna to pick up a toy. When she refused, he struck her on the head near the right ear, knocking her to the floor. He then removed a gun from his fanny pack and shot her as she lay face down. Donna died from the gunshot wound.
>
> The medical examiner's testimony confirmed there was a contusion on Donna's face consistent with being struck with a hand. In addition, the autopsy indicated that the gunshot entered Donna's back, traveled through her spinal cord, aorta, lung, chest, and arm. The injuries were consistent with being shot while face down on the floor.
>
> After shooting Donna, Hernandez-Alberto drove to the Apollo Beach Family Restaurant where Maria and Isela were working. Upon entering the back of the restaurant, Hernandez-Alberto went directly to the restroom where he

> remained for approximately eight to ten minutes. Upon exiting the rest-room, he walked up behind Isela and shot her twice in the back. After she fell to the floor, he then shot her once in the head.
>
> The medical testimony indicates that a gunshot to Isela's lower back passed through her hip and intestines before exiting the front of her body. A gunshot higher on her back penetrated her lung, diaphragm, spleen, pituitary gland, kidney, pancreas and stomach before exiting her body. The third gunshot to her neck hit her spine, then went through her carotid artery and jugular vein.
>
> After the shooting, Hernandez-Alberto left the restaurant with a gun in his hand, got into his car, and fled toward Mexico. He was arrested in Brookshire, Texas, a small town near Houston. He was interviewed by the Brookshire police chief, Joe Garcia, and he confessed to shooting and killing both Donna and Isela. At the time of his arrest, Hernandez-Alberto had a gun, which was later determined to be the murder weapon, in his possession. A fanny pack was also found in his possession.
>
> *Hernandez-Alberto*, 889 So. 2d at 724.

Trial and Sentencing Proceedings

Hernandez-Alberto's trial, for the murders of his two step-daughters was held on August 21 - August 24, 2001. (DAR V4-V9). The jury returned verdicts of guilty, as charged, on both counts of First-Degree Premeditated Murder. (DAR V2/317-318; V3/353; V9/925-927). The penalty phase was held on November 28-29, 2001; and the jury returned 10-2 death recommendations for each of the murders. (DAR V11/1261-1265).

After holding a *Spencer*[1] hearing on April 30, 2002 (DAR Supp. V3/278-282), the trial court sentenced Hernandez-Alberto to death

[1]*Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

on both counts on May 28, 2002.[2] (DAR V3/396-411).

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[2]In *Hernandez-Alberto*, 889 So. 2d at 724-726, this Court summarized the aggravating factors and mitigating factors as follows:

> The trial court found three aggravating circumstances for the murder of Donna Berezovsky, giving all three great weight: (1)the defendant had previously been convicted of another capital offense or of a felony involving the use of violence to some person; (2)the victim of the capital felony was a person less than twelve years of age; and (3)the victim of the capital felony was particularly vulnerable due to advanced age or disability or because the defendant stood in a position of familial or custodial authority over the victim. The trial court found two aggravating circumstances for the murder of Isela Gonzalez, giving both great weight: (1) the defendant had been previously convicted of another capital felony or of a felony involving the use of violence to some person; and (2)the crime for which the defendant was to be sentenced was committed in a cold, calculated, and premeditated manner and without any pretense of moral or legal justification.
>
> The trial court considered the following statutory mitigating circumstances: (1)the defendant had no significant history of prior criminal activity (some weight); (2)the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance (no weight); (3)the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (no weight); (4)the age of the defendant at the time of the crime (no weight); and (5)the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty (some weight). The trial court found the following nonstatutory mitigating circumstances: (1)the defendant suffers from a brain injury (little weight); (2)the defendant lost his mother at an early age (little weight); (3)the defendant suffered frequent beatings by his father when the father was drinking (some weight); (4)the defendant suffered beatings and mistreatment at the hands of the neighbor who took him in after the father abandoned the defendant (little weight); (5)the defendant trained and worked as an auxiliary police officer in Mexico City (little weight); (6)the defendant was capable when young of maintaining loving and respectful relationships (little weight); (7)the defendant lived in extreme poverty as a young child (no weight); (8)the defendant voluntarily provided a confession upon arrest (some weight); and (9)the defendant was of borderline intelligence (little weight).

Competency Proceedings at the Time of Trial

On April 19, 1999, the trial court issued an Order for Competency and Sanity Evaluation and Psychiatric Evaluation seeking a determination from Drs. Michael Maher and Alfonso Saa as to whether Hernandez-Alberto was competent to stand trial. (DAR V1/27-31). Dr. Maher's evaluation, dated May 7, 1999, concluded that Hernandez-Alberto was not competent to stand trial. While Hernandez-Alberto was somewhat uncooperative and his presentation and history were somewhat contradictory, Dr. Maher recommended evaluation and treatment in a secure forensic psychiatric hospital. Dr. Maher expected such treatment to restore Defendant to a level of competence within three to six months. (DAR V1/32-36).

Dr. Saa issued a report on May 3, 1999, concluding that Defendant was not competent to stand trial. Dr. Saa also questioned whether Defendant's current clinical presentation was a reflection of the stress he was facing or possible malingering. Dr. Saa concluded that involuntary hospitalization and further psychiatric treatment would help treat the Defendant's condition, as well as ascertain whether he was malingering. (DAR V1/40-43).

On May 18, 1999, relying on the evaluations of Drs. Maher and Saa, the trial court issued an Order Adjudging Defendant Incompetent to Stand Trial committing Defendant to the Department of Children and Families to be placed in a mental health facility. (DAR V1/37-39). On June 17, 1999, the South Florida Evaluation and

Treatment Center issued a competency evaluation finding Defendant had no major mental disorder, was competent to proceed, and was capable of assisting his attorney and acting appropriately in court. (DAR V1/44-45, 50-54). Letters dated June 24, 1999, from the treatment center confirmed the conclusion that Defendant was malingering, had no major mental illness and was competent to proceed. (DAR V1/46-47, 48-49).

After receiving the report of the treatment center finding Defendant to be a malingerer, the trial court issued a second Order for Competency and Sanity Evaluation and Psychiatric Evaluation Return, seeking further examination of Hernandez-Alberto by Drs. Maher and Saa. (DAR V1/59-62).

On July 22, 1999, Dr. Saa submitted his evaluation. (DAR V1/68-71). Dr. Saa's clinical impression was that Defendant's presentation was more compatible with malingering rather than a clear mental infirmity, defect or disease. (DAR V1/70). However, Dr. Saa concluded that Defendant was not competent to stand trial based on legal criteria, while noting that his conclusions were colored by Defendant's likely malingering. (DAR V1/71).

On August 6, 1999, Dr. Maher concluded that Hernandez-Alberto was competent to stand trial. (DAR V1/64-67). According to Dr. Maher,

> **The Defendant is engage[d] in an ongoing systematic pattern of deception in order to appear mentally impaired and incompetent**. This pattern of behavior limits the opportunities to perform a thorough psychiatric assessment regarding more subtle or underlying

> impairments or limitations. However, his presentation, history and demeanor are sufficient to strongly support a conclusion of competency to proceed.
>
> (DAR V1/64) (e.s.).

Dr. Maher also opined that, "...while [Defendant's] pattern of malingering [was] likely to continue, he [would], in all likelihood, remain competent throughout his legal proceedings." (DAR V1/67).

A competency hearing was conducted on November 9, 1999. (DAR V12/1285-1341). The trial court heard testimony from Drs. Maher and Saa, as well as Dr. Balzer from the treatment center where Defendant had been placed for five weeks. Dr. Saa concluded that Hernandez-Alberto was incompetent to stand trial. However, Dr. Saa also noted that Defendant's clinical condition was not consistent with a mental illness. If the defendant had the conditions that he was alleging to have, he would be very much impaired. Thus, Dr. Saa had concerns that Defendant was malingering. (DAR V12/1299).

Following his second evaluation, Dr. Maher concluded that Hernandez-Alberto was competent to stand trial. (DAR V12/1306). According to Dr. Maher, Hernandez-Alberto was systematically and willfully evading and presenting a picture of himself that was not genuine for the purpose of avoiding legal circumstances. (DAR V12/1306-1307).

Dr. Balzer observed Hernandez-Alberto during his five weeks at the treatment center. (DAR V12/1321). The first indications of the

Defendant's malingering were his claimed memory problems. Hernandez-Alberto's memory deficits were selective and self-serving. (DAR V12/1322). Dr. Balzer and the treatment team ultimately concluded that Hernandez-Alberto was competent to stand trial and was malingering. (DAR V12/1322-1323). Hernandez-Alberto suffered from no major psychiatric problems. (DAR V12/1324). The trial court found Hernandez-Alberto competent to stand trial. (DAR V12/1338-1340).

Later, in response to a request from defense counsel for appointment of a medical doctor to examine the Defendant, (DAR V1/94-96), the trial court appointed Dr. Arlene Martinez to evaluate and treat the Defendant. (DAR V1/97). On September 22, 2000, Dr. Martinez issued a report which found Hernandez-Alberto paranoid and psychotic and ordered medication as treatment. (DAR V1/38-102).

Defense counsel sought another competency determination; and, on August 9, 2001, the trial court issued an Order for Competency and Sanity Evaluation and Psychiatric Evaluation Return, seeking a third examination of Hernandez-Alberto by Drs. Maher and Saa. (DAR V1/123-127). On August 13, 2001, Dr. Saa reported that the Defendant's failure to cooperate prevented him from rendering an opinion about Defendant's competence to stand trial. (DAR V2/279). However, this report also noted the findings of the in-house psychiatrist, Dr. Stoll, who also determined that Hernandez-Alberto

was malingering. (DAR V2/279). On August 15, 2001, Dr. Maher reported that Hernandez-Alberto was competent to stand trial. (DAR V2/280-283). On August 20, 2001, another competency hearing was held. As a result of the initial evaluations done by Drs. Maher and Saa, Hernandez-Alberto was hospitalized for five weeks. The psychiatric staff at the hospital concluded Hernandez-Alberto was malingering to frustrate the trial process and was competent to stand trial. (DAR V4/36).

In his second evaluation, Dr. Maher found Hernandez-Alberto competent. (DAR V4/37). This change was partially based on the observations at the hospital – Hernandez-Alberto functioned well and did not behave consistent with any major mental health problems. (DAR V4/37-38). In his third evaluation, Dr. Maher concluded that Hernandez-Alberto was competent to stand trial. (DAR V4/39). Dr. Maher also observed Hernandez-Alberto's behavior in court. According to Dr. Maher, Hernandez-Alberto's behavior supported a finding of competence, and the Defendant showed no signs of psychotic thought patterns. (DAR V4/40-42, 58). Dr. Maher believed that Hernandez-Alberto was still engaged in a pattern of deception. (DAR V4/42, 59). The possibility that Hernandez-Alberto might have a brain injury would be irrelevant to Dr. Maher's opinion of the defendant's competency to proceed. (DAR V4/75-76).

Dr. Saa found Hernandez-Alberto incompetent to stand trial, with a diagnosis of psychosis. (DAR V4/80). However, Dr. Saa noted

in the second report that, “My clinical impression is that the defendant’s current clinical presentation is more compatible with malingering rather than a clear mental infirmity, disease or defect.” (DAR V4/82). At the third evaluation, Hernandez-Alberto refused to talk to Dr. Saa. Therefore, Dr. Saa stated that he could not render an opinion as to the Defendant’s competency. (DAR V4/84).

Dr. Robert Berland, a forensic psychologist, was hired by the defense to assist in preparation for the penalty phase. (DAR V4/87-88). Dr. Berland tried to see Hernandez-Alberto twice. On both occasions, Hernandez-Alberto refused to cooperate with any evaluation or discussion with Dr. Berland. (DAR V4/88-89). After reviewing the police reports, witness statements, medical records, an interview with the Texas authorities who arrested Defendant, and speaking with Dr. Martinez and the Defendant’s cell mate, Dr. Berland could not form an opinion he could swear to with substantial psychological certainty. (DAR V4/89-91). Rather, Dr. Berland opined that some secondary evidence was consistent with a brain injury resulting in delusional paranoid thinking. (DAR V4/92-93). Dr. Berland admitted that his opinion did not rise to the level of a diagnosis of mental illness. (DAR V4/104). Ultimately, the trial court ruled that Hernandez-Alberto was competent to proceed at trial. (DAR V4/126).

After the jury verdict of guilt, the trial court again ordered

a competency evaluation, on September 5, 2001. (DAR V2/322-326). On November 19, 2001, the trial court heard testimony from the defense expert, Dr. Berland. Relying solely on an interview with the Defendant's ex-wife, the mother of the two murder victims, Dr. Berland opined that Defendant was incompetent. According to information that he obtained from the Defendant's ex-wife, not from any additional testing or interviews of Hernandez-Alberto, Dr. Berland opined that the Defendant was psychotic with paranoid delusional thinking. (DAR V12/1401-1405).

After hearing from Dr. Berland, the trial court reiterated the history of Hernandez-Alberto's competency determinations. Additionally, the trial court noted that Dr. Maher had an opportunity to observe the Defendant's behavior in the courtroom and, based upon these observations, felt that the Defendant was competent. In addition, the trial judge personally observed the Defendant behaving appropriately in court and conducting an adequate defense of himself. Based upon this information, the trial court found Defendant remained competent and could proceed to the penalty phase. (DAR V12/1407-1409).

Despite the trial court's admonitions concerning the danger of representing himself, Hernandez-Alberto proceeded through the guilt phase representing himself and with his attorneys merely acting as standby counsel. However, at the close of the evidence, Hernandez-Alberto asked that his counsel be reappointed, and the trial court

complied with his request. (DAR V9/846-847). Thereafter, Attorney Traina made the relevant motions (DAR V9/848-849) and closing argument for the defense. Although Hernandez-Alberto later asked that Attorney Hernandez be fired and replaced with a new attorney, the trial court refused that request. (DAR Supp Vol. 3/224-235). Hernandez-Alberto proceeded through the penalty phase, *Spencer* hearing and sentencing hearing represented by Attorneys Traina and Hernandez. On direct appeal, this Court noted:

> Throughout the trial, the defense contended that Hernandez-Alberto suffered from a mental illness and may have had brain damage, which he allegedly suffered as a result of an automobile accident with a Hillsborough County Sheriff's vehicle several years prior to the homicides. Throughout the trial, Hernandez-Alberto was uncooperative with his attorneys, the investigators assigned to aid in his defense, and the doctors appointed to evaluate him. He also made repeated outbursts in the courtroom whereby he shouted profanities directed at the court and ultimately had to be removed on several occasions. At the beginning of the trial, he discharged his attorneys and invoked his constitutional right of self-representation.
>
> **The court made a specific observation that Hernandez-Alberto conducted himself appropriately throughout the trial while representing himself, that he asked relevant questions of the witnesses, and that he attempted to make valid points in the presence of the jury. After both sides rested, Hernandez-Alberto made the decision to have his attorney make the closing argument for him.**
>
> *Hernandez-Alberto*, 889 So. 2d at 724. (e.s.)

