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No. SC17-878

IN THE

SUPREME COURT OF FLORIDA

MILO A. ROSE,

Appellant

v.

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, FLORIDA
Lower Tribunal No(s).: 521982CF008683XXXXNO

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STATEMENT OF THE ISSUE

I. Whether the Circuit Court complied with the directives of Florida Rule of Criminal Procedure 3.851(i) and properly determined that the Appellant knowingly, intelligently, and voluntarily sought to dismiss his capital collateral proceedings and to discharge his capital collateral counsel?

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

Appellant Milo Rose is currently incarcerated under an impending sentence of death imposed in the Sixth Judicial Circuit of Florida, in and for Pinellas County. (R. 449.) Mr. Rose was charged with the murder of Butch Richardson. (R. 449.) Trial commenced on June 28, 1983 before the Honorable Susan F. Schaeffer. (R. 449.) Phase One of the trial concluded on June 30, 1983 with a jury finding Mr. Rose guilty as charged. (R. 449.)

Following the guilty verdict, the court delayed the penalty proceedings from July 1, 1983, until July 5, 1983, in order to allow defense counsel to commence his investigation and preparations for the penalty phase proceedings. (R. 449.) Evidence was later presented to establish that Mr. Rose's counsel had done little to prepare for the penalty phase and had contacted two experienced capital defense attorneys in a panic on the night of the Phase One verdict, asking them what he should do. (R. 449-

50.) The Court grant a brief continuance and held the penalty phase on July 5, 1983. (R. 450.) During the penalty phase, Mr. Rose's counsel presented the testimony of three witness, along with Mr. Rose himself. (R. 450.) He did not present any of Mr. Rose's family members as witnesses. (R. 450.) He likewise presented virtually no evidence regarding Mr. Rose's life history. (R. 450.) In total, Mr. Rose's whole penalty phase, with the inclusion of several bench conferences and Mr. Rose's own testimony, comprised only 49 transcript pages. (R. 450.)

The jury went on to recommend a death sentence with a vote of nine to three. (R. 450.) The Circuit Court then sentenced Mr. Rose to death on July 8, 1983. (R. 450.) In imposing sentence, the court found the existence of three aggravating factors: (1) the capital felony was committed while appellant was under sentence of imprisonment; (2) appellant was previously convicted of felonies involving the use or threat of violence; and (3) the murder was committed in a cold, calculated, and premeditated manner. (R. 450.) Although Mr. Rose presented as mitigation various evidence including his history of alcohol abuse and use of alcohol at the time of the alleged offense, his anti-social personality disorder, and testimony from the mother of the victim that Mr. Rose was a good person, the Court "found that there were no statutory or nonstatutory mitigating circumstances sufficient to outweigh or offset the aggravating circumstances." *Rose v. State*, 472 So. 2d 1155, 1157 (Fla. 1985). (R. 450.)

Mr. Rose, thereafter, took a direct appeal to this Court, raising issues of: 1) the denial of a motion to suppress, admission of evidence of an impermissibly suggestive pretrial identification, and admission of a tainted in-court identification; 2) violations of the Confrontation Clause brought on by restrictions on cross-examination; 3) a discovery violation issue; 4) the admission of "evidence of non-statutory aggravating circumstances including prior offenses for which appellant had not been convicted and a pending allegation of parole violation;" 5) violations of Mr. Rose's "right to testify in his own behalf, to present evidence in mitigation, and to respond to the state's evidence by denying his request to retake the stand to clarify and supplement his testimony prior to closing arguments;" 6) failure to "consider evidence of mitigating circumstances including [Mr. Rose's] potential for rehabilitation, his family background, and his relationship with the deceased; 7) error at to the CCP instruction that was read to the jury; 8) error by the Court in "finding that the law required imposition of the death penalty in this case;" and 9) the disproportionality of Mr. Rose's death sentence. *Id.* at 1157-59. The Court affirmed the conviction and sentence in a written opinion on May 16, 1985 and then denied rehearing on the appeal on August 16, 1985. *Rose*, *supra*, 472 So. 2d 1155.

