IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-2471

PEDRO HERNANDEZ-ALBERTO,

Appellant,

v. **CAPITAL POSTCONVICTION CASE**

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

CCRC filed a timely but unverified motion for postconviction relief along with a motion to determine competency pursuant to Rule 3.851(g) and *Carter v. State*, 706 So.2d 873 (Fla.1997) (*Carter* motion). After obtaining mental status evaluations and conducting competency hearings, the court ultimately found the defendant to be competent. That started the clock ticking for him to file a verified pleading. He never did. The court rejected repeated requests by CCRC to conduct a *Durocher* hearing to determine whether the defendant understood the consequences of his course of conduct. The motion filed by CCRC on the defendant's behalf (as amended several times) was dismissed with prejudice.

Appellant generally relies on the arguments presented in the initial brief. Those arguments are related. They are:

ARGUMENT I

THE COURT ERRED BY DISMISSING THE CASE.

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.

The Appellant argues here that the lower court erred by dismissing with prejudice the motion for postconviction relief that had been filed on his behalf by CCRC. Mr. Hernandez-Alberto refused to sign a verification of the motion (or anything else for that matter), despite repeated efforts by counsel, assisted by mental health experts and to some extent the court, to get him to do so. The State argues that a verification is required by Rule 3.851 as well as by this Court's case law in e.g. *Gorham v. State*, 494 So.2d 211 (Fla. 1986) and *Groover v. State*, 703 So.2d 1035 (Fla. 1997). CCRC offers a number of arguments here: first, that the postconviction court erred when it found Hernandez-Alberto to be competent, and that a verification is not required from an incompetent person, next, that the absence of a verification should not prevent the court from considering claims that do not require the defendant's input, and finally that the court should not have dismissed the case with prejudice without first conducting a hearing pursuant to *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993) and Rule 3.851(i). CCRC's contention is that, assuming that the defendant is competent, the case should be remanded, a *Durocher* hearing should be conducted, and, in the almost certain event that Hernandez-Alberto indicates his continuing intention to challenge the judgment and sentence, that the proceedings should continue as if a verification

had been signed.

Florida recognizes a due process right to competency in capital postconviction cases. *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1998) (recognizing a right to postconviction competency, but requiring defendants to meet the threshold requirement of showing specific factual matters at issue that require competent consultation with counsel before a competency hearing is granted).[1]

The particular circumstances of this case set it apart from the rest. For whatever reason – undersigned counsel argues it is because of continuing incompetency – the defendant has become fixated on refusing to sign anything his lawyers ask him to sign. This is not a case like *Trease v. State*, 41 So.3d 119 (Fla. 2010), where the Court found that a volunteer who has waived his postconviction counsel and proceedings after a *Durocher* hearing has since changed his mind. Hernandez-Alberto has never shown any interest in becoming a volunteer. There

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[1] See also *People v. Owens*, 564 N.E.2d 1184, 1189-90 (Ill. 1990) (holding that claims will only be suspended if the defendant can show that postconviction representation requires personal communication between the lawyer and the defendant). Wisconsin, a non-death-penalty state, has recognized a statutory right to competency in state postconviction claims in the noncapital context. *State v. Debra A.E.*, 523 N.W.2d 727 (Wis. 1994) (recognizing the due process right of a defendant to bring postconviction claims after regaining competency if certain claims were excluded from the first petition).

has never been a *Durocher* colloquy. It also is not like *Slawson v. State*, 796 So. 2d 491 (Fla. 2001) where this Court rejected an argument that postconviction claims which already had been presented to the trial court and adjudicated should be considered notwithstanding the defendant's waiver. Slawson expressly waived postconviction appeals and counsel. There is no express waiver here.

Although the lower court felt bound by the language contained in *Scott v. State*, 464 So.2d 1171 (Fla.1985), *Gorham*, and *Groover*, the situations presented in those cases were significantly different. Both *Scott* and *Gorham* involved arguments about what form the verification should take and what if anything might be implied by a defendant admitting to personal knowledge of the factual matters contained in the pleadings. This Court explained what a verification meant. "In its briefs filed both in *Scott* 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. . . ." *Gorham*, 494 So.2d at 212. In *Groover*, the Court held that "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. . . ." The Court added this clarification after having already denied relief on the substance of Groover's claims. Here, the court's dismissal with prejudice effectively terminated the postconviction proceedings without there being any consideration of the substance of Hernandez-Alberto's postconviction claims.

