IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,045

NEWTON C. SLAWSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL SUPPLEMENTAL BRIEF BY THE CAPITAL COLLATERAL REGIONAL COUNSEL

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PRELIMINARY STATEMENT ON REFERENCES

This proceeding was prompted by Slawson's pro se motion to waive collateral counsel and all collateral proceedings. A two volume supplemental record dealing with this matter is before this Court.

The following symbols will be used to designate references to the record in this instant cause:

"R. Supp." Supplemental Record on Appeal

"Dir." Record on direct appeal to this Court;

REQUEST FOR ORAL ARGUMENT

Mr. Slawson has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Undersigned counsel accordingly urges that the Court permit oral argument.

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Procedural History

This case has been considered by this Court on a number of occasions. Slawson's convictions and sentences were affirmed in Slawson v. State, 619 So.2d 255 (Fla. 1993). A preliminary motion for post-conviction relief was filed on September 14, 1995, and an amended motion followed on October 31, 1996. Both were filed without verifications. On January 14, 1997, the circuit court denied Mr. Slawson's motion to vacate. On February 12, 1997, Mr. Slawson filed notice of appeal to this Court.

Briefs were filed and the matter was scheduled for oral argument before this Court when Slawson filed a pro se pleading styled "Motion for Withdrawal and Termination of Appeal" on or about June 4, 1998. By Order dated August 28, 1998, this Court relinquished jurisdiction to the trial court to conduct a hearing on the pro se motion. The trial court did so on September 28, 1998, (R. Supp. 80 et. seq.), and by order dated October 5, 1998, found that the defendant had ". . .waived his right to counsel and to dismiss all proceedings." [Sic]. (R. Supp. 78). After review of that determination, this Court remanded the case for Slawson to undergo a mental health examination. Specifically, this Court stated:

> After reviewing Slawson's case, this Court finds it necessary to remand to the circuit court for Slawson to undergo a mental health evaluation to aid in determining his competency. After such a mental health evaluation is conducted, Judge Allen shall once again determine whether Slawson is competent to make a knowing, intelligent, and

> voluntary waiver of his collateral counsel and proceedings. If Judge Allen finds that Slawson is competent to make a knowing, intelligent, and voluntary waiver, then she shall report that finding to this Court. If Judge Allen finds that Slawson is not competent to make a knowing, intelligent, and voluntary waiver, she shall report that finding to this Court as well.

Slawson was examined by three mental health experts. On review after that was done, this Court issued an Order Requesting Briefing ". . .regarding Judge Allen's competency determination and the validity of Slawson's waiver of collateral proceedings." This brief is filed in response to that Order.

Statement of Facts

The following is an excerpt from this Court's factual statement in its opinion on direct appeal:

> Slawson further testified about his "habit" of drawing incisions on pictures of nude women. He explained that he began drawing pictures of mutilated bodies when he was eleven years old. For years, Slawson had lived with a "mental quirk" causing him to continuously think about disemboweling women. While in the Navy, Slawson discussed his problem with a psychologist, who told him the practice of drawing was "a useful tool for actualizing his aggressive tendencies" without actually harming anyone. According to Slawson, the psychologist told him to continue to draw but not to identify the pictures with anyone and to destroy the magazines after he drew on the pictures. 619 So.2d at 257.

The victims in this case were shot, but the evidence at trial also showed that Peggy Wood, carrying an eight and a half month fetus, was cut from the base of the sternum to the pelvic area

and that her right thigh had been cut several times. Her husband had also been stabbed in the abdomen.

Three mental health experts testified at Slawson's trial. Dr. Merin, a clinical psychologist, described Slawson as having a borderline personality disorder with obsessive features, and a passive aggressive personality. (Dir. 882). Dr. Maher, a psychiatrist, diagnosed schizoid personality disorder with paranoid trait, which did not in itself rise to the level of a general psychosis, but made him vulnerable to becoming virtually lethally psychotic at the time of his ingestion of cocaine and alcohol. (Dir. 966). Dr. Maher spoke of Slawson's fascination with mutilating people. Slawson had told him that he began drawing pictures of stick figures of people with hands or arms cut off when he was about ten or eleven years old. (Dir. 971). According to Dr. Merin, Slawson said that his mother had punished him as a child by making him undress, tying his feet together and tying his hands behind his back, and then whipping him. (Dir. 884). This report was actually confirmed by Slawson's mother. (Dir. 1560-61). Both experts were of the view that Slawson's cocaine and alcohol ingestion when coupled with his underlying mental illness precluded the element of premeditation. Dr. Samenow, a psychologist, was called by the state. He never examined Slawson; the thrust of his testimony was that he had participated in a lengthy study which cast doubt on the insanity defense in general. At the penalty phase, Dr. Berland, a forensic psychologist, testified to evidence of brain damage and

paranoid psychosis with factual biographical data to support these findings. (Dir. 1636 - 1644).

