IN THE SUPREME COURT OF FLORIDA
CASE NO. SC12-875

JAMES P. BARNES.
Appellant,

v.

STATE OF FLORIDA
Appellee,

ON APPEAL FROM THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT FOR BREVARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Barnes lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Barnes accordingly requests that this Court permit oral argument.

CITATION KEY

The record on direct appeal of Mr. Barnes' trial shall be cited (FSC ROA Vol. # p. #). The record of Mr. Barnes' Post-Conviction hearings shall be cited as (PCR Vol. # p. #).

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On April 18, 2006, the defendant was indicted for the murder of Patricia Miller. On April 27, 2006 at the First appearance; Mr. Barnes waived counsel and demanded a speedy trial. On May 2, 2006, the State announced it was seeking the death penalty. Mr. Barnes asserted his right to self-representation. A Faretta hearing was conducted by the trial court. Mr. Barnes entered a guilty plea as

charged and waived an advisory jury recommendation. (See FSC ROA Vol. I p. 12-62).

On January 22-26 a penalty phase was held. Mr. Barnes refused to present mitigation. (See FSC ROA Vol. III p. 393-FSC ROA Vol. V p. 803). On February 7, 2007, the trial court appointed Sam Baxter Bardwell as court counsel to develop mitigation. On February 9, 2007, Mr. Barnes objected to Mr. Bardwell preparing mitigation. (See FSC ROA Vol. V p. 847).

On November 16, 2007 a Spencer hearing was held. (See FSC ROA Vol. VII p. 1085- Vol.VIII p. 1294). On December 13, 2007, a sentencing hearing was held. (See FSC ROA Vol. VIII p.1355-1432). On direct appeal, Mr. Barnes was denied relief. Barnes v. State, 29 So.3d 1010 (Fla. 2010). Mr. Barnes' petition for writ of certiorari was denied on October 4, 2010. On September 21, 2011, the appellant filed his 3.851 Motion for Post-Conviction Relief. On October 17, 2011, the post-conviction court appointed two doctors--Dr. Danziger and Dr. Bernstein--to conduct competency evaluations upon motion by counsel for the appellant. Their evaluations found Mr. Barnes competent to proceed. The post-conviction court subsequently found Mr. Barnes to be competent to proceed. The trial court's Order denying the appellant's 3.851 Motion for Post-Conviction Relief was filed on March 14, 2012. This appeal follows.

SUMMARY OF ARGUMENTS

Issue I. As soon as the trial court and standby counsel became aware that Mr. Barnes was suffering from borderline personality disorder and that he had been Baker Acted in the past, Fla. R.of Cr. P. 3.210 should have been followed, and a determination of competency should have been made. Mr. Barnes' Due Process rights were violated, as the trial court erred in allowing Mr. Barnes to enter a plea of guilty to capital murder, without first sua sponte ordering a competency evaluation. Mr. Barnes entered a plea of guilty to the most serious of charges while possibly being incompetent to proceed.

Issue II. The defendant has been incarcerated since 1997. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Since the defendant may well be incompetent at the time of his execution, his Eighth Amendment rights against cruel and unusual punishment will be violated. An evidentiary hearing is not required for this claim as it is being preserved for federal review.

THE STANDARD OF REVIEW

All of the issues discussed in the brief, should be reviewed under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999),

The claims are a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

CLAIM I

MR. BARNES' RIGHTS UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING AMENDMENTS TO THE FLORIDA CONSTITUTION WERE VIOLATED DURING THE GUILT AND PENALTY PHASES OF HIS TRIAL. STANDBY TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE FOR A DETERMINATION OF COMPETENCY TO PROCEED AND THE TRIAL COURT ERRED IN NOT CONDUCTING A HEARING TO DETERMINE IF MR. BARNES WAS COMPETENT TO PROCEED.