Direct Appeal

On direct appeal, *Hernandez-Alberto*, 889 So. 2d at 734, this Court affirmed Hernandez-Alberto's convictions for two counts of

first-degree murder and the two sentences of death. In rejecting the claims related to the defendant's competency and *pro se* representation, this Court stated, in pertinent part:

> **Issue 1: Competency**
>
> Hernandez-Alberto asserts that he was incompetent to stand trial and that the trial court erred in this case by failing to hold competency hearings throughout the trial. We have outlined a trial court's role in the area of competency to stand trial as follows:
>
> > In determining whether a defendant is competent to stand trial, the trial court must decide whether the defendant "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 a factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); see also § 916.12(1), Fla. Stat. (1993); Fla.R.Crim.P. 3.211(a)(1). In situations where there is conflicting expert testimony regarding the defendant's competency, it is the trial court's responsibility to consider all the evidence relevant to competency and resolve the factual dispute. *Hunter v. State*, 660 So.2d 244, 247 (Fla.1995), *cert. denied*, 516 U.S. 1128, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996); *Watts v. State*, 593 So.2d 198, 202 (Fla.1992). The trial court's competency decision will be upheld absent a showing of an abuse of discretion. *Hunter*, 660 So.2d at 247; Watts, 593 So.2d at 202.
>
> *Hardy v. State*, 716 So.2d 761, 763-64 (Fla. 1998).
>
> On April 19, 1999, the trial court ordered a competency and sanity evaluation and psychiatric evaluation return to determine if Hernandez-Alberto was competent to stand trial. Both Dr. Michael S. Maher and Dr. Alfonso H. Saa determined that Hernandez-Alberto was incompetent to stand trial. On May 18, 1999, the trial court adjudged Hernandez-Alberto incompetent to stand trial and committed him to the Florida Department of Children and Families. While Hernandez-Alberto was committed to the South Florida Evaluation and Treatment Center in Miami, Dr. Fred J. Balzer, Dr. Andres L.

Jimenez, Dr. Francisco A. Campos, and Hospital Administrator Cheryl Y. Brantley all determined that Hernandez-Alberto was malingering and competent to proceed. On July 13, 1999, the trial court ordered a second competency and sanity evaluation and psychiatric evaluation return to determine if Hernandez-Alberto was competent to stand trial. Dr. Maher and Dr. Saa again evaluated Hernandez-Alberto. On July 22, 1999, Dr. Saa concluded that Hernandez-Alberto was incompetent but stated, "However, I suspect that his clinical presentation, likely compatible with malingering, is coloring my conclusions." On August 6, 1999, Dr. Maher concluded that Hernandez-Alberto was competent to stand trial. On August 9, 2001, the trial court ordered a third competency and sanity evaluation and psychiatric evaluation return to determine if Hernandez-Alberto was competent to stand trial. On August 15, 2001, Dr. Maher again concluded that Hernandez-Alberto was competent to stand trial. On August 16, 2001, Dr. Robert M. Berland concluded that he might have "a genuine psychotic disturbance." The trial court concluded that Hernandez-Alberto was competent to stand trial at this time, and the trial commenced on August 20, 2001. On August 24, 2001, the jury found Hernandez-Alberto guilty on both counts of first-degree murder.

On November 16, 2001, defense counsel filed a motion for reconsideration of competency, alleging that Dr. Berland had done additional work on the issue and was prepared to state definitively that the defendant had a mental illness and was incompetent. Prior to the penalty phase on November 19, 2001, the trial court revisited the issue of competency. Dr. Berland was allowed to elaborate on his findings concerning Hernandez-Alberto's competency. The new information which formed the basis of Dr. Berland's "definitive" opinion was a conversation with the defendant's ex-wife. At the conclusion of that hearing, the trial court stated:

> THE COURT: Initially in this case, I found that he was incompetent to proceed and had him transferred to the state hospital. While at the state hospital, they made extensive observations of Mr. Hernandez Alberto, and their final conclusion was that he was malingering. He was sent back to Hillsborough County, where he has just totally refused to cooperate with his attorneys, with all of the doctors that the Court has appointed, and to this day he continues to be uncooperative. I have

> previously found that Mr. Hernandez Alberto was competent to proceed, and I believe that presumption remains with Mr. Hernandez Alberto today. I'll make a few other observations. **One was that Dr. Maher had the opportunity to make some observations of Mr. Hernandez Alberto, and, based upon his observations, felt that he was competent to proceed, that he had conducted himself appropriately in the courtroom. Also when Mr. Hernandez Alberto represented himself throughout the trial, I made a particular note that he conducted himself appropriately in the courtroom and was able to ask what I felt were some competent questions in his defense. Therefore, I'm going to find that Mr. Hernandez Alberto remains competent to proceed to the penalty phase of this proceeding**.

The penalty phase was conducted on November 28 and 29, 2001. At the conclusion of the penalty phase, the jury recommended by a vote of 10-2 that Hernandez-Alberto receive the death penalty as to both counts of first-degree murder. Prior to the *Spencer* hearing on April 30, 2002, the trial court granted Hernandez-Alberto's motion for a PET scan. [n2] However, Hernandez-Alberto refused to cooperate and did not allow a PET scan to be performed on him.

> [n2] Positron emission tomography (or PET scan) is a medical test often used to detect tumors and monitor a patient's brain function.

The record supports the trial court's resolution of the factual disputes on the issue of competency. Five medical experts, after having observed and examined Hernandez-Alberto, informed the trial court that he was malingering and competent to proceed. Yet another expert opined that Hernandez-Alberto's presentation was compatible with malingering. Dr. Berland initially opined that Hernandez-Alberto might have a genuine psychosis. After talking with Hernandez-Alberto's ex-wife, Dr. Berland stated the defendant was not competent. Even though there is conflicting evidence on the issue, the trial court's determination is supported by competent, substantial evidence and will not be disturbed on this appeal. *See Evans v. State*, 800 So.2d 182, 188 (Fla.2001)("Even when the experts' reports conflict, it is the function of the trial court to resolve such

factual disputes, and the trial court's determination should be upheld absent an abuse of discretion."). As there was evidentiary support in the record for the trial court's decision, we will not disturb the trial court's competency determination. *See Mora v. State*, 814 So.2d 322, 327 (Fla.)("In situations where there is conflicting expert testimony regarding the defendant's competency, it is the trial court's responsibility to consider all the evidence relevant to competency and resolve the factual dispute."), *cert. denied*, 537 U.S. 1050, 154 L.Ed.2d 526, 123 S.Ct. 603 (2002).

The trial judge held hearings on Hernandez-Alberto's competency at various stages of the trial proceedings and did not err in finding him competent to stand trial.

Issue 2: Pro Se Representation

Hernandez-Alberto next asserts that the trial court erred in allowing him to proceed *pro se* at trial. **From the time of his arrest until the third day of his trial, Hernandez-Alberto had been represented at different times by two sets of attorneys. At some point he requested that both sets be discharged.** Prior to discharging each set of attorneys, the trial court conducted a *Nelson* hearing. Such a hearing is required:

> Where a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be

> required to appoint a substitute. *See Wilder v. State*, Fla. App. 1963, 156 So.2d 395, 397. If the defendant continues to demand a dismissal of his court appointed counsel, the trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel.

Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973).

After both *Nelson* hearings, the trial court concluded that Hernandez-Alberto had been zealously represented. However, at the conclusion of the first *Nelson* hearing, the trial court nonetheless discharged counsel and appointed substitute counsel. Prior to discharging the second set of attorneys and prior to opening statements, the trial court warned Hernandez-Alberto that substitute counsel would not be appointed and asked Hernandez-Alberto if he still wished to discharge his counsel and represent himself. When Hernandez-Alberto indicated that he wished to discharge his counsel, the trial court conducted a *Faretta* inquiry.

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and that his choice is made with his eyes open."

Faretta v. California, 422 U.S. 806, 835, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975) (citations omitted). **During the *Faretta* inquiry, Hernandez-Alberto indicated that he understood the charges against him, that he wished to represent himself, and that he understood the consequences of representing himself. Hernandez-Alberto then represented himself for two days while his second set of counsel remained, as required by the trial court's order, as standby counsel. [n3] During those two days,**

the trial court asked Hernandez-Alberto numerous times if he wished to have his counsel reappointed, and Hernandez-Alberto declined these invitations. On the morning of the final day of the guilt phase, Hernandez-Alberto moved for standby counsel to be reappointed prior to closing arguments, and the trial court granted his request.

> [n3] The "State may--even over objection by the accused--appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta*, 422 U.S. at 835 n.46.

Based upon the foregoing, we find that the trial court did not err in allowing Hernandez-Alberto to proceed *pro se*. As we stated in *Bowen*:

> Once a court determines that a competent defendant of his or her own free will has "knowingly and intelligently" waived the right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented. *See* Fla.R.Crim.P. 3.111. The court may not inquire further into whether the defendant "could provide himself with a substantively qualitative defense," *Bowen v. State*, 677 So.2d 863 at 864, for 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). **Although Hernandez-Alberto's self-representation did not result in a favorable outcome, the trial court committed no error in allowing Hernandez-Alberto to represent himself, because the record demonstrates that the trial court properly conducted a *Faretta* hearing.** As explained by the United States Supreme Court in *Faretta*:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can

> only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Faretta, 422 U.S. at 834. [n4] **The trial court did not err in allowing the defendant to exercise his right to represent himself in this case.**

> [n4] *Accord Bowen*, 698 So.2d at 250 ("The federal Court in *Faretta* made no provision for an additional layer of protection requiring courts to ascertain whether the defendant is intellectually capable of conducting an effective defense. Such a requirement would be difficult to apply and would constitute a substantial intrusion on the right of self-representation.").

Issue 3: Motion for Continuance

Hernandez-Alberto further claims the trial court erred in denying his motion for a continuance after the trial court permitted him to proceed *pro se*. We have repeatedly held that "the denial of a motion for continuance is committed to the sound discretion of the trial judge." *Lebron v. State*, 799 So.2d 997, 1018 (Fla.2001), *cert. denied*, 535 U.S. 1036, 152 L.Ed.2d 652, 122 S.Ct. 1794 (2002). A "court's ruling on a motion for continuance will only be reversed when an abuse of discretion is shown. An abuse of discretion is generally not found unless the court's ruling on the continuance results in undue prejudice to [the] defendant. This general rule is true even in death penalty cases." *Israel v. State*, 837 So.2d 381, 388 (Fla.2002) (quoting *Kearse v. State*, 770 So.2d 1119, 1127 (Fla.2000), *cert. denied*, 539 U.S. 931, 156 L.Ed.2d 611, 123 S.Ct. 2582 (2003)). "While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to

review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance." *Cooper v. State*, 336 So.2d 1133, 1138 (Fla.1976).

Hernandez-Alberto offered three reasons for his request for a continuance: (1)so that he could go to the library and familiarize himself with the law because he knew "almost nothing"; (2)so that he could obtain a copy of the indictment and read it over; and (3)so that he could have someone go to the library with him and translate from English to Spanish all of the related discovery documents in the case for him so that he could understand the State's case. The trial court addressed all three of Hernandez-Alberto's concerns, so a continuance was unnecessary. The trial court repeatedly warned Hernandez-Alberto that his unfamiliarity with the law was the main reason why it would be advantageous to remain represented by his counsel. Furthermore, the trial court appointed standby counsel to assist Hernandez-Alberto with the legal aspects of his case. The trial court recessed the guilt phase proceedings, gave Hernandez-Alberto a copy of the indictment, and allowed him to read the indictment in his cell. Leann Goudie, one of the attorneys initially assigned to represent Hernandez-Alberto, testified that she had traveled to the jail on two occasions to visit Hernandez-Alberto and translated the discovery documents into Spanish so that he could understand the charges and evidence against him. Furthermore, Caroline Fulgueira, a mitigation specialist hired by the Office of the Public Defender, testified that she played to Hernandez-Alberto the taped confession he made to the Brookshire police chief. This tape was a major piece of evidence against him in the State's case. Hernandez-Alberto even admitted that Fulgueira had in fact played the tape for him. **The trial court thoroughly considered and addressed the reasons proffered for a continuance. Therefore, the trial court did not abuse its discretion in denying Hernandez-Alberto's *pro se* motion for a continuance.**

Issue 4: PET Scan

Hernandez-Alberto also asserts the trial court erred in initially denying his motion for a PET scan. **Because he was given an opportunity to have a PET scan but refused to cooperate, we deny relief on this issue.** In *Rogers v. State*, 783 So.2d 980 (Fla.2001), we stated the criteria to be applied by trial courts in making a

determination regarding the necessity for a PET scan. We said:

> A trial court's decision to deny a defendant's motion for a PET-Scan will not be disturbed absent an abuse of discretion. In evaluating whether the trial court abused its discretion, this Court generally looks at two factors. First, before the trial court will provide a defendant with the necessary funds for a PET-Scan, the defendant must establish a particularized need for the test, that is, that the test is necessary for experts to make a more definitive determination as to whether the defendant's brain is functioning properly and to provide their opinions about the extent of the defendant's brain damage. Second, this Court must consider whether the defendant was prejudiced by the trial court's denial of the motion requesting a PET-Scan.

Id. at 998-99 (citations omitted).

On March 21, 2001, Hernandez-Alberto filed a motion for a PET scan to help in preparation for the sentencing phase. In the motion Hernandez-Alberto pointed to Dr. Berland's March 8, 2001, affidavit which recommended that the defendant receive a PET scan in order to "contribute critical and otherwise unavailable information about the presence of injured brain tissue which which [sic] may have been caused by the auto accident described above [Hernandez-Alberto's accident with a Hillsborough County sheriff], or in other, unknown incidents in the defendant's history." Although the trial court initially denied the motion for a PET scan on January 7, 2002, the trial court reversed itself and ordered that $2500 be allotted for a PET scan. This order was entered three months prior to the April 30 *Spencer* hearing. Had the test been done, the results of the PET scan would have been available for argument as mitigation at the *Spencer* hearing. However, Hernandez-Alberto refused to allow a PET scan to be performed on him. He now claims that, although he refused to cooperate with a PET scan prior to the *Spencer* hearing, he might have cooperated with a PET scan prior to the guilt and penalty phase hearings, and he may cooperate with PET scan testing on remand. He concedes that when given the opportunity he did not allow the PET scan.

It is clear that the trial court afforded Hernandez-

> **Alberto the opportunity for a PET scan, and he refused to take advantage of it. As a result, he has failed to demonstrate that he was prejudiced by the trial court's initial decision to deny the PET scan. Therefore, error has not been demonstrated.**
>
> * * *

Hernandez-Alberto, 889 So. 2d at 726-731. (e.s.)

On September 23, 2005, this Court affirmed Hernandez-Alberto's convictions and death sentences. Rehearing was denied on December 10, 2004. *Hernandez-Alberto*, 889 So. 2d at 721. Hernandez-Alberto's counsel filed an application in the U. S. Supreme Court on March 4, 2005 asking for an extension of time to file a petition for writ of certiorari, which was granted until May 9, 2005. A petition for writ of certiorari was never filed.

Post-Conviction Proceedings

On March 10, 2006, CCRC-M filed an unverified Motion to Vacate Judgment of Conviction and Sentence; and, on March 13, 2006, CCRC-M filed a Motion for Competency Determination pursuant to Florida Rule of Criminal Procedure 3.851(g). (PCR V1/146-196). An amended motion to vacate and amended motion for competency determination were filed on March 16, 2006. (PCR V1/197-200; V2/201-263). On May 9, 2006, the State filed its response and did not oppose a post-conviction competency determination. (PCR V2/310). On October 25, 2006 and on January 9, 2007, the trial court appointed two experts, Dr. Donald Taylor, Jr. and Dr. Wade Myers, to conduct a competency evaluation of the defendant. (PCR V2/322-327; 332-337).