The supplemental record presently before this Court contains three mental health evaluations of Slawson's competency. Dr. Maher reexamined Slawson on February 8, 1999, and concluded that he was not competent:

> His speech was. . . clear and coherent. He seemed to describe logical and rational beliefs, associated with his case. However, upon review of that information, these beliefs have no basis whatsoever, in fact. It is therefore my conclusion that these represent delusional beliefs and are part of a relatively fixed, well organized, psychotic condition. His affect was somewhat excited, however otherwise appropriate to circumstances. The psychological defenses consisted primarily of denial and were used extensively. The cognitive functions appeared to be intact. However, his capacity to evaluate factual information and understand logical connections and associations was clearly impaired by his delusional belief system.(R. Supp. 135 et. seq.).

Dr. Merin conducted a "brief mental status evaluation" on February 17, 1999. According to Dr. Merin:

> Clinical observations revealed no evidence of a thought disorder. While he clearly was angry with CCR, and while he was insistent about the State proceeding with his execution, these considerations did not rise to the level where they would be identified as psychotic thoughts. They would be more consistent with chronic depression found in dysthymic disorder. Such depression does not necessarily distort reality, but rather reflects a very long-term dysthymia without delusions or hallucinations. (R. Supp. 412)

Given this conflict, the trial judge appointed a third doctor as a tie breaker. (R. Supp. 150). This evaluation was performed by

Dr. Afield, M.D. His report is on letterhead indicating that he is affiliated with "The Neuropsychiatric Institute." There is nothing else in the record describing Dr. Afield's credentials. Dr. Afield found that Slawson had no psychiatric illness of any kind and was perfectly competent to proceed. He also noted, "[Slawson] has no problem with facing death. . . [H]e is very much of a fatalist as to what will be, will be. . .He feels that this thing is just being prolonged. All his appeals have been exhausted. If he changes his mind, he will appeal, but he would just like to get this thing over with. He said ten years is enough and quotes Nathan Hale's, 'give me liberty or give me death.'" Dr. Afield did not even find evidence of depression. (R. Supp. 445, -6).

Judge Allen did conduct a hearing of sorts on March 12, 1999, after she received these reports. (R. Supp. 148 et. seq.). Slawson, counsel for the state, and a lawyer from CCRC were present at the hearing. The doctors were not present. The state's attorney had made some efforts to have the doctors present, but the judge said, "I didn't want them here. I have their reports." (R. Supp. 152). CCRC counsel argued that Dr. Afield's report was inadequate on its face and noted that the doctors were not present, but Slawson objected to these remarks (R. Supp. 153), and the court indicated that it did not consider CCRC counsel to be his counsel. Id. The transcript of the hearing is only four pages long, and aside from noting that the

reports presented a two-to-one finding in favor of competency, their contents were not discussed at all. (Dir. 151).

SUMMARY OF THE ARGUMENT

This cause should be remanded for a full dress adversarial hearing on at least the issue of Slawson's competency to waive the assistance of collateral counsel and to waive all collateral proceedings. When this case was remanded for a competency evaluation, two mental health experts who had previously examined Slawson were re-appointed to address this issue, but they split on the issue of competency. A third expert, who functioned as a "tie-breaker," submitted a report that was wholly superficial on its face and which did not meet the requirements of Ake v. Oklahoma, infra, Fla. R. Crim. P. 3.211, and Carter v. State, infra. Despite this, the lower court did not conduct a hearing other than to note the two-to-one results in favor of competency, and so found. The lack of any kind of useful hearing violated due process under Pate v. Robinson, infra. Moreover, the record as it stands does not even reflect a true waiver. This Court should remand the case so that these outstanding issues may be resolved in the context of a full adversarial hearing, and the undersigned stands ready to serve as special counsel to represent society's interest in insuring that the death penalty is constitutionally reliable.

The Court is invited to revisit its holding in Hamblen, that a competent defendant has the right to waive collateral counsel and proceedings. In any event, the scope of the hearing on

remand should not be limited strictly to the issue of competency to waive proceedings. The record does not reflect an unambiguous waiver. Therefore, special counsel should be entitled to examine Faretta issues. Finally, to prevent the unconstitutional application of the death penalty, special counsel should be permitted to investigate and present all mitigation available.

