IN THE SUPREME COURT OF FLORIDA

CAPITAL POSTCONVICTION CASE

CASE NO. SC10-2471

PEDRO HERNANDEZ-ALBERTO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

Mark S. Gruber
Florida Bar No. 0330541
Maria Perinetti
Florida Bar No. 0013837
CAPITAL COLLATERAL REGIONAL
COUNSEL MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813 740 3544
Counsel for Appellant

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PRELIMINARY STATEMENT ON CITATIONS TO THE RECORD

This is an appeal of the circuit court's denial of Hernandez-Alberto's motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

The following format will be used when citing to the record. References to the record of the direct appeal of the trial, judgment, and sentence in this case shall be referred to as "ROA" followed by the appropriate volume and page numbers. References to the postconviction record on appeal are referred to as "PC-R." followed by the appropriate volume and page numbers.

REQUEST FOR ORAL ARGUMENT

Hernandez-Alberto has been sentenced to death. Given the gravity of the case and the complexity of the issues raised herein, Mr. Hernandez-Alberto, through counsel, respectfully requests this Court grant oral argument.

JURISDICTION

This is an appeal of the trial court's dismissal with prejudice of a capital motion for postconviction relief. This Court has plenary jurisdiction over death penalty cases. Art. V, § 3(b)(1), Fla. Const.; *Orange County v. Williams*, 702 So.2d 1245 (Fla. 1997).

STANDARD OF REVIEW

Rulings on requests for self representation are reviewed for an abuse of discretion. *Trease v. State*, 41 So. 3d 119, 124-25 (Fla. 2010). A trial court's decisions regarding competency are reviewed for an abuse of discretion. *Carter v. State*, 576 So.2d 1291, 1292 (Fla.1989). "Generally, this Court's standard of review following a denial of a postconviction claim where the trial court has conducted an evidentiary hearing affords deference to the trial court's factual findings. 'As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' . . . However, the circuit court's legal conclusions are reviewed de novo." *Nelson v. State*, 43 So.3d 20, 35 (Fla. 2010) (citations omitted).

STATEMENT OF THE CASE

The Defendant, a citizen of Mexico legally residing in Florida, was arrested on January 4, 1999 for the murders of Donna Berezovsky and Isela Gonzales, his stepdaughters through his marriage to Carmen Gonzales. He was arrested in Brookshire, Texas, en route to Mexico. He was interrogated, confessed, and returned to Florida after a brief extradition hearing at which he was represented by

appointed counsel. Neither the transcript of his interrogation nor the record of the extradition hearing reflects that he was advised of any consular rights. Mexican authorities report that they were first notified of his arrest about two weeks later when the Defendant himself called them from jail in Florida. Upon visiting him the next day, they observed that he exhibited obvious symptoms of mental illness. Since then, the Mexican Consulate has been actively involved in the case.

The Defendant was indicted on January 13, 1999, on two counts of first degree murder. He was tried by a jury on August 21-24, 2001, and he was found guilty as charged.

Prior to trial, the Defendant was found incompetent to proceed and committed to the state hospital[1] after a brief, uncontested hearing on May 18, 1999.[2] After about five weeks, the hospital staff requested that he be returned to the jail. ROA Vol. I 44-56. After a full adversarial hearing on November 9, 1999, the Court found that he was competent to stand trial. The Court again found the Defendant to be competent on August 20, 2001, the day before trial. ROA Vol. IV 4-126.

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[1]South Florida Evaluation and Treatment Center in Miami. This facility has since changed hands.

[2]Motion to Determine Competency dated April 5, 1999, ROA Supp. Vol. I 1; transcript of hearing, ROA Vol. XII 1276; Order finding Defendant incompetent dated May 18, 1999, ROA Vol. I 37-39.

Also on that day, the Court entertained a number of other motions, including one to suppress the Defendant's statements due to a violation of the Vienna Convention on Consular Relations. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (hereinafter "VCCR"). The motion asserted as an independent ground that the Defendant's *Miranda*[3] waiver was insufficient. ROA Vol. I 72-81. However, counsel declined to proceed on the motion because he felt that he had to show prejudice in order to proceed, and "[t]hat prejudice had to come from him [the Defendant]." ROA Vol. I 140. The prosecution elicited testimony from Police Chief Joe Chief Garcia, the officer in Texas who took the Defendant's statement, and the statement was eventually admitted in evidence.

The Defendant was uncooperative and often obstructive throughout the proceedings, to the point that he spent a significant portion of his trial viewing the proceedings over an audio/video feed after being removed from the courtroom. After the Public Defender was allowed to withdraw due to a conflict of interest, the Defendant was represented by two court appointed private attorneys, Daniel Hernandez and Charles J. Traina. Despite the Defendant's complaints, two *Nelson* hearings, and motions to withdraw or discharge counsel, they were ordered to

[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).

represent him through jury selection. After the jury was sworn, the Court conducted a *Faretta* inquiry, discharged counsel (who remained on standby), and ordered the Defendant to represent himself. ROA Vol. VII 488-515.

On August 24, 2001, after both sides had rested, the Defendant submitted a written request for reappointment of counsel, which was granted. ROA Vol. IX 845-47. The Court also observed that the Defendant had previously refused to speak to representatives from the Mexican Consulate, who had nevertheless been present throughout the trial, that he had requested to speak to them that morning for the first time, and that they had conversed with him at some length. *Id.* 842-44. Following a recess, Mr. Traina reported that he had the first successful dialogue with his client since he had been appointed on the case. *Id.* 850. Counsel remained on the case for the remainder of the trial court proceedings.

The penalty phase on November 29, 2001 resulted in a recommendation of ten to two in favor of death on both counts. At a combined *Spencer* and sentencing hearing on April 30, 2002, the Court sentenced the Defendant to death.

The following claims were raised on direct appeal:

> Issue One: The Court erred in finding the Defendant competent to stand trial.
> Issue Two: The Court erred in allowing the Defendant to proceed *pro se.*
> Issue Three: Denial of the Defendant's motion for a continuance after counsel was discharged.
> Issue Four: Denial of a PET scan.

> Issue Five: Insufficient evidence of premeditation as to count one, the murder of Donna Berezovsky.
> Issue Six: Lack of proportionality.
> Issue Seven: Florida's capital sentencing statute is unconstitutional (*Ring* Claim).

All claims for relief were denied on the merits. *Hernandez-Alberto v. State*, 889 So. 2d 721 (Fla. 2004). A timely motion for rehearing was denied on December 10, 2004. Thereafter, the Defendant had ninety days in which to file a petition for writ of certiorari in the United States Supreme Court by operation of Sup. Ct. R. 13. However, the Defendant timely petitioned the Supreme Court for and received a sixty day extension of that time, until May 4, 2005.[4]

Pursuant to Fla. R. Crim. P. 3.851(g) the Defendant filed a motion to vacate judgment and sentence along with a separate motion alleging that he was incompetent to proceed in capital collateral proceedings on March 10, 2006.

After appointing experts and a full press competency hearing, the Court found the defendant competent to proceed in postconviction by order dated June 3, 2008. A timely motion for reconsideration was denied on July 15, 2008. The Court's ruling was not reviewable by way of an interlocutory appeal. *Trepal v. State*, 754 So.2d 702 (Fla. 2000); Fla. R. App. P. 9.142 (b)(6); *Jeffries v. State*, SC 06-41 (petition for review dismissed without prejudice to raise on direct appeal).

[4]Ultimately, a petition for certiorari was not filed.