On March 22, 2007, Dr. Taylor and Dr. Myers went to Union Correctional Institution to conduct a competency evaluation of Hernandez-Alberto. Dr. Taylor and Dr. Myers each issued written reports. (PCR V2/359-370; V3/400-404; V3/406-417). In Dr. Myers opinion, within a reasonable degree of medical certainty, Hernandez-Alberto was "competent to proceed in capital collateral proceedings," and "Hernandez-Alberto's behavior to not cooperate with this evaluation was voluntary, not a product of mental illness, and was done for the purpose of delaying the legal process." (PCR V3/403). Dr. Taylor's 12-page written report concluded that "it is probable that [the defendant's] lack of cooperation is due to willful behavior rather than a psychotic disorder," and "probable that the defendant is competent to proceed." (PCR V3/417).

On February 14, 2008, the trial court held a competency hearing.[3] (PCR V24/T82-184). Three expert witnesses testified at the competency hearing: Donald Taylor, M.D. and Wade C. Myers, M.D., experts appointed by the court, and Arlene M. Martinez, M.D., an expert retained by the defense.

Dr. Donald Taylor, a forensic psychiatrist, testified that he and Dr. Myers traveled to Union Correctional Institution to meet Hernandez-Alberto on March 22, 2007. (PCR V24/88-89; 104).

[3]A competency hearing was originally scheduled for August 20, 2007, but was reset to accommodate CCRC's representation in an active death warrant case. (PCR V2/377-378; 384-385).

Hernandez-Alberto refused to meet with them. (PCR V24/89). According to documents Dr. Taylor reviewed, Hernandez-Alberto has not received any mental health treatment or medication while in Department of Corrections' custody since being sentenced in this case. Dr. Taylor noted two incidents, where Hernandez-Alberto was evaluated after claiming that his cell was electrified, in April, 2005 and November, 2006. (PCR V24/T103). On both occasions, Hernandez-Alberto was given a provisional diagnosis of delusional disorder. (PCR V24/T103). Following the November, 2006 incident, Hernandez-Alberto was monitored by the mental health staff on a regular basis, but he refused to talk to or cooperate with them and he had not received any psychotropic medication. (PCR V24/T104).

When Drs. Taylor and Myers arrived at UCI, they were taken into an interview room. (PCR V24/T105). Hernandez-Alberto was brought to the room, and he was invited to come in and sit down, but he did not enter the room. (PCR V24/T105-106). Dr. Taylor explained that they were psychiatrists and had been ordered to evaluate him, but Hernandez-Alberto stated that he did not want to talk to them. (PCR V24/T106). Hernandez-Alberto indicated that his lawyer had not answered his letter, and that he wanted his lawyer to explain what was going on to him. (PCR V24/T106). He was then returned to his holding cell. (PCR V24/T106). The doctors were taken by Hernandez-Alberto's cell in another attempt to talk with him, but he asked them to "please leave me alone." (PCR V24/107).

Dr. Taylor testified that Hernandez-Alberto remained calm during their interactions, and he did not demonstrate any evidence of psychotic thought processes. (PCR V24/T109). Based on his observations and records he reviewed, Dr. Taylor opined that, while he could not exclude the possibility that Hernandez-Alberto has an underlying psychotic disorder which accounts for his failure to cooperate, it is more probable that Hernandez-Alberto is engaging in willful behavior in refusing to cooperate and that he would be competent and have the capacity to cooperate if he choose to do so. (PCR V24/T108-109).

Dr. Wade Myers, a forensic psychiatrist, corroborated Dr. Taylor's testimony about their trip to UCI to meet with Hernandez-Alberto. (PCR V24/T124-125). Dr. Myers independently reviewed records and documents, including Hernandez-Alberto's prior psychological assessments and Department of Corrections records. (PCR V24/T123-124). His recollection of the attempted visit with Hernandez-Alberto was "[v]irtually identical to what Dr. Taylor described." (PCR V24/T124). Dr. Myers noted nothing remarkable about Hernandez-Alberto's hygiene, which can tell a lot about a person's ability to care for themselves and the organizational capacity of their mind. (PCR V24/T126-127). Hernandez-Alberto's speech was coherent and relevant; there was no evidence of any thought disorder. His psycho motor behavior was also normal, and he made appropriate eye contact. (PCR V24/T127). Dr. Myers

concluded that Hernandez-Alberto was competent to proceed in post-conviction. (PCR V24/T129). According to Dr. Myers, Hernandez-Alberto's refusal to meet with the doctors was a form of malingering. (PCR V24/T130). He noted Hernandez-Alberto's history of malingering, and observed that the medical records did not provide any credible evidence of a major mental illness of psychotic proportions. (PCR V24/T130).

Dr. Arlene Martinez is not board certified in forensic psychiatry and her practice is mostly clinical. (PCR V24/T172). She had evaluated Hernandez-Alberto prior to trial, on September 22, 2000, and thought he was paranoid and psychotic. (PCR V24/T151; 152). She also evaluated Hernandez-Alberto in post-conviction on September 14, 2005; she accompanied a Spanish-speaking attorney from CCRC and an investigator to UCI. (PCR V24/T158). The attorney, Carol Rodriguez, wanted Hernandez-Alberto to sign some legal documents, but he refused to sign anything. (PCR V24/T158-159). Dr. Martinez observed that Hernandez-Alberto was guarded and suspicious. (PCR V24/159). He spoke with her about pain from a car accident years ago and told her that electricity was coming from his cell up his feet and coming out his brain. (PCR V24/T159). Ms. Rodriguez reminded him that he had changed cells due to this complaint before, and she could not get him to focus on the legal issues she wanted to discuss with him. (PCR V24/T160).

Dr. Martinez testified that Hernandez-Alberto's refusal to

cooperate with her or Ms. Rodriguez was consistent with an established pattern of refusing to sign anything or accept medical services. (PCR V24/T161). According to Dr. Martinez, Hernandez-Alberto suffered somatic delusions, which are delusions relating to the body. (PCR V24/T162). Dr. Martinez noted his descriptions of feeling a burning sensation in his leg and up his body as electricity; she felt the electricity had been a consistent delusion on his part. (PCR V24/T162).

Dr. Martinez diagnosed Hernandez-Alberto with chronic paranoid schizophrenia. (PCR V24/T165). She didn't think Hernandez-Alberto was competent to proceed. (PCR V24/T166). She observed that he refused to consult with counsel. (PCR V24/T166). She stated that because Hernandez-Alberto did not cooperate, she could not assume that he understood the adversarial process. (PCR V24/T167). Dr. Martinez did not believe that Hernandez-Alberto was malingering, because she did not identify any secondary gain that he could receive for failing to cooperate with his attorneys. (PCR V24/T168). When asked if avoiding execution might provide an incentive to malinger, she acknowledged that it could, but did not think it did in this case, because there was a documented suicide attempt at some point and because he engaged in self-mutilation behavior, such as wrapping a tourniquet around his leg. (PCR V24/T171). Dr. Martinez had not seen Hernandez-Alberto since September, 2005. (PCR V24/T173). She acknowledged that Hernandez-

Alberto had not received any anti-psychotic medication in 2007, and she was not aware of any delusional thought processes or bizarre behavior in 2007. (PCR V24/T174-176). Her explanation for the lack of bizarre behavior was to suggest that his schizophrenia was in remission, and she noted that the fact that there was no documentation of any delusions did not necessarily mean that he was not experiencing them. (PCR V24/T176-177).

On June 3, 2008, the trial court (Judge Timmerman) found Hernandez-Alberto competent to proceed; the trial court denied CCRC's motion for reconsideration on July 16, 2008. (PCR V3/521-524). The trial court's order denying reconsideration states, in pertinent part:

> Analysis
>
> In his affidavit, Dr. Aufderheide does state that the DOC's mental health staff is not trained to make legal competency determinations. The Defense argues that because of this fact, the DOC's mental health staff's notes and records may be incomplete or inaccurate when applied to a competency determination as opposed to their intended use of treatment. They claim that while these records may be helpful as a "piece" of a competency evaluation, they cannot be used as a substitute for an actual face-to-face interview. Consequently, the defense believes that Dr. Taylor and Dr. Myers' opinions as to Defendant's competency should be discounted because Defendant refused to speak with them.
>
> On March 22, 2007, Dr. Taylor and Dr. Myers did speak with Defendant for approximately ten minutes at the doorway to an interview room at Union Correctional Institution and then briefly back at his holding cell. During this interview, despite Defendant's unwillingness to talk, a number of observations were made relevant to Defendant's mental state: he had acceptable hygiene, his speech was logical, coherent and at a normal rate and volume, his psychomotor behavior was unremarkable, he

made appropriate eye contact and he did not appear to be responding to internal stimuli. (See Dr. Taylor's and Dr. Myers' Reports, attached.) As Dr. Myers explained, a person who suffered from the number of "different" delusions that Defendant has claimed over the past several years would be in an extreme state of mental disorganization with a complete lack of awareness about one's own behaviors. (See Dr. Myers' Report, attached.) However, at the interview Defendant appeared organized, aware and completely able to care for himself. (See Transcript, pages 43-49, attached.)

Furthermore, while Dr. Taylor and Dr. Myers did review the DOC's records, they did not rely on the mental health staff's opinion as to Defendant's competency. Rather, they used the mental health staff's notes and observations, in conjunction with Defendant's prior court transcripts and forensic evaluations and their interview with Defendant, to form their own opinion as to Defendant's competency. For example, Dr. Myers noted in his report, major mental illness of psychotic proportions does not appear and disappear within short periods of time; instead, it is difficult to treat psychotic illness even when patients cooperate by taking psychotropic medication and participate in other treatments. (See Dr. Myers' Report, attached.) However, in the instant case, despite the fact Defendant has not taken psychotropic medications during the past year, Defendant's mental health records during that time have continually documented no disturbances in his thoughts, moods or behavior, and any sign of delusions only appear intermittently; seemingly when it is convenient for Defendant to appear incompetent. (See Transcript, pages 51-53, attached.) This is information that is presumably correctly noted by the DOC mental health staff as it is relevant both to a legal competency determination and to a patient's treatment.

Consequently, because Dr. Taylor and Dr. Myers' were able to interview Defendant, even briefly, and they did not solely rely on the DOC's mental health staff's opinion as to Defendant's competency when forming their own opinion, this Court will not completely discount their opinions because they also relied on DOC records. Though the brevity of their interview with Defendant is one factor the Court must consider when evaluating the conflicting evidence as to Defendant's competency. However, after examining Defendant's Motion for Reconsideration, the court file and the record, including

reviewing the hearing transcript and the expert's reports, the Court finds that it will not alter its previous factual findings that Defendant has:

1. a present ability to consult with his lawyer with reasonable degree of rational understanding, and
2 a rational as well as a factual understanding of the proceeding against him.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Motion for Reconsideration is hereby **DENIED**.

(PCR V3/R522-524).

On July 28, 2008, the trial court inquired of Hernandez-Alberto:

THE COURT: First question is do you want to sign the document that puts in motion or that--or where did--the matters that you want to go forward with an appeal, sir? The document that's been prepared by Mr. Gruber. Do you want to sign that document? You haven't signed it yet. Do you want to sign it, yes or no?

THE DEFENDANT: No, because--

THE COURT: No.

THE DEFENDANT: I have--

THE COURT: You do not want--

THE DEFENDANT: --I already talked with--talked with him, and he give me a copy Friday, I tell him what--what's--what's happening. And I read these pages and agree, because this information no helping me, only agree with 25 percent of the information we have despite the information he put in--in this motion no helping me in nothing, only 25 percent support--

THE COURT: Okay. So the answer to my question is, no, you do not wish to sign the document.

THE DEFENDANT: No. No.

THE COURT: All right. Do you want Mr. Gruber or his

office to represent you?

THE DEFENDANT: Mr. Gruber already tell it two times I fire him because not do any job for me in three years.

THE COURT: Okay. The question is, do you want him or his office, the office of the Capital Collateral Regional Counsel, do you want them to represent you? Yes or no.

THE DEFENDANT: Him, no, but other lawyers, yes, I wanted another lawyer.

THE COURT: Well, is your office prepared to furnish him with another lawyer, Mr. Gruber or are you like the Public Defender's Office, you--your--you have a boss in where assigns you a case and you don't have any say on that. Does that-does that have to come from someone over you? Does that come from someone over you?

MR. GRUBER: No, I think that we can reassign him within the office. And I've run into that question before, and I--I don't believe that is the case that our setup is directly analogous with the Public Defender's Office where there's a single elected public defender who represents everybody in effect and then assigns--

THE COURT: Well, I just assumed there was someone who was in charge of your whole office who assigned cases when they came in.

MR. GRUBER: That much is true, but I do believe our office can continue to represent him if he would be content with that.

THE COURT: With another lawyer?

MR. GRUBER: Yes, sir.

THE COURT: All right. Assuming they get another lawyer other than this gentleman, do you want the Office of the Capital Collateral Regional Counsel to represent you? In fact, that's who represents you, not Mr. Gruber. You're being represented by the Office of Capital Collateral Regional Counsel. He's just one of the lawyers that works there. Do you want that-that office-that office to represent you through someone other than Mr. Gruber?

THE DEFENDANT: Someone who can do the job because--

> THE COURT: Someone other than Mr. Gruber. So you want their office to represent you; is that correct?
>
> THE DEFENDANT: Someone do the job, no matter what office come in. Yes. Yes.
>
> (PCR V29/T238-241).

On July 28, 2008, the trial court extended the time by sixty (60) days for CCRC-M to file a facially sufficient motion that included an oath signed by Hernandez-Alberto, verifying the claims made in his motion as required by rule 3.851. (PCR V5/921).

At a status hearing held on October 27, 2008, Hernandez-Alberto refused to verify the motion, and requested that CCRC be discharged as counsel and that he be allowed to represent himself. After conducting a *Faretta*[4] inquiry, the trial court granted Hernandez-Alberto's request, discharged CCRC-M as counsel and appointed them as standby counsel. The Rule 3.851 amended motion to vacate, previously filed by CCRC-M, was dismissed. On October 30, 2008, Hernandez-Alberto was given sixty (60) days to file a *pro se* post-conviction motion to vacate. On December 17, 2008, the Court extended by sixty (60) days the time which Hernandez-Alberto had to file his *pro se* motion. (PCR V5/921).

On January 12, 2009, the trial court conducted a colloquy with Hernandez-Alberto in open court. As of January 12, 2009, Hernandez-Alberto still had not begun preparing his *pro se* motion to vacate. The trial court found that although Hernandez-Alberto

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

was competent to proceed, pursuant to *Indiana v. Edwards*, 128 S. Ct. 2379 (2008), the trial court re-appointed CCRC-M and gave the defense another ninety (90) days to file an amended motion to vacate. (PCR V36/331).

On March 18, 2009, CCRC-M filed a second amended motion to vacate; and, on April 7, 2009, a motion to extend the time to file a signed verification, which was granted on April 27, 2009. (PCR V5/921).

On June 1, 2009, CCRC-M reported that Hernandez-Alberto had not signed the verification, and CCRC-M did not anticipate that they would ever be able to convince Hernandez-Alberto to sign the verification. CCRC-M also requested that Hernandez-Alberto be re-evaluated to determine if he was still competent to proceed. The trial court granted CCRC-M's request and ordered that Hernandez-Alberto be reevaluated. (PCR V4/795-797).