ARGUMENT

Introduction

In response to this Court's Order requesting briefing, the undersigned counsel requests that this Court appoint him as special counsel to conduct an adversarial testing on at least the issue of Slawson's competency to waive collateral proceedings, and preferably on the broader issue of mitigation of any kind. This case presents a situation where a defendant has expressed his determination to waive the assistance of collateral counsel, end all proceedings and be put to death. As such it is similar to a line of cases which include Hamblen v. State, 527 So.2d 800 (Fla. 1988); Sanchez-Velasco v. State, 702 So.2d 224 (Fla. 1997); Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993), Farr v. State, 656 So.2d 448 (Fla. 1995), Case No. 82,894; Durocher v. Singletary, 623 So.2d 482 (Fla. 1993); also see Castro v. State, Case No. 81,731; Koon v. Dugger, 619 So.2d 246 (Fla. 1993); Carter v. State, 706 So.2d 873 (Fla. 1997). This case certainly implicates the broader concerns addressed in those opinions, but there are specific, narrowly drawn problems appearing in this record which distinguish this case from the others. For example,

this Court stated in Durocher that, "CCR argues that Durocher is not competent to waive collateral representation, but presents nothing more than speculation to support its argument. Durocher, on the other hand, presents every indication that he is knowingly, intelligently and voluntarily waiving his right to collateral proceedings through his adamant refusal to allow CCR to represent him." Id. at 484. The record here has substantial evidence that Slawson is or at least may be incompetent. In Sanchez-Velasco, the trial court conducted a Faretta inquiry which did not raise a doubt in the judge's mind about the defendant's competency to proceed. In an abundance of caution, the judge ordered a mental evaluation, which confirmed the court's opinion that the defendant was competent and which was consistent with nine previous evaluations. Here, while the trial court judge may not have had "a doubt" about the defendant's competence, in the language of Durocher and Sanchez-Valasco, this Court was evidently concerned enough to order a competency evaluation. Farr's cases have some factual similarities in that there is substantial evidence about Farr's mental problems in the record, but in Farr II, where this Court affirmed the death penalty, the issue of competency is not addressed at all. In any event, Farr has since decided that he does not wish to waive collateral proceedings. The principal distinction between this case and the others, however, is the complete inadequacy of the record that was made on the competency issue in the court below, a point which is discussed later on in this brief.

This Court first addressed the ". . .friction between an individual's right to control his destiny and society's duty to see that executions do not become a vehicle by which a person could commit suicide," in Hamblen v. State, 527 So.2d 800 (Fla. 1988). Hamblen pled guilty to first degree murder, waived counsel, waived a penalty phase jury trial, and agreed with the prosecution that he should be sentenced to death. His appellate counsel argued that the case should be remanded and a lawyer should be appointed to represent – not Hamblen's and not the state's, but – "society's" interests in ensuring that the death penalty would be imposed properly. The majority rejected this position and found that the trial judge had adequately protected society's interests in ensuring that the death penalty had not been imposed improperly. Justice Barkett dissented, citing the automatic review requirement of Section 941.141, Florida Statutes. Id. at 806, Erlich, J. concurring. Later, in Durocher, then Chief Justice Barkett stated: "I agree with the majority opinion, but write separately to emphasize that the role of the State in imposing the death sentence transcends the desires of a particular inmate to commit state-assisted suicide." Id. at 485. A Texas appeals court stated the point rather eloquently:

> Faretta does not authorize trial judges across this state to sit idly by doling out enough legal rope for defendants to participate in impending courtroom suicide; rather, judges must take an active role in assessing the defendant's waiver of counsel.

Blankenship v. State. 673 S.W. 2d 578, 583 (Tex.Crim.App. 1984), relying on von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92

L.Ed. 309 (1948). Accordingly, there is an obligation upon Florida courts to consider mitigation "even if the defendant asks the court not to consider mitigating evidence." Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993).[1] Chief Justice Barkett concurred in Farr I, reiterating her disagreement with Hamblen and again stating that defendants should not be able to waive presentation of mitigation in the context of an adversarial proceeding.[2] Nevertheless, this Court has never receded from

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[1]We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent that it is believable and uncontroverted. E.g., Santos v. State, 591 So .2d 160 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence. Robinson v. State, 684 So.2d 175, 177 (Fla. 1996).

[2]In Farr II, Justice Kogan wrote:

> A time is coming when this Court must comprehensively address the problem of defendants who seek the death penalty, whose numbers are growing. We have reached the stage at which our holdings are not entirely consistent with each other or with our own rules of court. Case-by-case adjudication of a larger problem certainly has its place, but not when the result is a confounding of the overall law: a point we are rapidly reaching.
>
> I personally would favor referring the entire matter to one of The Florida Bar's standing rules committees or to a commission created especially to investigate this problem. This Court has inherent authority to promulgate rules of procedure, which could include a new procedural framework for dealing with defendants who favor their own executions. Our piecemeal approach to cases

(continued...)

Hamblen's holding that a competent defendant has the right to waive counsel. E.g., Bowen v. State, 698 So.2d 248 (Fla. 1997), holding that forcing a non-capital defendant to accept, against his will, a state-appointed lawyer deprived him of his constitutional right to conduct his own defense.