CCRC filed a fully pled, timely, but unverified, amended motion for postconviction relief ("Defendant's Second Amended Motion to Vacate Judgment of Conviction and Sentence").[5] The two orders currently being appealed from

[5]The second amended motion for postconviction relief contained the following claims:

> **CLAIM I: THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE ATTORNEY WHO REPRESENTED HIM AT HIS FIRST APPEARANCE HEARING FAILED TO ADVISE HIM OF HIS RIGHTS UNDER THE VIENNA CONVENTION ON CONSULAR RELATIONS.**
>
> **CLAIM II: THE DEFENDANT HAS BEEN DENIED HIS RIGHTS UNDER ARTICLE 37 OF THE VCCR. IN THE ALTERNATIVE, THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO RAISE AN ARTICLE 37 CLAIM**
>
> **CLAIM III: THE DEFENDANT WAS DENIED DUE PROCESS WHEN THE FIRST APPEARANCE COURT FAILED TO ADVISE HIM OF HIS RIGHTS UNDER THE VCCR.**
>
> **CLAIM IV: THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT TO PROCEED PRO SE AT TRIAL. RELIEF IS WARRANTED DUE TO A NEW RULE OF CONSTITUTIONAL LAW ANNOUNCED IN INDIANA V. EDWARDS.**
>
> **CLAIM V: THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL ABANDONED HIS MOTION TO SUPPRESS.**
>
> **SUBCLAIM: TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO SEEK ANY REMEDY FOR A VIOLATION OF THE VCCR OTHER THAN SUPPRESSION OF THE DEFENDANT'S STATEMENT.**
>
> **CLAIM VI: THE DEFENDANT IS MENTALLY RETARDED AND EXECUTION IS BARRED.**
>
> **CLAIM VII: THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT AVAILABLE MITIGATION AND OTHERWISE CHALLENGE THE PROSECUTION'S CASE FOR THE DEATH SENTENCE.**

contain a summary of the case as it now stands. Their text is reproduced here.[6]

> **ORDER DISMISSING DEFENDANT'S SECOND AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE**

> **CLAIM VIII: EXECUTION BY LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS**
>
> **CLAIM IX: THE EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS THE DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION.**
>
> **CLAIM X: THE DEFENDANT SUFFERED FROM A MAJOR MENTAL ILLNESS AT THE TIME OF THE OFFENSE AND EXECUTION IS BARRED.**

PC-R Vol. IV 725-82 (April 2009). None of these claims has been adjudicated because the court dismissed the motion.

In *Bryant v. State*, 901 So.2d 810 (Fla.2005) this Court disapproved what in effect turned out to be a dismissal with prejudice because of pleading defects, but affirmed the lower court's alternative summary denial of the defendant's postconviction claims on the merits. There is no adjudication of the individual claims in this case either on the merits or otherwise. All of them assert violations of federal as well as state law.

[6]Attachments and footnotes omitted.

THIS MATTER is before the Court on Defendant's Second Amended Motion to Vacate Judgment of Conviction and Sentence, filed through counsel on March 18, 2009. After reviewing Defendant's Motion, court file and the record, the Court finds as follows:

Procedural History

In May of 1999, Alphonso A. Saa, M.D. ("Dr. Saa") and Michael S. Maher, M.D. ("Dr. Maher") were appointed to examine Defendant and evaluate his competency to stand trial. Each expert found him disorganized in his train of thoughts, noted that his perception of reality did not appear intact and concluded that he was incompetent to proceed.

Defendant was committed to the South Florida Evaluation and Treatment Center. Within ten days of his commitment the center's treatment team began developing the opinion that his conduct was willful. Defendant was transferred back to the Hillsborough County Jail and in July and August of 1999 he was reexamined by Dr. Saa and Dr. Maher. After their examinations, Dr. Saa found that although his clinical presentation was compatible with malingering, it was his opinion that Defendant was still not competent to proceed; however, Dr. Maher found that he was malingering and was competent to proceed.

In August 2001, just prior to Defendant's trial, Dr. Saa and Dr. Maher each evaluated Defendant for a third time. Dr. Saa stated that because Defendant was uncooperative, he was unable to give an opinion at that time regarding Defendant's competence. Dr. Maher noted that Defendant was initially uncooperative, but he eventually responded appropriately to his questions. After the examination, Dr. Maher formed the opinion that Defendant was competent to proceed. The Court

concluded that Defendant was competent to stand trial. See *Hernandez-Alberto v. State*, 889 So.2d 721, 726-727 (Fla. 2004).

On August 22, 2001, prior to opening statements, Defendant requested that his counsel be discharged. The trial court warned Defendant that substitute counsel would not be appointed and asked if he still wished to discharge counsel and represent himself. Defendant indicated that he would and after the Court conducted a Faretta inquiry, it discharged counsel and appointed standby counsel. See *Hernandez-Alberto,* 889 So.2d at 728-729. . . . Defendant proceeded to represent himself during the majority of the guilt portion of his trial; although prior to closing argument he moved for standby counsel to be reappointed, which the Court granted. *Id*. . . . On August 24, 2001, the jury found Defendant guilty of two counts of First Degree Murder. . . On November 29, 2001, a jury recommended the death penalty, and on May 28, 2002, the Court sentenced Defendant to death on each count. The Supreme Court of Florida subsequently affirmed Defendant's judgment and sentence. See *Hernandez-Alberto*, 889 So.2d at 721 (Fla. 2004).

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). The Court held a competency hearing on February 14, 2008, and on June 3, 2008, the Court found Defendant competent to proceed.

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 3.851. . . 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. 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.

On December 17, 2008, the Court extended by sixty (60) days the time which Defendant had to file his motion. 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. On March 18, 2009, defense counsel filed their amended motion. 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.

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

Analysis and Ruling

A postconviction motion filed pursuant to rule 3.851 shall be under oath. Fla. R. Crim. P. 3.851(e)(l). 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 3.851(e)(l) 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 *Gorham* and *Groover*, is that rule 3.85 l(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.
>
> It is therefore ORDERED AND ADJUDGED that Defendant's Second Amended Motion to Vacate Judgment and Sentence is hereby DISMISSED WITHOUT PREJUDICE for Defendant to file an amended, facially sufficient motion which includes a signed verification, within sixty (60) days from the date of this order.

PC-R Vol. V 912-25.

The text of the final order dismissing the defendant's postconviction motion with prejudice is as follows:

ORDER DISMISSING WITH PREJUDICE DEFENDANT'S SECOND AMENDED MOTION TO

VACATE JUDGMENT OF CONVICTION

THIS MATTER is before the Court on Defendant's Second Amended Motion to Vacate Judgment of Conviction and Sentence, filed through counsel on March 18, 2009. After reviewing Defendant's Motion, court file and the record, the Court finds as follows:

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). The Court held a competency hearing on February 14, 2008, and on June 3, 2008, the Court found Defendant competent to proceed.

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 3.851. 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. 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.

On December 17, 2008, the Court extended by sixty (60) days the time which Defendant had to file his motion. 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.

On March 18, 2009, defense counsel filed their amended motion. 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.

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

A status hearing was then scheduled for July 29, 2010, and at that hearing . . . 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 signed 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.

PC-R Vol. VII 1201-08. This appeal follows.

SUMMARY OF ARGUMENT

The court erred by dismissing this case with prejudice while expressly rejecting postconviction counsel's argument that a full *Durocher/Faretta* hearing should be conducted to determine whether the defendant's refusal to sign a verification was made freely, voluntarily, and with knowledge of the consequences.

The defendant was incompetent to proceed in postconviction, and the court should have proceeded to adjudicate those claims which could be resolved without the defendant's input. The mental health competency evaluations and, therefore, the court's ultimate competency determination, were inadequate to determine whether the defendant fell within a gray area identified in *Indiana v. Edwards* which would require that the case proceed to an adjudication of the defendant's postconviction claims with or without a formal verification.

