IN THE SUPREME COURT OF FLORIDA

D. TODD DOSS, ET AL.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-1553

Case in 8th Judicial Circuit:
State of Fla. v. Ricardo Gill
#63-2002-CF-0028-A

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR UNION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This appeal is from an order citing to Fla.R.Crim.P. 3.851(i). Therefore, Appellant in this case (SC11-1553) was actually the Defendant's postconviction attorney in the state circuit court. This brief will refer to Appellant as such, or by proper name, e.g., "Mr. Doss." "Mr. Gill" or "Gill" designates the Defendant in the state circuit court. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The following references to the record will be used: "R" indicates the direct-appeal record; "SR," the supplemental record in the direct appeal; "PCR," the two-volume pleading-type record in this appeal; and "PCT," the one-volume transcript of the June 13, 2011, evidentiary hearing conducted pursuant to Fla.R.Crim.P. 3.851(i). Each symbol will be followed by any applicable volume number(s), then any applicable page number(s).

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case and Factual Timeline.

DATE	EVENT
2000	In another murder case, Mr. Gill, in essence, threatened to kill another person if a death sentence is not imposed in that case. (See SR2 150, 151)
7/20/2001	In the other murder case, Judge Morris sentenced Gill to life (R5 713-40), and Gill stated that he will ensure that the next Judge imposes the death sentence (See R5 695).
7/24/2001	Gill murdered Orlando Rosello by strangling him to death (See, e.g., R5 753, 763-4, 793, 796-801). The day prior to the murder (See R5 753, 755-56, 864), Gill had written a letter to a newspaper and the Circuit Court for case number 99-2277-CFA, stating that he "would not spend the rest of his life in prison for something I didn't do" and that he took the life of Orlando Rosello by strangulation and it was "cold, calculated, and premeditated manner without any pretense of moral or legal justification (R5 861-62); he disclaimed mental mitigation using statutory language (R5 862).
7/24/2001	Gill told FDLE that he killed Orlando Rosello to ensure that he is sentenced to death this time. (R5 764-65, 770-73, 791-92)
7/31/2001	Gill wrote a letter blaming Judge Morris for his (Gill's) murder of Orlando Rosello (SR2 141) and stating that "[i]t only took four days, just like I promised," again cross-referencing his "promise" in his prior letter, describing in detail how he strangled Rosello (SR2 141).
2/6/2002	Indictment charging Gill with Murder First Degree of Orlando Rosello (R1 1-2), **resulting in this case**.
4/15/2005	**Competency hearing** at which trial court noted that three experts previously found Gill competent, and indicated that Gill is competent. (R18 282-83) Gill

DATE	EVENT
	said there will be no defense at trial. (R18 331)
5/5/2005	Attorney Salmon told the Court that he does not see any issues of **competency** that still need to be raised (SR1 62); trial court found that Gill is **competent** to waive his right to counsel, directed that Gill represent himself, and appointed Salmon as standby counsel (SR1 65-66).
7/8/2005	Gill told trial court that he wished "to enter a plea today" (R19 335-36); when the Judge offered Gill more time to think about it, Gill responded, "I've already thought about it" (R19 336-37); after standby counsel discussed what additional steps could be taken on Gill's behalf (R19 342-44), Gill indicated that is "not what I want" and cited to the Florida Rules of Criminal Procedure (R19 344-45); trial court conducted an extensive plea colloquy (R19 337-56), including renewing the offer of counsel (R19 337-38; see also R19 377-78); Gill stated that he is thinking clearly and pleading guilty is what he wants to do regardless of whether he is on medication (R19 350-51); ultimately, trial court accepted plea and adjudicated Gill guilty (R19 355-56); prosecutor provided factual basis in support of the charge (R19 356-57); Judge again found Gill **competent** (R19 362); Judge conducted a colloquy concerning Gill's right to a penalty-phase jury and Gill waived jury (R19 373-78); prosecutor introduced various documents in support of aggravation and mitigation (R19 378-402); prosecutor (R19 402-403) and Gill 404-405) argued for the death sentence.
6/30/2006	Gill affirmed his prior waivers of counsel and guilt-phase jury trial and penalty-phase jury trial (R21 464-65); trial court enumerated findings of aggravating and mitigating facts and sentenced Gill to death (R21 467-89).
2009	Gill v. State, 14 So.3d 946 (Fla. 2009), rejected a number of appellate issues and affirmed Gill's conviction and death sentence; among its holdings, Gill, 14 So.3d at 960-62, upheld "the trial court's finding of **competency**" and upheld Gill's plea of guilty. (A copy of this Court's 2009 Gill opinion is attached to this brief)
2010-2011	Several postconviction motions and responses. (See PCR1)