The Lower Court's Error

In denying this claim, the lower court held in part:

> As to trial counsel's alleged failure to sua sponte order a competency hearing, this issue had to be raised on direct appeal and therefore, is procedurally barred when raised for the first time in Defendant's motion for postconviction relief. Nelson v. State, 43 So. 3d 20 (Fla. 2010). (See lower court's March 14, 2012 Order, at p. 13).
>
> The Defendant cannot make the requisite showing of incompetence for a substantive claim of incompetency as shown by the record and cited in the preceding paragraphs of this Order. The Defendant consulted with standby counsel and talked with court counsel. No counsel, prosecutor, or judge had any doubt the

Defendant was not competent as shown by the record. Judge Davidson found the Defendant "extremely competent" to represent himself after learning from the Defendant that he had been Baker Acted in 1980, had been diagnosed with borderline personality disorder, and hearing Defendant's comments regarding mitigation evidence. Judge Davidson had the opportunity to observe the Defendant on several occasions and numerous *Faretta* inquiries were conducted throughout the case because the Defendant continued to reject offers of counsel. (See lower court's March 14, 2012 Order, at p. 13-14).

Not only did this Court, standby counsel, and the prosecutor, observe no reasonably grounds of incompetency, the Supreme Court of Florida specifically found the guilty plea knowing, voluntary, and intelligent. The alleged bases for incompetency were all at the same hearing on May 2, 2006. The "reasonable grounds" preferred in the Rule 3.851 motion were refuted by the record. In the subject case, there were no indications of Defendant's incompetence, distinguishable factually from the cases cited by the Defendant in his postconviction motion. The record shows that the Defendant was not only competent, but also intelligent. There was no reason for a competency evaluation.
The Supreme Court of Florida findings also dispose of the Defendant's claim on page nineteen of the subject motion he was incompetent to enter the plea. (See lower court's March 14, 2012 Order, at p. 14-15).

Raising the claim of standby counsel's ineffectiveness does not overcome the procedural bar on the procedural competency claim. Medina v. State, 573 So.2d 293, 294-95 (Fla. 1990). James Barnes represented himself during the guilt and penalty phase in this case. A defendant who represents himself has the entire responsibility for his own defense even if he has standby counsel and cannot

> later claim that the quality of his defense was a denial of effective assistance of counsel. Behr v. Bell, 665 So.2d 1055, 1056-57 (Fla. 1996). (See lower court's March 14, 2012 Order, at p. 15).

The lower court erred.

On May 2, 2006 the following testimony occurred:

> BY THE COURT:
> Q. Okay. Mr. Barnes, we are here in case number 05-2006-CF-014592. There has been an indictment charging you in count one with first degree premeditated murder which is a capital offense.
> THE COURT: Is the State seeking the death penalty in this case?
> MR. HUNT: Yes, your Honor,
> BY THE COURT:
> Q. Okay. Count two is burglary of a dwelling with an assault or battery. It's a first degree felony punishable by life. Count three: Sexual battery by use or threat of deadly weapon for a victim 12 years of age or older. It's a life felony. Count four: Sexual battery by use of threat of deadly weapon for a victim 12 years of age or older which is a life felony. And count five: Arson of a dwelling which is a first degree felony punishable by up to 30 years in prison. Do you understand what you're charged with?
> A. Yes, I do.
> Q. Okay. Do you understand – and there's going to be a lot of do you understands. But I really – before I can go to any next step I have to be clear in my mind that you understand what I'm saying and what we're doing.
>
> If at any point you don't understand what I'm saying because you didn't hear what I'm saying or the words aren't clear to you, you don't know the meaning of the words or you have any questions, you need to stop

me and let me make sure you do understand. Are we in agreement with that?
A. I understand.
Q. Okay. Now, Mr. Barnes, I have present in court with me today I have Michael Hunt who's from the State Attorney's Office and Susan Garrett from the State Attorney's Office. There's a gentleman sitting behind them. And I'm not sure who that gentleman is.
MR CIZMADIA: I'm an investigator. I work for the State Attorney's Office.
THE COURT: And your name, please?
MR. CIZMADIA: My first nam's John and my last name's Cizmadia C-I-Z-M-A-D-I-A.
THE COURT: Okay. I also have from the Public Defender's Office – at the request of my office we asked the Public Defender's Office to have an experienced attorney present. And I've got Phyllis Riewe present. Ms. Riewe, would you spell your name for the record; the last name?
MS RIEWE: R-I-E-W-E.
BY THE COURT:
Q. Okay. And Ms. Riewe is here as I'm going to – I'm going to designate her as your standby counsel until – and along the way at any point if yo want me to appoint Ms. Riewe I will stop and have her appointed if you qualify for a Public Defender.