ARGUMENT

ARGUMENT I

THE COURT ERRED BY DISMISSING THE CASE

The trial court's disposition of this case without any adjudication of the claims raised herein, let alone a full and fair hearing on them, constitutes a denial of federal and state due process.

Mr. Hernandez has never indicated by any of his words or actions that he is a "volunteer" in the sense of wanting to waive postconviction proceedings. To the contrary, he has always vigorously opposed the charges and he has never asserted any acquiescence in his death sentence.

Fla. R. Crim. P. 3.851 (i) establishes the procedure to be used in the case of a true volunteer – one who chooses to waive counsel and any further collateral proceedings because he has decided to accept the death penalty. The rule is a codification of a line of cases in which death-sentenced prisoners demanded that they be allowed to waive counsel and collateral proceedings and that their sentence of death be carried out. E.g. *Durocher v. Singletary*, 623 So.2d 482, 483 (Fla.1993), *Alston v. State*, 894 So.2d 46 (Fla.2004); *Castro v. State*, 744 So.2d 986 (Fla.1999); *Sanchez-Velasco v. State*, 702 So.2d 224 (Fla.1997); *Slawson v. State*, 796 So.2d 491 (Fla.2001). The rule requires that, if the judge finds that there

are reasonable grounds to believe the prisoner is not competent "for the purposes of this rule," the court must appoint mental health experts and conduct an evidentiary hearing regarding the prisoner's competency. Fla. R. Crim. P. 3.851 (i)(4).

The quoted phrase is important. CCRC made the argument numerous times during the proceedings below that the defendant's refusal to sign a verification coupled with a finding of competency would result in the defendant becoming a *de facto* volunteer:

> A determination that Mr. Hernandez has effectively waived postconviction proceedings by not signing a verification or formally taking an oath would turn him into *de facto* volunteer. Aside from the fact that such a determination would be premature, because Mr. Hernandez has never been evaluated as to his competency to make such a waiver, it would simply be wrong. It is fairly predictable that a satisfactory *Durocher* hearing could never result in a finding that Mr. Hernandez has freely, voluntarily and knowingly waived his legal remedies. To the contrary, everything he has done or said indicates that he has every intention of fighting his conviction and sentence.

PC-R Vol. IV, 693-705 (CCRC's Memorandum of Law Regarding the Requirement That the Defendant's Motion for Postconviction Relief Be under Oath). Also see hearing, July 16, 2008:

> THE COURT: Now he has been determined

> competen[t].
> [CCRC]: I asked to have this hearing today and the defendant be present, in an extreme situation my concern would be that if Mr. Hernandez does not execute a verification within the time allotted that we would have would be a *de facto* waiver, and if that's true I would request that the proceeding be treated as a waiver of proceeding and that would invoke the *Faretta* type inquiry with the Court . . . .
> THE COURT: Hold him here. Make sure he is not sent back. At that time you can announce whether or not he is going to ratify what you have done for him or if he refuses to do then it is a waiver as you said. I understand your problem.
> MR. GRUBER: The Court would have to proceed with a *Durocher* inquiry.
> THE COURT: Sure, we will do it that way.

PC-R Vol. XXVIII, 206-09. The defendant then said he wanted to fire his lawyer.

Id. 210. Again:

> [CCRC]: Okay. I did speak with him. . . bear in mind that I've alleged that he's incompetent. I've also alleged that he's retarded and the conversation was difficult because of a language barrier as well. . . . So what I'm actually looking for is a finding by this Court through whatever means we get there that Mr. Hernandez does want his post-conviction appeals to go forward and he wants to continue with the representation that he has, that the Court will accept the motion as having been properly filed in the sense of having gone through basic filing requirements. . .
> THE COURT: Well, if the rule requires a verification and it didn't have one, now that it's been determined that he's competent . . . it would appear to me that it is not legally adequate. . .
> 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: All right. Assuming they get another lawyer other than this gentleman, do you want the Office of 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.

PC-R Vol. XXIX, 214-41.

On October 27, 2008, the court conducted a *Faretta* hearing, discharged counsel, and granted additional time for the defendant to file a *pro se* motion, although CCRC remained on standby. PC-R Vol. XXXII, 261-88.

At a hearing on December 8, 2008, CCRC repeated the argument about the

case becoming a *de facto* waiver and that the court would then need to conduct a *Durocher* hearing. PC- R Vol. XXXIV, 297-306. At the next hearing, the court conducted a colloquy which revealed that the defendant was depending on other inmates working in the prison law library. The defendant had apparently done nothing towards preparing a postconviction motion. The court extended the time for filing one and advised the parties that the decision to allow self-representation would be reconsidered in light of *Indiana v. Edwards*[7] at the next hearing. PC- R Vol. XXXV, 307-17. On January 12, 2009, after another colloquy with the defendant, the court re-appointed CCRC, citing *Indiana v. Edwards*, *United States v. Garey*, 540 F.3d 1253 (11th Cir.2008) (en banc),[8] and *Tennis v. State*, 997

[7] *Indiana v. Edwards*, 128 S.Ct. 2379 (2008)

[8] In *U.S. v. Posadas-Aguilera*, 336 Fed.Appx. 970, 976 n.5 (11th Cir. 2009), the court was considering a *Faretta* claim, but in a footnote stated that, "[i]n those cases in which a court finds a defendant to be suffering from a severe mental illness, *Edwards* appears to limit that defendant's right to self-representation and require counsel." In the same case, the Court noted that *Faretta* had been complied with and that the trial court had not erred in allowing the defendant to proceed pro se, and concluded that, "[m]oreover, Posadas-Aguilera did not show, and has not shown, that he suffered from a significant mental illness to such an extent that his choice must not be considered intelligent." *Id*. at 976. Under this reasoning, the test in the Eleventh Circuit would be whether a defendant's mental illness renders his choice to waive his right to counsel "unintelligent," thereby precluding courts from granting the request to represent himself under *Faretta*'s "knowing and intelligent" waiver standard. *Accord U.S. v. Garey*, 540 F.3d 1253, 1268 n. 9 (11th Cir. 2008) ("If, when viewing all relevant circumstances, a court concludes a defendant's equivocal, irrational, or otherwise uncooperative conduct

So.2d 375 (Fla.2008).[9]

On July 13, 2009 the court ordered an update to the competency finding. Vol. XXXIX, 345-47. Dr. Taylor, who was familiar with the case, and Dr. Rao

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stems from serious mental illness, confusion, or any other condition indicative of a lack of understanding, the court should prohibit the defendant from proceeding *pro se*, even if the defendant has rejected counsel or made an affirmative request to proceed without counsel").

[9] In *Tennis v. State*, the Florida Supreme Court held that courts must be satisfied of three things before allowing a defendant to proceed *pro se*:

1) The request for self-representation must be unequivocal;

2) A *Faretta* hearing must be held to determine whether the request is made knowingly and intelligently;

3) Under *Indiana v. Edwards*, 554 U.S. 164, a defendant may be denied the right to proceed *pro se* if, after the *Faretta* hearing, the judge has doubts as to the defendant's mental competency. 997 So.2d 375, 378-9 (Fla. 2008). A *Faretta* hearing, at which the court should make a determination of the defendant's mental competency to represent himself, is required and the failure to hold one is per se reversible error. *Id*. at 379. A petitioner challenging the court's decision to allow him to proceed *pro se* should both allege and show that he suffered from a "severe mental illness to the point where [he was] not competent to conduct trial proceedings by [himself]." *Muehleman v. State*, 3 So.3d 1149, 1160 (Fla. 2009).