On October 2, 1987, after his death warrant was signed and his execution scheduled, Mr. Rose filed a motion for post-conviction relief in the Circuit Court, raising the following issues:

> (1) trial counsel rendered ineffective assistance of counsel in the guilt phase of trial by: (a) failing to challenge evidence regarding blood found on Rose; (b) failing to point out inconsistencies in the eyewitness testimony and failing to obtain an expert witness in eyewitness identification; (c) failing to object when the prosecutor in closing argument misrepresented the testimony of four eyewitnesses; and (d) failing to object when the prosecutor told the jury that there was evidence that jurors did not hear that would be disclosed to the judge in a presentence investigation report; (2) trial counsel rendered ineffective assistance in the penalty phase by failing to prepare and present mitigating evidence; (3) the court-appointed psychologist conducted an inadequate psychological evaluation, thereby depriving Rose of mitigating evidence; (4) Rose's right to be present at a critical stage of the proceeding was violated when the trial judge held an in-camera discussion with Rose's trial counsel concerning counsel's representation of Rose; (5) Rose's death sentence was disproportionate based on the facts in the case; (6) the sentencing jury and judge were erroneously allowed to consider nonstatutory aggravating circumstances; and (7) the jury instructions improperly instructed the jury on its role in determining whether aggravating circumstances were applicable and in recommending a sentence for the defendant.

Rose v. State, 774 So. 2d 629, 631 n.4 (Fla. 2000); (R. 451-52.) The Circuit Court summarily denied most of the post-conviction claims, but ordered a limited evidentiary hearing as to those claims concerning ineffective assistance of counsel in the penalty phase and as to the penalty phase jury instruction claim that related to a violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). (R. 452.) At the evidentiary hearing, Mr. Rose presented eleven witnesses to testify regarding mitigation evidence that had not been investigated or presented at the penalty phase, including evidence that Mr. Rose was the victim of severe neglect and physical and verbal abuse as a child; that he grew up in a dysfunctional home and that his mother was a severe substance abuser; that he never knew his father; that he suffered from very serious illnesses as a child, including rheumatic fever; that he was frequently picked on by other children regarding his illnesses and his dark complexion; that he had previously been married and had two children in his younger adult life, during which time he had been a good father, was employed, and had provided for his family; that he received medical treatment after a) being pistol-whipped in the head and b) when he was hospitalized following a severe car accident in his younger adult life. (R. 452.) In addition to the family members who testified to the foregoing mitigation, three mental health experts testified at the evidentiary hearing to establish that Mr. Rose suffered from chronic alcohol and drug abuse, possible dependent personality disorder, and organic brain damage. (R. 452.) The experts further opined that, at the time of the homicide, Mr. Rose was suffering from extreme mental disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired. (R. 452.) Virtually none of the evidence set forth above was discovered by Mr. Rose's trial counsel or presented at his penalty phase. (R. 452.) The Circuit Court ultimately denied all relief on January 25, 1990. (R. 452.) Mr. Rose, thereafter, appealed the denial of the motion to this Court, which again affirmed the lower court's holding. *Rose v. State*, 617 So. 2d 291 (Fla. 1993).

On July 16, 1993, Mr. Rose filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida, Tampa Division. (R.

452.) The petition set forth 18 different claims for relief. (R. 452.) Beginning on September 23, 1996, the petition was held in abeyance pending the outcome of *Hill v. Butterworth*, 133 F.3d 783 (11th Cir. 1997); 147 F.3d 1333 (11th Cir. 1998). (R. 452.)

In late 1996, while the federal petition was in abeyance, evidence came to light establishing that critical State witnesses Becky Borton and Mark Poole had made a deal with the State to receive lenient treatment in then-pending criminal matters in exchange for their testimony against Mr. Rose. (R. 452.) The State had not previously disclosed that relationship with Borton and Poole. (R. 452.) On December 23, 1996, Mr. Rose filed a successive Rule 3.850 motion based on that newly discovered evidence. (R. 452.) Mr. Rose's federal habeas petition was again held in abeyance pending the outcome of the Rule 3.850 proceedings. (R. 452.) The Circuit Court summarily denied Mr. Rose's claims. (R. 452.) Mr. Rose correspondingly appealed to this Court, raising the following issues:

> (1) The State withheld impeachment evidence concerning two state witnesses, Mark Poole and Becky Borton, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (2) the State purposely misled the jury about the motives of Borton and Poole for testifying, in violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); (3) defense counsel was ineffective under the standards of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for failing to discover this impeachment evidence against Borton and Poole and for failing to present this evidence to the jury; (4) the State violated Rose's constitutional rights by improperly withholding requested public records; (5) the trial court erred by granting the State's motion