The requirement of a verification does not have any constitutional or jurisdictional implications. "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." *Stevens v. State*, 947 So.2d 1227, 1228 (Fla. 2d DCA 2007; 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"). "The verification requirement "means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect." Section 92.525(4), Florida Statutes (2009). *Scott* and *Gorham* made it clear that the verification implies merely that the client knows as much of the results of the postconviction attorney's factual investigation as the attorney, not that he is in any position to know more.

The need of a verification in this case is also affected by the fact that the

court re-appointed CCRC over the defendant's objection pursuant to *Indiana v. Edwards*, 128 S.Ct. 2379 (2008). The transcript of the hearing after the court had relieved CCRC pursuant to *Faretta* and given Mr. Hernandez-Alberto time to file his own postconviction motion for relief reads as follows:

> THE COURT: Well, since you were here before, the only thing I've gotten from you is something that came into me within the last couple days, and it's entitled "A Motion to be Heard and/or Motion for a Hearing". Did you write that yourself?
> MR. HERNANDEZ-ALBERTO: Yes, I write it.
> THE COURT: And in this motion, you're asking me to bring you back here so that you can have a meeting with the prosecutor and settle the case, basically, is what you're asking for. Does that sound familiar?
> MR. HERNANDEZ-ALBERTO: Yes.
> THE COURT: And you haven't made any progress at all on an actual motion for post-conviction relief under 3.851; you haven't even started such a motion. Is that right?
> MR. HERNANDEZ-ALBERTO: No, because here, no one give assistance, what I needed, so I could --
> MR. HERNANDEZ-ALBERTO: The person that is a lawyer who work in law library, give me the assistance necessary for here writing something for me. Where me no understand what he writed for me. That way, the motion got to be the right, appropriate information that's necessary in law.
> THE COURT: Are you referring to --
> MR. HERNANDEZ-ALBERTO: It's a lot.
> THE COURT: Are you referring to another inmate that you think is going to help you. Is that what you're asking; is that what you're telling me?

> MR. HERNANDEZ-ALBERTO: The people who work in law libraries.
> THE COURT: Another inmate. Not a lawyer, an inmate, right?
> MR. HERNANDEZ-ALBERTO: Yes.

PC-R XXXV, 312.

The court subsequently re-appointed CCRC. This is an excerpt from the proceeding where it did so:

> Mr. Hernandez- Alberto, so why don't you go ahead and explain to me, what's happened in the last 90 days or so, since I last saw you.
> MR. HERNANDEZ-ALBERTO: Your Honor, you may permit? I want to take -- make a request to you, Your Honor, is possible make this (indiscernible) put a stop the abuse the State has with me in jail or in prison. It's my request today, first, you put a stop, please, the abuse causes too much pain to me, to my body, my soul, my back, my head, too, with this electric system causing injury in my body. . . . But my request first is please put a stop to the prison and jail, this abuses, because have injury in my head. Look. Can you see closely?
> THE COURT: Mm-hmm (affirmative). No, no, no. Stay there; stay there. . . .

PC-R Vol. XXXVI 322-23. Things went on like that for a while, then:

> THE COURT: Have you done anything to prepare a postconviction motion; do you have anything on a piece of paper you can show me?
> MR. HERNANDEZ-ALBERTO: I got the Constitution United States, only here, with me. . .
> THE COURT: Okay. And is that the only thing you

> have to show me?
> MR. HERNANDEZ-ALBERTO: I know this relation are value for me, if for this purpose my request is return the benefit of the grand jury, guilty to not guilty, As my request, you permit me explain more -- more well. I can explain a little more, because here it say in the Constitution of the United States, no -- it say shall not be (indiscernible), the --
> THE COURT: All right. So, if I'm clear, --
> MR. HERNANDEZ-ALBERTO: -- public trial.
> THE COURT: -- when I had you here before; it's been what, 90 days or so was the last time? What was the date? Does anybody have that down; about 90 days?
> MR. HERNANDEZ-ALBERTO: Yes, approximately.
> THE COURT: And I took you through *Faretta*, and I gave you the right to handle this yourself, --
> MR. HERNANDEZ-ALBERTO: Yes.
> THE COURT: -- and since that time, the only thing you're telling me is that you're being shocked in your cell, and you've got a copy of the United States Constitution in front of you, and that's what you've done in the last 90 days, right?