And if you have any questions along the way you can ask her those questions. Because I – it's crucial that you understand what's going here – going on here. And it's crucial that you have at least a standby attorney who can advise you at any point. Do you understand that?
A. Is that the discretion of the Court?
THE COURT: Okay. Ms. Riewe, how long have you been with the Public Defender's Office?
MS. RIEWE: This most recent time since 2002.
THE COURT:
Okay. And how long have you been admitted to the practice of the law?

MS. RIEWE: Since 1978.
THE COURT: Okay. And what division are you in the Public Defender's Office?
MS. RIEWE: Regular felony division.
THE COURT: Okay..
BY THE COURT:
Q. Mr. Barnes – well, let me – to the best of your knowledge has an attorney been appointed to represent you?
A. No, ma'am. And I have a defendant's waiver of representation by counsel written with me. I've already filed one with the State and Clerk of the Court. And since this is capital felony and they're seeking the death penalty, I figured I'd give the State Attorney a copy right now and the clerk if you'd let me.
Q. Okay. At first appearance or initial appearance were you offered an attorney?
A. Yes, ma'am. I waived counsel.
Q. Okay. Now, you have an absolute right to have an attorney to represent you, a competent attorney to represent you if you cannot afford an attorney. Do you understand that?
A. Yes, I do.
Q. Okay. Can you afford an attorney?
A. No, ma'am. I'm going to waive – waive counsel.
Q. Well, it's two different questions. One is can you afford an attorney?
A. No, ma'am.
Q. Okay. Do you have any assets whatsoever?
A. No, ma'am.
Q. Okay. And knowing that I would appoint an attorney to represent you do you wish to represent yourself?
A. Yes, I do.
Q. Okay. Tell me why you wish to represent yourself.
A. *I was under the impression that the Court would be aware that when I came here and was arraigned under the indictment that I would offer a plea at that time. And I would also waive the advisory jury and let the Court*

sentence me as they so choose either to life or death. (Emphasis added)

Q. Okay.

A. This is an 18-year-old case. So it's not like –

Q. Well, you know, I – I understand, you know – I understand that you know a lot about this case in the sense that, you know, it's 18 years old and the State has information, you have information.

But I need to have a record here.

A. Yes, ma'am.

Q. So that anyone that picks this record up and reads it understands what happened here today and can see or understand that everybody knew – we're all on the same page. Okay? So bear with me.

A. Yes, ma'am.

Q. Okay. Are you presently incarcerated?

A. Yes, I am.

Q. And you're incarcerated in Sharpes?

A. I'm in – at this time I was just transferred back from Florida State Prison about a week ago. I'm at Sharpes at this time.

Q. Okay. And you're incarcerated in Florida State Prison for what charge?

A. Capital murder.

Q. Okay.

THE COURT: Mr. Hunt, I'm going to give you an opportunity to kind of give me some background.

MR. HUNT: Your Honor, Mr. Barnes was arrested in the summer of 1997 for the murder of his wife Linda Barnes and was indicted I believe early in 1998, indicted on a Tuesday. And through negotiations with Randy Moore of the Public Defender's Office and David Silverman of the Public Defender's Office who worked as co-counsel on behalf of Mr. Barnes, the State agreed upon consultation with the family to waive the death penalty in that case.

Mr. Barnes had been incarcerated previously and had sufficient aggravators the State believed to go

forward at that time. However, we made an agreement with Mr. Barnes through his counsel to waive the death penalty.

He was indicted on a Tuesday, pled before Judge Moxley on Friday and was sentenced to life in prison. And That's where he's been since then.

The incident that's before the Court today occurred April 20th of 1988. Mr. Barnes was a suspect at the time in 1988 for this murder. I need not get into the facts unless the Court desires at this point. But he was a suspect. It wasn't until 2005 when we had sufficient evidence to go forward and finally present the case to the Grand Jury upon the date of the indictment which was April 18th of 2006.