On the other hand, this Court has consistently recognized that a capital defendant must be competent to waive collateral proceedings. A waiver of collateral counsel must be knowing, intelligent, and voluntary. Durocher, supra, citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).[3] The procedure to be followed is:

> [W]hen a defendant expresses a desire to dismiss his or her collateral counsel and proceedings, the trial judge must conduct a Faretta-type evaluation to determine that the defendant understands the consequences of his or her request. . . If the Faretta-type evaluation raises a doubt in the judge's mind as to the defendant's competency, the judge may order a mental health evaluation and determine competency thereafter. If the Faretta-type evaluation raises no doubt in

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(...continued)
like Farr's has not adequately addressed all the problems at hand, and I believe the time is approaching for a comprehensive study and the development of one or more proposals for reform, with adequate input from all segments of the public and the Bar. Id., 656 So.2d 448 at 452, concurring in part and dissenting in part, Anstead, J., concurring.

[3]A limitation on the need for competence in a waiver situation analogous to that of Carter v. State, supra, would be illogical. Carter held that an incompetent defendant's collateral proceedings would go forward if the issues were strictly legal in nature, whereas a waiver terminates all proceedings, legal or otherwise.

> the judge's mind as to the defendant's competency, no mental health evaluation is necessary for the competency determination. [Citations omitted].

Sanchez-Velasco, supra, 702 So.2d 224, 228, citing Durocher. Sanchez is noteworthy here because the decision in that case turned on the point that the judge never had a doubt as to the defendant's competency; she merely ordered an evaluation in an abundance of caution. Procedurally, this case has gone one step farther. The lower court here conducted the Faretta-type hearing and obviously did not have a doubt as to the defendant's competency. The judge specifically considered whether a mental health evaluation was necessary and concluded that it was not. After noting that the trial court had made that decision, this Court then remanded ". . .for Slawson to undergo a mental health evaluation to aid in determining his competency. After such a mental health evaluation is conducted, Judge Allen shall once again determine whether Slawson is competent to make a knowing, intelligent, and voluntary waiver of his collateral counsel and proceedings." (R. Supp. 421). There is a broader issue about whether the language contained in Sanchez-Velasco and Durocher – "a doubt" -- provides sufficient guidance as to what triggers a competency evaluation,[4] but the foregoing Order clearly indicates

[4]E.g. "Reasonable ground to believe that the defendant is not mentally competent to proceed," Fla. R. Crim. P. 3.210(b); "[M]eaningful evidence that a capital defendant suffers from a mental disease, disorder, or defect which prevents him from understanding his legal position and the options available to him or that prevents him from making a rational choice among his (continued...)

that the threshold, whatever it is, has been crossed in this case. In response to this Court's Order, the judge simultaneously appointed two of the experts who had previously examined the defendant and testified at the trial with regard to the issue of premeditation, and they returned contradictory opinions as to Slawson's competency. The judge then appointed a tie breaker who found the defendant competent. At hearing on March 12, 1999, the judge found the defendant competent and again accepted the waiver.

ARGUMENT I

THE MENTAL HEALTH EVALUATIONS IN THIS CASE, THAT OF DR. AFIELD IN PARTICULAR, DID NOT SATISFY THE STANDARDS OF AKE V. OKLAHOMA,[5] IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Judge Allen did nothing more than count noses when she determined that Slawson was competent. This is especially problematic because Dr. Afield, the only mental health expert who has ever examined Slawson and found that there was nothing wrong with him, not only cast the deciding vote in this case, the tie breaker, but was also the one who provided the most superficial report. The first paragraph of Dr. Afield's report contains a

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(...continued)
options." Whitmore v. Arkansas, 110 S. Ct. 1717, 1727 (1990); Evidence sufficient to require further investigation. Rees v. Peyton, 384 U.S. 312 (1966); Evidence required to raise a "bona-fide doubt" regarding a defendant's competency. Hunter v. State, 660 So.2d 244 (Fla. 1995); Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

[5]Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

self report by Mr. Slawson about his current legal situation. Dr. Afield presented the conclusions of Drs. Merin and Maher in the context of what Slawson told him. The second paragraph of the report is a brief, clinically unremarkable history also apparently presented by Slawson. The rest of the report consists of brief conclusions.

The order appointing Dr. Afield is, with a few modifications, a fill-in-the-blanks type form which tracks Fla. R. Crim. P. 3.210. (R. Supp. 430 et. seq.). Both the Rule and the Order contain the following language:

> In considering the issue of competence to proceed, the examining experts shall consider *and include in their report*:
> (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. Rule 3.211(a)(2). (Emphasis added).

(Dir. 131). The Rule and the order appointing Dr. Afield also contain the following language:

> (d) Written Findings of Experts. *Any written report submitted by the experts shall:*
> (1) identify the specific matters referred for evaluation;
> *(2) describe the evaluative procedures, techniques, and tests*

> *used in the examination and the purpose or purposes for each*;
>
> (3) state the expert's clinical observations, findings, and opinions on each issue referred for evaluation by the court, and indicate specifically those issues, if any, on which the expert could not give an opinion; and
>
> *(4) identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions*. Fla. R. Crim. P. 3.211(d); (R. Supp. 433). (Emphasis added).