On November 7, 2009, Dr. Rao advised that "no formal psychiatric evaluation for the purposes of competency was able to be completed." As Dr. Rao explained:

> The defendant reports that he does not want a psychiatric evaluation. He claims "I have told my lawyer I do not want a psychiatric evaluation." When I asked the defendant as to his reasoning and rationale for not wanting a psychiatric evaluation, his response was "you ask my lawyer, I have told him I am not going to have a psychiatric evaluation." The defendant refused to cooperate and refused to proceed with the interview. Hence, no formal psychiatric evaluation for the purposes of competency was able to be completed.
>
> His psychiatric records at the Orient Road Jail were reviewed and there is no psychiatric evaluation. He is

currently not on any psychotropic medication.

(PCR V6/R1192).

Dr. Annis' competency evaluation report of February 17, 2010 (PCR V6/R1171-1178) states, in pertinent part:

> **II. EVALUATION PROCEDURES**:
>
> Mr. Hernandez was examined by the undersigned on February 17, 2010 to assess his mental status and competency to proceed as specified in section 916.12, Florida Statutes. Assisting in the examination and providing translation services was Juan C. Couto Llinas, Psy.D. Dr. Couto is a Psychological Resident at the Florida State Hospital forensic transition program. The limits of confidentiality were explained to Mr. Hernandez. He demonstrated that he understood the limits of confidentiality. In addition to the interview, Mr. Hernandez' record maintained at Union Correctional Institution was reviewed, which contains among other things his disciplinary record, clinical assessments and evaluation reports performed since admission to the Department of Corrections' custody, observations of his behavior while in custody, and his disciplinary record. Other documents reviewed were: the criminal report affidavits for the charged offenses; the forensic psychiatric re-evaluation dated October 15, 2009, submitted to the court by Dr. Donald R. Taylor, Jr.; and the forensic psychiatric evaluation dated November 7, 2009, submitted to the court by Dr. Bala K. Rao. Mr. Hernandez met for a few minutes with the examiner and Dr. Couto on February 17, 2010, and twice more that same day with Dr. Couto. In addition, the examiner and Dr. Couto met with Department of Corrections security officers who have had repeated contact with Mr. Hernandez during his confinement on Death Row.
>
> **III. RELEVANT HISTORY:**
>
> **Personal, Social, Family, Education, and Work History**. Mr. Hernandez declined to speak about his personal history, and records of his early life are sparse. He was reportedly born in Mexico and raised in an abusive household. He reportedly left school in sixth grade. There is no available information regarding his subsequent formal education. A request written in Spanish for tuberculosis screening and a letter he wrote in

Spanish to the Governor in 2003 suggest he is literate. Although both letters contain grammatical errors, they are well composed for a person with his reported educational history.

Mr. Hernandez married Maria Gonzalez in 1996, reportedly after knowing her for several years. By her he fathered his only natural child, his daughter Gabriella. Living in the home with Mr. Hernandez, Maria and Gabriella during the marriage were Maria's three children from previous relationships: her adult son, Salvatore Gonzalez; her adult daughter, Isela Gonzalez; and her minor daughter, Donna Berezovsky.

Mental Health, Physical Health, and Substance Abuse History. No information has been located that indicates Mr. Hernandez required, pursued, or received inpatient or outpatient psychiatric treatment prior to his arrest. He was apparently treated for depression while awaiting trial, diagnosed major depressive episode with psychotic features, and committed to South Florida Evaluation and Treatment Center (SFETC) in June 1999 as incompetent to proceed. He was recommended to the court within a few weeks as competent to proceed. His diagnoses at discharge from SFETC were malingering and antisocial personality disorder.

In addition to the SFETC report to the court authored by Francisco A. Compos, M.D. and Fred J. Balser, Ph.D. (June 17, 1999), records indicate evaluations for the court by Alfonso H. Saa, M.D. (May 3, 1999, July 22, 1999, and August 13, 2001); Michael S. Maher, M.D. (May 7, 1999, August 6, 1999, and August 15, 2001), Donald R. Taylor, M.D. (October 15, 2009), and Bala K. Rao, M.D. (November 7, 2009). Dr. Taylor's report includes a comprehensive summary of evaluation findings beginning in 1999. Mr. Hernandez refused to be examined by Dr. Taylor or Dr. Rao. Based on Mr. Hernandez' history and prison record, Dr. Taylor diagnosed nicotine dependence in a controlled environment. Dr. Rao did not offer a diagnosis.

Except for tuberculosis screening, Mr. Hernandez has generally refused medical tests while in prison. Records indicate past treatment for tuberculosis, syphilis, and hyperlipidemia (excess lipids, a fatty molecule, in the blood, which is a risk factor for heart disease). He reportedly used marijuana and alcohol prior to his arrest, but no records seen by this examiner indicate a history of treatment for alcohol or drug abuse.

* * *

IV. PRISON BEHAVIOR:

Mental Health Records. Records from the Department of Corrections indicate that on April 21, 2005, Mr. Hernandez put his belt around his neck. He said he did this because his cell floor was electrified. He denied attempting or considering suicide. Prison records indicate that on November 27, 2006, Mr. Hernandez put some paper on the floor of his cell and tied four cloth strips around his right leg. He said he did this because the floor and bed in his cell were electrified, and the improvised tourniquets were to stop poison from spreading from his right foot to the rest of his body. After the strips were removed from around his leg, he was treated with Keflex (an antibiotic) and Motrin (an analgesic), but refused mental health evaluation, psychiatric treatment, or medical tests. He was subsequently diagnosed rule-out delusional disorder, persecutory type, but he refused treatment, signs of delusional disorder were not observed, and this diagnosis was subsequently closed (I did not locate the date the diagnosis was removed). From prison records it appears that Mr. Hernandez has refused to participate in mental health evaluations by prison staff for at least the past three years. The most recent mental health evaluation in the prison record was by Jennifer Sagle, M.Ed., on January 14, 2010. Ms. Sagle reported that he refused to be interviewed so the evaluation was limited to observation from in front of his cell. She reported there were no gross disturbances of thought, mood or behavior.

Psychiatric Medications. Records from the Department of Corrections indicate Mr. Hernandez is not presently prescribed medications and has not taken psychiatric medications during this incarceration.

Correctional Officer Interviews. Three correctional officers who have regular contact with Mr. Hernandez were individually interviewed for this report. Lieutenant Randolph Salle has been with the Department of Corrections for 23 years and assigned to Death Row since 1992. Officer Brandon Meade has been with the Department of Corrections for nine years and assigned to Death Row for four years. Officer Dale Crary has been with the Department of Corrections for four years and assigned to

Death Row for eight months. The three officers present similar descriptions of Mr. Hernandez' daily life on Death Row and his interactions with inmates and corrections staff.

Interactions with Security Staff. The officers describe Mr. Hernandez as respectful and polite towards correctional officers and not presenting behavioral management problems. They report he speaks to them in Spanish-accented English and responds to instructions spoken to him in English, but he sometimes asks for something to be explained to him in Spanish. He has behaved at times as if he does not understand what an officer was saying to him and occasionally seems to ignore an officer who is giving him an instruction or asking him a question, but responds when reminded.

Interactions with Inmates. They report he interacts with other inmates without observable problems. He generally prefers to engage with inmates who are Spanish speakers.

Daily Activities. The officers report that Mr. Hernandez adheres to the facility rules. They describe his primary outdoor recreation as walking around the exercise yard. He does not shoot baskets with the other inmates, but sometimes plays volleyball.

Personal Behavior. The officers describe Mr. Hernandez as a quiet person who generally keeps to himself. Mood expression is described as within normal limits. No cyclic, diurnal, or seasonal mood variations are described. He is not tearful. Speech is terse but rational and coherent. Interests expressed are his personal needs. No loosened associations, neologisms, word salad, flights of ideas, rambling speech, preoccupations, or delusional thinking are reported. He does not appear distracted by his thoughts or unseen stimuli. He demonstrates that he remembers prison rules and Death Row procedures. The officers report that Mr. Hernandez does not present distraction to internal or unseen stimuli, odd verbalizations or movements, unusual affect, and other overt signs of hallucinations. They report he has not told them of hearing or seeing anything others would not be able to see or hear.

V. CURRENT MENTAL STATUS:

On February 17, 2010, the undersigned and Dr. Couto met with Mr. Hernandez for the purpose of completing a

competency evaluation interview. Mr. Hernandez spoke to the examiner and Dr. Couto for a few minutes, but he refused to participate in an interview and prematurely terminated the meeting. Dr. Couto subsequently met individually with him twice that same day, and each time Mr. Hernandez spoke with Dr. Couto for a few minutes, but refused to participate in a formal interview.

At each meeting with Mr. Hernandez, he wore standard Death Row attire. He presented with adequate hygiene and grooming. No psychomotor agitation or physical sluggishness was observed. He maintained appropriate levels of eye contact. He did not wear glasses or appear to require corrective lenses. His speech was within normal limits with respect to rate and tone. His Spanish-accented English was difficult for the examiner, who is not a Spanish speaker, to understand. Dr. Couto conversed with Mr. Hernandez in Spanish and reported no difficulty understanding him. Mr. Hernandez did not stutter. His conversation was relevant, goal-directed, and easily understood. Orientation could not be formally assessed, but he was aware of who he was, as he responded to his name. He appeared to understand the purpose of the examination and aspects of his legal situation, such as by spontaneously reporting he had filed four motions in court. He was alert and attentive throughout the meetings. No abnormal body movements were observed. He appeared calm and relaxed. Concentration appeared normal. He did not repeat questions or require questions to be repeated. He would not describe his mood. Although affect was somewhat constricted, overt mood expression was within normal limits. Depression, anxiety, and mania were not apparent. Mr. Hernandez' attitude appeared guarded and evasive. With the examiner and with Dr. Couto alone, Mr. Hernandez did not exhibit overt indication of responding to internally-generated stimuli. That is, he was not observed mumbling, talking to himself, talking to unseen others, or unduly distracted by objects or beings unseen by others. His thought processes, as evidenced by his statements and his responses to questions, were relevant, coherent, and goal-directed. He was attentive to the interviews and maintained effective concentration to the interviewers. His memory appeared intact, as evidenced by his recalling meeting with two evaluators from CCRC and filing four motions in court. His conversations were logical and coherent. No overt signs of delusional thinking were evidenced. Suicidal and homicidal ideation could not be formally assessed in the interviews, but correctional staff report he is pleasant

in his interactions with others. Judgment could not be formally assessed due to his refusal to participate in a formal interview, but he expressed understanding that anything he said could be included in a report to the court. Mr. Hernandez advised that “I don’t want to talk to you, because if I do, you are going to write a report saying that I talked to you.”

COMPETENCY ASSESSMENT:

Despite encouragement from the examiner, from Dr. Couto, and from corrections security staff, Mr. Hernandez refused to participate in a formal competency examination. He did volunteer statements and respond to a few questions.

Appreciation of Legal Charges. Mr. Hernandez indicated awareness that he had serious criminal charges. His appreciation of his present charges could not otherwise be assessed.

Appreciation of Penalties. Mr. Hernandez did not answer questions regarding possible penalties. He terminated the interviews before being questioned about pleas.

Appreciation of the Adversarial Nature of the Legal Process. Mr. Hernandez indicated that the judge is the authority in the courtroom. He did not mention anything to suggest a belief that the judge is against him, as he stated that he wanted the judge to know that he was ready to go to court. When encouraged to participate, Mr. Hernandez stated, ‘You just tell the judge that I refused to talk to you.” He indicated awareness that his attorney was on his side and that he needed to work with his attorney to present his case and he needed his attorney to help him make legal decisions. He said he had filed a motion in court in the past to dismiss his lawyer “because he was not doing his job.” Given Mr. Hernandez’ lack of participation, his understanding of other aspects of the adversarial nature of the legal process could not be assessed.

Ability to Disclose Pertinent Facts to his Attorney. Mr. Hernandez refused to discuss the facts surrounding the offense. However, he communicated with the examiner and Dr. Couto in a relevant and goal-directed manner. He spoke without being distracted by irrelevant or tangential information. He did not discuss his opinion of his attorney in the interviews. His Department of

Corrections records indicate that he asked a correctional staff member if his lawyer was aware that he was being evaluated (by a previous examiner), which suggests that he is motivated to work with counsel. His ability to disclose pertinent facts regarding his legal situation appeared hindered by guardedness and evasion rather than by intellectual, perceptual, or memory deficits. Mr. Hernandez recalled meeting with two people from "CCRC" in 2005 and filing four motions in court, including one to dismiss his lawyer.

Capacity for Appropriate Courtroom Behavior. Mr. Hernandez' behavior as described by security staff indicates he has sufficient capacity to manifest appropriate courtroom behavior. He remained calm and relaxed while expressing his refusal to participate in the examination. Despite encouragement to participate in the evaluation, Mr. Hernandez calmly indicated that he would talk to the judge when he went to trial. He will need to have statements and questions by officers of the court and by witnesses translated into Spanish if he is to effectively understand them.

Capacity to Testify. Mr. Hernandez demonstrated awareness of his right to avoid self-incrimination. He was able to communicate with Dr. Couto in a relevant and reality-based manner. He is described by prison staff as communicating effectively with staff and inmates in the prison environment. While he should have sufficient capacity to provide relevant testimony on his behalf if he believes it is in his best interest, he will likely be a much more effective witness if examined in Spanish and allowed to respond in Spanish.

Other factors as indicated. Mr. Hernandez appears to be very concerned about the possible outcome of his current legal situation, it is possible that he will refuse to participate in proceedings or attend court if he sees legal proceedings as not likely to improve his present situation.

VI. DIAGNOSES IN ACCORDANCE WITH THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV:

Inclusion of a DSM-IV diagnosis in this report "does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorders, or mental disability. The clinical and scientific considerations involved in categorization of

these conditions as mental disorder may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency" (Desk Reference to the Diagnostic Criteria From DSM–IV™, 1994, page xi).

Axis I: No diagnosis
Axis II: No diagnosis
Axis III: No medical conditions were reported that are relevant to the issue of competency to proceed
Axis IV: Incarceration
Axis V: Current Global Assessment of Functioning = 70

Summary of Relevant Psychiatric Symptoms. Although Mr. Hernandez is unusually guarded and resistive in his interactions with mental health professionals, no symptoms of major mental illness were observed.

VIII. CONCLUSIONS AND RECOMMENDATIONS:

Opinion regarding competency. It is the opinion of the undersigned that Mr. Hernandez is competent to proceed with Capital Collateral Proceedings Pursuant To Fla.R.Crim.P. 3.851(G).

* * *

(PCR V6/1171-1177).

Dr. Taylor re-evaluated Hernandez-Alberto in 2009. Several pages of Dr. Taylor's re-evaluation report of October 15, 2009 detailed the sources of information that he reviewed, including the DOC medical records from June 10, 2002 to October 30, 2007. (PCR V6/1179-1187). Dr. Taylor's re-evaluation report also noted the:

11. Brief attempt to interview the defendant on March 22, 2007. Wade Myers, M.D. and Mark Hough, Deputy Chief Investigator with the Capita]. Collateral Regional Counsel were present. Mr. Hough was there to videotape the interview.

12. Court appearance on February 13, 2008. The defendant interrupted and challenged the examiner's testimony. He demonstrated the use of English as a second language. He

was oppositional but presented with no evidence of cognitive deficits or a thought disorder. He was removed from the courtroom at his request.