> to strike Rose's *pro se* motion for reconsideration; (6) Rose has been denied the right to effective representation because Capital Collateral Regional Counsel ("CCRC") lacks the necessary funding to fully investigate and prepare Rose's postconviction pleadings; (7) Florida's use of electrocution as its method of execution is unconstitutional; (8) the State failed to afford Rose a clemency review process that comports with due process; and (9) the Florida Bar Rule of Professional Conduct forbidding attorneys from interviewing jurors violates Rose's constitutional rights

Rose, 774 So. 2d at 632 n.7. This Court went on to affirm this Court's summary denial of the claims. *Rose, supra*, 774 So. 2d 629.

On July 16, 2003, the Circuit Court appointed undersigned counsel Bjorn E. Brunvand to represent Mr. Rose. (R. 220-21.) Various matters were thereafter litigated in the lower court. *See* R. 2-3. On June 16, 2005, Mr. Rose filed in the Circuit Court a motion seeking the discharge of counsel. (R. 284-88.) On November 9, 2005, the Circuit Court granted Mr. Rose's request and entered an order permitting him to represent himself. (R. 388-89.)

Meanwhile, on November 8, 2005, the United States District Court reopened the federal habeas case. (R. 454.) Undersigned counsel continued to represent Mr. Rose in the federal proceedings. Mr. Rose, through counsel, filed a second amended petition for writ of habeas corpus on September 1, 2006. (R. 454) In that petition, Mr. Rose amended a previously-pled challenge to the constitutionality of Florida's death penalty scheme to include reliance on *Ring v. Arizona*, 536 U.S. 584 (2002) that had been decided since Mr. Rose filed his initial petition. (R. 454.) On March

19, 2010, the district court entered an order summarily denying relief on the remaining grounds for relief set forth in the petition. (R. 454.) Mr. Rose then took an appeal to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the district court's ruling. (R. 454.) Mr. Rose then filed a petition for a writ of certiorari in the Supreme Court of the United States. (R. 454.) The Supreme Court denied that petition. (R. 454.)

(ii) <u>Statement of the Facts Pertaining to the Motion to Dismiss Proceedings and to Discharge Counsel</u>

On January 11, 2017, counsel filed, on Mr. Rose's behalf, a successive motion to vacate his sentence of death in light of the recently decided opinions, *Hurst v. Florida*, --- U.S. ---, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). (R. 449-474.) While Mr. Rose had been granted *pro se* status in the state case in 2005, counsel had continued to represent Mr. Rose in his federal proceedings. In light of the subsequent amendments to Rule 3.851(b)(6), which no longer permitted capital defendants to represent themselves in collateral proceedings, coupled with the need to preserve any potential federal habeas corpus claims arising from *Hurst v. Florida*, counsel believed it was necessary for them to seek to file the motion on Mr. Rose's behalf. (R. 512-13, 526-27.) Prior to filing the motion, counsel consulted with Mr. Rose. (R. 474.) Mr. Rose indicated to counsel that he did not want them to file the motion and did not want them to continue representing him. (R. 474, 512-

13, 526-27.) In an effort to comply with the certification requirements of Rule 3.851, counsel included the following certification in the motion:

> I HEREBY CERTIFY that I have attempted to discuss the contents of this motion fully with the defendant, that I have complied with Rule 4-1.4 of the Rules of Professional Conduct to the best of my ability, and that the motion is filed in good faith. Mr. Rose has indicated to counsel that he does not want counsel to file anything on his behalf. Counsel, however, believe they are duty-bound to file the instant motion and that they are duty bound to file it as of the present date to prevent any potential procedural time-bars.

(R. 474.) At the first status hearing on the motion, counsel informed the Circuit Court of Mr. Rose's position with regards to the filing of the motion. (R. 512-13.)