After *Edwards* came down, this Court modified Florida Rule of Criminal Procedure 3.111(d)(3) to reflect the Supreme Court's holding in *Edwards* as follows:

> Rule 3.111(d)(3): Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, *and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by himself or herself.*

See In re Amendments to Fla. Rule of Crim. Procedure 3.111, 17 So.3d 272 (Fla. 2009) (emphasis shows new language).

were originally the court appointed experts. Because the defendant did not cooperate with them, the court ordered that he be transferred to the psychiatric unit of the Florida State Prison for observation. PC-R Vol. V, 825.[10] The Department of Corrections, moved to rescind the order. PC-R Vol. V 851-57. The Department's reasons were that, 1) there was no such facility, 2) Section 916.111, Fla. Stat. (2009) tasks the Department of Children and Families, not the Department of Corrections, with making competency evaluations, 3) Section 916.13, Fla. Stat. (2007) places the responsibility for treating prisoners found to be incompetent on DCF, not the DOC, as does Rule 3.851(g)(13), and 4) even if the Department of Corrections had the personnel to provide competency services, it would be an ethical violation to do it. *Id.* On recommendation of the DOC, the court ordered the DCF to conduct a competency evaluation. PC-R Vol. V 859-64; PC-R Vol. XLIII 367-74. DCF assigned a Dr. Annis to conduct the evaluation, but warned that it would not do any further competency evaluations of death row inmates due to budgetary concerns. PC-R Vol. V 879-81. The result of all this was that the original intention, which was that the defendant be evaluated in a more coercive setting where his lack of cooperation would not be a problem, was thwarted.

[10]Dr. Rao did not complete an evaluation.

The hearing took place on June 3, 2010. PC-R Vol. XLVI 382-454; PC-R Vol. V 903-12 (Dr. Annis' report); PC-R Vol. V 834-45 (Dr. Taylor's report). The defendant did not cooperate with either of the experts. Based on reports of three guards, none of the medical staff, records review, no psychological testing, and his observation of Hernandez for about twelve minutes, Dr. Annis found that he was competent. When was asked to describe what a "longitudinal evaluation" (Dr. Taylor's term) would entail, Dr. Annis said:

> A longitudinal evaluation? . . . Your staff. Your prescribers. you have control of the perimeter, you have control of the environment that they are in. That in those kinds of situations one can do lots of things that you can't do to someone who's in a prison cell. . . At union Correctional institution, to do a longitudinal evaluation we would need to have the security staff do almost constant observation and recordkeeping as to somebody's behavior, we would have to have our own prescribers, our own counseling and clinical staff who are there to provide opportunities, instruction, observation, framing, for weeks and months.
>
> Now, I understand that the Department of Corrections intends to have a really significant psychiatric capacity at the new facility they are building in North Florida. It's in Suwannee . . . I have not seen a program like that in corrections in some years.

PC-R Vol. XLVI 426-26.

Dr. Taylor, with considerably more familiarity with the case, also opined that Hernandez was incompetent. He qualified that opinion this way:

> At this time I would not say that I could say within a reasonable degree of medical probability that he is fully capable of forming all the tasks necessary to be competent for postconviction proceedings.
> Q Well, is the converse true then, is your opinion that he is incompetent to proceed?
> A No. I certainly do not have any information indicating that he's incompetent to proceed and would not offer that as an opinion.

Id. 438-39. The court found that he was competent.

As cited above, the lower court expressly rejected CCRC's argument about the need to conduct a *Faretta/Durocher* hearing:

> 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 *Gorham* and *Groover*, is that rule 3.85l(i) only applies once a facially sufficient postconviction motion is filed and that if 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.

PC-R Vol. V 923.

The court's reasoning is obviously faulty. If "rule 3.85l(I) only applies once a facially sufficient postconviction motion is filed" then a capital postconviction defendant (and his lawyer) would have to go through the bizarre exercise of researching, investigating, drafting, and verifying under oath a facially sufficient motion requesting that the judgment and sentence of death be set aside before the defendant would be permitted to demand that it be carried out. True "volunteers" can and do waive postconviction proceedings and counsel as soon as their mandatory direct appeal is final and before any postconviction motion is filed. E.g. Glen Ocha, SC00-2507; John Blackwelder, 2004; Paul Hill 2003; Dan Hauser, 2000; (source: http://www.deathpenaltyinfo.org/ information defendants who were executed 1976 and designated volunteers (visited 8/3/11); see generally *Trease v. State*, 41 So. 3d 119 (Fla. 2010); Blume, KILLING THE WILLING: "VOLUNTEERS," SUICIDE AND COMPETENCY, 103 Mich. L. Rev. 939 (2005).

The rule further requires that:

> If the prisoner is found to be competent for purposes of this rule, the court shall conduct a complete (*Durocher/Faretta*) inquiry to determine whether the prisoner knowingly, freely and voluntarily wants to dismiss pending postconviction proceedings and discharge collateral counsel.

Fla. R. Crim. P. 3.851 (i)(6). There is also a provision for automatic appellate review of the proceedings. *Id*. Although Hernandez has been examined for competency numerous times, he has not been examined specifically to determine whether he is competent to waive his postconviction proceedings. As quoted above, the court rejected CCRC's argument that a *Durocher/Faretta* hearing should be conducted.

This Court has "allowed competent death-sentenced individuals, who have made a knowing, intelligent, and voluntary waiver of their rights to collateral counsel and proceedings, to implement that waiver without a resolution of the collateral claims that were pending before us." *Trease, supra, citing inter alia Slawson v. State*, 796 So. 2d 491 (Fla. 2001). In this case a competency determination specifically for the purposes of a 3.851(i) waiver has not been conducted, nor has a *Durocher* hearing.

If a capital postconviction defendant is incompetent to proceed, the court still should adjudicate those claims which do not require his factual input.

> A death-sentenced prisoner pursuing collateral relief under this rule who is found by the court to be mentally incompetent shall not be proceeded against if there are factual matters at issue, the development or resolution of which require the prisoner's input. However, all collateral relief issues that involve only matters of record

> and claims that do not require the prisoner's in put shall proceed in collateral proceedings notwithstanding the prisoner's incompetency.

Fla. R. Crim. P. 3.851 (g)(i). Absent any issues regarding competency, Fla. R. Crim. P. 3.851 (c)(1) ordinarily requires that a motion for postconviction relief "shall be under oath." If the oath requirement is not met, the proper procedure is to strike the motion with leave to amend within a reasonable period. *Spera v. State*, 971 So.2d 754 (Fla.2007); *Bryant v. State*, 901 So.2d 810 (Fla.2005). Both rules 3.850 and 3.851 require that defendants file their postconviction motions under oath and penalty of perjury that all facts alleged are true. 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."). F.S. § 944.279 and § 944.09 provide that if a prisoner files a frivolous motion for postconviction relief or one made knowingly or with reckless disregard for the truth may be sanctioned with a loss of gain time. *Spera v. State*, 971 So.2d 754 (Fla.2007); *Bryant, supra*. It is problematic whether these provisions would have much effect on a death sentenced

prisoner.

In *Gorham v. State*, 494 So.2d 211 (Fla.1986), this Court held that a death sentenced prisoner's motion for postconviction relief was properly dismissed without prejudice where the oath was not in the form required by the rule governing postconviction relief motions, but that a defendant is not required to have "first hand" knowledge in order to meet the "personal knowledge" requirement of oath:

> In its briefs filed both in *Scott* [*Scott v. State*, 464 So.2d 1171 (Fla.1985)] and the instant case, the state's position is that a defendant may review the information contained in a motion for post-conviction relief which was discovered by his counsel's investigations, and the defendant therefore would be in the same position as his counsel and able to meet the "personal knowledge" requirement of the rule 3.987 oath. It is with this understanding that our holding in *Scott* must be assessed. Counsel for defendants seeking post-conviction relief must draft such motions with adequate specificity, taking care to set forth the factual basis for each of the allegations contained therein, in order for their client to review the allegations and verify the motion in accordance with the rule 3.987 oath.