13. Individual's Charge Report dated October 6, 2009. The defendant was transferred to Hillsborough County from Union Correctional Institution on October 2, 2009.

14. Hillsborough County Jail medical records.

15. Brief attempts to interview the defendant on October 6 and October 15, 2009.

(PCR V6/1188).

In addition, Dr. Taylor described the attempts to interview Hernandez-Alberto as follows:

MENTAL STATUS EXAMINATION: On March 22, 2007 the defendant was seen sitting in a holding cell at Union Correctional Institution while the examiners were escorted to the interview room. Once the examiners were in the interview room he was escorted to the doorway. He presented as a Hispanic male of medium height and build who appeared approximately his stated age. He had cuffs on his hands and was dressed in prison issue clothing. He remained in the doorway as the examiners introduced themselves and began to explain the purpose of the evaluation. He stated "I don't wanna talk." Responses to other statements by the examiners included "My lawyer no answer my letter,""I want my lawyer to tell me what's going on," and "I want my lawyer to explain it to me." He left the area and returned to the holding cell. The examiners were escorted to the front of the holding cell and attempted to convince him to return to the interview room. He asked for the name of the judge and wrote it on a notepad. When the examiners attempted to continue the discussion he put the notepad in front of his face and said "Please leave me alone." The interview was terminated at that time.

On October 6, 2009 the defendant was escorted to an interview room on a confinement unit at the Orient Road Jail. He presented as a Hispanic male of medium height and build whc' appeared approximately his stated age. He was dressed in jail issue clothing with cuffs on his hands and legs. He was unshaven but otherwise adequately groomed. He stood at the doorway but did not enter the

> room. The examiner introduced himself and began to explain the purpose of the evaluation. The defendant interrupted and said "Excuse me. I don't want to see you." When the examiner attempted to continue the explanation the defendant stated "I don't want to talk." He motioned to the deputy and was returned to his cell.
>
> On October 15, 2009 the defendant was seen in his cell at the Orient Road Jail. He remained seated on his bed. Following the examiner's introduction and explanation he was asked if he would answer a few questions. He responded "No thank you. I don't want to talk with you." He remained calm but did not respond to any of the examiner's questions. The interview was terminated after a few minutes.
>
> (PCR V6/1190).

Dr. Taylor's re-evaluation report also explained:

> OPINION: Due to the defendant's lack of cooperation it is difficult to arrive at an opinion regarding his level of functioning and competence to proceed. He has a history of behavioral disturbances including lack of cooperation which were probably due to malingering and/or other manipulative behavior. In 2006 he engaged in behavior which was probably manipulative but may have been due to a psychotic disorder. I have been provided with little information regarding his behavior and level of functioning since 2007. The information provided does not indicate that he has recently presented with behavioral problems suggestive of mental illness. It is probable that his lack of cooperation is due to willful behavior rather than mental illness. However, I cannot state within a reasonable degree of medical probability that he has the capacity to understand the adversary nature of the legal process and proceedings and is capable of disclosing pertinent facts to collateral counsel.
>
> (PCR V6/1191).

Both Dr. Annis and Dr. Taylor testified at the competency hearing held on June 3, 2010. (PCR V6/T1089-1169). The trial court summarized the testimony presented at the evidentiary hearing as follows:

Dr. Annis testified that he is currently the psychological services director at the Florida State Hospital (FSH). On February 17, 2010, he visited Defendant at the Union Correctional Institution (UCI) prison holding cell to conduct an evaluation interview.

Defendant sat with Dr. Annis but declined to be interviewed. When questioned why, Defendant stated that he and his attorney were developing an appeal and he did not want to talk to anyone but his attorney. Defendant remained calm and attentive and was cooperative with the prison staff during Dr. Annis' visit.

Dr. Annis also interviewed three correctional officers regarding their observations and interactions with Defendant. The correctional officers described Defendant as calm, polite and with good control. They said Defendant did not talk to himself, speak gibberish, wave his arms wildly, or show extreme mood. Defendant also recognized who the officers were, carried on conversations with other inmates, and understood and followed prison rules and guidelines. As part of his evaluation, Dr. Annis also reviewed UCI's records and the reports which were completed by other examiners.

Based on his brief interaction with Defendant, his interviews of the correctional officers and his review of Defendant's records, Dr. Annis testified that in his opinion Defendant is competent to proceed with his postconviction proceedings. Specifically, Dr. Annis testified that based on Defendant's references to working with an attorney and appealing his case, he is aware of the charges against him; that he is cognizant of the importance of the attorneys to his case and that the judge is the decision maker; that based on the logical nature of Defendant's writings made in prison, he has the ability to disclose pertinent information to his attorneys; and that based on Defendant's ability to communicate his needs to the correctional staff, he can maintain appropriate courtroom behavior and has the capacity to testify in postconviction proceedings. Finally, Dr. Annis testified that Defendant is likely to sabotage or not participate in any situation in which he believes is not helpful to his cause, such as a competency interview.

Dr. Taylor testified that he completed a competency evaluation of Defendant in 2007 and found Defendant competent to proceed. As part of the evaluation, he

> attempted to interview Defendant, but Defendant was uncooperative and refused to be interviewed. However, based on his limited interaction with Defendant, as well as reports of other evaluators, Defendant's medical and mental health records and some court documents, Dr. Taylor was able to make a determination that Defendant was competent to proceed.
>
> In 2009, the Court again appointed Dr. Taylor to evaluate Defendant to determine if Defendant was competent. Defendant refused to be interviewed. However, unlike in 2007 when Dr. Taylor had current medical and mental health records to review, he was unable to review any of Defendant's records from 2007 to 2009. Therefore, although he believed it was probable that Defendant's lack of cooperation is due to willful behavior rather than mental illness, he was unable to testify with a reasonable degree of medical probability that he is competent to proceed.
>
> (PCR V6/1093-1095).

At the conclusion of the hearing, the trial court again found Hernandez-Alberto competent to proceed.[5] (PCR V6/T1093-1096; 1167-1168). A status hearing was held on July 29, 2010, and CCRC-M reported that Hernandez-Alberto refused to verify the truth of the [second amended] motion to vacate. On August 6, 2010, the State

[5]At the conclusion of the hearing, the trial court noted,

> ". . . I want to put my own observations on the record here and my own personal observations of the defendant.
>
> I have noticed that he appears to be, um, very attentive during the proceedings. He has actually participated in the proceedings, interjected himself early on with Dr. Annis' testimony. Made his points quite clear. There is no doubt in my mind that he clearly understands the nature of these proceedings. He's exhibited appropriate courtroom behavior. Conducted himself appropriately and conducted himself properly.
>
> I'm going to find specifically that there were sufficient evaluations done in this case. I'm going to find that the defendant is competent to proceed for continued hearings in

filed a Motion to Strike Defendant's Unverified Second Amended Motion to Vacate Judgment and Sentence, without prejudice. (PCR V5/916-918).

On August 17, 2010, the court issued an order dismissing Hernandez-Alberto's second amended motion to vacate without prejudice to file a verified motion within sixty (60) days. (PCR V5/R919-924). The trial court detailed the procedural history regarding the defendant's competency proceedings before trial and during trial and outlined the following proceedings in post-conviction:

> On March 10, 2006, Capital Collateral Regional Counsel (CCRC) filed an unverified Motion to Vacate Judgment of Conviction and Sentence on Defendant's behalf, and on March 13, 2006, they filed a Motion for Competency Determination pursuant to Florida Rule of Criminal Procedure 3.851(g). [fn2] The Court held a competency hearing on February 14, 2008, and on June 3, 2008, the Court found Defendant competent to proceed. [fn3] (See Case Progress, attached.)
>
> On July 28, 2008, the Court extended the time by sixty (60) days for the defense to file a facially sufficient motion that included an oath signed by Defendant verifying the truth and accuracy of the claims made in his motion as required by rule 3.85 1. (See Case Progress, attached.) But on October 27, 2008, at a status hearing, Defendant not only refused to verify the motion, he also requested that CCRC be discharged as counsel and that he be allowed to represent himself. After conducting a *Faretta* inquiry, the Court granted Defendant's request, discharged CCRC as counsel and appointed them as standby counsel. (See Case Progress, attached.) The postconviction motion previously filed by CCRC on Defendant's behalf was dismissed and on October 30, 2008, Defendant was given sixty (60) days to file his pro se postconviction motion. (See Case Progress, attached.)

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the post conviction proceedings." (PCR V6/T1167-1168).

On December 17, 2008, the Court extended by sixty (60) days the time which Defendant had to file his motion. (See Case Progress, attached.) However, on January 12, 2009, after interviewing Defendant, the Court concluded that although Defendant was competent to proceed, he was not competent to represent himself, and pursuant to *Indiana v. Edwards*, 128 S.Ct. 2379 (2008), the Court reappointed CCRC as defense counsel and gave them ninety (90) days to file an amended motion.4 (See Case Progress, attached.)

On March 18, 2009, defense counsel filed their amended motion. (See Second Amended Motion, attached.) On April 7, 2009, they filed a motion to extend the time to file a signed verification, and on April 27, 2009, the Court granted defense counsel's request. On June 1, 2009, defense counsel conceded that not only had Defendant not signed the verification but they did not anticipate that they would ever be able to convince him to sign one. On that date they also requested that Defendant be reevaluated to determine if he was still competent to proceed. (See Case Progress, attached.)

In an abundance of caution the Court granted the defense's request and ordered that Defendant be reevaluated. (See Order, attached.) A competency hearing was held on June 3, 2010, and after hearing testimony from two experts, the Court again found Defendant competent to proceed. (See Case Progress, attached.)

A status hearing was then scheduled for July 29, 2010. At that hearing, defense counsel stated that Defendant still refused to verify the truth of the instant Motion. (See Case Progress, attached.)

Analysis and Ruling

A postconviction motion filed pursuant to rule 3.851 shall be under oath. Fla.R.Crim.P. 3.85 1(e)(1). A motion filed without the required oath is facially insufficient and warrants dismissal without prejudice. *See Gorham v. State*, 494 So.2d 211 (Fla.1986); *Groover v. State*, 703 So.2d 1035, 1038 (Fla.1997).

In the instant case, Defendant has refused to verify the truth and accuracy, either orally or by a written verification, of the claims made in any of his postconviction motions filed by counsel.

Defense counsel has argued that because rule 3.851(g) mandates that when a defendant is found incompetent to proceed a court must still rule on the claims that do not require the defendant's input even if he has not verified the motion, that a verification is not necessary for the Court to rule on those claims that do not require Defendant's input in the instant case.

However, rule 3.85 1(e)(1) and the holdings of the Supreme Court of Florida make clear that an unverified motion is facially insufficient. *See Gorham*, 494 So.2d at 211; *Groover*, 703 So.2d at 1038. Furthermore, the plain meaning of 3.851(g) is that its exception the oath requirement only applies when a defendant is found incompetent to proceed. Therefore because the Court found Defendant competent to proceed in the instant case, rule 3.851(g) is inapplicable.

Defense counsel also argues that the Court cannot dismiss Defendant's motion because rule 3.85 1(i) requires the Court to conduct a *Faretta* hearing to determine whether the defendant is knowingly, freely and voluntarily dismissing his pending postconviction proceedings, and in the instant case, Defendant has never stated that he wishes to dismiss his postconviction proceedings, he simply has refused to verify the truth of his postconviction motion. Using defense counsel's reading of 3.851(i), a defendant could theoretically hold postconviction proceedings in a continual abeyance by refusing to verify the truth of his motion, thus making the motion facially insufficient, but also stating that he does not wish to dismiss his postconviction proceedings. A better reading of the rule, and a reading that conforms to the Supreme Court of Florida's holdings in *Gorsham* and *Groover*, is that rule 3.851(i) only applies once a facially sufficient postconviction motion is filed and that if a the motion is facially insufficient, as in the instant case, it must be dismissed without prejudice for the Defendant to file an amended facially sufficient motion.

Consequently, the Court is compelled to dismiss Defendant's Motion without prejudice for him to file an amended facially sufficient motion within sixty (60) days from the date of this order that includes a signed verification. [fn6]

(PCR V5/920-923).

On November 2, 2010, the trial court issued its final order dismissing, with prejudice, the second amended motion to vacate. The trial court's order of November 2, 2010, states, in pertinent part:

> A status hearing was then scheduled for July 29, 2010, and at that hearing defense counsel stated that Defendant still refused to verify the truth of the instant Motion. On August 17, 2010, the Court entered an Order dismissing Defendant's Motion without prejudice so that he may file a facially sufficient motion, which included a sign oath, within sixty (60) days. **Defendant did not file a facially sufficient motion within the sixty (60) day period; consequently, the Court now enters the instant order dismissing Defendant's Motion with prejudice.** *See Christner v. State*, 984 So.2d 561 (Fla. 2d DCA 2008) (holding that an order dismissing a postconviction motion without prejudice to file an amended, facially sufficient motion is not an appealable order and the best practice would be for the trial court to enter a final order disposing of the motion if the defendant does not file an amended motion within the given time period.)
>
> It is therefore ORDERED AND ADJUDGED that Defendant's Second Amended Motion to Vacate Judgment and Sentence is hereby DISMISSED WITH PREJUDICE.
>
> (PCR V6/R1198-99). (e.s.).

Defendant's notice of appeal was filed on November 30, 2010. This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I:

This Court's case law provides that "if a movant . . . alleges a valid legal claim with sufficient factual support, and complies with the oath and contents requirement, then he will ordinarily have stated a facially sufficient postconviction motion." *Jones v. State*, 998 So. 2d 573, 591 (Fla. 2008), quoting *Jacobs v. State*, 880 So. 2d 548, at 550 (Fla. 2004). Because Hernandez-Alberto failed to comply with the oath requirement, his second amended motion to vacate remained facially and legally insufficient and, as a result, it was properly dismissed by the trial court.

Issue II:

Hernandez-Alberto has a documented history of "manipulative behavior" which includes malingering as well as refusing to cooperate with his legal team. The fact that this history has continued into post-conviction is not surprising, nor should it be seen as indicative of incompetency. Given the evidence presented in this case and the applicable standards of review, a sufficient basis exists to support the trial court's resolution of conflicting evidence and the trial court did not abuse its discretion in finding Hernandez-Alberto competent to proceed.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DISMISSED THE DEFENDANT'S SECOND AMENDED RULE 3.851 MOTION DUE TO LACK OF VERIFICATION.

After two separate competency hearings in post-conviction and after twice finding Hernandez-Alberto competent to proceed in post-conviction, the trial court gave Hernandez-Alberto multiple opportunities to verify his motion to vacate, yet Hernandez-Alberto failed to ever do so.

On July 29, 2010, the trial court conducted an inquiry with the defendant on the record regarding his refusal to sign the post-conviction motion. Hernandez-Alberto was duly sworn and explained that he refused to sign the post-conviction motion because (1) he disagreed with the information in the motion, (2) the information was offensive to Hernandez-Alberto and his family, (3) the information was not useful in helping him and (4) Hernandez-Alberto previously had fired his CCRC counsel. (PCR V48/T471-473).

This Court's case law provides that "if a movant . . . alleges a valid legal claim with sufficient factual support, *and complies with the oath* and contents requirement, then he will ordinarily have stated a facially sufficient postconviction motion." *Jones v. State*, 998 So. 2d 573, 591 (Fla. 2008), quoting *Jacobs v. State*, 880 So. 2d 548, at 550 (Fla. 2004). Because Hernandez-Alberto failed to comply with the oath requirement, his second amended

motion to vacate remained facially and legally insufficient and, as a result, it was correctly dismissed by the trial court.