On April 7, 2017, the Circuit Court conducted a status hearing and was prepared to address a request from Mr. Rose to dismiss the collateral proceedings and discharge counsel. (R. 519-43.) Undersigned counsel and counsel for the State appeared at the hearing. (R. 519-43.) Mr. Rose appeared at the hearing by telephone. (R. 519-43.) At the outset of the hearing, the court stated to Mr. Rose that "… I understand that you do not want to go forward, is that correct, with any post --" (R. 523-24.) At that point, Mr. Rose interjected and said:

> Excuse me. I'm of the same opinion as Chief Justice Pariente of the Florida Supreme Court, and I believe that my sentence has already been overturned and that anything now further than that is a waste of time.
>
> If I was to ask for – for anything, I would ask for time-served, immediate and unconditional release, in lieu of filing an actual innocence claim.

(R. 524.) The hearing and the exchange between Mr. Rose and the court continued on. (R. 524-29.) Later, the court again asked of Mr. Rose, "… the question before the Court is whether or not you want to – to end postconviction proceedings at this point… And do you understand if you do that, that's the end of it? There's – there's no more process." (R. 529.) Mr. Rose responded, "[w]ell, we'll find out." (R. 529.) The following exchange then occurred:

> THE COURT: Well, I want to make sure –
> THE DEFENDANT: Like I said –
> THE COURT: Well, I just want to make sure –
> THE DEFENDANT: I waive everything. I'm gonna waive counsel, everything. You sign may death warrant right now if you want to. I don't care.
> THE COURT: Okay. Mr. Rose, what I – what I want to make sure I understand is do you want to voluntarily dismiss the post – the pending postconviction proceedings and discharge collateral counsel at this point?
> THE DEFENDANT: Yes.
> THE COURT: All right. And this is something you've thought about?
> THE DEFENDANT: Yes
> THE COURT: And do you understand what the consequences of that are?
> THE DEFENDANT: *No. Explain them.*
> THE COURT: Well, if you – if you stop postconviction proceedings , quite frankly, there are no more postconviction proceedings. If counsel is dismissed, then you don't have counsel. So everything is going to be up to you, but –
> THE DEFENDANT: Well, then –
> THE COURT: Go ahead, Mr. Rose.
> THE DEFENDANT: Like I say, you guys been shoving me along for 34 years. If you want to continue that, continue it. I don't care. Or give me an evidentiary hearing – I mean guilt/innocence.
> THE COURT: Well, the –

> THE DEFENDANT: You know, otherwise if you're not gonna give me an evidentiary, guilt/innocence, go ahead and – go ahead. I – I – I waive my right to this – these proceedings.

(R. 529-30) (emphasis added). Mr. Rose went on to tell the court of other Phase One issues that had been previously raised or that he wished to raise. (R. 530-534.) The following exchange then occured:

> THE DEFENDANT: Well, I'm already of the same opinion of Justice Pariente of the Florida Supreme Court, that my conviction has already been overturned, that the United States Supreme Court has ruled that Florida sentencing procedure was ruled unconstitutional from conception. That means from the start of it, from the very beginning it was ruled unconstitutional. The reversed all the decisions.
> THE COURT: Okay. Mr. Rose, you understand that hasn't happened, in fact, and that the way the law sits right now –
> THE DEFENDANT: Well –
> THE COURT: Hold on, Mr. Rose. The – as it stands right now, the state of the law is that you're on death row and that *Hurst* does not apply because your case was final before the *Ring* case and you have –
> THE DEFENDANT: *Ring* has nothing to do with it.
> THE COURT: Well, it does if the judges say so, and they tell me –
> THE DEFENDANT: The Florida Supreme Court – the Florida judges can whatever they want to. It's the federal court that has to test it. The federal court has precedence, not the Florida courts.
> THE COURT: But that is not what I'm trying to explain to you, Mr. Rose, and I'm beginning to think you don't quite understand the nature of the situation you're in. As it stands right now, if the governor – if you stopped your postconviction proceedings and dismissed your collateral counsel, if tomorrow morning the governor signed a death warrant, there would be nothing standing between you and the death chamber.
> Do you understand that? Is that clear enough for you?
> THE DEFENDANT: I understand that.
> THE COURT: Okay.
> THE DEFENDANT: And they can do that. *I don't believe that's true.*
> THE COURT: All right.

> THE DEFENDANT: That would give me a voice that hasn't been heard in 34 years.