Gorham, 494 So.2d at 212. It is true that rule 3.987 which provides a model form for prisoners to use when filing a motion for postconviction relief states in its instructions that "[t]his motion must be legibly handwritten or typewritten, signed by the defendant, and contain either the first or second oath set out at the end of

this rule." However, that rule on its face refers to *pro se* motions filed under Rule 3.850 in noncapital cases, not capital collateral postconviction motions under Rule 3.851 which, due to the automatic appointment provisions of ch.27 in death cases, normally will be researched and drafted by counsel. Rule 3.851 requires only that a motion for postconviction relief be made "under oath," not that it be accompanied by a written verification. Given that flexibility, the explication in *Gorham*, and the automatic appointment of postconviction counsel by statute in capital cases, the oath or verification requirement serves at most as a vehicle to insure that the client and counsel will have consulted on the motion rather than as a credible threat of punishment if a defendant makes false allegations. All the requirement does is put "the defendant . . . in the same position as his counsel." In other words, by itself it does little if anything to protect the integrity of capital postconviction proceedings.[11]

[11]Another view is that the verification requirement in capital postconviction cases is a meaningless ritual. In noncapital cases, appointment of counsel is discretionary and normally occurs only *after* the prisoner has already filed a *pro se* postconviction motion containing claims deemed worthy of further development. In capital cases, the situation is as described in *Scott* and *Groover*, namely that the defendant – who may have no knowledge about the claims whatsoever – is put "in the same position as his counsel." Under those circumstances, if there are any sanctions to be enforced for bad pleadings they should be against the lawyer, not the defendant.

The verification ritual in practice and as envisioned in *Scott* and *Groover* is the *only* point in the process where the defendant unilaterally can exert power.

Gorham and *Groover* both dealt with narrow issues about the wording and import of the verification requirement, which itself was taken for granted. In *Gorham*, the defendant argued that a strict reading of the language of the oath would require him to sabotage his *Brady* claim. In *Groover*, the pertinent part of the Court's decision was as follows:

While signed releases are convenient, court ordered releases (which were used here) will do just as well. Otherwise, the process of obtaining records, investigation, drafting a postconviction motion and so on usually can be done without the defendant's input (however helpful it might be).

> The court based the dismissal on several grounds, including the fact that *Groover* failed to verify the amended motion under oath as required by rule 3.850. See Fla.R.Crim.P. 3.850(c) (motion shall be under oath). Contrary to *Groover*'s argument, rule 3.850 requires that all motions be verified, even where the motion amends a previously filed verified motion. Failure to meet the oath requirement warrants dismissal of the motion without prejudice. *Anderson v. State*, 627 So.2d 1170, 1171 (Fla.1993). Thus, we find no error in the trial court's dismissal of Groover's unverified amended motion.

Groover v. State, 703 So.2d 1035, 1038 (Fla. 1997). Both were capital postconviction cases, but otherwise they are both distinguishable. In both cases the Court considered what amounted to interlocutory appeals of dismissals without prejudice, which would not be entertained now.

It is also apparent that the oath "requirement" is not always required, at least with regard to those claims that do not require factual consultation between the attorney and an incompetent client. Thus the oath requirement is not jurisdictional, nor is its absence necessarily fatal to the pleading as a whole. Moreover, the competency rule refers to claims which "the court found required factual consultation with counsel." Here the court has not made any findings about what, if any, claims fall into that category. Because Mr. Hernandez was not found to be incompetent, the issue has not arisen. The rule does not refer to all factual allegations or to questions of fact or mixed questions of fact and law which can be

decided without the client's testimony; rather it only refers to those claims which *require* factual consultation with counsel. Nor does the rule refer to those claims in which the client's ability (or willingness) to consult with counsel would be helpful or desirable. It only refers to those claims for which consultation is necessary, i.e. "required."

The question of which claims, if any, might fit that category could be addressed efficiently during a *Huff* hearing or case management conference, where the court would in due course examine each of the claims and decide which of them require an evidentiary hearing for resolution and which can be adjudicated summarily as a matter of law. Claims of ineffective assistance of counsel by their nature rely heavily on the testimony of trial counsel and review of the record, rather than on the defendant's own input. In particular, a claim of ineffective assistance for failure to develop and present mitigation would typically rely on trial counsel's testimony and the evidence presented at an evidentiary hearing by way of family members, lay witnesses, and experts. In fact, the ABA Guidelines require that collateral counsel conduct thorough and *independent* investigations relating to the issues of both guilt and penalty. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev.

ed. Feb.2003), 10.7 Investigation; 10.8 The Duty to Assert Legal Claims; and 10.15.1.E.4. Duty of Post-Conviction Counsel. These guidelines apply regardless of whether the client is incompetent, retarded, or otherwise less than a fruitful source of information.

The case should be remanded so that the trial court can conduct the appropriate colloquies and employ a fairly liberal standard in determining whether the oath requirement is at least minimally satisfied. If the court cannot make such a finding, then a case management or *Huff* hearing should be scheduled at which the court will make the usual determinations as to which claims require an evidentiary hearing. As to those which require an evidentiary hearing, the issue as to whether the defendant's input is required can be addressed. If the claim is legally sufficient to go forward, and if it appears that it can be decided without the defendant's factual input, then the case can proceed to an evidentiary hearing. This was the course advocated by CCRC in the proceedings below and it is argued here that it is either consistent with existing case law or that existing case law may need to be modified so that it is. The trial court's rationale was that the existing scheme allows a loophole:

> 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.

The approach advocated here does *not* entail such an outcome. It envisions a case-specific competency evaluation which would require that the mental health experts focus on what is actually happening in the case rather than on the more generalized *Dusky* standard. It envisions a *Durocher* hearing would squarely present the fact to the prisoner that there is a motion for postconviction relief in existence and that, if he remains on his present course, he will waive any opportunity for relief he may have – rather than leave it up to a possibly insane and retarded prisoner to put two and two together. If the court determines that the defendant falls in "falls in a gray area between *Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose," *Indiana v. Edwards*, 128 S.Ct. at 2385, then the case can proceed to an adjudication of the claims which do not absolutely require the defendant's input.

ARGUMENT II

THE TRIAL COURT ERRED IN FINDING THE DEFENDANT COMPETENT TO PROCEED IN POSTCONVICTION. COMPELLING THE DEFENDANT TO PROCEED WHILE HE WAS INCOMPETENT VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

In *Carter v. State*, this Court held that "a judicial determination of competency is required when there are reasonable grounds to proceed in post-conviction proceedings in which factual matters are at issue, the development or resolution of which require the defendant's input." 706 So. 2d 873, 875 (Fla. 1997). This requirement has been codified in Fla. R. Crim. P. 3.851 (g) (2008).[12]

During the February 14, 2008 competency hearing, Dr. Taylor testified

[12] Cf. *Rohan v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003) (Kozinski, J.) (federal habeas petitioners must be competent to proceed given their statutory right to counsel); *Reid v. State*, 197 S.W.3d 694, 699-701 (Tenn. 2006) (Defendant has a constitutional due process right to competency in post-conviction proceedings); *State v. Debra A.E.*, 188 Wis.2d 111, 127-129 (Wis. 1994) (defining a standard of competency in post-conviction to be consistent with federal constitutional due process); *People v. Owens*, 564 N.E.2d 1184, 1190 (Ill. 1990) (holding that petitioner must be "competent to communicate his allegations of constitutional deprivations to counsel" in post-conviction proceedings under state statute and declining to decide constitutional claims), with Ex *Parte Mines*, 26 S.W.3d 910, 914-916 (Tex. Crim. App. 2000) (en banc) (holding that neither due process nor the right to counsel requires competency in state habeas proceedings but leaving open the possibility that for certain claims counsel may successfully demonstrate the need for defendant's competent participation).