In *Bryant v. State*, 901 So. 2d 810, 819 (Fla. 2005), this Court held that "due process demands" that defendants sentenced to death be given a reasonable opportunity to amend a post-conviction motion which is determined to be legally insufficient for failure to meet either the rule's or other pleading requirements. In this case, Hernandez-Alberto was given far more than a "reasonable opportunity" to comply with the requirements for a facially and legally sufficient motion to vacate. The following timeline summarizes the proceedings below:

March & April, 2006:

CCRC-M filed a Rule 3.851 motion and amended Rule 3.851 motion. Although the Rule 3.851 motion was not under oath or accompanied by a sworn verification executed by Hernandez-Alberto, CCRC-M filed a motion for competency determination and a certificate of good faith pursuant to *Carter v. State*, 706 So. 2d 873 (Fla. 1997) and Rule 3.851(g), Fla. R. Crim. P.

May, 2006:

The State filed its response and did not oppose the defense request for a competency determination pursuant to Fla. R. Crim. P. 3.851(g).

October, 2006:

The trial court (Judge Timmerman) appointed two experts to evaluate Hernandez-Alberto.

February, 2008 & June, 2008:

A competency hearing was held on February 14, 2008.

On June 3, 2008, the trial court (Judge Timmerman) found Hernandez-Alberto competent to proceed; reconsideration was denied

on June 15, 2008. Under Florida Rule of Criminal Procedure 3.851(g)(11), Hernandez-Alberto then was entitled to 60 days to file a verified amendment to his post-conviction motion.

October, 2008:

On October 27, 2008, CCRC-M's amended motion to vacate was dismissed following Hernandez-Alberto's refusal to sign the oath or verification. Following extended inquiry that same date, Hernandez-Alberto was allowed to discharge CCRC and represent himself, with CCRC as standby counsel.

On October 28, 2008, the State filed a motion to set a timetable for Hernandez-Alberto to file any *pro se* motion[s].

Hernandez-Alberto did not file any *pro se* Rule 3.851 motion.

January, 2009:

On January 21, 2009, the trial court (Judge Black), after reviewing *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379 (2008), reappointed CCRC-M to represent Hernandez-Alberto. The trial court granted CCRC-M an additional 90 days to file a [second] amended 3.851 motion.

March & April, 2009:

In March and April of 2009, CCRC-M filed a second amended motion to vacate and motion for extension of time to file a sworn verification from the defendant.

On April 27, 2009, CCRC-M reported that Hernandez-Alberto still refused to sign a verification for the 3.851 motion; CCRC-M received assistance from the "Mexican Capital Legal Assistance Program" and additional time was needed for M.C.L.A.P.'s director to visit Hernandez-Alberto

June & July, 2009:

On June 1, 2009, CCRC-M asserted that Hernandez-Alberto had suffered from de-compensation since his previous evaluation and requested that Hernandez-Alberto be reevaluated for competency.

On July 17, 2009, the trial court (Judge Black) granted CCRC's oral request for a competency evaluation and appointed two mental health experts to examine Hernandez-Alberto.

October & November, 2009:

Dr. Donald Taylor and Dr. Rao attempted to evaluate Hernandez-Alberto; the defendant refused to cooperate and submit to an evaluation.

February, 2010:

Dr. Annis attempted to interview Hernandez-Alberto and, on February 24, 2010, DCF submitted a response to the trial court, with Dr. Annis' evaluation report

June, 2010:

On June 3, 2010, another competency hearing was held. The trial court (Judge Ficarrotta) found Hernandez-Alberto was competent to proceed. Therefore, under Rule 3.851(g)(11), Hernandez-Alberto was entitled to 60 days to file a verified amendment to his post-conviction motion.

July & August, 2010

On July 29, 2010, CCRC-M reported that Hernandez-Alberto still refused to verify the [second amended] motion to vacate. The trial court conducted an inquiry with the defendant; Hernandez-Alberto was duly sworn and explained that he refused to sign the post-conviction motion because (1) he disagreed with the information in the motion, (2) the information was offensive to Hernandez-Alberto and his family, (3) the information was not useful in helping him and (4) Hernandez-Alberto previously had fired his CCRC counsel. (PCR V48/T471-473).

On August 6, 2010, the State filed a Motion to Strike (without prejudice) the Defendant's Unverified Second Amended Motion to Vacate Judgment and Sentence.

On August 17, 2010, the trial court (Judge Sexton) issued an order dismissing Hernandez-Alberto's second amended motion to vacate without prejudice to file a verified motion within sixty (60) days. The trial court's order states, in pertinent part:

> In the instant case, Defendant has refused to verify the truth and accuracy, either orally or by a written verification, of the claims made in any of his postconviction motions filed by counsel.
>
> Defense counsel has argued that because rule 3.851(g) mandates that when a defendant is found incompetent to proceed a court must still rule on the

claims that do not require the defendant's input even if he has not verified the motion, that a verification is not necessary for the Court to rule on those claims that do not require Defendant's input in the instant case.

However, rule 3.851(e)(1) and the holdings of the Supreme Court of Florida make clear that an unverified motion is facially insufficient. *See Gorham*, 494 So.2d at 211; *Groover*, 703 So.2d at 1038. Furthermore, the plain meaning of 3.851(g) is that its exception to the oath requirement only applies when a defendant is found incompetent to proceed. Therefore because the Court found Defendant competent to proceed in the instant case, rule 3.851(g) is inapplicable.

Defense counsel also argues that the Court cannot dismiss Defendant's motion because rule 3.851(i) requires the Court to conduct a *Faretta* hearing to determine whether the defendant is knowingly, freely and voluntarily dismissing his pending postconviction proceedings, and in the instant case, Defendant has never stated that he wishes to dismiss his postconviction proceedings, he simply has refused to verify the truth of his postconviction motion. **Using defense counsel's reading of 3.851(i), a defendant could theoretically hold postconviction proceedings in a continual abeyance by refusing to verify the truth of his motion, thus making the motion facially insufficient, but also stating that he does not wish to dismiss his postconviction proceedings. A better reading of the rule, and a reading that conforms to the Supreme Court of Florida's holdings in *Gorsham* and *Groover*, is that rule 3.851(i) only applies once a facially sufficient postconviction motion is filed and that if a the motion is facially insufficient, as in the instant case, it must be dismissed without prejudice for the Defendant to file an amended facially sufficient motion.**

(PCR V5/R922-923) (e.s.).

At the conclusion of the hearing on August 17, 2010, in response to CCRC's inquiry regarding another hearing, the trial court responded, "No, I think at this point as far as procedurally, it's dismissed. **It's up to you-all** [CCRC]." (PCR V49/496) (e.s.).

November, 2010

On November 2, 2010, the trial court issued its final order dismissing, with prejudice, the second amended motion to vacate. The trial court's order of November 2, 2010, states, in pertinent part:

> A status hearing was then scheduled for July 29, 2010, and at that hearing defense counsel stated that Defendant still refused to verify the truth of the instant Motion. On August 17, 2010, the Court entered an Order dismissing Defendant's Motion without prejudice so that he may file a facially sufficient motion, which included a sign oath, within sixty (60) days. **Defendant did not file a facially sufficient motion within the sixty (60) day period; consequently, the Court now enters the instant order dismissing Defendant's Motion with prejudice.** See *Christner v. State*, 984 So.2d 561 (Fla. 2d DCA 2008) (holding that an order dismissing a postconviction motion without prejudice to file an amended, facially sufficient motion is not an appealable order and the best practice would be for the trial court to enter a final order disposing of the motion if the defendant does not file an amended motion within the given time period.)
>
> (PCR V6/R1198-99) (e.s.).

Argument

In *Spera v. State*, 971 So. 2d 754, 762 (Fla. 2007), this Court reiterated that "rules 3.850 and 3.851 require that defendants file these postconviction motions under oath and penalty of perjury that all the facts alleged are true. See, Fla. R. Crim. P. 3.850(c), 3.851(e); see also, Fla. R. Crim. P. 3.987 (providing a form for motions and warning that "[a]ny false statement of a material fact may serve as the basis for prosecution and conviction for perjury"); *Stevens v. State*, 947 So. 2d 1227, 1228 (Fla. 2d DCA 2007) ("The purpose of the oath is to prevent false factual

allegations by subjecting the movant to prosecution for perjury if the factual allegations in the motion prove to be false.").

However, as explained in *Carter v. State*, 706 So. 2d 873, 876 (Fla. 1997), "if collateral counsel believes that a death-row inmate is incompetent prior to the institution of postconviction proceedings, and such proceedings must be instituted on the inmate's behalf in order to meet the time requirements of rule 3.851(b), counsel may file a motion for postconviction relief pursuant to rule 3.850, without the inmate's signature, and attach a motion for competency determination and accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is incompetent to proceed. The motion and certificate shall replace the signed oath by the defendant that otherwise must accompany a rule 3.850 motion." In this case, two separate competency hearings were conducted in post-conviction and Hernandez-Alberto was twice found to be competent to proceed in post-conviction. As a result, the trial court concluded that the oath requirement did apply to Hernandez-Alberto.

On July 29, 2010, the trial court conducted the following inquiry with the defendant, who explained why he refused to sign the post-conviction motion:

> THE COURT: Okay. Let me place Mr. Hernandez under oath. Would you raise your right hand, sir.
>
> (THE DEFENDANT WAS DULY SWORN.)
>
> THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Hernandez, you are not having any problem hearing and understanding me? I'm speaking English. Can you understand me?

THE DEFENDANT: Yes, I speak English. I understand. I looking for my release from prison because--

THE COURT: Okay. Hold on. Let me ask you a question. I know that's what you're asking for, but the question I have to ask you before we can decide what is going to happen with your cause is that there is a motion that needs to be signed by you under oath. I've placed you under oath. I don't know whether we have a copy of that. Do you understand the motion that I'm talking about, the motion for post-conviction relief?

THE DEFENDANT: Yes, I understand what is the motion. I read it. I disagree with the information he write in the motion. This contain as offense to me and offended to my family, also. I disagree. The rest of the information is not useful for helping me in my defense case.

THE COURT: Is that why you're not signing it?

THE DEFENDANT: Yes, for this purpose, I not sign it. And the other purpose is already fired the lawyer two years ago.

THE COURT: Okay. Let me ask you something-or let me just say this: In order for us to proceed, we have to have--I hae to have a motion according out our law that's been signed by you. So the motion as is written, you are not going to sign that; is that correc?

THE DEFENDANT: Yes, that is correct. No want to sign it because I disagree with the information he write in it. No is useful for helping me in my case, the information he writed[sic]. Information is because the amendment-the Constitution of the United States. In my case, in my trial, was broken several amendments including the amendment six.

THE COURT: Okay. I understand amendment six. And I also want to caution you, and this is one reason why again, you have a lawyer is that I really don't think you need to go into everything because we're only here for this little, limited purpose because everything you're saying is being taken down. If, in fact, you get a new trial or at some point anything that you say can be used against

> you. And I'm sure your attorneys have advised you of that. So we're just going to be dealing with this issue today, about whether you intend to sign. You've told me you don't intend to sign and so I have that information and the reasons. You've told me the reasons. Okay.
>
> (PCR V48/T471-473).

In *Hojan v. State*, 3 So. 3d 1204, 1211 (Fla. 2009), this Court reiterated that "[c]ompetent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys' handling of their cases," and,

> . . . Defendants also have the right to proceed *pro se* in capital trial proceedings. See, e.g., *Durocher v. Singletary*, 623 So.2d 482, 483 (Fla.1993)("Competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose.")(citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Hamblen v. State*, 527 So.2d 800 (Fla.1988)). We have also held that a capital defendant has the right to withdraw Florida Rule of Criminal Procedure 3.850 motions filed on the defendant's behalf. See *Sanchez–Velasco v. State*, 702 So.2d 224 (Fla.1997)(affirming postconviction court's allowing defendant to withdraw his rule 3.850 motion and affirming postconviction court's dismissal of collateral counsel). "[T]he defendant, not the attorney, is the captain of the ship." *Nixon v. Singletary*, 758 So.2d 618, 625 (Fla.2000)("Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant.").

Florida Rule of Criminal Procedure 3.851(g) states that "all collateral relief issues that involve only matters of record and claims that do not require the prisoner's input shall proceed in collateral proceedings notwithstanding the prisoner's incompetency." (e.s.). CCRC argued below that because rule 3.851(g) mandates that when a defendant is found incompetent to

proceed, a court must still rule on the claims that do not require the defendant's input even if he has not verified the motion, that a verification is not necessary for the Court to rule on those claims that do not require Defendant's input in the instant case. The trial court rejected this argument and explained that "rule 3.851(e)(1) and the holdings of the Supreme Court of Florida make clear that an unverified motion is facially insufficient. See, *Gorham v. State*, [494 So. 2d 211 (Fla. 1986)]; *Groover v. State*, [703 So. 2d 1035, 1038 (Fla. 1997)]. Furthermore, the plain meaning of 3.851(g) is that its exception to the oath requirement only applies when a defendant is found incompetent to proceed. Therefore because the Court found Defendant competent to proceed in the instant case, rule 3.851(g) is inapplicable." (PCR V5/923). See also, *Breedlove v. State*, 13 So. 3d 1056 (Fla. 2009) (Table), citing *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997); *Ferguson v. State*, 789 So. 2d 306 (Fla. 2001); *Provenzano v. State*, 739 So. 2d 1150, 1154 (Fla. 1999).

CCRC relies, primarily on *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). The procedures described in *Durocher* have been codified in Florida Rule of Criminal Procedure 3.851(i) which applies only when a defendant seeks both to dismiss pending post-conviction proceedings and discharge collateral counsel. Rule 3.851(i)(1) requires the trial judge to hold a hearing, and, if the defendant is found to be competent, the trial court is required to

conduct an inquiry to determine whether the prisoner knowingly and voluntarily wishes to discharge counsel and dismiss post-conviction proceedings. See, *Trease v. State,* 41 So. 3d 119, 124 (Fla. 2010). In rejecting the defendant's reliance on Rule 3.851(i), the trial court explained:

> Using defense counsel's reading of 3.851(i), a defendant could theoretically hold postconviction proceedings in a continual abeyance by refusing to verify the truth of his motion, thus making the motion facially insufficient, but also stating that he does not wish to dismiss his postconviction proceedings. A better reading of the rule, and a reading that conforms to the Supreme Court of Florida's holdings in *Gorsham (sic)* and *Groover*, is that rule 3.851(i) only applies once a facially sufficient postconviction motion is filed and that if a the motion is facially insufficient, as in the instant case, it must be dismissed without prejudice for the Defendant to file an amended facially sufficient motion.

(PCR V5/R922-923).