As this Court instructed in Carter v. State, supra, until special rules are in place the examining experts in a post-conviction proceeding are to follow Rules 3.210-3.212. Id. at 876; (also see Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), holding that, although the some of the issues are different, the competency standard for pleading guilty or waiving the right to counsel is the same as that for standing trial). Dr. Afield's report contains some of the information required by the Rule and the order but it has critical omissions. The issues specified in Rule 3.211(a)(2) are not addressed at all, neither are the requirements of 3.211(d) which are emphasized above. There is also nothing on the record specifying Dr. Afield's qualifications. It is possible that these omissions could have been addressed at a hearing with the doctors present, but nothing like that took place.

The superficiality of Dr. Afield's report and the fact that his only source of information was Slawson himself are especially troublesome here for a number of reasons. Slawson obviously does

not want to be found incompetent. The record clearly reflects that Slawson can be quite lucid and even eloquent at times. Nevertheless, eloquence does not equal sanity. As Dr. Maher reported:

> His speech was. . .clear and coherent. He seemed to describe logical and rational beliefs, associated with his case. However, upon review of that information, these have no basis whatsoever, in fact. It is therefore my conclusion that these represent delusional beliefs and are part of a relatively fixed, well organized, psychotic condition." (R. Supp. 437).

It would have been helpful if Dr. Afield had read and commented on this conclusion, or if he had been confronted with it in the context of a hearing. It is especially noteworthy that Dr. Afield apparently did not review any independent information while Dr. Maher expressly did. In any event, given Slawson's motivation and ability to appear rational, plus the apparent superficiality of Dr. Afield's examination, it is not surprising that the doctor would reach the conclusion that he did, and it is also all too likely that the conclusion was wrong. It is a bit ironic that Dr. Samenow was called by the state at Slawson's trial to promote the idea that Slawson was "faking bad" to escape the consequences of his acts, while Dr. Afield has helped clear the way for his execution because Slawson was "faking good," but that may well be the case here. Moreover, Dr. Afield's opinion would have been more convincing if he had not said flatly. "He also has no psychiatric illness of any kind." (R. Supp. 446). Perfectly sane, well adjusted young boys do not obsessively slice

up pictures of nude women, grow up to seek psychiatric help for the practice,[6] and wind up on death row for killing children and pregnant women. Every other expert who has examined Slawson has found something wrong with him, although there are differences of opinion about the kind, degree and legal consequences of his mental condition.

Dr. Afield's report resembles that found to be inadequate in Mason v. State, 489 So.2d 734 (Fla. 1986), where this Court said:

> A crucial issue on remand, of course, will be the source of the examining psychiatrists' information utilized in their evaluations of competency. Dr. Gonzales, one of the later interviewers, cited his reliance on a "County Hospital Chart" and an interview. Since no other documents are cited in the other interviewer's reports, too great a risk exists that these determinations of competency were flawed [as neglecting a history indicative of organic brain damage.]
>
> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. One of the earlier interviewing psychiatrists noted in his report that Mason was "extremely hostile, guarded, indifferent and generally gave an extremely poor history in regard to dates, symptoms ... etc." In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. Id. at 736.

Mason's problem appeared to be more a matter of inability than unwillingness to provide accurate information to the evaluators.

[6]Only to be told that it was safe and therapeutic.

It is clear from the record that Slawson was highly motivated to provide sanitized information or even misinformation to Dr. Afield so that he would be found competent. The clinically unremarkable biographical sketch contained in Dr. Afield's report contains none of the information about bizarre behavior and obsessions, childhood abuse, prior psychiatric history and the like that was brought out during the testimony of Drs. Maher and Merin at trial or included in their reports that were made years later. Also, as noted above, Dr. Afield did not review independent information about the facts and procedural history of the case, while Dr. Maher did and specifically noted that they contradicted Slawson's self-report. Thus, Dr. Afield's report is considerably less reliable than the reports found to be inadequate in Mason.

ARGUMENT II

THE COMPETENCY HEARING CONDUCTED BELOW DID NOT SATISFY THE REQUIREMENTS OF PATE V. ROBINSON AND CONSTITUTED A DENIAL OF DUE PROCESS.

Because of this situation with the reports, the need for Judge Allen to conduct a full dress hearing on the issue of incompetence was evident. Due process attaches to competency hearings:

> In Pate v. Robinson, 382 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 903-904, 43 L.Ed.2d 815 (1975).

Under Pate v. Robinson, a defendant's due process rights are violated if the state trial court does not afford him an adequate hearing on the question of competency.