about three series of pretrial competency evaluations which were conducted by court appointed experts Alphonso A. Saa, M.D. and Michael S. Maher, M.D. When Drs. Saa and Maher evaluated Mr. Hernandez-Alberto in May of 1999 at the Hillsborough County Jail, he was being treated with Pamelor, an anti-depressant medication, and Trilafon, an anti-psychotic medication. PC-R Vol. III 543-46. At the conclusion of their evaluations, both doctors opined that Mr. Hernandez-Alberto was incompetent to proceed. *Id.* Furthermore, both doctors found that Mr. Hernandez-Alberto was disorganized in his train of thought and that his perception of reality did not appear intact. *Id.* As a result, Mr. Hernandez-Alberto was committed to the South Florida Evaluation and Treatment Center, where he remained for approximately one month before being returned to Hillsborough County Jail. *Id.*

Drs. Saa and Dr. Maher evaluated Mr. Hernandez-Alberto again in July and August 1999. Mr. Hernandez-Alberto continued to have problems with memory, and he had difficulty providing historical information. *Id.* Dr. Saa concluded that, although his clinical presentation was consistent with malingering, Mr. Hernandez-Alberto was still not competent to proceed. *Id.* Mr. Hernandez-Alberto's cooperation with Dr. Maher was limited, which led Dr. Maher to the opinion that he was malingering and competent to proceed. After a full adversarial hearing on

November 9, 1999, the trial court found that Mr. Hernandez-Alberto was competent to stand trial.

Again, just days prior to trial in August 2001, the Court appointed Dr. Saa and Dr. Maher to conduct a third competency evaluation of Mr. Hernandez-Alberto. ROA Vol. IV at 4-126. *Id* Mr. Hernandez-Alberto was uncooperative with Dr. Saa. *Id.* Thus, Dr. Saa was not able to render an opinion regarding his competency at that time. *Id.* Dr. Maher found that Mr. Hernandez-Alberto was competent, but he noted that he was guarded and therefore unable to rule out paranoia as a reason for his lack of cooperation. *Id.* The Court found Mr. Hernandez-Alberto competent to stand trial on August 20, 2001.

Mr. Hernandez-Alberto was tried and convicted on two counts of first degree murder. He was sentenced to death on April 30, 2002. The judgment and sentence were affirmed on appeal to the Florida Supreme Court in *Hernandez-Alberto v. State*, 889 So.2d 721 (Fla. 2004) and a motion for rehearing was denied on December 10, 2004. On December 30, 2004, the Florida Supreme Court appointed CCRC-Middle to handle post-conviction proceedings for Mr. Hernandez-Alberto. Shortly after being appointed to Mr. Hernandez-Alberto's case, his attorneys at CCRC-Middle became concerned about his competency to proceed in post-conviction proceedings due to his bizarre behaviors and his

irrational thought processes that were used to explain not signing standard DOC record release forms. As a result, CCRC-Middle retained Arlene M. Martinez, M.D., who had previously been appointed by the trial court for the purpose of diagnosis and treatment, to evaluate Mr. Hernandez-Alberto and determine his competency to proceed in post-conviction proceedings.

Dr. Martinez had considerable knowledge of Mr. Hernandez-Alberto due to her prior evaluation and investigation into Mr. Hernandez-Alberto's background pursuant to her appointment by the Court in 2000. During that investigation, Dr. Martinez learned that Mr. Hernandez-Alberto came from a small town in Mexico. PC-R Vol. III 591 – Vol. IV 624. His father was an alcoholic and it was reported that he physically abused Mr. Hernandez-Alberto's mother while she was pregnant. *Id.* His mother was described as running naked through the village and abandoning her family. *Id.* As a result of her bizarre behavior, the people in the town referred to her as "*la loca*," which means "crazy" in Spanish. *Id.* Dr. Martinez explained that his mother's apparent psychosis is significant because mental illness tends to run in families, and the history with his mother gives strength to the belief that Mr. Hernandez-Alberto has a psychotic disorder. *Id.*

Dr. Martinez first met with Mr. Hernandez-Alberto at Orient Road Jail on September 22, 2000, and she spoke with him in Spanish for approximately twenty

minutes. *Id*. He refused to sit down during the interview and he covered his mouth and half his face with his shirt. *Id.* Mr. Hernandez-Alberto repeatedly informed her that his attorneys and the people at the jail were against him and that everyone, including Dr. Martinez, was trying to hurt him. Dr. Martinez's impression of Mr. Hernandez-Alberto was that he was distrustful and paranoid. *Id.* *S*he diagnosed Mr. Hernandez-Alberto with psychotic episode not otherwise specified because of the duration of time. Although she suspected that Mr. Hernandez-Alberto may have been suffering from paranoid schizophrenia, she did not have enough evidence to make that clinical diagnosis. *Id*.

On September 14, 2005, Dr. Martinez conducted a complete psychiatric interview of Mr. Hernandez-Alberto, including a mental status evaluation. PC-R Vol. III 431-38 (Dr. Martinez Report). The interview lasted approximately one hour and was conducted in Mr. Hernandez-Alberto's native language, Spanish. PC-R Vol. IV 602-13. Dr. Martinez was accompanied by a Spanish-speaking attorney and investigator from CCRC. During the interview, Mr. Hernandez-Alberto spoke about a car accident that occurred several years ago, as well as his belief that electricity was coming into his foot from his cell and out his brain. The delusions about the electricity in his cell are consistent with Mr. Hernandez-Alberto's history of delusions and bizarre behavior, which is documented by the Department of

Corrections.[13] Jennifer Segal, a psychological specialist who speaks with inmates who are under mental health supervision at Union Correctional Institution, confirmed in a December 2007 telephone conversation with Dr. Martinez that she has observed Mr. Hernandez-Alberto on a daily basis expressing delusions about electricity coming from the floor of his cell and going up through his body. *Id*. Despite numerous attempts by Dr. Martinez and his attorney to redirect Mr. Hernandez-Alberto to speak about his case and some legal documents he needed to sign, he continued to exhibit circumstantial thought processes[14] and

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[13] According to records from the Department of Corrections, Mr. Hernandez-Alberto has a history of delusions and bizarre behavior:

> - He has claimed on numerous occasions since at least April 2005 that his cell is electrified.
> - On April 21, 2005, he wrapped a t-shirt around his neck.
> - On April 25, 2005, he was removed from the law library because he placed a book on his head.
> - On November 27, 2006 and December 14, 2006, he complained that someone was trying to get into his body through his right foot. On November 27, 2005, four tourniquets were on his lower right leg to "stop the poison" and severe swelling was observed. He denied tying the tourniquets there and claimed that the electricity caused the injury.
> - It was noted on November 30, 2006 that he was hoarding paper, wetting it, and placing it under his bed, which caused a bad odor.
> - On January 3, 2007, Mr. Hernandez was observed sleeping and wrapped in several layers of sheets.

(Dr. Taylor March 22, 2007 Report, PC-R Vol. III 406-17)

[14]Mr. Hernandez-Alberto exhibited circumstantial thought processes in that "he repeated the same thing and would not get to the point." (Dr. Martinez October 2, 2005 Report at 4).

perseveration.[15] *Id.* Based on her review of Mr. Hernandez-Alberto's records, her investigation into his background, and her evaluations of Mr. Hernandez-Alberto in 2000 and 2005, Dr. Martinez diagnosed him with chronic paranoid schizophrenia and found that he is incompetent to proceed in post-conviction proceedings. *Id.* Among the criteria that she considered in making this diagnosis were Mr. Hernandez-Alberto's flat affect, his circumstantial speech process, and his pattern of bizarre delusions of electricity. *Id.* She distinguished the diagnosis of chronic paranoid schizophrenia from a diagnosis of delusional thought disorder, which involves non-bizarre delusions, such as a cheating spouse, as opposed to Mr. Hernandez-Alberto's bizarre delusions about electricity in his cell. *Id.* Although she last evaluated Mr. Hernandez-Alberto in 2005, Dr. Martinez testified that her opinion has not changed regarding his present competency because chronic paranoid schizophrenia is a chronic condition. *Id.* Furthermore, she concluded that he is not malingering because he has no secondary gain. *Id.* Likewise, he has no secondary gain in refusing to cooperate with counsel who is trying to help him, or in refusing to sign legal documents provided by counsel.