Id. 324-26. The court then re-appointed counsel.[2]

Whether or not the lower court erred in ultimately finding that the defendant was competent, there is no present challenge to the postconviction court's finding that he at least falls in the "gray area between *Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat

[2] Death-sentenced appellants may not appear pro se in postconviction appeals. *Gordon v. State*, --- So.3d ---, 2011 WL 4596660, 36 Fla. L. Weekly S583 (Fla.

higher standard that measures mental fitness for another legal purpose" identified by *Indiana v. Edwards*. The *Edwards* court recognized that mental illness is not a singular category. "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Id*. at ----, 128 S.Ct. at 2386, 171 L.Ed.2d at 356. Consequently the Supreme Court held that the question of mental competence for self-representation "calls for a different standard" than the question of mental competence for assistance of counsel at trial. *Edwards*, 128 S.Ct. at 2386.

The concept of competency in capital sentencing has been described by various authorities as being, legal, medical, psychological, moral, social, or any almost any permutation of these descriptions. E.g. Barbara A. Ward, COMPETENCY FOR EXECUTION: PROBLEMS IN LAW AND PSYCHIATRY 14 Fla. St. U. L. Rev. 35, 48-49 (1986) ("Because competency for execution is a moral as well as medical and legal concept, the standard of competency for any legally relevant action must depend upon the basic policy or principle underlying the requirement that an individual be competent to perform or be exempted from that particular activity. Similarly, the rationale for the rule should determine the procedures for deciding whether a capital inmate is competent for execution. Before the level of

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Oct. 6, 2011).

due process to be accorded an incompetent capital inmate can be determined, it is necessary to know the purpose and significance of the exemption."). *Also see D'Arcangelo v. State*, 2011 WL 1376875 (Fla.2d 2011), which concerned the competency of a prisoner serving a life sentence to decide whether to proceed in postconviction when a "favorable result" could result in a new trial and a death sentence:

> [W]e note that the *Carter* opinion cited favorably to *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994) . . . . *Carter*, 706 So.2d at 876. In *Debra A.E.*, counsel for a noncapital postconviction relief petitioner requested a competency determination because he feared that his client was not competent to decide whether to proceed with her petition and possibly subject herself to a harsher, albeit noncapital, penalty. The Supreme Court of Wisconsin held that the petitioner was entitled to be competent in order to make that decision.
> Competency is a contextualized concept; the meaning of competency in the context of legal proceedings changes according to the purpose for which the competency determination is made. Whether a person is competent depends on the mental capacity that the task at issue requires. One task required of defendants during postconviction relief is to make the decision to proceed with or forego relief.
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> 523 N.W.2d at 732 (footnotes omitted). The court concluded that a defendant is incompetent to pursue postconviction relief "when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational

understanding." *Id*. (footnote omitted).

D'Arcangelo, supra.

The problem here is that, despite all of the competency evaluations, hearings and so on, there does not exist a clean finding that the defendant is competent to terminate postconviction proceedings. In other words, the court declined to address the issue of the defendant's competency to voluntarily, knowingly and intelligently make the decision which he was, in fact, making.

Florida's statutory scheme provides for the appointment of counsel in capital postconviction cases. It follows that capital postconviction counsel appointed under *Indiana v. Edwards* should be expected to comply with Fla. Stat §27.702 by "instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts . . . " *Id*. CCRC *did* institute a collateral action by filing the original *Carter* 3.851 motion and by subsequent amendments, but has been unable to "prosecute" the action. That leaves open the question, "What CCRC was appointed for?"

Likewise, the courts have long recognized that a defendant can forfeit his right to self-representation by obstructionist conduct. There is plenty of that here. Under the current legal regime, the one and only time that a defendant needs to participate in postconviction proceedings is the signing of a verification (*see*

Gordon, supra). If the position taken by the court and the State is right, that Mr. Hernandez-Alberto's refusal to sign a verification is purely the product of malingering and is not reflective of incompetency, then for that very reason he can be deemed to have forfeited his right to self-representation. CCRC submits that by so doing, at least in the absence of a *Durocher* inquiry, he has forfeited whatever right he may have to terminate the proceedings by refusing to execute a verification.