DATE	EVENT
4/11/2011[1]	Motion by Gill's postconviction counsel, Mr. Doss, that included a request that Gill's competency be examined. (PCR1 155-56)
4/26/2011	Gill's pro se motion in which he indicated that he did not want any direct-appeal or postconviction counsel, that he has been "continuously found competent," that actions by his postconviction counsel are a waste of time and tax dollars (PCR1 148-49); this motion attached and referenced postconviction counsel's 4/11/2011 motion (Compare PCR1 149 with PCR1 152-53).
5/2011	Trial court's order, pursuant to Fla.R.Crim.P. 3.8519i) appointing experts to evaluate Gill's competency and scheduling an evidentiary hearing. (PCR1 158-60)
5/2011-6/2011	Written reports from Dr. Brian Cooke (PCR1 170-75) and Dr. Harry Krop. (PCR1 178-80)
6/30/2011	Evidentiary hearing concerning Gill's competency and his requests that postconviction counsel be discharged and postconviction proceedings be terminated. (PCT 1-72)
7/2011	Post-evidentiary hearing memoranda of the State (PCR1 183-95) and Mr. Doss (PCR2 197-204).
7/2011	Trial court's order finding that Gill's testimony at the evidentiary hearing "supports the competency findings of the experts," dismissing postconviction proceedings, and discharging postconviction counsel, Mr. Doss (PCR2 206-207), resulting in this appeal pursuant to Fla.R.Crim.P. 3.851(i)(8). (A copy of the order is attached to this brief)

Because Gill v. State, 14 So.3d 946 (Fla. 2009), on direct appeal, detailed background pertinent to this appeal, it is attached to this brief.

The current appeal concerns the trial court's 2011 finding of Mr. Gill

[1] This motion was apparently was not actually filed in Union county until 5/11/2011 because it was initially sent to Alachua County. (See clerk's stamps at PCR1 155)

competent to dismiss postconviction proceedings. On direct appeal, Gill, 14 So.3d at 953, discussed the five experts appointed "to examine Gill for competency," each "concluding that Gill was competent to proceed," and the prior evaluations "in which Gill was also found competent to proceed." The competency evaluations "included an in-depth review of Gill's medical records and records of his early mental health history." This Court noted that Gill does have "a long history of mental illness and behavioral difficulties." Gill, 14 So.3d at 953-54 (footnote omitted), continued:

> The trial court held a hearing on June 18, 2004, at which it received testimony from Dr. Clifford Levin, Ph.D., **Dr. Harry Krop, Ph.D.**, and Dr. Tonia Werner, M.D., who all opined that Gill was competent to proceed, although no competency order was entered at that time. Pursuant to one of Gill's motions to discharge appointed counsel, a *Nelson* hearing was held on February 18, 2005, but the court refused to discharge counsel, finding counsel was not ineffective. Gill requested a *Faretta* hearing at that time but the trial court refused without a further competency evaluation.

Gill, 14 So.3d at 954, quoted Gill addressing the trial court and noted the trial court's finding Gill competent:

> > THE DEFENDANT: Your Honor, you might as well make your decision today because I'm not speaking to another expert. If you can't make your decision, this case will never end. With or without [defense counsel] Mr. Salmon's assistance, I will implicate myself in a crime that will result in my death. So you might as well make the decision today.
>
> The trial court then ruled that Gill was competent to proceed in the case based on the prior reports of the three doctors who testified on June 18, 2004. Although Gill was still represented by counsel, he immediately asked the court to allow him to enter a guilty plea. ...

Because Gill ultimately pled guilty to this murder, this Court "'scrutinize[d] the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily,'" Gill, 14 So.3d at 959 (quoting Ocha

v. State, 826 So.2d 956, 965 (Fla2002)). Conducting a review of Gill's competency as a foundation for examining Gill's plea, Gill, 14 So.3d at 960, discussed additional background pertinent to the issue here:

> In this case, before accepting Gill's plea, the trial court received numerous reports resulting from examinations by five different doctors, including three psychologists, a forensic psychiatrist, and a neuropsychiatrist. The examinations were generally governed by Florida Rule of Criminal Procedure 3.211(a)(2), which provided that in considering the issue of competence to proceed, the examining experts should consider and include in their reports the following:
>
> > (A) the defendant's capacity to:
> >
> > (i) appreciate the charges or allegations against the defendant;
> >
> > (ii) appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant;
> >
> > (iii) understand the adversary nature of the legal process;
> >
> > (iv) disclose to counsel facts pertinent to the proceedings at issue;
> >
> > (v) manifest appropriate courtroom behavior;
> >
> > (vi) testify relevantly; and
> >
> > (B) any other factors deemed relevant by the experts.
>
> Fla. R.Crim. P. 3.211(a)(2). Based on these reports, and testimony of the experts, the trial court found Gill competent to proceed.
>
> Gill's determination of competency has not been challenged, and, based on the record of competency reviews, reports, and testimony presented in this case, we conclude that the trial court's finding of competency is supported by competent, substantial evidence and is sufficient to establish Gill's competence to enter a knowing, intelligent and voluntary plea. Nor has any abuse of discretion been shown in the trial court's ruling. *See Boyd v. State*, 910 So.2d 167, 187 (Fla. 2005) ('The competency determination must be based on all relative evidence, and the decision will stand absent an abuse of discretion.'). Accordingly, our review moves to examination of the plea colloquy that occurred prior to the trial court accepting Gill's guilty plea.