So subsequent to that, wrote Mr. Barnes, advised him what had occurred and sent him a copy of the indictment because the had requested that previously, requested that he be advised. So that's what brings us before the Court today.

THE COURT: And then has he been in contact with the State Attorney's Office indicating that he wished to come here and enter a plea of guilty today?

MR. HUNT: Yes, your Honor.

THE COURT: Okay.

BY THE COURT:

Q. Mr. Barnes, how old are you?

A. 44.

Q. Okay. And you understand that you have the right to represent yourself.

A. Yes, I do.

Q. Okay. And again, I've asked you this but I'm going to ask you again. It's my understanding that you've requested to represent yourself in this case before the Court today.

A. Yes, I have. And I've given you a written waiver now.

Q. Okay. And how far did you get in school?

A. 13 years.

Q. Did you get through the first year of college?
A. With continuing education units, yes, ma'am.
Q. Do you read, write the English language?
A. Yes, I do.
Q. Have you ever taken any legal courses?
A. Yes, I have. But my mechanics of the law probably isn't what's in question here right now. I mean, I've had enough dealings with the court system to know where I stand right now today.
Q. Do you have experience, education or knowledge about criminal proceedings?
A. Yes, I do.
Q. Tell me what experience, education and knowledge you have about criminal proceedings.
A. I've taken couple of criminal justice courses and I'm a certified law clerk if that helps you at all.
Q. Where did you take these courses?
A. Certified law clerk I did at would have been Hillsborough Correctional Institution.
Q. What year?
A. Nineteen... 1980.
Q. What – what makes you a certified law clerk? Who gave you that designation? Or what entity gave you that designation?
A. The Florida Department of Corrections has an accredited course for people who seek to be a certified law clerk.
Q. So since 1980 you've been a certified law clerk as designated by the Department of Corrections?
A. Yes, ma'am.
Q. Okay. And in that capacity do you – are you given special responsibilities or duties?
A. Well, of course. What they're basically looking for is somebody who can not only read but they can put down on paper a thought. I believe that I qualified under those auspices.
Q. Any other legal experiences you've have or any other experience you've had in the legal system other than the

fact that you've had your own cases and you've had – you became a certified law clerk in 1980? Anything else that gives you experience in the law?
A. Well, I've worked in the law library off and on for 20-something years. I mean, this isn't new to me.
Q. Okay. You know that. But I don't.
A. Okay.
Q. So I need – I need a record.
A. Okay.
Q. Do you believe that you' re mentally alert now?
A. Absolutely.
Q. Have you ever watched a complete criminal trial in the courtroom?
A. Yes, I have.
Q. Which criminal trials have you watched?
A. Mine.
Q. And what year was that?
A. Complete jury trial that I went through was in Oklahoma, Tulsa, Oklahoma, was in 1985.
Q. And you were charged with what?
A. Let's see. Assault and – aggravated assault and disorderly conduct and destruction of private property.
Q. Did you represent yourself in that case?
A. No, ma'am.
Q. And you had a lawyer.
A. Yes, I did.
Q. Okay. Do you believe that you're mentally alert right now?
A. Yes, I do.
Q. Okay. Within the last 24 hours have you taken any substance that would affect your judgment?
A. No, ma'am.
Q. Have you taken any pills, drugs or alcohol?
A. No, ma'am.
Q. Okay. Do you or have you ever suffered from any mental disorder, defect, disease or derangement?
A. No, ma'am.

> Q. Has anyone ever told you; a psychologist, a psychiatrist, a social worker, a licensed mental health worker that you have any type of mental illness?
> A. No, ma'am. I'm borderline personality disorder based on somebody's, you know, matrix. I've read the diagnostic and statistical manual. I – I don't believe that there's any reason to think that I don't have the cognitive ability to understand what's going on right now, ma'am.
> Q. Have you ever been treated for mental illness?
> A. No, ma'am.
> Q. Have you ever been in a mental health facility?
> A. Observation. I was Baker Acted once. One time.
> Q. When was that?
> A. That was about 1990.
> Q. And when you were Baker Acted did you just remain at the facility for three days? Or did they send you off –
> A. Three days.
> Q. (Cont'd.) To a State hospital?
> A. Three days. (FSC ROA Vol. I p. 11-23)

At that point, the trial court proceeded to conduct a standard Farretta hearing. Florida Rule of Criminal Procedure 3.210 (b) provides:

> If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition. Which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing. Attorneys for the State and the defendant may be present at the examination.