In this case, the trial court dismissed the defendant's Rule 3.851 motion, without prejudice, to allow Hernandez-Alberto to file a facially sufficient motion to vacate. See *Gorham v. State*, 494 So. 2d 211, 212 (Fla. 1986) (confirming that the purpose of the 3.850 oath requirement was to prevent false allegations of fact without the fear of a perjury conviction); *Groover v. State*, 703 So. 2d 1035, 1038 (Fla. 1997) ("Failure to meet the oath requirement warrants dismissal of the motion without prejudice."); see also *Desouza v. State*, 874 So. 2d 729, 730 (Fla. 3d DCA 2004) (citing *Groover* and concluding that the trial court properly ruled that the defendant who had failed to sign and swear his post-

conviction motion should be afforded an opportunity to refile). Although CCRC criticizes the trial court for not conducting another hearing, it is clear that the trial court informed CCRC, when the motion was dismissed without prejudice, that the ball was in the defense court and "it's up to you-all." (PCR V49/496). Inasmuch as the defendant did not file a facially sufficient motion within the sixty day period, the trial court properly dismissed the defendant's motion to vacate, with prejudice. See, *Christner v. State*, 984 So. 2d 561 (Fla. 2d DCA 2008) (holding that an order dismissing a post-conviction motion without prejudice to file an amended, facially sufficient motion is not an appealable order and the best practice would be for the trial court to enter a final order disposing of the motion if the defendant does not file an amended motion within the given time period.)

ISSUE II

THE TRIAL COURT PROPERLY FOUND HERNANDEZ-ALBERTO COMPETENT TO PROCEED IN POST-CONVICTION.

CCRC next asserts that the trial court erred in finding Hernandez-Alberto competent to proceed. For the following reasons, the trial court's order should be affirmed.

Standards of Review

In *Alston v. State*, 894 So. 2d 46, 54 (Fla. 2004), this Court reiterated the following standards applied to the trial court's competency determination:

> 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." *Hardy v. State*, 716 So.2d 761, 763 (Fla.1998)(quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)); see also §916.12(1), Fla. Stat. (2003); Fla.R.Crim.P. 3.211(a)(1), 3.851(8)(A).
>
> "It is the duty of the trial court to determine what weight should be given to conflicting testimony." *Mason v. State*, 597 So.2d 776, 779 (Fla.1992). "The reports of experts are 'merely advisory to the [trial court], which itself retains the responsibility of the decision.'" *Hunter v. State*, 660 So.2d 244, 247 (Fla.1995) (quoting *Muhammad v. State*, 494 So.2d 969, 973 (Fla.1986)). Thus, when the experts' reports or testimony conflict regarding competency to proceed, it is the trial court's responsibility to consider all the relevant evidence and resolve such factual disputes. See, e.g., *Hardy*, 716 So.2d at 764 (citing *Hunter*, 660 So.2d at 247).
>
> "Where there is sufficient evidence to support the conclusion of the lower court, [this Court] may not substitute [its] judgment for that of the trial judge."

> *Mason*, 597 So.2d at 779. A trial court's decision regarding competency will stand absent a showing of abuse of discretion. See, e.g., *Hardy*, 716 So.2d at 764; *Carter v. State*, 576 So.2d 1291, 1292 (Fla.1989). Thus, the issue to be addressed by this Court is whether the circuit court abused its discretion in finding Alston competent to proceed in his postconviction proceedings. In addressing that issue, we are mindful that a trial court's decision does not constitute an abuse of discretion "unless no reasonable person would take the view adopted by the trial court." *Scott v. State*, 717 So.2d 908, 911 (Fla.1998).

The Trial Court's Ruling

In determining Hernandez-Alberto's competence to proceed following the June 3, 2010 hearing, the trial court explained, in pertinent part:

> Evidentiary Hearing
>
> On June 3, 2010, the Court held an evidentiary hearing to address Defendant's motion for competency determination, at which time Lawrence Annis, Ph.D. ("Dr. Annis") and Dr. Taylor appeared. (See Hearing Transcript, attached.)
>
> Dr. Annis testified that he is currently the psychological services director at the Florida State Hospital (FSH). On February 17, 2010, he visited Defendant at the Union Correctional Institution (UCI) prison holding cell to conduct an evaluation interview.
>
> Defendant sat with Dr. Annis but declined to be interviewed. When questioned why, Defendant stated that he and his attorney were developing an appeal and he did not want to talk to anyone but his attorney. Defendant remained calm and attentive and was cooperative with the prison staff during Dr. Annis' visit.
>
> Dr. Annis also interviewed three correctional officers regarding their observations and interactions with Defendant. The correctional officers described Defendant as calm, polite and with good control. They said Defendant did not talk to himself, speak gibberish, wave his arms wildly, or show extreme mood. Defendant also recognized who the officers were, carried on

conversations with other inmates, and understood and followed prison rules and guidelines. As part of his evaluation, Dr. Annis also reviewed UCI's records and the reports which were completed by other examiners.

Based on his brief interaction with Defendant, his interviews of the correctional officers and his review of Defendant's records, Dr. Annis testified that in his opinion Defendant is competent to proceed with his postconviction proceedings. Specifically, Dr. Annis testified that based on Defendant's references to working with an attorney and appealing his case, he is aware of the charges against him; that he is cognizant of the importance of the attorneys to his case and that the judge is the decision maker; that based on the logical nature of Defendant's writings made in prison, he has the ability to disclose pertinent information to his attorneys; and that based on Defendant's ability to communicate his needs to the correctional staff, he can maintain appropriate courtroom behavior and has the capacity to testify in postconviction proceedings. Finally, Dr. Annis testified that Defendant is likely to sabotage or not participate in any situation in which he believes is not helpful to his cause, such as a competency interview.

Dr. Taylor testified that he completed a competency evaluation of Defendant in 2007 and found Defendant competent to proceed. As part of the evaluation, he attempted to interview Defendant, but Defendant was uncooperative and refused to be interviewed. However, based on his limited interaction with Defendant, as well as reports of other evaluators, Defendant's medical and mental health records and some court documents, Dr. Taylor was able to make a determination that Defendant was competent to proceed.

In 2009, the Court again appointed Dr. Taylor to evaluate Defendant to determine if Defendant was competent. Defendant refused to be interviewed. However, unlike in 2007 when Dr. Taylor had current medical and mental health records to review, he was unable to review any of Defendant's records from 2007 to 2009. Therefore, although he believed it was probable that Defendant's lack of cooperation is due to willful behavior rather than mental illness, he was unable to testify with a reasonable degree of medical probability that he is competent to proceed.

Legal Standards

To be competent to proceed in a postconviction proceeding a defendant must have (1) a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and (2) a rational as well as a factual understanding of the proceeding against him. *See Peede v. State*, 955 So.2d 480, 488 (Fla.2007) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

"It is the duty of the trial court to determine what weight should be given to conflicting testimony." *See Mason v. State*, 597 So.2d 776, 779 (Fla.1992). "The reports of experts are 'merely advisory to the [trial court], which itself retains the responsibility of the decision." *See Hunter v. State*, 660 So.2d 244, 247 (Fla.1995) (quoting *Muhammad v. State*, 494 So.2d 969, 973 (Fla.1986)). Therefore when the experts' reports are in conflict, it is the trial court's responsibility to consider all the relevant evidence and resolve such factual disputes. *See Peede* 955 So.2d at 489.

Findings

The Court first notes that during the evidentiary hearing Defendant seemed very attentive, actually participating during a portion of the hearing, made his points in a logical, concise manner and clearly understood the nature of the proceedings. He also exhibited appropriate courtroom behavior.

After observing Defendant, reviewing the record and listening to the expert testimony, the Court finds that Defendant's refusal to assist the court appointed experts is a willful behavior and not the result of mental illness. The Court also makes the specific findings of fact that Defendant has:
1. a present ability to consult with his lawyer with a reasonable degree of rational understanding, and
2. a rational as well as a factual understanding of the proceeding against him.

It is therefore ORDERED AND ADJUDGED that Defendant is competent to proceed with postconviction proceedings.

(PCR V6/R1093-1096) (e.s.).

Argument

Hernandez-Alberto's competency to proceed with his post-conviction litigation is governed by Florida Rule of Criminal Procedure 3.851(g). Pursuant to that rule, Hernandez-Alberto is deemed competent if he "has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and . . . has a rational as well as factual understanding of the pending collateral proceedings." Fla. R. Crim. P. 3.851(g)(8)(A).

Mental illness is defined as "an impairment of the emotional processes that exercise conscious control of one's actions, or of the ability to perceive or understand reality, which impairment substantially interferes with a defendant's ability to meet the ordinary demands of living." § 916.106(13), Fla. Stat.; See, Fla. R. Crim. P. 3.851(9)(A).

CCRC relies extensively on Dr. Martinez, who evaluated Hernandez in 2000 and again in 2005. Dr. Martinez had not had any interaction with Hernandez-Alberto since 2005. The opinions formed by the other doctors – including Dr. Myers (in 2007), Dr. Taylor (in 2007 and 2009) and Dr. Annis (in 2010) — were supported by more recent observations of Hernandez-Alberto[6] and their review of his

[6]Dr. Taylor's 2009 report (PCR V5/834-846) described the attempts to interview Hernandez-Alberto in 2007 and in 2009:

> On March 22, 2007 the defendant was seen sitting in a holding cell at Union Correctional Institution while the examiners were escorted to the interview room. Once the examiners were in the interview room he was escorted to the doorway. He presented as a Hispanic male of medium height and

records. Their conclusions are fully consistent with Hernandez-Alberto's past mental health history of malingering.

In contrast, Dr. Martinez apparently started with a presumption of incompetence, refusing to "assume" that Hernandez-Alberto understood what was going on when he refused to cooperate with his attorneys. Dr. Martinez's discounted the possibility that

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build who appeared approximately his stated age. He had cuffs on his hands and was dressed in prison issue clothing. He remained in the doorway as the examiners introduced themselves and began to explain the purpose of the evaluation. He stated "I don't wanna talk." Responses to other statements by the examiners included "My lawyer no answer my letter,""I want my lawyer to tell me what's going on," and "I want my lawyer to explain it to me." He left the area and returned to the holding cell. The examiners were escorted to the front of the holding cell and attempted to convince him to return to the interview room. He asked for the name of the judge and wrote it on a notepad. When the examiners attempted to continue the discussion he put the notepad in front of his face and said "Please leave me alone." The interview was terminated at that time."

On October 6, 2009 the defendant was escorted to an interview room on a confinement unit at the Orient Road Jail. He presented as a Hispanic male of medium height and build who appeared approximately his stated age. He was dressed in jail issue clothing with cuffs on his hands and legs. He was unshaven but otherwise adequately groomed. He stood at the doorway but did not enter the room. The examiner introduced himself and began to explain the purpose of the evaluation. The defendant interrupted and said "Excuse me. I don't want to see you." When the examiner attempted to continue the explanation the defendant stated "I don't want to talk." He motioned to the deputy and was returned to his cell.

On October 15, 2009 the defendant was seen in his cell at the Orient Road Jail. He remained seated on his bed. Following the examiner's introduction and explanation he was asked if he would answer a few questions. He responded "No thank you. I don't want to talk with you." He remained calm but did not respond to any of the examiner's questions. The interview was terminated after a few minutes. (PCR V6/845).

Hernandez-Alberto was malingering; Dr. Martinez could not identify any secondary gain to provide any incentive for malingering, despite the fact that Hernandez-Alberto's refusals to cooperate with counsel or mental health evaluators have substantially thwarted and delayed, indefinitely, the ultimate sentence of execution.

CCRC maintains that Dr. Martinez conducted a "complete interview" of Hernandez-Alberto and that the subsequent evaluators did not have enough information to reach an accurate conclusion as to Hernandez-Alberto's competence. (Initial Brief at 52). Although Dr. Martinez's report states that a "complete psychiatric interview including a comprehensive mental status evaluation was conducted," the body of the report indicates that Hernandez-Alberto was not cooperative and that the interview consisted primarily of watching CCRC attorney Rodriguez try to communicate with Hernandez-Alberto. (PCR V3/433-434). Dr. Martinez's report admits, "After about an hour of this, I decided to end the interview since I had gathered enough clinical information." (PCR V3/434). Thus, it does not appear that Dr. Martinez had any significant information to support her diagnosis.

Dr. Martinez observed Hernandez-Alberto to be acting suspicious, with a flat affect and circumstantial thought process. Her determination of competence relied heavily on the fact that she had previously diagnosed Hernandez-Alberto to be psychotic, at a

time when the trial court agreed with the other experts that he was malingering. Yet, Drs. Taylor and Myers and Annis had similar information, as well as their more recent observations of Hernandez-Alberto, as being hygienic, oriented, coherent in speech, and responsive, along with the his established history of malingering. Dr. Taylor, Dr. Myers and Dr. Annis also reviewed records which demonstrated that Hernandez-Alberto has not shown any recent symptoms of psychotic thought processes, despite the fact that he has received no treatment or medication since being admitted to death row.

Notably, Dr. Martinez could not reasonably explain how Hernandez-Alberto could be incompetent while showing no symptom of schizophrenia. She speculated that his schizophrenia could be in remission, which raised a question as to how the alleged illness could be affecting his competency, or that perhaps he was experiencing delusions and just not telling anyone about them. While CCRC discusses the fact that Hernandez-Alberto was on medication at times while awaiting trial, they fail to address the fact that he has not been receiving medication or treatment since being in prison; and although CCRC highlights various instances of "bizarre" behavior by Hernandez-Alberto since their appointment in 2004 (Initial Brief at 41, noting that, in 2005, Hernandez-Alberto wrapped a t-shirt around his neck and placed a book on his head; in 2005 and 2006, Hernandez-Alberto complained of electricity coming

through his cell floor, wrapped his lower leg with tourniquets, and hoarded wet paper; and in January of 2007, Hernandez slept while wrapped in several layers of sheets), they cannot explain why no actual *psychotic* behavior has been documented during this time.

Although Dr. Martinez relied on a 2007 telephone conversation with a psychological specialist, Jennifer Segal,[7] regarding Hernandez-Alberto's alleged delusions of electricity in his prison cell running up through his body (Initial Brief at 41), Dr. Myers' report (in 2007) explains why Hernandez-Alberto's complaints were likely feigned rather than indicia of delusions. Since Hernandez-Alberto claimed to have wrapped a tourniquet around his leg in response to the electricity, but then denied having taken such action, Hernandez-Alberto's actions were not consistent with any likely mental illness, as Dr. Myers explained:

> **The actual content of Mr. Hernandez-Alberto's complaints of intermittent psychotic symptoms over the last two or so years also suggests feigning rather than true mental illness.** He tied tourniquets around his leg which led to marked swelling. When asked about what happened, he repeatedly denied he had placed these tourniquets on his leg, and instead insisted his problem was from floor electricity. Someone with an "electricity in the floor" delusion, which they then say is the cause of their self-inflicted leg damage, would therefore need a secondary, separate delusion that they did not actually

[7]In 2010, Dr. Annis' report noted, "From prison records it appears that Mr. Hernandez has refused to participate in mental health evaluations by prison staff for at least the past three years. The most recent mental health evaluation in the prison record was by Jennifer Sagle, M.Ed., on January 14, 2010. Ms. Sagle reported that he refused to be interviewed so the evaluation was limited to observation from in front of his cell. She reported there were no gross disturbances of thought, mood or behavior." (PCR V6/1173).

> put the tourniquets on their own leg. Clinically this would call for an extreme state of mental disorganization and a complete lack of awareness about one's own behaviors (i.e., not remembering the cognitive and physical experiences associated with tying tourniquets on one's own leg). Additionally, the presence of a "nullifying" delusion involving someone believing he had not done something that he actually had done is quite atypical--delusions are usually "affirming" in the sense that something has occurred or is occurring. Moreover, the odds of two unconnected delusions of this proportion appearing inconsistently also would be highly unlikely from a clinical standpoint.
>
> (PCR V3/403-404) (e.s.).