Gill, 14 So.3d at 961-62, then discussed details concerning the validity of Gill's plea and concluded:

> Accordingly, because Gill was competent and was fully advised as required by rule 3.172 of all the rights he would be waiving and of the risk that he would be given the death penalty-and he confirmed that he understood all these rights and that his plea was freely, knowingly and intelligently given-we conclude that there was a sufficient basis for the plea and conviction, both in the factual basis supporting the plea and in the inquiry conducted by the trial court.

As listed in the Timeline, supra, after this Court's affirmance on direct appeal, the trial court appointed mental health experts to examine Gill (PCR1 158-59) due to Gill's desire to discharge postconviction counsel and dismiss postconviction proceedings and due to "competency ... [being] raised in accordance with the provisions of Fla.R.Crim.P. 3.851(i), and the Court having reasonable grounds to believe that the defendant may be incompetent and that experts should be appointed." (PCR1 158). The trial court subsequently noted: "These experts were not appointed due to any belief by this Court that Defendant was incompetent." (PCR2 206)

Pursuant to the trial court's order, Dr. Cooke (PCR1 170-177) and Dr. Krop (PCR1 178-82) filed their respective reports. Dr. Cooke's report indicated that he conducted extensive reviews of records, including multiple prior mental evaluations, but Dr. Cooke was not able to reach a final conclusion regarding competence because Gill refused to see the doctor. Dr. Kropp's report indicated that he had seen Gill numerous times in the past, related some prior history, discussed his recent observations of Gill, and concluded that Gill is competent.

At the beginning of the June 30, 2011, evidentiary hearing, Defendant Gill explained to the trial court that he refused to see Dr. Cooke because Dr. Cooke had someone with him when he tried to interview Gill at the

prison. Mr. Gill said that the trial court's order did not include someone accompanying Dr. Cooke while he interviewed Gill (PCT 4-6; accord PCT 59-60). Gill agreed to see Dr. Cooke during a recess if Dr. Cooke was alone. (PCT 5-6) Gill also agreed to see Dr. Krop again. (PCRT 5-6)

After about an hour-long court recess (See PCT 7), court reconvened and Dr. Cooke testified that he interviewed Gill during the recess and was able to provide an opinion on Gill's competency. (PCT 11) The trial court overruled postconviction counsel's objection to Dr. Cooke's qualifications "in this proceeding" (PCT 13-14), and Dr. Cooke explained his background and training in forensic and general psychiatry (PCT 7-13) and background for his opinion that Gill is competent (See PCT 14-27).

Dr. Krop also testified at the June 30, 2011, evidentiary hearing. (See PCT 28 et seq.) Dr. Krop indicated that he had seen Gill several times since 2000, including in May 2011 (PCT 29-30) and in the morning of the evidentiary hearing (PCT 31-32). He did no new testing of Gill in 2011 because he did not think it was necessary. (PCT 33-34) Dr. Krop opined that Gill is competent. (PCT 30-34) Dr. Krop indicated that he had informally spoken to some correctional officers, who indicated that Gill's behavior had "changed for the better over the last few years" (PCT 36). Dr. Krop said that DOC records would not affect his opinion of Gill's "current mental status" (PCT 36-37) Dr. Krop testified that Gill is rational and not delusional. (PCT 39-42) Dr. Krop indicated that --

> this is **the most mature, most responsible**, the most logical, and the most intelligent, in terms of his means of communication that I've ever seen.

(PCT 37)

The trial court examined Mr. Gill at the evidentiary hearing. (PCT 45 et seq.) Mr. Gill confirmed his understanding of his legal situation and that he wished to discharge counsel. Gill explained why he did not wish to go forward with postconviction proceedings. (PCT 46-56) In response to questions from the prosecutor, Mr. Gill detailed his conviction, sentence, date of birth, education, and bilinqual ability. (PCT 56-57) Gill discussed his motive for terminating postconviction proceedings and more about his understanding of the process. (PCT 57-64) Gill repeatedly said that he will not change his mind. (PCT 63-67)

By order dated July 12, 2011, Judge Cates found and reasoned that he appointed the two experts not because he had "any belief ... that Defendant was incompetent"; that the "Defendant's testimony supports the competence finding of the experts"; and that at the hearing, "Defendant continued to express his desire to end the post-conviction process and discharge counsel, even after being given the opportunity to revoke that request." As a result, the order dismissed postconviction proceedings and discharged Mr. Doss as Mr. Gill's postconviction counsel.

Mr. Doss appeals the trial court's July 12, 2011, order.

SUMMARY OF ARGUMENT

Mr. Gill has validly exercised his option to cease postconviction litigation. The trial court properly honored Mr. Gill's decision.