Mr. Barnes contends that as soon as the trial court and standby counsel became aware that Mr. Barnes was suffering from borderline personality disorder and that he had been Baker Acted in the past, Fl.R.of Cr. P. 3.210 should have been followed.

Mr. Barnes' intention to accept the death penalty was clear when he stated to the court:

> "I was under the impression that the Court would be aware that when I came here and was arraigned under the indictment that I would offer a plea at that time. And I would also waive the advisory jury and let the Court sentence me as they so choose either to life or death." Id.

This unusual statement should have in and of itself, prompted the trial court to order a mental examination. This was never done.

Later in the proceedings the trial court voiced its intention to appoint Muhammed counsel to aid the trial court in uncovering mitigation. The following testimony occurred:

> THE COURT: I'm going to appoint an attorney. Okay? I need to follow the statute. The statute says I must consider any mitigating circumstances. That – that attorney doesn't – is not being appointed for you. It's being appointed for the Court.
> A. That's ...
> I don't know how to put into words how you bifurcate that. I just don't understand how you can say the Court's appointing an attorney for the Court. I mean,

> the State Attorney is the State's Attorney. I mean, that's his job to do that.
>
> If you're trying to appoint somebody to protect me or defend me, I don't need that. And I don't want it. (FSC ROA Vol. I p. 58-59).

The above cited passage reveals two things. First, Mr. Barnes was unaware that the State's Attorney does not investigate and present mitigation; meaning he was unaware of the role of the State Attorney's office. Second, Mr. Barnes did not want anybody to protect or defend him.

Further in the proceedings, Mr. Barnes made clear that he did not want any mitigation and wanted to proceed directly to sentencing. The following testimony occurred on August 17, 2006:

> THE DEFENDANT: I understand where everything is right now. I'm going to make a point here. I never got the other test results when they took the vehicle swaps, all right, in May. That concerned me, and I was wondering why.
>
> What also concerned me, that they are claiming that they had enough evidence to prosecute me in 1998, and they didn't. All right? There is a lot of people involved here.
>
> What concerned me even more, was I pled guilty as soon as I came here. Now, I'm not trying to do anything other than resolve this; all right? I understand what the severity is of the sentencing, that the State is seeking the death penalty. That's a big deal.
>
> The problem that I have is that if we are going to spend all this time, all these monies now, sitting here waiting in jail or filing motions or trying to find new ways to make people work, I'm going to show you that

I'm a fighter, because you basically said to me by giving me the Muhammed case, that I'm not going to just let you just sit there and not offer mitigating circumstances. I'm prepared right now for the sentencing phase.

I'm prepared. Obviously, you are not. Obviously, the State is not. So, if you people are not prepared to have the sentencing phase right now, because you set me off to January 22nd, then I'm going to utilize the Court and anything else I can to show you that I'm not trying to commit State assisted suicide. It's not happening.

So, that's all I can say about that. If you want to set the sentencing phase this morning and start it next week, that's fine with me. I'm prepared. But, if we are going to wait until January 22nd to start the sentencing phase, which there's a possibility of getting set off again, then every step of the way I'm going to file as many motions that I can. I have 17 right now that I can file, death penalty motions that I can file, death penalty motions that I can file. I think there's a total of 22 or 25 that I can file.

But, I'm not prepared to do that because I want to see what the Courts are going to do. So, it's on you and it's on the State. If you people want to set a sentencing phase in the near future I'm prepared to just forego all this. But, if you are going to set me off, I'm going to show you every step of the way I know what's going on. I'm lucid. I'm clear. I understand what's going on, and I'm going to fight. Not that I'm trying to say I'm any less guilty. But I'm going to show you that hey, here I am too. I'm right in the midst of it.