> Due process requires that an adequate hearing be held on competency when the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial. See Drope, 420 U.S. at 172-73, 95 S.Ct. at 904-05; Pate, 383 U.S. at 385, 86 S.Ct. at 842.
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> * * *
>
> A Pate analysis must focus on what the trial court did in light of what it then knew, Hance, 696 F.2d at 948, whether objective facts known to the trial court were sufficient to raise a bona fide doubt as to the defendant's competency. Reese v. Wainwright, 600 F.2d 1085, 1091 (5th Cir.), cert. denied, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979).

Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987). Moreover, one who is incompetent cannot waive his right to a competency hearing. Alexander v. State, 380 So.2d 1188 (Fla. 1980). Zapata v. Estelle, 588 F.2d 1017 (5th Cir. 1979); citing Pate, 383 U.S. at 384, 86 S.Ct. 836. Accord Floyd v. U. S., 365 F.2d 368, 377 & n.15 (5th Cir. 1966); See also Nathaniel v. Estelle, 493 F.2d at 797 (issue of incompetency not raised at trial but court remanded for hearing on that issue). The question of competency is a legal question and not a medical question, although based on medical and other evidence, and it must be "legally" decided. Alexander, supra; Butler v. State, 380 So.2d 1188 (Fla. 1980). Where there is conflicting expert testimony on competency, it is the court's responsibility to resolve the disputed factual issue.

Hunter v. State, 660 So.2d 244 (Fla. 1995); Ponticelli v. State, 593 So.2d 483 (Fla. 1991); Fowler v. State, 255 So.2d 513 (Fla. 1971); King v. State, 387 So.2d 463 (Fla. 1st DCA 1980).

The two experts who had extensive prior contact with Slawson and his case split on the issue of competency. A third evaluation finding the defendant competent might or might not have been sufficient to resolve the issue depending on what the report said, but the third report here was so skimpy that it is impossible to evaluate *it.* As noted above, the lower court did nothing more than count noses at the March 12 hearing. This was simply inadequate under the circumstances:

> In order for an expert's psychological evaluation to constitute evidence adequate to support a trial court's competency determination, it must include a discussion of each of the specific factors which rule 3.211(a) enumerates. See Livingston v. State, 415 So.2d 872 (Fla. 2d DCA 1982). Martinez v. State, 712 So.2d 818 (Fla. 2d DCA 1998).

A thorough colloquy by the judge arguably might have obviated the need for a hearing (but see below), but the exact opposite happened. The state had made some effort to have the experts present but the judge did not want them there. If the reports had been consistent one way or the other, the failure to conduct a hearing might have been deemed at most harmless, but they were in conflict on the ultimate issue of competence and their clinical findings contain major differences. Dr. Maher found a "relatively fixed, well organized, psychotic condition." Dr. Merin noted dysthymia and depression, while Dr. Afield did not

even find that. While Dr. Merin's observations did not support a finding of incompetency, they might well have been deemed relevant to issues about Slawson's motivation to waive collateral proceedings. As such, although perhaps not rising to the level of incompetency, his findings might well have been relevant to mental mitigation in general or to issues surrounding the possibility of state assisted suicide. Even if the situation with regard to the reports had been far worse than it is, the problem might have been resolved by a thorough hearing. That was not done here. Thus the argument made in this brief, that the case must be remanded for at least an adversarial hearing on the competency issue, does not rest on some far reaching proposal to appoint special counsel and conduct a full dress adversarial hearing in every case involving competency issues or a waiver. It rests on the particular problems caused by the sheer inadequacy of the record that was made regarding Slawson's competence.

This Court has held that an adversarial presentation is necessary in direct capital appeals for one of the reasons given by Judge Barkett in Hamblen, Durocher, and Farr I, namely to carry out the Court's statutory responsibility to review death cases. Klokoc v. State, 589 So.2d 219 (Fla. 1991); Hill v. State, 656 So.2d 1271 (Fla. 1995). In Farr II the Court rejected the argument that Klokoc effected a modification of Hamblen.

> [N]othing in Klokoc modified the core holding of Hamblen: that there is no constitutional requirement that such a procedure be used. While trial courts have discretion to appoint

> special counsel where it may be deemed necessary, there is no error in refusing to do so. Compare Klokoc with Hamblen. We thus find no error in the fact that no special counsel was appointed in this case.

On the other hand, the Farr II opinion also said:

> We acknowledge that this is a troubling area of the law. On a case-by-case basis, we have attempted to achieve a solution that both honors the defendant's right of self-determination and the constitutional requirement that death be imposed reliably and proportionately. Id. 450.

There is certainly nothing in Hamblen or its progeny that would prevent this Court from ordering an adversarial hearing where the particular circumstances of the case indicate the need for one.