In previous proceedings, Mr. Gill was been examined, re-examined,... by mental health experts, and the trial court found Mr. Gill competent to

stand trial and to plead guilty, and this Court affirmed the trial court on direct appeal. The trial court, through the same judge who observed Mr. Gill in prior proceedings, has again observed Mr. Gill and again considered mental health experts' opinions. The trial court, again, merits affirmance.

ARGUMENT

OVERARCHING STANDARD OF APPELLATE REVIEW.

Rulings of the trial court[2] are purportedly the subject of an appeal. Accordingly, this Court recently re-affirmed the "Tipsy Coachmen" principle that a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). See also Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Tipsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("... affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was

[2] Even in cases of fundamental error, the focus is on a trial court ruling, that is, one that should have been rendered.

appropriate, but for a different reason").

CLAIM I: WAS THE TRIAL COURT UNREASONABLE IN FINDING THE DEFENDANT COMPETENT TO WAIVE COLLATERAL COUNSEL AND POSTCONVICTION PROCEEDINGS? (IB 9-17, RESTATED)

A. Preservation.

The Initial Brief's issue statement (IB 9, 15) claims that United States Constitutional rights were violated due to insufficient psychological evaluations and an insufficient competency hearing. The Initial Brief does not demonstrate, and the State has not found, where in the record any constitutional claim was preserved below. (See, e.g., PCR2 197-203) Therefore, any constitutional claims were not preserved below. See, e.g., Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court … procedurally bars"); U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995)("raise-or-waive rule prevents sandbagging").

The initial Brief also asserts that the trial court's competency order erred because it was based upon an erroneous ruling that Dr. Cooke was qualified as an expert (IB 9-13) and because Dr. Cooke and Dr. Krop did not have necessary medical and DOC records (IB 13-17). Mr. Doss did discuss

these matters with the trial court (See PCT 13-14, 68-70), but even though it appears that Mr. Doss had obtained records (See PCR2 199-200; see also PCT 71), he did not proffer them under seal, thereby failing to preserve that sub-claim. See, e.g., Baker v. State, 71 So.3d 802, 816 (Fla. 2011)("proffer is necessary to preserve a claim" concerning admissibility; collecting cases and explaining rationale for the proffer requirement).

B. The Standard of Appellate Review.

The standard of appellate review for a trial court's postconviction competency/discharge order is abuse of discretion: "an abuse of discretion standard applies when reviewing the trial court's determination regarding a capital defendant's competency to waive collateral counsel and proceedings," Slawson v. State, 796 So.2d 491, 502 (Fla. 2001). The standard of review for evidentiary rulings, to the degree that this Court decides that they were preserved, is also abuse of discretion. See, e.g., Hojan v. State, 3 So.3d 1204, 1210 (Fla. 2009)("This Court] review[s] a trial court's decision to admit evidence under an abuse of discretion standard"; quoting Hudson v. State, 992 So.2d 96, 107 (Fla. 2008).

"Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Ocha v. State, 826 So.2d 956, 963 (Fla. 2002)(quoting Trease v. State, 768 So.2d 1050, 1053 n. 2 (Fla. 2000), quoting Huff v. State, 569 So.2d 1247, 1249 (Fla.1990))

C. The Trial Judge's Order and Rulings.

The trial court's order, at issue here, found and reasoned:

> 2. Rule 3.851(i) requires that the court hold a hearing on a defendant's motion that is filed under this rule. And, given post-conviction counsel's assertion in his motion for extension of time that Defendant could be incompetent, this Court appointed two experts (Dr. Harry Krop and Dr. Brian Cooke) to evaluate Defendant prior to the evidentiary hearing on his motion. These experts were not appointed due to any belief by this Court that Defendant was incompetent.
>
> [3]. Defendant's testimony at the evidentiary hearing supports the competency finding of the experts. *See* The State's Written Memorandum at 7-8.
>
> [4]. During the *Durocher* hearing[3], Defendant continued to express his desire to end the post-conviction process and discharge counsel, even after repeatedly being given the opportunity to revoke that request.
>
> Therefore, it is ORDERED AND ADJUDGED that:
>
> I. The post-conviction proceedings in this case are hereby DISMISSED.
>
> Defendant's Motion for Post-Conviction Relief was previously DISMISSED on February 21, 2011 [due to the omission of the Defendant's oath, dismissed without prejudice at that time, PCR1 133].
>
> II. D. TODD DOSS, Esquire, is hereby DISCHARGED as post-conviction counsel in the above-captioned case.

(PCR2 206-207)

In the evidentiary hearing, the trial court also ruled that Dr. Cooke was qualified as an expert. (See PCT 13-14)

The trial court also refused to order the release of Mr. Gill's medical records:

---

[3] Durocher v. Singletary, 623 So.2d 482(Fla. 1993).

> THE COURT: I'm not going to order it unless you [Mr. Gill] agree that it should be reviewed. I respect your revocation of your release. That's your responsibility. It's your right. And not to mention the fact that this -- we've been over your medical history a number of times, except for the operation you had at the State prison after I sentenced you.

(PCT 70) Mr. Gill re-confirmed that he did not want his records released. (See PCT 70)

The State contends that Appellant has failed to demonstrate that the trial court's findings and rulings are unreasonable as an abuse of discretion.