Both CCRC and the defense amicus criticize the brevity of Dr. Annis' face-to-face contact with Hernandez-Alberto. However, Dr. Annis' evaluation was not based solely on his attempt to interview with Hernandez-Alberto on February 17, 2010. Instead, as Dr. Annis' report detailed,

> Mr. Hernandez was examined by the undersigned on February 17, 2010 to assess his mental status and competency to proceed as specified in section 916.12, Florida Statutes. Assisting in the examination and providing translation services was Juan C. Couto Llinas, Psy.D. Dr. Couto is a Psychological Resident at the Florida State Hospital forensic transition program. The limits of confidentiality were explained to Mr. Hernandez. He demonstrated that he understood the limits of confidentiality. **In addition to the interview, Mr. Hernandez' record maintained at Union Correctional Institution was reviewed, which contains among other things his disciplinary record, clinical assessments and evaluation reports performed since admission to the Department of Corrections' custody, observations of his behavior while in custody, and his disciplinary record. Other documents reviewed were: the criminal report affidavits for the charged offenses; the forensic psychiatric re-evaluation dated October 15, 2009, submitted to the court by Dr. Donald R. Taylor, Jr.; and the forensic psychiatric evaluation dated November 7, 2009, submitted to the court by Dr. Bala K. Rao. Mr.**

Hernandez met for a few minutes with the examiner and Dr. Couto on February 17, 2010, and twice more that same day with Dr. Couto. In addition, the examiner and Dr. Couto met with Department of Corrections security officers who have had repeated contact with Mr. Hernandez' during his confinement on Death Row.

***** ***** *****

Mental Health, Physical Health, and Substance Abuse History. No information has been located that indicates Mr. Hernandez required, pursued, or received inpatient or outpatient psychiatric treatment prior to his arrest. He was apparently treated for depression while awaiting trial, diagnosed major depressive episode with psychotic features, and committed to South Florida Evaluation and Treatment Center (SFETC) in June 1999 as incompetent to proceed. **He was recommended to the court within a few weeks as competent to proceed. His diagnoses at discharge from SFETC were malingering and antisocial personality disorder.**

In addition to the SFETC report to the court authored by Francisco A. Compos, M.D. and Fred J. Balser, Ph.D. (June 17, 1999), records indicate evaluations for the court by Alfonso H. Saa, M.D. (May 3, 1999, July 22, 1999, and August 13, 2001); Michael S. Maher, M.D. (May 7, 1999, August 6, 1999, and August 15, 2001), Donald R. Taylor, M.D. (October 15, 2009), and Bala K. Rao, M.D. (November 7, 2009). Dr. Taylor's report includes a comprehensive summary of evaluation findings beginning in 1999. Mr. Hernandez refused to be examined by Dr. Taylor or Dr. Rao. Based on Mr. Hernandez' history and prison record, Dr. Taylor diagnosed nicotine dependence in a controlled environment. Dr. Rao did not offer a diagnosis.

* * *

Psychiatric Medications. Records from the Department of Corrections indicate Mr. Hernandez is not presently prescribed medications and has not taken psychiatric medications during this incarceration.

Correctional Officer Interviews. Three correctional officers who have regular contact with Mr. Hernandez were individually interviewed for this report. Lieutenant

Randolph Salle has been with the Department of Corrections for 23 years and assigned to Death Row since 1992. Officer Brandon Meade has been with the Department of Corrections for nine years and assigned to Death Row for four years. Officer Dale Crary has been with the Department of Corrections for four years and assigned to Death Row for eight months. The three officers present similar descriptions of Mr. Hernandez' daily life on Death Row and his interactions with inmates and corrections staff.

Interactions with Security Staff. The officers describe Mr. Hernandez as respectful and polite towards correctional officers and not presenting behavioral management problems. They report he speaks to them in Spanish-accented English and responds to instructions spoken to him in English, but he sometimes asks for something to be explained to him in Spanish. He has behaved at times as if he does not understand what an officer was saying to him and occasionally seems to ignore an officer who is giving him an instruction or asking him a question, but responds when reminded.

Interactions with Inmates. They report he interacts with other inmates without observable problems. He generally prefers to engage with inmates who are Spanish speakers.

Daily Activities. The officers report that Mr. Hernandez adheres to the facility rules. They describe his primary outdoor recreation as walking around the exercise yard. He does not shoot baskets with the other inmates, but sometimes plays volleyball.

Personal Behavior. The officers describe Mr. Hernandez as a quiet person who generally keeps to himself. Mood expression is described as within normal limits. No cyclic, diurnal, or seasonal mood variations are described. He is not tearful. Speech is terse but rational and coherent. Interests expressed are his personal needs. No loosened associations, neologisms, word salad, flights of ideas, rambling speech, preoccupations, or delusional thinking are reported. He does not appear distracted by his thoughts or unseen stimuli. He demonstrates that he remembers prison rules and Death Row procedures. The officers report that Mr. Hernandez does not present distraction to internal or unseen stimuli, odd verbalizations or movements, unusual affect, and other overt signs of hallucinations. They report he has not told them of hearing or seeing anything

others would not be able to see or hear.

V. CURRENT MENTAL STATUS:

On February 17, 2010, the undersigned and Dr. Couto met with Mr. Hernandez for the purpose of completing a competency evaluation interview. Mr. Hernandez spoke to the examiner and Dr. Couto for a few minutes, but he refused to participate in an interview and prematurely terminated the meeting. Dr. Couto subsequently met individually with him twice that same day, and each time Mr. Hernandez spoke with Dr. Couto for a few minutes, but refused to participate in a formal interview.

At each meeting with Mr. Hernandez, he wore standard Death Row attire. He presented with adequate hygiene and grooming. No psychomotor agitation or physical sluggishness was observed. He maintained appropriate levels of eye contact. He did not wear glasses or appear to require corrective lenses. His speech was within normal limits with respect to rate and tone His Spanish-accented English was difficult for the examiner, who is not a Spanish speaker, to understand. Dr. Couto conversed with Mr. Hernandez in Spanish and reported no difficulty understanding him. Mr. Hernandez did not stutter. His conversation was relevant, goal-directed, and easily understood. Orientation could not be formally assessed, but he was aware of who he was, as he responded to his name. He appeared to understand the purpose of the examination and aspects of his legal situation, such as by spontaneously reporting he had filed four motions in court. He was alert and attentive throughout the meetings. No abnormal body movements were observed. He appeared calm and relaxed. Concentration appeared normal. He did not repeat questions or require questions to be repeated. He would not describe his mood. Although affect was somewhat constricted, overt mood expression was within normal limits. Depression, anxiety, and mania were not apparent. Mr. Hernandez' attitude appeared guarded and evasive. With the examiner and with Dr. Couto alone, Mr. Hernandez did not exhibit overt indication of responding to internally-generated stimuli. That is, he was not observed mumbling, talking to himself, talking to unseen others, or unduly distracted by objects or beings unseen by others. His thought processes, as evidenced by his statements and his responses to questions, were relevant, coherent, and goal-directed. He was attentive to the interviews and maintained effective concentration to the interviewers. His memory appeared intact, as

> evidenced by his recalling meeting with two evaluators from CCRC and filing four motions in court. His conversations were logical and coherent. No overt signs of delusional thinking were evidenced. Suicidal and homicidal ideation could not be formally assessed in the interviews, but correctional staff report he is pleasant in his interactions with others. Judgment could not be formally assessed due to his refusal to participate in a formal interview, but he expressed understanding that anything he said could be included in a report to the court. **Mr. Hernandez advised that "I don't want to talk to you, because if I do, you are going to write a report saying that I talked to you."**
>
> (PCR V6/1171-1173) (e.s.).

In addition to the experts' opinions, the court may permissibly consider other relevant facts, including Hernandez-Alberto's mental health history and his behavior in the courtroom. See, *Hunter v. State*, 660 So. 2d 244, 247 (Fla. 1995) (noting expert opinions are advisory, not dispositive); *Hertz v. State*, 803 So. 2d 629, 640 (Fla. 2001) (affirming lower court's rejection of incompetency by two of three doctors based on court's own observations of defendant).

CCRC also asserts that Hernandez-Alberto's refusal to cooperate and his behavior at the first post-conviction competency hearing in 2008 demonstrates that he is unable to control himself in the courtroom and that he would not be able to testify relevantly. This assertion again ignores the history of this case. Prior to and during trial, Hernandez-Alberto refused to cooperate with his attorneys, investigators and experts; he "made repeated outbursts in the courtroom whereby he shouted profanities directed

at the court and ultimately had to be removed on several occasions." *Hernandez-Alberto*, 889 So. 2d at 724-25. Yet, overall, this court determined just prior to the penalty phase that Hernandez-Alberto "had conducted himself appropriately in the courtroom," *Id.* at 727. This again supports the finding that Hernandez-Alberto's refusal to cooperate with his legal team is voluntary and not due to mental illness, as history has shown that Hernandez-Alberto can control himself when he chooses to do so.

This case is similar to *Peede v. State*, 955 So. 2d 480 (Fla. 2007). In *Peede*, this Court upheld a finding of post-conviction competency of a death row defendant who, like Hernandez-Alberto, suffers personality disorders and refuses to cooperate with his attorneys. As in this case, the mental health experts disagreed as to Peede's competency. Two defense experts testified that Peede was unable to assist his counsel in the proceedings. The two court-appointed experts were unable to interview Peede because Peede refused to be interviewed; therefore, they were unable to render an opinion on competency. One court-appointed expert subsequently reviewed a videotaped interview conducted by a defense expert and, thereafter, opined in a written report that Peede was competent.

Ultimately, the trial court determined that Peede was competent to proceed in post-conviction. At a status conference after this determination, Peede's new counsel again questioned Peede's competency, and the trial court reaffirmed its prior

competency ruling, but granted the State's motion for Peede to submit to an examination by a mental health expert selected by the State. The trial court in *Peede* also granted a defense motion for an additional examination and this mental health expert filed a written report stating that Peede was uncooperative and recommended that Peede be transferred to the psychiatric unit of the Florida State Prison where he could be further observed and evaluated. The State agreed and Peede was transferred to a state mental health facility. Thereafter, a doctor from the psychiatric unit of Union Correctional Institution submitted a report stating that Peede refused most services and evaluations. He concluded that Peede had a personality disorder with antisocial and borderline features that did not require inpatient treatment. Another doctor also recommended that Peede's psychiatric classification be lowered because he had not received any mental health treatment that year. The trial court then conducted another hearing to determine Peede's competency. Dr. Frank, the defense's only witness, testified that Peede was not incompetent to assist his counsel in the proceedings and Peede's unwillingness to discuss the circumstances surrounding the murder was not due to any mental illness. During this post-conviction hearing, the trial court also questioned Peede. Moreover, although defense counsel asserted that Peede would not discuss the facts of the murder, the evidentiary hearing testimony of Dr. Faye Sultan, a defense witness, demonstrated that Peede had

discussed the murder with her. The trial court subsequently found Peede competent to proceed, concluding, "Simply put, Mr. Peede could assist his attorneys, if he wanted to, but is instead choosing not to discuss the facts of this case. It is clear to this Court that Mr. Peede is not incompetent, simply uncooperative." Thus, the trial court in *Peede* determined that his refusal to discuss relevant facts with his attorneys was the result of his choice rather than an inability borne of mental illness. *Peede*, 955 So. 2d at 488.

On post-conviction appeal, this Court found sufficient evidence to support the trial court's conclusion finding Peede competent to proceed in post-conviction proceedings. The trial court in *Peede* entertained multiple motions from the defense regarding Peede's competency, ordered Peede to a psychiatric facility to be observed even after finding him competent, held multiple hearings during which the court discussed the issue with Peede himself, and considered various experts' testimony and written reports. "In short, the record supports the trial court's ruling that Peede was competent to proceed in post-conviction proceedings, and that any difficulties in communicating with counsel were of Peede's own choosing rather than due to any mental defects." *Peede*, 955 So. 2d at 489.

There has been no showing that Hernandez-Alberto is unable to converse with counsel, only that he does not always choose to

converse. The assertion that the defendant refuses to speak with CCRC is not surprising. Hernandez-Alberto refused to speak with his trial counsel, Mr. Traina. Thus, at the time of trial, Attorney Traina lacked a good faith basis to assert any claim of prejudice in connection with his motion to suppress Hernandez-Alberto's statements to Chief Garcia in Texas. As Attorney Traina explained,

> I have absolutely no good faith basis or way to show that. That prejudice would have to come from him [the defendant].
>
> * * *
>
> . . . And he has never given me anything. He refuses to speak to me.
>
> So I don't think at this time, in good faith, I can go forward with the motion to suppress Mr. Hernandez-Alberto's statement in Texas.

(DAR V4/T140).

Significantly, a "rational understanding" does not require "rational acceptance" of his attorneys' legal strategy. See, *Provenzano v. State*, 760 So. 2d 137, 141 (Fla. 2000) (Anstead, J., dissenting, quoting trial court's order, which continues: "Many defendants, without mental health problems, maintain their innocence though, under the facts, such a position is irrational. This can be said to be a fairly normal human reaction."). There has been no evidence which demonstrates that Hernandez-Alberto's ability to function is impaired to the extent that he does not

understand the nature of these proceedings. Nor does the evidence establish substantial interference with Hernandez-Alberto's ability "to meet the ordinary demands of living" as required for a finding of mental illness pursuant to § 916.106(13). Although the rationality of his thought processes has been questioned, this can be attributed to his personality disorders and does not compel a finding of incompetence.

Hernandez-Alberto has a documented history of "manipulative behavior" which includes malingering as well as refusing to cooperate with his legal team. The fact that this history has continued into post-conviction is not surprising, nor should it be seen as indicative of incompetency. Given the evidence presented in this case and the applicable standards of review, a sufficient basis exists to support the trial court's resolution of conflicting evidence and the trial court did not abuse its discretion in finding Hernandez-Alberto competent to proceed. See, *Alston v. State*, 894 So. 2d 46, 56 (Fla. 2004), citing *Hertz v. State*, 803 So. 2d 629, 640-41 (Fla. 2001) (affirming circuit court finding of competency where defense experts found defendant incompetent, but other experts found defendant competent, capable of understanding charges against him and roles and functions of courtroom personnel, did not exhibit major mental illness, and presented behavior that could be evidence of malingering); *Ferguson v. State*, 789 So. 2d 306, 315 (Fla. 2001) (affirming circuit court finding of competency

where circuit court's rejection of defense experts' opinions supported by testimony of three doctors who found evidence of malingering, by testimony of corrections officers that defendant only acted irrationally shortly before and after mental evaluations, and by neurological examinations revealing no organic brain disease); *Bryant v. State*, 785 So. 2d 422, 427 (Fla. 2001) (affirming circuit court finding of competency where two of three experts concluded defendant was competent and two supervising deputy sheriffs observed defendant providing legal advice to others and saw nothing indicating defendant suffered mental defect or infirmity); *Hardy v. State*, 716 So. 2d 761, 764 (Fla. 1998) (affirming circuit court finding of competency where supported by testimony of three out of five experts, testimony from jail employees regarding prisoner's abilities to communicate and participate in activities, and circuit court's own observations of demeanor and ability to assist counsel).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the decision of the lower court dismissing the second amended motion to vacate and finding Hernandez-Alberto competent to proceed in post-conviction relief should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished U.S. Regular mail to Mark S. Gruber, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 15th day of November, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Katherine V. Blanco

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
katherine.blanco@myfloridalegal.com

COUNSEL FOR APPELLEE