This is about a resolution of a case and I am the first, and that is the defendant in this case. So, I'm giving you no reason to appoint independent counsel. I won't do it. But, you know, like I said, this is a courtroom and in this case I'm pro se and there's lots of things I can do to, you know, tie up the time. If you want to go to the sentencing phase forward, fine. If you don't hey, you know, I'll see you next month in another motion.

> THE COURT: Okay.. Ms. Garrett, do you object to a DNA?
> (FSC ROA Vol.I p. 170-172).

Subsequently to this proceeding, Mr. Barnes did file numerous motions attacking the constitutionality of the death penalty.

Mr. Barnes' intentions were clear from the initial appearance; he was going to enter a plea and proceed directly to sentencing for this crime.

Legal argument

In Hamblen v. State, 527 So.2d 800 (Fla. 1988), the Florida Supreme Court was faced with a similar factual situation. After a grand jury indicted Hamblen for first-degree murder, his public defender moved for a psychiatric examination. Both doctors reported that Hamblen was competent to stand trial and was legally sane at the time of the offense. Upon receiving news of the doctors' reports, Hamblen asked the court to revoke the appointment of the public defender and allow him to represent himself. He simultaneously announced his intention to plead guilty. The trial judge conducted a hearing according to the requirements of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.ed.2d 562 (1975), and Goode v. State, 365 so.2d 381 (Fla. 1975), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979) to determine Hamblen's fitness for self-representation. Id. at 801.

The reasoning of the Court is explained in this manner:

> While we commend Hamblen's appellate counsel for a thorough airing of the question presented by this issue, we decline to accept his logic and conclusions. We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all *competent* (emphasis added) defendants have a right to control their own destinies. Id.at 804.

The trial court in Hamblen did not allow the defendant to fire his attorneys and enter a plea until after two doctors had been appointed and a formal determination of competency had been made. Such a plan protected Mr. Hamblen's Due Process rights, and recognized that "death is different".

In Mr. Barnes' case, the trial court or standby counsel should have followed Florida Rule of Criminal Procedure 3.210 (b) and in the spirit of Hamblen appointed two doctors for a formal determination of competency.

The trial court and standby counsel had reasonable grounds to believe that Mr. Barnes may not have been competent to proceed based on his comments that he suffered from borderline personality disorder and had been Baker Acted in the past. Furthermore, Mr. Barnes' contention that it was the State's Attorney job of

presenting mitigation indicated that Barnes did not possess a clear understanding of the adversarial process.

In Pridgen v. State, 531 So.2d 951 (Fla.1988), The Supreme Court of Florida held:

> However, Pridgen's competency to stand trial by the time of the penalty proceedings is another matter. In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the United States Supreme Court held that due process was violated when the court failed to suspend the proceedings for psychiatric evaluations when the defendant who had previously exhibited bizarre behavior shot himself in the foot on the second day of the trial. The Court said:
> "The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even none of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestation and subtle nuances are implicated. ... When a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial". *Id.* at 180-81, 95 S.Ct. at 908.
>
> Florida courts have also held that the determination of the defendant's mental condition during trial may require the trial judge to suspend proceedings and order a competency hearing. *Scott v. State,* 420 So.2d 595 (Fla. 1982); *Holmes v. State*, 494 So.2d 230

> (Fla. 3d DCA 1986). *See Lane v. State,* 388 So.2d 1022 (Fla. 1980) (finding of competency to stand trial made nine months before does not control in view of evidence of possible incompetency presented by experts at hearing held on eve of trial). Id. at 954.

In Mr. Barnes' case, Mr. Barnes demonstrated a lack of understanding of the adversarial process when he assumed that the prosecutor would present mitigation. A competency evaluation should have been ordered at that time.