(R. 534-36) (emphasis added). Mr. Rose continued to tell the court that he wanted to dismiss the proceedings. (R. 536-37.) The court later inquired of Mr. Rose:

> THE COURT: How do you think if you stop postconviction proceedings and you dismiss collateral counsel that there will be – that it would happen that you would not be executed?
> THE DEFENDANT: I've told you before. I'm of the same opinion as Justice Pariente, that my sentence has already been reversed or overturned, you know, that the United States Supreme Court has already overturned my sentence by ruling is constitutional.
> THE COURT: Do you understand that Justice Pariente had not come to the prison to unlock your cell door and escort you out to the parking lot?
> THE DEFENDANT: Well, I mean –
> THE COURT: And that's not going to happen.
> THE DEFENDANT: I'm of the same opinion. If she's wrong – if she's wrong, I'm gonna be wrong too. Okay?
> THE COURT: All right.
> THE DEFENDANT: If Justice Pariente is wrong, I'm wrong too.
> THE COURT: So you just want to wait to see if the U.S. Supreme Court –
> THE DEFENDANT: Right.
> THE COURT: – clarifies the law in your favor?
> THE DEFENDANT: Yes, sir. Thank you. Yes, sir. Thank you.

(R. 537-38.) The court then asked defense counsel if he wanted to add anything additional. (R. 538.) Counsel responded that he was concerned that Mr. Rose, by abandoning all claims, may not preserve *Hurst* related issues for later review in federal courts. (R. 538.) Counsel also informed the court that when a predecessor Judge had permitted Mr. Rose to proceed *pro se*, Mr. Rose had abandoned all of his claims and did so, in counsel's opinion, to his own detriment. (R. 538-39.)

The court went on to state that it was going to grant Mr. Rose's requests to dismiss proceedings and to discharge counsel. (R. 541.) The court ended the hearing, stating "[h]e seemed alert, intelligent, definitely seemed to know a lot of details. So we're gonna give him his wish as least for now…We'll see if once the reality sinks in, things change." (R. 541-42.)

The court went on to issue a written order on May 1, 2017 and ultimately found that Mr. Rose "knowingly, intelligently, and voluntarily waived his right to pursue postconviction relief and his right to appointed collateral counsel" (R. 576-78.)

On May 10, 2017, undersigned counsel filed a notice to seek review of the order dismissing proceedings and discharging counsel. (R. 574-75.)

(iii) Standard of Review

This Court reviews for abuse of discretion a circuit court's order finding that a defendant knowingly, intelligently, and voluntarily dismissed his capital collateral proceedings and discharged his capital collateral counsel. *Trease v. State*, 41 So. 3d 119, 124 (Fla. 2010).

SUMMARY OF THE ARGUMENT

Undersigned discharged counsel respectfully submit that the record of the hearing before the Circuit Court established that Mr. Rose was not knowingly, intelligently, and voluntarily waiving his collateral proceedings and his right to collateral counsel. The record of the hearing established that Mr. Rose did not have an understanding of the consequences that would follow his decision, nor did he even have an understanding of the actual status of his case. The Circuit Court, while understandably frustrated, was not able to effectively relay to Mr. Rose the risks and consequences that would result from the dismissal of proceedings and the discharge of counsel. In the end, the Circuit Court did not fulfill the requirements set forth in Florida Rule of Criminal Procedure 3.851(i). Under the circumstances, discharged counsel submit that Mr. Rose must continue to be represented by qualified capital collateral counsel, be it undersigned counsel or other attorneys.

ARGUMENTS AND CITATIONS OF AUTHORITY

I.

THE CIRCUIT COURT ERRED IN GRANTING MR. ROSE'S REQUEST TO DISMISS COLLATERAL PROCEEDINGS AND TO DISCHARGE COUNSEL BECAUSE THE RECORD OF THE PROCEEDINGS DID NOT ESTABLISH THAT MR. ROSE WAS MAKING HIS REQUEST KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY

A. The Rule 3.851(i) Inquiry

Florida Rule of Criminal Procedure 3.851(i) sets out a detailed procedure for trial courts to follow in situations in which a defendant seeks to both dismiss pending capital collateral proceedings and to discharge his capital collateral counsel. FLA. R. CRIM. P. 3.851(i). The Rule sets out that if a defendant filed a pro se motion seeking such relief, the trial court must schedule a hearing at which the defendant, his capital collateral counsel, and the State are to be present. The Rule further holds that, at that hearing, the court must "examine" the defendant and hear argument from the defendant, collateral counsel, and the state. *Id.* at (i)(4). In addition, "if the judge concludes that there are reasonable grounds to believe the defendant is not mentally competent for purposes of this rule," the judge must appoint "no fewer than 2 or more than 3 qualified experts…to examine the defendant." *Id.* Those experts must then file reports with the court. *Id.* The court, thereafter, would be required to conduct an evidentiary hearing on the question of competency. *Id.*