The postconviction motion to vacate filed by CCRC contains an *Atkins* mental retardation claim. *Atkins v. Virginia*, 536 U.S. 304 (2002); Claim VI, PC-R 171-73. The motion cited an IQ score of 63 obtained during the pre-trial mental status examinations. It alleges:

> Dr. Gerald Mussenden administered a WAIS in Spanish. The Defendant's score was 63, in the retarded range, which is 70 and below. An IQ score of 70 or below falls two standard deviations below the mean of intellectual functioning in this country, or in the bottom 2.2 percentile. . . . Dr Mussenden also administered a literacy test and found that the Defendant was "borderline literate at best." He tested at a first grade level and was functionally illiterate. Impairment of his social/ interpersonal skills is obvious from the record. . . . The Defendant's history is replete with significant limitations. His school records, interviews with family members, and department of corrections records reveal he had little or no personal independence and an utter lack of the ability

to understand social responsibility.

PC-R 171-73.

The trial court originally addressed mental functioning when it considered possible brain injury as a nonstatutory mitigating circumstance:

> Three expert witnesses, Drs. Mussenden, Berland, and Merin, were called to testify regarding the possibility that the defendant Hernandez-Alberto suffers from a brain injury resulting from a 1994 car accident. . . . Dr. Gerald Mussenden, a clinical psychologist, gathered information on the defendant through three structured interviews he conducted on the defendant in 1999. The doctor observed that the defendant became less and less cooperative with each corresponding interview. Dr. Mussenden testified that he suspects that the defendant suffers from a brain injury. The doctor also noted that the defendant has always complained of migraine headaches from the 1994 auto accident, despite the fact that the defendant has never sought medical attention for any brain injuries. . . . Dr. Mussenden attempted to conduct hard psychological tests to determine whether the defendant suffers from brain damage. The Defendant, however, refused to cooperate and take those tests, which could have provided more quantitative results.

ROA Vol. III, 403-04.

The rule 3.851 postconviction motion, filed in 2006, relied on Fla.R.Crim.P.3.203(d)(4), (2004) which provided that postconviction prisoners should raise mental retardation as a bar to execution via a rule 3.851 claim for

postconviction relief. *See Amendments to Fla. R.Crim. P. and Fla. R.App. P.*, 875 So.2d 563 (Fla.2004).

The State, faced with the time limits of Rule 3.851, filed a response to the motion for postconviction relief in which it ***agreed*** to an evidentiary hearing on the mental retardation claim. PC-R Vol. II, 264-310. "An evidentiary hearing is appropriate on postconviction Claim #6 (mental retardation) and Claim #7 (IAC/penalty phase)." *Id*., State's Response to Amended Motion to Vacate, page 308 (conclusion). Nonetheless, there has never been a *Huff* hearing or Case Management Conference because the case never got beyond the competency and verification issues. There has never been a hearing on any of the claims asserted in the postconviction motion, including the *Atkins* claim.

Mental illness, intellectual disability or mental retardation, and counter indications that the defendant is malingering are not mutually exclusive. As argued in the accompanying habeas petition, the defendant's insistence on self-representation at trial does not suggest clever manipulation. It much more suggests irrational oppositional behavior. Likewise, Appellant submits that the State's minimization of some examples of the defendant's bizarre behavior, particularly the tourniquet incident, is not supported by the record. The record reflects that he was found in his cell after applying improvised tourniquets to his leg, requiring

medical intervention, not that he did so and called the guards to draw attention to his condition. See Dr. Taylor's March 22, 2007 Report, PC-R Vol. III, 406-17, which noted that: 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 . . . on November 30, 2006 that he was hoarding paper, wetting it, and placing it under his bed, which caused a bad odor . . January 3, 2007, Mr. Hernandez-Alberto was observed sleeping and wrapped in several layers of sheets. The prison records reflect that the defendant did not perform these acts for an audience. He declined mental health evaluations and consistently refused treatment.

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 Reply 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 17th day of January, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply 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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