In Hill v. State, 473 So.2d 1253 (Fla. 1985), The Florida Supreme Court held:

> The trial court failed to properly address the issue of whether the evidence necessitated a hearing on Hill's competence to stand trial. We totally reject the contention of the state that there was no evidence before the court that was sufficient to raise a bona fide doubt as to Hill's competency to stand trial. We find that any objective evaluation of the facts in this case establishes beyond question that a hearing on Hill's competency to stand trial was constitutionally required and that the failure to do so deprived him of the right to a fair trial. As was determined in *Drope* and *Robinson*, this type of competency hearing to determine whether Hill was competent at the time he was tried cannot be held retroactively because, as was stated in *Drope* , "a defendant's due process rights would not be adequately protected" under that type of procedure. 420 U.S. at 183, 95 S.Ct. at 909. Id. at 1259.

Pursuant to Hill, a determination of competency cannot be used retroactively. Therefore, the only proper remedy would be for Mr. Barnes to

withdraw his plea and after a proper determination of competency; be allowed to proceed.

In Drope v. Missouri, 420 U.S. 162, 174 95 S.Ct. 896, 904 (1975) 43 L.Ed. 103, the United States Supreme Court held:

> In the present case there is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court prior to trial and thereafter. Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry into petitioner' competence to stand trial, denied him a fair trial. In such circumstances we believe it is 'incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured'. Id. at 174-5 * 905.

In Mr. Barnes' case, the evidence possibly relevant to Mr. Barnes' mental condition was before the trial court. Mr. Barnes' contention that the State's Attorney was somehow obligated to present mitigation to the trial court instead of Muhammed counsel should have indicated to the trial court that a competency evaluation may be in order. Also possibly relevant to Mr. Barnes's mental condition was Barnes' own self-diagnosis, with the statement: "I'm borderline personality disorder based on somebody's, you know, matrix. I've read the diagnostic and statistical manual."

Furthermore, the admission by Mr. Barnes that he had been Baker Acted in the past is also relevant to his mental condition. As in Hamblen, a competency evaluation should have been ordered before Mr. Barnes was allowed to enter his plea. Relief is proper.

In Dusky v. United States, 362 U.S. 402,403 80 S.Ct. 788,789 4 L.Ed.2d 824 (1960), the Supreme Court of the United States held:

> In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent. It is so ordered. Id. at 403 *789.

Pursuant to Dusky, Mr. Barnes should be allowed to withdraw his plea and a formal determination of competency be held.

In James v. Singletary, 957 F.2d 1562, 1571,(11thCir. 1992), the court distinguishes the issue of competency in this manner:

> In sum, there are two kinds of incompetency claims. First, a petitioner may allege that the trial court denied him or her due process by failing sua sponte to hold a competency hearing. This is a *Pate* claim. Second, a petitioner may allege that he or she was denied due process by being tried and convicted while incompetent. This is a substantive claim of incompetency. To put it

> bluntly, a *Pate* claim is a substantive incompetency claim with a presumption of incompetency and a resulting reversal of proof burdens on the competency issue. Id. at 1571-2.

Mr. Barnes contends that it is now the burden of the State to prove that he was competent at the time of trial in regards to Claim I.. The James court went on to hold:

> In order to make out his substantive incompetency claim, petitioner need not, and does not allege any error on the part of any state actor. For example, petitioner does not complain of the trial judge's failure (1) to appoint an expert to assess petitioner's competency to stand trial, (2) to conduct a competency hearing, either sua sponte or upon request, or (3) to declare him incompetent as a result of a competency hearing. Similarly, petitioner does not complain of defense counsel's performance. Nowhere does petitioner assert that defense counsel failed (1) to request an expert for the purpose of assessing petitioner's competency, (2) to request a competency hearing or otherwise to alert the trial court to the petitioner's potential incompetency, (3) to notice indications of petitioner's incompetency, or (4) to investigate indications of petitioner's incompetency. This absence of any allegation of error committed by a state actor differentiates substantive incompetency claims from other challenges deriving from a defendant's alleged incompetency, including *Pate* claims and Sixth Amendment claims of ineffective assistance of counsel.
>
> The Fourteenth Amendment prohibits states from denying defendants due process of law by trying them while incompetent. Unlike other amendments, including the First and Sixth Amendments, the Due Process Clauses of the Fifth and Fourteenth Amendments do not establish an affirmative right. Instead, they prohibit the states from engaging in certain activities, namely

depriving persons of their life, liberty, or property, in a certain manner namely without due process of law.