The Rule goes on to provide that "[i]f the defendant is found to be competent for purposes of this rule, the court shall conduct a complete (*Durocher/Faretta*) inquiry to determine whether the defendant knowingly, freely and voluntarily wants to dismiss pending postconviction proceedings and discharge collateral counsel." *Id.* at (i)(6). If the court is satisfied that the defendant is knowingly, freely, and voluntarily seeking to dismiss his collateral proceedings and discharge counsel, the court is to enter an order granting that relief. *Id* at (i)(7). If, on the other hand, the court is not satisfied that the defendant is making his decision knowingly, freely and voluntarily, the court must enter an order denying the defendant's motion without prejudice. *Id.*

The methods set forth in Rule 3.851(i) codified the procedure that this Court laid out in *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). This Court held in *Durocher*, that "capital defendants who are competent can waive postconviction counsel and postconviction proceedings, reasoning '[i]f the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived.'" *Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010) *quoting Durocher*, 623 So. 2d at 483. "This Court explained that it 'cannot deny [a death row inmate] his right to control his destiny to whatever extent remains.'" *Id. quoting*

Durocher, 623 So. 2d at 484. Nevertheless, the court must conduct a *Faretta/Durocher* inquiry and be satisfied that the defendant is making the waiver knowingly, intelligently, and voluntarily. *Id. citing Durocher*, 623 So. 2d at 485.

The Supreme Court recognized in *Faretta v. California*, 422 U.S. 806, 95 S.Ct 2525, 45 L.Ed.2d 562 (1975), that a defendant in a criminal case has a right to self-representation. To ensure that a defendant seeking to invoke that right is doing so knowingly, intelligently, and voluntarily, this Court requires trial court to conduct a fairly detailed colloquy with the defendant. *McGirth v. State*, 209 So. 3d 1146, 1157 (Fla. Jan. 21, 2017); *Aguirre–Jarquin v. State*, 9 So. 3d 593, 602 (Fla. 2009). The standard *Faretta* inquiry approved by this Court "requires the judge to explicitly state the pitfalls of self-representation. The colloquy also requires the judge to state that the defendant's access to legal resources will be limited while in custody and that the defendant is not required to possess special skills in order to represent himself." *Aguirre–Jarquin*, 9 So. 3d at 602 *citing Amendment to Fla. Rules of Crim. Pro. 3.111(d)(2)-(3),* 719 So. 2d 873 (Fla. 1998). While the trial court is not required to follow the standard colloquy "word for word," it must carry out a colloquy that is sufficient to ensure the defendant makes a knowing and voluntary waiver of counsel." *Id. citing Porter v. State*, 788 So. 2d 917, 927 (Fla. 2001). In addition, this Court has held that "[i]n order to ensure the waiver is knowing and voluntary, the trial court must inquire as to the defendant's age, experience, and understanding of the rules of criminal procedure. *Id.*

This Court considered the adequateness of a *Faretta* colloquy in the recently decided capital case, *McGirth v. State*, *supra*, 209 So. 3d 1146. In *McGirth*, this Court found that the circuit court, when faced with a motion to dismiss collateral proceedings and discharge capital collateral counsel, thoroughly discussed with the defendant the advantages and disadvantages of proceeding pro se. *Id.* at 1157. The court specifically advised the defendant that "(1) [he] would not receive special treatment by the court or the State; (2) he would not be entitled to additional prison library privileges; (3) he would be expected to abide by the law and the rules of procedure; and (4) if he is unsuccessful in his postconviction proceedings, he will not be able to raise his lack of knowledge or skill as a basis for relief on appeal." *Id.* As to the benefits counsel could afford to the defendant, the *McGirth* circuit court told the defendant: "[T]hey could obviously call witnesses for you, question witnesses against you, present evidence on your behalf, can advise you about whether to testify or not testify, they know the rules of evidence, know what evidence can and cannot come in. And they can also preserve any errors that they believe that I may commit during this hearing so that ... the Florida Supreme Court can properly review that." *Id.* The *McGirth* circuit court, furthermore, placed on the record the defendant's "age, education, and IQ score; confirmed that [the defendant] could read and write; verified that the [defendant] was not under the influence of drugs, alcohol, or medications; indicated that [the defendant] followed along during his trial and was not disruptive;" and noted that the defendant had discussed a recent case had been "'on the cutting edge of new US Supreme Court cases.'" *Id.* This Court additionally noted that the circuit court and the State had inquired into whether the defendant had any mental health conditions that might affect his ability to represent himself. Based on that extensive and detailed colloquy, this Court concluded that the *McGirth* circuit court conducted a completely adequate *Faretta* inquiry. *Id*. at 1157-58.