D. Appellant has failed to demonstrate that the trial court's competency finding was unreasonable.

1. The presumption of Mr. Gill's competency continues and actually has been buttressed.

The presumption the Mr. Gill is competent is buttressed in this case by substantial background.

In 2005, Mr. Gill's competency had been exhaustively litigated and, after reviewing several experts' evaluations, the trial court found Mr. Gill competent. (See R18 282-83; SR1 62; SR1 65-66; R19 362). Moreover, on direct appeal this Court expressly upheld this Court's finding of Mr. Gill as competent. See Gill v. State, 14 So.3d 946, 960 (Fla. 2009)("based on the record of competency reviews, reports, and testimony presented in this case, we conclude that the trial court's finding of competency is supported by competent, substantial evidence and is sufficient to establish Gill's competence to enter a knowing, intelligent and voluntary plea").

Therefore, at the evidentiary hearing on June 30, 2011, Mr. Gill was presumed competent. See Durocher, 623 So.2d at 484 ("A presumption of

competence attaches from a determination of competency to stand trial"); Dessaure v. State, 55 So.3d 478, 482-83 (Fla. 2010)("Once a defendant has been deemed competent, the presumption of competence continues throughout all subsequent proceedings"); Slawson v. State, 796 So.2d 491, 503 (Fla. 2001)("presumption of competency that attaches from trial"); Sanchez-Velasco v. State, 702 So.2d 224, 228 (Fla. 1997)("judge's determination of competency was also supported by the fact that Sanchez-Velasco arrived at the hearing with a presumption of competence attributable to the previous determinations of his competency"); see also, e.g., Rodriguez v. Pino, 634 So.2d 681, 685 (Fla. 3d DCA 1994)("a person is presumed to be competent unless the evidence shows otherwise").

This Court's appellate holding elevates Gill's competency status to the law of the case unless and until a significant change of circumstances has been demonstrated. See, e.g., Fla. Dep't of Transp. v. Juliano, 801 So.2d 101, 106 (Fla. 2001) ("Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision[s] are based continue to be the facts of the case"); Henry v. State, 649 So.2d 1361, 1364 (Fla. 1994)(under "'law of the case' doctrine[,] ... all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice"). There has been no showing of an exception to law of the case.

The trial court conducting competency proceedings does not negate or otherwise diminish the presumptions of Mr. Gill's competency. Instead, the trial court acted in an abundance of caution based upon the representations of Appellant, Mr. Doss. (See PCR1 155-56; PCR1 206-207). Thus, during the competency hearing, the trial court relied upon previously "going over your [Mr. Gill's] medical history a number of times, except for the operation you had at the State prison after I sentenced you." (PCT 70) No evidence was presented that indicated that the surgery had any material negative impact on Mr. Gill's competency.

Moreover, the competency hearing affirmatively supports Mr. Gill's competency and the trial court's finding of competency.

Dr. Krop, who has very extensive experience in competency examinations, was very familiar with Mr. Gill based upon previous examinations and proceedings. (See, e.g., R15 136). On May 25, 2011, Dr. Krop interviewed Mr. Gill for this competency hearing, and, by written report dated May 31, 2011, Dr. Krop found no indicia of incompetency (See Exhibit #1; PCR1 178-80). At the June 30, 2011, competency hearing, Dr. Krop's observations of Mr. Gill's demeanor and effect substantiated a conclusion that Mr. Gill is competent. (T 29-31) Dr. Krop testified:

> Q. ... [T]he opinion that you're rendering here today that's in line with your May 31st opinion?
>
> A. ... [C]ompetency is a present issue .... And I believe that I have sufficient information from my interview of Mr. Gill, as well as my past experiences with Mr. Gill. ... I'm in a position that I have an opportunity to make a comparison to Mr. Gill's behavior in the past. I don't know if you want to call it baseline behavior. But this is the most mature, most responsible, the most logical, and the most intelligent, in terms of his means of communication that I've ever

seen. He has been calm. He has been -- his affect was totally appropriate. He expressed anger and resentment in appropriate ways when I was talking to him. That hasn't always been the case.

I became a little concerned when I saw him speak out of turn in court, but I think he responded appropriately to and reacted appropriately to Judge Cates, who indicated that he would give Mr. Gill an opportunity to talk. And I think that's all Mr. Gill really wanted: Just an opportunity to communicate some of his wishes and desires.

...

Q Have you observed anything today that would in any way alter the opinion you reached when you authored your May 21st, 2011 report in which you have reached the opinion that Mr. Gill is competent?

A. No. To the contrary. I would say that everything that I have observed today and my own interaction with Mr. Gill would support my original contention that he is competent to proceed in all of the proceedings and deal with all of the issues that would be necessary in any type of post-conviction hearing.