This Court recently recognized the value of an adversarial hearing with language that is particularly apt:

> The majority opinion concludes that questions of fact on the issue of a defendant's sanity should be "examined and resolved in the crucible of an adversarial proceeding." Majority op. At 7. This procedure is in keeping with the Supreme Court's opinion in Ford v. Wainwright, 477 U.S. 399, 415 (1986), wherein Justice Marshall, writing for a plurality of the Court, stated:
>
> > A related flaw in the Florida procedure is the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions. "[C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence § 1367 (J. Chadbourn rev. 1974). Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise

> factors underlying those beliefs, any history of error or caprices of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts concerning their technical conclusions, a fact finder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent.

Provenzano v. State, Case No. 95,959 (Slip. op. August 26, 1999), concurrence by Chief Justice Harding, Pariente and Lewis, J.J., concurring.

Every reason for an adversarial hearing set out in these paragraphs applies to the instant case.

ARGUMENT III

THE PRESENT RECORD DOES NOT REFLECT A TRUE WAIVER.

Slawson's reasons for waiving collateral counsel and all further proceedings have never been entirely clear. Dr. Afield's report said: "If he changes his mind, he will appeal, but he would just like to get this thing over with. He said ten years is enough and quotes Nathan Hale's, 'give me liberty or give me death.'" The pro se motion filed by Slawson which initiated this phase of the collateral proceedings states as its first ground, "The refusal of CCRC-M and its attorneys to interview or even try to locate materiel [sic] witnesses." (R. Supp. 1). This does not sound like the complaint of one who has resolved to accept execution. Likewise, most of the rest of the pro se motion

essentially alleges ineffective assistance of post conviction counsel, which only makes sense in the context of a desire to pursue a case. It is true that, at one time or another, Slawson has expressed a desire to terminate collateral proceedings in order to thwart collateral counsel's perceived self-serving conduct in prolonging the proceedings. At the Faretta-type hearing on September 28, 1998, Slawson told the court that he did not believe CCRC was representing him; he believed they were representing themselves. (R. Supp. 92). The court inquired about the appointment of different counsel and Slawson refused that as well:

> I am extremely displeased with counsel; I'll agree with that. However, I fail to see how another attorney at this late of date would make any difference. Even if it were not from the Office of the Capital Representative, even if it were not a state attorney of any kind, even if it was from out of state, what difference would another attorney make at this late of date? (R. Supp. 100).

Later on in the hearing Slawson also said:

> [T]his court has already appointed an attorney at one point in my case, one Simpson Unterberger, and when I complained that he didn't want to talk to me, you decided that was a motion to dismiss counsel and all I wanted to do is make the attorney talk to me. I don't see any reason for another attorney, Your Honor. I'm just tired. I want to put an end to it, all of it. (R. Supp. 116).

When asked again about whether his motion was prompted by dissatisfaction with present counsel or whether it reflected a true desire to terminate all post conviction proceedings and accept execution, Slawson said:

> [W]hen after living in a cage for eight years, there comes a time when simply drawing the next breath just takes too much effort when death is a release, not punishment, and I've come to view death as a release rather than a punishment. (R. Supp. 115).

It is noteworthy that Slawson has never attributed his desire to waive collateral proceedings to moral, religious or philosophical reasons, or frankly, to anything concerning the crime itself. If anything, his comments indicate a strong belief that the truth would help him obtain relief. His statements indicate an extreme distrust of lawyers and the legal system coupled with what appears to be a belief that he will never be afforded a just result. Moreover, Slawson's express reason for wishing to die was that he could not stand the stress of incarceration. This is one of the traditional factors to be considered in making a competency determination. Very few people actually like being incarcerated, but some can stand the stress better than others. People who feel a great need to exercise control for the sake of doing so are more likely to experience stress from incarceration. Given these concerns, Slawson's motivation, whether essentially manipulative or an effort to escape psychic pain, resembles that of some people who wind up being Baker Acted because of suicide attempts. In any event, to the extent that this Court has been engaged in a balancing act between the right to self-determination on one hand and refusal to be manipulated into facilitating a state-assisted suicide on the other, the facts in this case tilt towards suicide.

To constitute a valid waiver, there must be an intentional relinquishment of a known right. United States v. Brown, 569 F.2d 236 (5th Cir. 1978).

> It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Admittedly, the lower court questioned Slawson about his views of his collateral proceedings at the September 28, 1998, Faretta-type hearing, but it is not clear from Slawson's statements whether he views collateral proceedings as a complete sham, a legitimate process that would afford him relief if pursued appropriately or fast enough, or something in between. If Dr. Maher's view is correct, that Slawson's understanding of the process, however well articulated, is part of a fixed delusional system that has no basis in fact, then there cannot be a knowing waiver. Even if Slawson's misunderstanding of the collateral process, if that is what it is, falls short of actual mental incompetency, the purpose of the Faretta-type inquiry, to insure that the waiver was a "knowing" one, was not satisfied. For this reason, not only should the case be remanded for an adversarial

hearing on competency, but the scope of the hearing should extend to Faretta issues as well.