On January 9, 2007, the Court appointed Donald R. Taylor, M.D. and Wade

[15]According to Dr. Martinez, "he continued talking about the same thing even though we tried to engage him in another subject." (Dr. Martinez October 2, 2005 Report at 4).

C. Myers, M.D. as experts to examine Mr. Hernandez-Alberto in order to determine his competency to proceed in capital collateral proceedings. Pursuant to their appointments, Dr. Taylor and Dr. Myers traveled together to UCI on March 22, 2007, to evaluate Mr. Hernandez-Alberto. *Id*. at 23-26; 43-47. Mr. Hernandez-Alberto, however, informed the doctors that he did not wish to speak with them, and they were unable to conduct a clinical examination. *Id.* After a limited review of Mr. Hernandez-Alberto's records and this brief interaction with Mr. Hernandez-Alberto on March 22, 2007, Dr. Myers concluded that Mr. Hernandez-Alberto did not have a major mental illness and that he was refusing to cooperate in order to delay the legal process. *Id.* at 48. However, Dr. Taylor also testified that Mr. Hernandez-Alberto may suffer from an underlying psychotic disorder involving paranoia, which could account for his failure to cooperate. PC-R Vol. III 551-52. If this were the case, Dr. Taylor acknowledged that his level of competency would be seriously called into question. *Id.* at 554. Due to Mr. Hernandez-Alberto's lack of cooperation, Dr. Taylor admitted, "it is difficult to arrive at an opinion within a reasonable degree of medical probability regarding his level of functioning." (Dr. Taylor's March 22, 2007 Report, PC-R Vol. III, 406-17).

On January 12, 2009, 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) reappointed CCRC. A On July 13, 2009 the court ordered an update to the competency finding. Vol. XXXIX, 345-47. Competency hearing was held on June 3, 2010, and after hearing testimony from two experts, the Court again found Defendant competent to proceed.

Dr. Taylor, who was familiar with the case, and Dr. Rao were originally the court appointed experts. Because the defendant did not cooperate with them, the court ordered that he be transferred to the psychiatric unit of the Florida State Prison for observation. PC-R Vol. V 825.[16] The Department of Corrections, moved to rescind the order. PC-R Vol. V 851-57. The Department's reasons were that, 1) there was no such facility, 2) Section 916.111, Fla. Stat. (2009) tasks the Department of Children and Families, not the Department of Corrections, with making competency evaluations, 3) Section 916.13, Fla. Stat. (2007) places the responsibility for treating prisoners found to be incompetent on DCF, not the DOC, as does Rule 3.851(g)(13), and 4) even if the Department of Corrections had the personnel to provide competency services, it would be an ethical violation to do it. *Id.* On recommendation of the DOC, the court ordered the DCF to conduct a competency evaluation. PC-R Vol. V 859-64; PC-R Vol. XLIII 367-74.

[16]Dr. Rao did not complete an evaluation.

DCF assigned a Dr. Annis to conduct the evaluation, but warned that it would not do any further competency evaluations of death row inmates due to budgetary concerns. PC-R Vol. V, 879-81. The result of all this was that the original intention, which was that the defendant be evaluated in a more coercive setting where his lack of cooperation would not be a problem, was thwarted.

The hearing took place on June 3, 2010. PC-R Vol. XLVI 382-454; PC-R Vol. V 903-12 (Dr. Annis' report); PC-R Vol. V 834-45 (Dr. Taylor's report). The defendant did not cooperate with either of the experts. Based on reports of three guards, none of the medical staff, records review, no psychological testing, and his observation of Hernandez for about twelve minutes, Dr. Annis found that the defendant was incompetent. Dr. Taylor also opined that Hernandez was competent but could not say within a reasonable degree of medical probability that "he is fully capable of forming all the tasks necessary to be competent for postconviction proceedings."

The U.S. Supreme Court has held that a defendant must be able to effectively communicate with his counsel with a reasonable degree of rational understanding. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 789 4 L.Ed.2d 824 (1960) "A defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer . . The defendant

must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf." *Riggins v. Nevada*, 112 S.Ct 1810, 1820 (1992) (Kennedy, J., concurring in judgment).

Florida Rule of Criminal Procedure 3.851 (g) (2008) is the governing procedure that establishes the criteria for a determination of a defendant's incompetence to proceed in capital collateral proceedings. Rule 3.851 (g)(8) provides in relevant part that :

> (A). The experts first shall consider factors related to the issue of whether the death sentenced prisoner meets the criteria for competence to proceed, that is whether the prisoner has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the prisoner has a rational as well as factual understanding of the pending collateral proceedings.
>
> (B). In considering the issue of competence to proceed, the experts shall consider and include in their report:
> (i) the prisoner's capacity to understand the adversary nature of the legal process and the collateral proceedings;
> (ii) the prisoner's ability to disclose to collateral counsel facts pertinent to the postconviction proceeding at issue; and
> (iii) any other factors considered relevant by the experts and the court as specified in the order appointing the experts.

A. Mr. Herndandez-Alberto lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.

Throughout post-conviction proceedings, the attorneys at CCRC-Middle have faced continued difficulties with Mr. Hernandez-Alberto refusing to speak

with them. Furthermore, even in the rare instances when he agrees to speak with counsel, it is not possible to goal-direct him so that he speaks about matters that are relevant to his case. For example, when Dr. Martinez evaluated Mr. Hernandez-Alberto in 2005, she was accompanied by a Spanish speaking attorney from CCRC so that she could observe his interactions with counsel. During this encounter, Mr. Hernandez-Alberto continued to repeat himself about issues such as the electricity in his cell and a prior car accident. PC-R Vol. IV 608. When Dr. Martinez attempted to intervene in the interactions between Mr. Hernandez-Alberto and his attorney and focus him on the reason for their visit, his reaction was oblivious and uncooperative. *Id*. That reaction was similar to his reaction in court during the February 14, 2008 hearing, which led to his removal from the courtroom. *Id.* *Dusky*, *supra*, as well as Florida Rule of Criminal Procedure 3.851 (g), require that a defendant must be able to communicate with attorney with a rational degree of understanding. Because Mr. Hernandez-Alberto lacked that ability, he was not competent to proceed to in postconviction proceedings.

B. Mr. Hernandez-Alberto did not appreciate the range and nature of possible penalties.

Dr. Martinez testified that Mr. Hernandez-Alberto does not understand that he could receive the death penalty. PC-R Vol. IV, 617. When Dr. Martinez interviewed Mr. Hernandez-Alberto on September 14, 2005, she described to him

in detail how the death penalty would be imposed if he does not cooperate with her or his counsel. PC-R Vol. III 431-38 (Dr. Martinez Report). In response, Mr. Hernandez-Alberto stared at her and maintained a flat affect, then went back to talking about such unrelated issues as his back pain, wanting his x-rays, and wanting to change to a cell without electrical problems. *Id*. Furthermore, during her evaluation of Mr. Hernandez-Alberto, Dr. Martinez reported that he was unable to "maintain focus or remain goal directed in any type of conversation related to the sentence." *Id.*

C. Mr. Hernandez-Alberto did not understand the adversary nature of the legal process and collateral proceedings.

Dr. Martinez found that Mr. Hernandez-Alberto did not appear to understand the nature of the legal process and collateral proceedings. In 2000, Dr. Martinez noted that Mr. Hernandez-Alberto was paranoid and had fixed delusions that everybody, including his own attorneys, was after him and trying to hurt him. These delusions appear to remain persistent. During her September 14, 2005, evaluation of Mr. Hernandez-Alberto, he was unable to have a logical conversation with counsel from CCRC and he refused to cooperate with counsel. When Dr. Martinez asked Mr. Hernandez-Alberto to sign a consent form to obtain his medical records, he demanded to see her "Medical Doctor ID" and was so

suspicious that he refused to sign the release form. In fact, Mr. Hernandez-Alberto has refused to sign any documentation during the course of postconviction proceedings.