(T 36-37, 31; accord Exhibit #1 pp. 2-3, PCR1 179-80)

Dr. Cooke also testified at the competency hearing. Having extensively reviewed documents and, on the morning of the hearing, interviewed Mr. Gill (PCT 10-11, 24-25), Dr. Cook also found Mr. Gill to be competent. For example, Dr. Cook testified:

THE COURT: Would you please tell us what the opinion is?

DR. COOK: It's my opinion with a reasonable degree of medical certainty that Mr. Gill does have -- that he is competent to -- to dismiss counsel and his right to appeals.

THE COURT: How did you arrive at that opinion?

DR. COOK: I arrived at it from conducting a psychiatric evaluation, assessing his current mental status, and examining his reasoning -- his rationale for why he wants to -- why he put forward this motion before The Court. And it was my opinion that throughout our interview, that he explained a consistent and rational explanation for why he wanted to do that. It did not appear that this was influenced by any psychiatric -- current psychiatric symptoms or distress. He was thinking coherently, logically. This was not influenced by any psychotic process, hallucinations, delusions. He

> did not appear depressed, and he was consistent with his explanations.
>
> ...
>
> His decision to dismiss counsel and not proceed with any further hearings appeared consistent within what he wanted to accomplish. That he did not -- that he does not want to spend the rest of his life in prison.

(T 13-14; see also Dr. Cooke's report at PCR1 170-77)

The trial court's order (PCR2 207) explicitly referenced Mr. Gill's testimony at the competency hearing. The trial court was able to personally evaluate Mr. Gill's demeanor during his testimony, as well as during the entire competency hearing. As such, Mr. Gill's presentation of himself and his testimony was compelling. Moreover, this was the same trial judge who had observed Mr. Gill in the proceedings in this case leading up to his plea of guilty and found Mr. Gill competent then.

At the 2011 competency hearing, Mr. Gill was consistently responsive, articulate, and emphatic that he wished to discharge postconviction counsel and end postconviction proceedings. His competency and knowing and voluntary intent was illustrated when he clarified one of his prior answers because he thought it could be interpreted to undermine his wishes. (See T 53-54) Consistent with the mental health experts' opinions of competency --

- Mr. Gill maintained appropriate courtroom demeanor at the June 30th proceeding (See PCT);
- Mr. Gill, through his responsive answers proves that he is intelligent, speaks English, and is articulate (See PCT 45-71);
- Mr. Gill's testimony that, in the postconviction proceedings, he wrote the Motion to Strike (PCT 56) is undisputed and proves that

he is intelligent, as the trial court previously observed (See "extremely intelligent" at R10 24; "an intelligent man" at R15 146), reads and writes English, and is articulate;

- Mr. Gill understood the meaning of the oath (PCT 55);
- Mr. Gill's testimony that he has a high school diploma (PCT 56) was consistent with evidence adduced at previous proceedings (R5 816);
- Mr. Gill accurately identified the prosecutor as representing the State (PCT 59-60);
- Mr. Gill accurately described the trial court's role in the case as the "decision maker" (PCT 60);
- Mr. Gill was oriented in terms of his location at the hearing (PCT 59);
- Mr. Gill was not under the influence of any chemical substance during the hearing, and he was not even on any medication at the time (PCT 57); and,
- Mr. Gill understood that he is forfeiting an opportunity to overturn his death sentence and conviction in state and federal courts (PCT 45-50, 61-63).

Based on the totality of Mr. Gill's answers while testifying on June 30th and the experts' opinions (PCT 25-26, 32), Mr. Gill had the "capacity to understand the adversary nature of the process and collateral proceedings," Fla.R.Crim.P. 3.851(g)(8)(B)(i), and the "ability to disclose to collateral counsel facts pertinent to the postconviction proceedings,"

Fla.R.Crim.P. 3.851(g)(8)(B)(ii).

Concerning the Durocher portion of the June 30th proceeding, Mr. Gill steadfastly indicated his wish to discharge postconviction counsel (PCT 46-47, 50, 52-54, 60, 64, 65-66), end all postconviction proceedings (PCT 46-47, 50, 51, 61-62, 63, 65-66), and subject himself to the death penalty at any time (PCT 19, 54, 62, 63).

Mr. Gill swore that he has not been promised anything or in any way threatened (PCT 60-61) and that his decision is entirely voluntary (PCT 61), and there has been no evidence of any promise or threat. Mr. Gill buttressed his intent by re-confirming that he is guilty of this Murder (PCT 47, 54-55) and that postconviction proceedings would be a waste of taxpayer's money (PCT 56-57).

Mr. Gill summarized his desire for the death sentence to be implemented:

> Q. ... Do you understand that if nothing further happens, if you don't -- if I discharge your attorney, and the case continues in its current posture, that the sentence of death will ultimately be imposed upon you?
>
> A. I -- it's already been imposed. It'd just be enacted. Acted out.
>
> Q. And enacted. There's nothing to stop it from being carried out.
>
> A. I understand that.
>
> Q. Is that your desire?
>
> A. Yes.
>
> Q. And your desire for that is stronger than it is to have any further legal proceedings on your behalf. Is that correct?
>
> A. Yes.
>
> Q. And stronger than having any further attorney representation.