ARGUMENT IV

HAMBLEN SHOULD BE REVISITED OR, IN THE ALTERNATIVE, ITS HOLDING SHOULD NOT LIMIT THE INQUIRY IN THIS CASE.

Consideration of collateral waivers strictly within the context of competency is not a completely satisfactory approach. It is true that a competency inquiry will necessarily address matters which are traditionally included within mental mitigation. Nevertheless, there are many potential mitigators which do not implicate an individual's competency, and some, like Slawson's military service and honorable discharge, which may tend to establish competence rather than negate it. The fact that the record in the case of one waiver inclined collateral defendant who happens to be mentally ill is more likely to present mental mitigation (which must then be developed and added into the sentencing equation in accordance with Durocher, Farr, and Sanchez-Velasco), while the record for another such individual without mental problems but with other significant mitigation will not provide such a vehicle, means by definition that the determination of who will die and who will not is governed by chance, happenstance, and lack of information.

It is true, as noted above, that some of the reasons for Judge Barkett's dissent in Hamblen, as well as this Court's holdings in Klokoc and Hill, were based on this Court's statutory obligation to review death sentences, also, Hamblen, Erlich, J.

dissenting, however there are constitutional reasons to require an adversarial hearing on waiver cases as well. Judge Barkett wrote in Hamblen:

> So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. Reid v. Covert, 354 U.S. 1, 77, 77 S.Ct. 1222, 1262, 1 L.Ed.2d 1148 (1957) (Harlan, J. concurring).
>
> Indeed, the United States Supreme Court repeatedly has recognized that the finality of the death penalty demands enhanced due process. In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), Justice Stevens observed:
>
> > [E]very Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.
>
> Id. at 468, 104 S.Ct. at 3166-67 (Stevens, J., concurring in part, dissenting in part) (footnote omitted).
>
> Death must "serve both goals of measured, consistent application and fairness to the accused," Eddings v. Oklahoma, 455 U.S. 104, 111, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982), and must "be imposed fairly, and with reasonable consistency, or not at all." Id. (emphasis added). Accord Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95

> L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); Eddings; Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). At a minimum, sentencing procedures must be designed so as to ensure that the death penalty will not be "inflicted in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). See Furman. See generally Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J.Crim.L. & Criminology 860 (1983); Note, A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings, 90 Yale L.J. 889 (1981).
>
> This heightened scrutiny is meaningless, however, if the defendant "waives" any part of the proceedings critical to determining the proper sentence. Without a presentation of mitigating evidence, we cannot be assured that the death penalty will not be imposed in an arbitrary and capricious manner, since the very facts necessary to that determination will be missing from the record. The state's responsibility in this regard cannot be handed over to the accused merely because he wishes to see himself executed.
>
> The doctrine of waiver, therefore, must be deemed inapplicable in cases like this one. Hamblen v. State, 527 So.2d 800 (Fla.1988) (Barkett, J., dissenting). See Pettit v. State, 591 So.2d 618 (Fla.1992), Barkett, J., dissenting; Henry v. State, 586 So.2d 1033

(Fla. 1991), Barkett, J., concurring. Justice Barkett expressly agreed with the same position taken by the Pennsylvania Supreme

Court in Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174, 180 (1978). See State v. Shank, 410 So.2d 232 (La. 1982) (held that where defendant sought to defend himself so that he could be convicted of first degree murder and sentenced to death, trial court erred in permitting defendant to defend himself); State v. Hightower, 214 N.J.Super. 43, 518 A.2d 482 (1986) (defense counsel could present any relevant evidence on mitigation during sentencing phase of capital trial despite defendant's express order not to contest imposition of death sentence). The constitutional right to self-representation is limited and a court may appoint counsel over an accused's objection in order to protect the public interest in the fairness and integrity of the proceedings. U. S. v. Taylor, 569 F.2d 448 (7th Cir.), cert. denied, 435 U.S. 952, 98 S.Ct. 1581, 55 L.Ed.2d 803 (1978). Similarly, while a defendant may in some contexts enjoy the right to refuse appeals and legal proceedings instituted in his behalf, see, e. g., Bishop v. State, 597 P.2d 273 (Nev. 1979), this right is also limited and a state may require reasonable proceedings in order to protect its own interests in the fairness of its determinations. Massie v. Sumner, 624 F.2d 72, 74 (9th Cir.1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828 (1981).

CONCLUSION AND RELIEF SOUGHT

The record with regard to competency in this case is simply inadequate. The experts' reports conflict and the lower court did not conduct any sort of competency hearing other than to

count the score. This cause should be remanded for a full dress adversarial hearing. The scope of the hearing should not be limited just to competency. Either Hamblen should be revisited, or special counsel should be able to investigate and present mitigating evidence regardless of whether it relates to the competency issue.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Supplemental Brief by the Capital Collateral Regional Counsel, which has been typed in Courier 12 Font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record and to Newton Slawson on this 31st day of August, 1999.

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