It has long been established that the conviction of an incompetent defendant denies him or her the due process of law guaranteed in the Fourteenth Amendment. *See Pate*, 383 U.S. at 378, 86 S.Ct. at 838 (citing *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956) (per curiam opinion summarily vacating the judgment and remanding to the district court for a competency hearing)). A defendant's allegation that he or she was tried and convicted while incompetent therefore claims that the state, by trying him or her for and convicting him or her of a criminal offense, has engaged in certain conduct covered by the Fourteenth Amendment, namely deprivation of life, liberty, or property, in a way prohibited by the Fourteenth Amendment, namely without due process of law. Accordingly, in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980), the United States Supreme Court recognized that "a state criminal trial, a proceeding initiated and conducted by the State, is an action of the State within the meaning of the Fourteenth Amendment."*Id*. At 343, 100 S.Ct. at 1715.

A substantive incompetency claim implicates the Fourteenth Amendment's prohibition against deprivations of life, liberty, or property without due process of law by identifying a specific deprivation. While such a claim assigns responsibility for the deprivation to the state, it need not assign responsibility for the absence of due process to the state as well. To try an incompetent defendant makes for an undue process regardless whether or not any person, state actor or not, could or should have diagnosed the defendant's incompetency. This absence of due process blossoms into a constitutional violation if it occurred during a proceeding in which the state deprived a person of life, liberty, or property. In short, a substantive incompetency claim based on the Due

> Process Clause of the Fourteenth Amendment requires an allegation of state action, not of state misconduct.
>
> We now return to the case at hand. According to precedent in our circuit, a petitioner is entitled to an evidentiary hearing on a substantive incompetency claim if he or she "presents clear and convincing evidence to create a 'real, substantial and legitimate doubt'" as to his or her competency. [FN17] *Fallada*, 819 F.2d at 1568 n.1 (quoting *Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986)). A defendant is considered competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and [if] he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4L.Ed.2d 824 (1960). Id. at 1572-74.

Mr. Barnes' Due Process rights were violated when the trial court allowed him to enter a guilty plea, without first determining that he was competent via a competency hearing. The lower court erred by failing to make a determination of competency. Mr. Barnes also was denied Due Process as he was allowed to enter a plea while possibly being incompetent. Relief is proper.

The lower court further erred by failing to grant Mr. Barnes an evidentiary hearing on this claim. The reasoning for granting an evidentiary hearing is detailed in Allen v Butterworth, 756 So.2d 52 (Fla. 2000):

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of the circuit courts to

grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system Id. At 66,67.

The Florida Supreme Court frequently relies on procedural defaults to preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 So. 2d 512, 519-20, 525 (Fla. 1998). The refusal to consider such issues increases the risk that the innocent or the legally undeserving will be executed. It diminishes a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not" Furman, at 313 (White, J., concurring).

Mr. Barnes is entitled to an evidentiary hearing on this claim. Relief is proper.

CLAIM II

MR. BARNES' 8TH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

An evidentiary hearing is not required for this claim as it is being preserved for federal review.

In accordance with Florida rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(if Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp.2d 1037 (D. Ariz. 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S.Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998) (respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1999) (the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE: Provenzano, No. 00-13193 (11th Cir June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it. [citations omitted]
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244 (b)(2), and that such a claim cannot meet either of the exceptions set out in that provision. Id. at pages 2-3 of the opinion.

Given that federal law requires, that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and in order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, the filing of this claim.

The defendant has been incarcerated since 1997. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as the defendant may well be incompetent at time of

execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Barnes never received a fair adversarial testing of the evidence. Confidence in the outcome is undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Barnes requests this Honorable Court to:

1. Vacate the convictions and sentence of death.
2. Order an evidentiary hearing.
3. Allow Mr. Barnes to withdraw his plea of guilty and proceed to trial or reenter the guilty plea since a formal determination of competency has been recently determined.

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by Email service to Carol Dittmar, Assistant Attorney General on this_____, day of September, 2012.

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CERTIFICATE OF COMPLIANCE

HEREBY CERTIFY that a true copy of the foregoing Initial Brief was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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