> A. Yes. It's even stronger than July 20th of 2001, when I told Stan Morris, and it's even stronger than July 24th of 2001, when I committed the murder.

(PCT 54-55) July 20, 2001, was, in fact, the date that Judge Morris sentenced Mr. Gill to life in prison contrary to Mr. Gill's wishes (See R5 695), and July 24, 2001, 2001, was, in fact, the date that Mr. Gill killed the victim in this case (See, e.g., R5 753, 763-4, 793, 796-801).

At the competency hearing, Mr. Gill expressly rejected the prosecutor's recommendation that he not discharge postconviction counsel and not end postconviction proceedings. (PCT 63-64)

Mr. Gill's unhesitating and unequivocal wishes to cease all postconviction proceedings should continue to be honored.

2. The trial court rulings claimed on appeal as error are inconsequential to the competency determination as well as reasonable.

In view of the foregoing compelling evidence and judicial determinations in 2005 and 2009, further buttressed by the evidence in 2011, including Mr. Gill's demeanor and testimony and Dr. Krop's uncontested testimony, Appellant has failed to demonstrate that the trial court's competency rulings should be reversed. Any purported error was harmless. However, here there actually was no error at all.

Smith v. State, So.3d 473, 496 (Fla. 2009), explained the applicable text for the admissibility of an expert opinion:

> Section 90.702 governs opinion testimony by expert witnesses and provides that a witness can be qualified as an expert by knowledge, skill, experience, or training. §90.702, Fla. Stat. (2005). Whether a witness is qualified as an expert is largely a matter of discretion for the trial court. *See, e.g., Ramirez v. State*, 542 So.2d 352, 355 (Fla.1989) ('The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the

> trial judge, whose decision will not be reversed absent a clear showing of error.').

Here, the trial court correctly ruled that Dr. Cooke was qualified to give an opinion concerning Mr. Gill's competency and that Mr. Gill's wishes to maintain his medical records as confidential should continue to be honored.

Dr. Cooke's credentials include --

- specialization in forensic psychiatry (PCT 8); training was initiated at Yale (PCT 8, 9);
- a medical degree from St. Louis University School of Medicine, then general psychiatry residency training at University of Maryland Shepherd Prep (PCT 9);
- licensed to practice medicine in Florida and Conencticut (PCT 10);
- his prior experience testifying, including previously giving an opinion on competency to waive counsel once (PCT 9-10):

  > I've testified -- when I was doing my training in Conneticut, I testified in competency to stand trial hearings across the state of Conneticut. I testified in an insanity hearing in Conneticut. I've testified in several civil proceedings in Florida, and a case that started off as an insanity, and then became something else in the Tampa area. I've also testified in guardianship hearings and Baker act, civil commitment hearings in Alachua.
  >
  > (PCT 9);
- devoting about half of his time to clinical psychiatry, evaluating and treating patients about half to forensic work for courts and attorneys (PCT 8);
- has seen approximately 100 forensic cases (PCT 8); and,

- current employment at the University of Florida (PCT 8).

While Dr. Cooke had not previously testified many times in capital cases concerning postconviction proceedings (See PCT 12), this is not the test. Indeed, every expert begins testifying as an expert by testifying the first few times.

Appellant also complains (IB 10-11 that Dr. Cooke was not sufficiently versed in Florida law. However, Dr. Cook was not testifying as a law expert, but rather, as a mental expert. He was educated and trained as such, and his training was even supplemented with experience. He was qualified, and the trial court's ruling was reasonable.

Appellant discusses (IB 12) Chavez v. State, 12 So.3d 199 (Fla. 2009), but there, unlike here, there the area of expertise was a specialization within law, not mental status. Moreover, there, this Court also indicated that the evidence at issue would not have affected the outcome, like here.

Huggins v. State, 889 So.2d 743, 764-65 (Fla. 2004), upheld the admissibility of the opinion of the medical examiner concerning the victim's mental state. Here, Dr. Cooke was trained in, and practiced in, not only medicine but forensic psychiatry. He was more than qualified to testify concerning Mr. Gill's mental state. See also Grenitz v. Tomlian, 858 So.2d 999, 1002 (Fla. 2003)(scope of "neuropsychologist" expert's opinion; collecting cases; citing Bishop v. Baldwin Acoustical & Drywall, 696 So.2d 507, 510 (Fla. 1st DCA 1997) (observing that, although psychologists are competent to testify as to the existence of organic brain damage, they “cannot testify that an accident resulted in physical injury

causing organic brain [damage]"); GIW Southern Valve Co. v. Smith, 471 So.2d 81, 82 (Fla. 2d DCA 1985)(observing that a psychologist may give opinion testimony as to an existing mental condition and existing organic brain damage)).

Appellant also complains (IB 13-14) that Dr. Cooke and Dr. Krop did not discuss other records that could be relevant to the competency determination and that these records could disclose competency-relevant incidents. However, this overlooks that the experts, as such, grounded their opinions on substantial information, including, their recent interviews of Gill (PCT 29-30, 11, 15-17). Compare Ocha v. State, 826 So.2d 956, 961-63 (Fla. 2002)(affirmed trial court's failure to order further testing even though experts would have preferred additional testing).