B. <u>The Circuit Court's Colloquy with Mr. Rose was Inadequate to Ensure that Mr. Rose Knowingly, Intelligently, and Voluntarily Dismissed his Collateral Proceedings and Discharged his Counsel</u>

The record of the hearing before the Circuit Court demonstrated that Mr. Rose was not knowingly and intelligently dismissing collateral proceedings and discharging counsel. The record, likewise, showed that Mr. Rose did not have a true and correct understanding of the consequences that would follow any such decision. While the circuit court made attempts to discuss with Mr. Rose the disadvantages of dismissing his proceedings and discharging his counsel, those discussions led into tangential conversations regarding Mr. Rose's complaints as to the progress of his case. When the court asked Mr. Rose if he understood the consequences of dismissing his collateral proceedings, Mr. Rose replied "No. Explain them." As the court made subsequent attempts to explain those consequences, Mr. Rose seemingly did not agree with or did not believe what the court was telling him. Given the apparent difficulties in communicating with Mr. Rose, the court also did not have any meaningful discussions with Mr. Rose concerning the benefits that he would receive if he opted to remain represented by counsel. The dialogue that continued on between the court and Mr. Rose during the course of the hearing simply demonstrated that Mr. Rose did not understand the legal ramifications of the decision that was seeking to make.

Mr. Rose's statements during the hearing indicated that he believed that his sentence, and seemingly even his conviction, had somehow already been vacated. He likewise had the belief that Florida's capital sentencing structure had been struck down as unconstitutional across the board at some time prior to *Hurst*. As the Court is well aware, Mr. Rose was incorrect on both of those beliefs. The record of the hearing also indicates that Mr. Rose believes that if he waives all of his collateral proceedings, and potentially ends up under active death warrant status, he will be able to receive an evidentiary hearing on an actual innocence claim. The applicable rules of procedure do not provide for any such turn of events. Given Mr. Rose's clear misunderstandings of the status of his case, the applicable rules of procedure, and the current state of the precedent surrounding Florida's capital sentencing scheme, any waiver of his proceedings and his right to counsel could not have been knowing and intelligent or with a proper understanding of the consequences.

In contrast to the *Faretta* inquiry at issue in *McGirth*, the *Faretta* inquiry of Mr. Rose did not include a detailed discussion of the specific disadvantages Mr. Rose would face if he waived his proceedings and his counsel. Just the same, the hearing in the instant case did not include a detailed discussion of the advantages that Mr. Rose would have if he elected not to go forward with his waiver. Furthermore, unlike the circuit court in *McGirth*, the lower court did not inquire into Mr. Rose's education, intelligence, mental capacity, or mental health. The record also does not indicate that the Circuit Court reviewed the record of prior proceedings to determine if Mr. Rose had exhibited adequate courtroom behavior or had otherwise demonstrated that he had the ability to properly represent himself. In the end, the record was simply insufficient to demonstrate that Mr. Rose was knowingly, intelligently, and voluntarily moving to dismiss his collateral proceedings and to discharge his counsel.

Based on the foregoing, undersigned discharged counsel respectfully submit that Mr. Rose should continue to be represented by counsel in his collateral proceedings.

CONCLUSION

Undersigned discharged counsel ask that this Honorable Court vacate the order granting Mr. Rose's requests to dismiss collateral proceedings and to discharge counsel and remand the case to the circuit court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by email to the Office of the Attorney General at capapp@myfloridalegal.com, and by mail to Milo Rose at Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026-4000, on this 21st day of November, 2017.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Brief is formatted in compliance with Florida Rule of Appellate Procedure 9.210.

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