Mr. Hernandez-Alberto's lack of understanding regarding the nature of post-conviction proceedings was further evidenced by his statements in court during his February 14, 2008 competency hearing. After interrupting Dr. Taylor's testimony, Mr. Hernandez-Alberto engaged in the following exchange with the Court:

> The Defendant: Excuse me. I need to the guilty say the jury. I need Your Honor turn it over not guilty because-
> The Court: You want me to find you not guilty, is that what you're telling me?
> The Defendant: What?
> The Court: You want me to find you not guilty, overturn your conviction?
> The Defendant: The jury found guilty.
> The Court: I didn't declare guilty.
> The Defendant: I am asking Your Honor turn it over not guilty.
> The Court: So you want me to overturn the jury's verdict?
> The Defendant: Yes.

PC-R Vol. III, 533-40. The Court informed Mr. Hernandez-Alberto that he needed to be quiet or he would be removed from the courtroom. *Id*. Mr. Hernandez-Alberto responded, "Only I need time for talk. . . One is accused and one is the victim. The victim is the accused took one each other in front of the judge. That's

correct?" *Id.* Several minutes later, Mr. Hernandez-Alberto informed the Court, "I asked for my direct appeal. It has thirty days." *Id*. It is evident from these exchanges that Mr. Hernandez-Alberto had no understanding of the purpose of the competency hearing on February 14, 2008 or the adversarial nature of collateral post-conviction proceedings.

D. Mr. Hernandez-Alberto was not able to disclose to collateral counsel facts pertinent to the postconviction proceedings at issue.

Mr. Hernandez-Alberto's ability to communicate was impaired by his chronic paranoid schizophrenia. For example, when Dr. Martinez evaluated Mr. Hernandez-Alberto in 2005, his attorney presented him with legal papers and asked him if he would sign them. Instead of answering the question, he continued to speak about his back pain. Additionally, Mr. Hernandez-Alberto had what Dr. Martinez described as perseveration. PC-R Vol. IV 607-08. When an attorney from CCRC-Middle attempted to goal-direct Mr. Hernandez-Alberto on September 14, 2005 to speak about post-conviction proceedings, he was not responsive, and he proceeded to speak about his back pain and the electricity in his cell no matter how much Dr. Martinez attempted to redirect him. *Id*. As Dr. Martinez wrote in her report following the 2005 evaluation, Mr. Hernandez-Alberto was unable to disclose to counsel any facts because "his thought process is impaired and his main focuses are his delusional thoughts and paranoia."

E. Mr. Hernandez-Alberto was unable to manifest appropriate courtroom behavior.

In order to be deemed competent to proceed in post-conviction proceedings, a defendant must be able to manifest appropriate courtroom behavior. Mr. Hernandez-Alberto made repeated outbursts in the courtroom during his trial in 2001 and his competency hearing in 1999 and the judge removed him from the courtroom in both instances." (Dr. Taylor's March 22, 2007 Report, PC-R Vol. III 406-17). Dr. Martinez, who was present at the February 14, 2008 hearing and observed Mr. Hernandez-Alberto's repeated outbursts, testified that his behavior on that date was "very consistent with patients who have no social boundaries at all . . . This type of behavior is very common for schizophrenic patients such as the defendant." PC-R Vol. IV, 602.

F. Mr. Hernandez-Alberto lacked the capacity to testify relevantly.

It is evident from Dr. Martinez's September 14, 2005 evaluation of Mr. Hernandez-Alberto that he would not be able to testify relevantly. On that date, his attorney from CCRC-Middle tried to goal-direct the Defendant to speak about post-conviction proceedings. Mr. Hernandez-Alberto's response was to stare at her and continue to speak about unrelated issues, such as his back pain, wanting his x-rays, and wanting to change to a cell without electrical problems. *Id.* Mr.

Hernandez-Alberto's perseveration and circumstantial thought processes would make it impossible to direct the Defendant on the stand, as he would speak about what he wanted to speak about and not what he was asked.

Conclusion

Dr. Martinez is the only credible expert who had sufficient information to properly evaluate Mr. Hernandez-Alberto's competency to proceed under *Dusky* and *Carter*. First, Dr. Martinez is the only one of the three doctors to complete an evaluation of Mr. Hernandez-Alberto, and she did so twice on two different occasions. Dr. Taylor and Dr. Myers traveled together to UCI to evaluate the Defendant and when he refused to speak with them, neither doctor returned to attempt another evaluation, make attempts to contact collateral sources at the prison such as Ms. Segal, or contact collateral counsel to discuss the nature of the problems or issues that raised concerns regarding Mr. Hernandez-Alberto's competency. Rather, Dr. Taylor and Myers chose not to conduct any further investigation and based their opinion regarding the Defendant's competency on the paucity of evidence they had gleaned from a limited records review and one brief interaction with Mr. Hernandez-Alberto. Additionally, Dr. Martinez was the only expert to observe Mr. Herandez-Alberto interacting with his attorney from CCRC, and therefore she was able to see firsthand that Mr. Hernandez-Alberto lacks the

present ability to consult with his attorney with a rational degree of reasonable understanding. Finally, Dr. Martinez was the only one of the three doctors who considered information about his background in Mexico and his family history of mental illness, which lends support to her diagnosis of chronic paranoid schizophrenia.

Dr. Taylor acknowledged at the February 14, 2008 hearing that Mr. Hernandez-Alberto speaks English as a second language and that he "clearly does not speak it as well as somebody who would speak it as a first language." Dr. Martinez, on the other hand, is a native Spanish speaker and she conducted her entire evaluation on September 14, 2005 in Spanish. She spoke directly with the Mr. Hernandez-Alberto about the death penalty, post-conviction proceedings, and his case. Furthermore, she was present when an attorney from CCRC-Middle attempted to speak with Mr. Hernandez-Alberto about his case and tried to get him to sign legal documents, to no avail. She is the only one of the three doctors who has any information with regard to Mr. Hernandez-Alberto's understanding of the adversary nature of the legal process and collateral proceedings, his appreciation of the range and nature of possible penalties, and his ability to disclose facts pertinent to post-conviction proceedings.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the circuit court improperly dismissed Hernandez-Alberto's postconviction proceedings. The case should be remanded with directions to reinstate the proceedings, re-evaluate the defendant's competency in light of the considerations raised herein, or for such other relief as this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, or by overnight courier, to all counsel of record and the Defendant on this ___ day of August, 2011.

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MARK S. GRUBER
Florida Bar No. 0330541
Maria Perinetti
Florida Bar No. 0013837
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

Copies furnished to:

Katherine Blanco
Assistant Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, FL 33607-7013

Steven H. Malone, P.A.
Second Floor, Flagler Plaza
1217 South Flagler Drive
West Palm Beach, Fl. 33401

Pedro Hernandez-Alberto
DOC # T28329
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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MARK S.GRUBER
Florida Bar No. 0330541
Maria Perinetti
Florida Bar No. 0013837
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

Counsel for Appellant