Moreover, Dr. Krop has a long history evaluating Mr. Gill (See, e.g., PCT 29-30; PCR1 178-79), and Dr. Cooke reviewed extensive documentation of prior evaluations part of the foundation for his opinion (PCT 25-26; PCR1 170-75).

Mr. Gill should be afforded his right to the privacy of his medical records, especially given the extensive history of this case, many mental evaluations supporting competency, an upheld finding of competency that presumptively continues to this day, and no evidence proffered to the trial court that the records would mandate a different result. See restrictions on access to health records at Health Insurance Portability and Accountability Act (HIPAA); 45 CFR § 164.512; §456.057; 395.3025, Fla. Stat.

It was Appellant's burden to prove a basis for concluding that Mr. Gill was incompetent, and Appellant produced no such evidence. Instead, Appellant attempts to second-guess Mr. Gill's motive for waiving postconviction proceedings. This is not the test. It is not for anyone else to judge Mr. Gill's values or motives. Durocher v. Singletary, 623 So.2d 482, 484 (Fla. 1993), the seminal case, succinctly stated the underlying policy:

> Regardless of our feelings about what we might do in a similar situation, we cannot deny Durocher his right to control his destiny to whatever extent remains.

Therefore, "[r]egardless of our feelings about what we might do in a similar situation, we cannot deny Durocher his right to control his destiny to whatever extent remains."

Here, there was no evidence (**NONE**) that Mr. Gill was delusional or hallucinating. Instead, for example, Dr. Cooke testified that Mr. Gill "does not want to spend the rest of his life in prison" and wants to move "forward" towards executing the sentence. (PCT 15) Thus, "He wants to die before his mother dies so that she can properly take care of his remains and bury him in Orlando next to his maternal grandmother." (PCT 18-19)

Appellant contends (IB 15) that a motive to see his parents is "irrational." Far from it, it totally made sense that Mr. Gill would want to "see his family until he was executed," (PCT 18), which would also mean that his mother would survive him to ensure the burial that Mr. Gill wanted. Moreover, there was no evidence that any arguable hope of accelerated or intensified visitation was in any way irrational or

groundless.

Appellant also argued that Mr. Gill did not cooperate with his postconviction counsel. Indeed, this is additional corroboration that Mr. Gill wants to end these proceedings. Thus, Alston v. State, 894 So.2d 46, 58 (Fla. 2004) (discussing Sanchez-Velasco v. State, 702 So.2d 224 (Fla.1997)), indicated that dissatisfaction with counsel does not undermine implementing Mr. Gill's request to discharge counsel and end postconviction proceedings. And, Durocher, 623 So.2d at 484, indicated that the defendant there refused to meet with postconviction counsel, yet it remanded for hearing "to determine if he understands the consequences of waiving collateral counsel and proceedings," id. at 485. In other words, Durcoher can still be competent even though he refuses to cooperate with counsel. See also Slawson v. State, 796 So.2d 491, 494-95, 502-503 (Fla. 2001)(unverified postconviction motion alleged that "Slawson would not meet with counsel"'; "circuit court did not abuse its discretion in finding Slawson competent to waive collateral counsel and collateral proceedings"); Hojan v. State, 3 So.3d 1204, 1211 (Fla. 2009)(collecting cases regarding defendant's "right to make choices in respect to ... handling of their cases").

As Hunter v. State, 660 So.2d 244, 248 (Fla. 1995), rejected a claim of "error in the denial of his renewed motion to determine competency" because there was "nothing materially new" that changed the previous competency determination, here Mr. Gill's legal competency continues, and indeed, is corroborated through additional expert testimony and through his

demeanor and testimony to the trial court. The trial court merits affirmance.

Here, there was a full and fair determination of Mr. Gill's competency grounded upon extensive evidence presented over multiple phases of this case. Honoring Mr. Gill's request to terminate postconviction proceedings violates no rule or constitutional provision.

In conclusion, because there has been no proof of a change in material and probative circumstances, this Court's affirmance of the trial court's prior finding of Mr. Gill competent is the law of the case, to which the trial court's competency ruling essentially adhered, and to which this Court should now adhere.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's order re-finding Mr. Gill competent and dismissing postconviction proceedings and discharging postconviction counsel.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on January 17th, 2012:

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CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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IN THE SUPREME COURT OF FLORIDA

D. TODD DOSS, ET AL.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-1553

APPENDIX TO
ANSWER BRIEF OF APPELLEE

A. Trial court's Order Dismissing Post-Conviction Proceeding and Discharging Post-Conviction Counsel and Directing the Court Reporter to Transcribe the June 30, 2011 Hearing (PCR2 206-208) (the order under review here).

B. Gill v. State, 14 So.3d 946 (Fla. 2009)(upholding prior trial-court finding of competency).

A

B