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

SECOND SUPPLEMENTAL BRIEF BY THE CAPITAL COLLATERAL REGIONAL COUNSEL

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PRELIMINARY STATEMENT ON REFERENCES

The record in this case comprises a six volume supplemental record of the relinquishment proceedings conducted by the lower court, a record of proceedings on the defendant's motion for postconviction relief, and the record of the defendant's direct appeal of his judgment and sentence.

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

"R. Supp." Supplemental Record on Appeal, Volumes I through VI.

"PC" Record of postconviction proceedings.

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

Undersigned counsel, Capital Collateral Regional Counsel, Middle Region, is termed "CCRC."

DISCLAIMER REGARDING REPRESENTATION

CCRC has consistently taken the position in these relinquishment proceedings that it is not representing Mr. Slawson. Rather, CCRC's participation in these proceedings is authorized and delimited by the language contained in certain Orders issued by this Court. Also, CCRC was counsel of record when this case was before this Court on review of the lower court's summary denial of Slawson's original motion for postconviction relief, and CCRC has never filed a motion to withdraw with this Court.

The case had actually been briefed and scheduled for oral argument when Slawson filed a pro se "Motion for Withdrawal and Termination of Appeal." This Court relinquished jurisdiction to the trial court, which eventually granted Slawson's motion and terminated CCRC's representation. (R. Supp. Vol. I, 78). On subsequent review, this Court issued an Order Requesting Briefing dated July 2, 1999, which said that CCRC "may serve an initial brief solely addressing" the issues involved in the relinquishment proceedings. Slawson himself was also permitted to file a pro se brief, and did so. After briefing and argument, this Court remanded the case for a hearing "to afford the opportunity to any participant to present the testimony" of the three mental health experts who had examined Slawson. (Order dated June 21, 2000, R. Supp. Vol. III, 161). With some qualifications, the lower court again found that Slawson had waived representation. (R. Supp. Vol. III, 227, -28). By Order dated November 7, 2000, this Court directed "Counsel for the parties" to file briefs. A subsequent Order gave the "parties" a specific time to file supplemental briefs. (Order, January 3, 2001). These latter Orders do not appear to have been served on Slawson himself, nor do they authorize Slawson to file a pro se brief.

Mr. Slawson has expressed undisguised hostility to CCRC throughout at least these relinquishment proceedings. Under

these circumstances, if undersigned counsel had been appointed to represent Mr. Slawson, undersigned counsel should have moved to withdraw and for appointment of substitute counsel due to a conflict of interest some time ago. Because the earlier Orders requesting briefing and later remanding so that "any participant" could examine the experts did not create an attorney-client relationship, there was no conflict. The three experts involved in these proceedings are court appointed, none have been retained by counsel for Mr. Slawson. He has not had either counsel or expert mental health assistance during these relinquishment proceedings.

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.

STATEMENT OF FACTS AND OF THE CASE

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) cert den 512 U.S. 1246 (Fla. Jun 27, 1994). During the trial and on direct appeal, Slawson's defense counsel challenged the admissibility of Slawson's admissions to the police under Miranda, but did not argue that they were involuntary. Defense counsel raised a mental state defense during the trial. In rebuttal, the State called an expert, Dr. Samenow who said, without objection, that such defenses were a "charade." (Dir. Vol. VII, 1224). This Court observed:

> [Dr. Samenow] explained that [a] study indicated that people who had been adjudicated not guilty by reason of insanity were "not mentally ill at all, but that the insanity defense had been a charade by which they calculatingly were able to get into a hospital rather than go to prison."
>
> This entire line of questioning proceeded without objection. Rather than objecting to the testimony, defense counsel attempted to rebut the testimony both by offering expert testimony that a defendant's state of mind could be reconstructed and by cross-examining Dr. Samenow on the subject. In fact, it was defense counsel who elicited Dr. Samenow's opinion on "impairment defenses" in general. On cross-examination, defense counsel asked, "Is it fair to say that your basic position is that mental health defenses are a sham?" Dr. Samenow replied, "I'm hesitating at the words 'mental health defenses.' I would say that the insanity defense and the, um, impairment defense is [sic] essentially a charade."

Slawson v. State, 619 So.2d 255, 258 (Fla.1993). This Court held that such testimony was improper, but without an objection at trial the issue could only be reviewed as fundamental error. In

finding that Slawson was not "deprived of a defense," this Court noted that it was Slawson's attorney who on cross examination of the prosecution's expert elicited the testimony that mental impairment defenses in general were "a charade." Slawson, 259.

A preliminary "shell" motion for postconviction relief was filed on September 14, 1995, and an amended motion containing twenty eight claims for relief followed on October 31, 1996. The motion was unverified and replete with allegations that Slawson would not communicate with collateral counsel. The motion alleged that Slawson was presently incompetent to proceed and in Claim IV of the motion alleged ineffective assistance of trial counsel for failure to object to the improper expert testimony cited above. (PC Vol. II, 211). Citing Carter v. State, 706 So.2d 873 (Fla. 1997), the circuit court found that all of the claims in Slawson's motion for postconviction relief, other than his allegation of present incompetency, were either "procedurally barred, without merit, or otherwise insufficient to warrant the granting of an evidentiary hearing, for the reasons stated in the State's Response to the Motion."[1] Because present competency was the only remaining issue, the circuit court summarily denied Mr. Slawson's motion to vacate on January, 14 1997. On February 12,

[1]The State's two and a half page response to Claim IV (P.C. Vol. II, 340 to 342) pointed out that the testimony in question had been addressed on direct appeal and that defense counsel aggressively cross examined the State's expert at trial.

1997, CCRC 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, then Judge Allen, did so and by order dated October 5, 1998, found that the defendant had ". . . waived his right to counsel and to dismiss all proceedings." (R. Supp. Vol. I, 78). After review of that determination, this Court remanded the case for Slawson to undergo a mental health examination. That Order 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.

Order dated December 17, 1998. On review after that was done, this Court issued an Order Requesting Briefing. The text of the Order said that both CCRC-M and Slawson himself could file

briefs. Both did so. After briefing and argument, the Court remanded the case again:

> After reviewing the trial court's order dated March 19, 1999, and the material filed with this Court pursuant to the December 17, 1998 order of this Court requiring a mental health evaluation, this Court finds it necessary to relinquish this case to the circuit court to conduct a hearing to afford the opportunity to any participant to present the testimony of Dr. Michael S. Maher, Dr. Sidney Merin and Dr. Walter Afield, directed exclusively to the issue concerning whether Newton Slawson is competent to make a knowing, intelligent and voluntary waiver of his collateral counsel and proceedings. At the prior hearing only the reports of these witnesses were considered. . . .

(Order dated June 21, 2000, R. Supp. Vol. III, 161).

The lower conducted the hearing at different times over a period of several months. Dr. Afield testified first. Consistent with his report he said that Slawson had no psychiatric illness, and was competent to proceed. (R. Supp. Vol. IV, 11-12). He said that he spent about thirty or forty minutes with Slawson all told. Id. 13. Prior to the hearing he had a chance to review the reports of the other doctors, and they did not change his opinion. Id. Other than that he had done nothing. Id. 14. He did not learn anything about the facts of the case other than what Slawson had told him. Id. 15. Slawson did not tell Dr. Afield anything about his past that was of clinical significance, such as Slawson's visit to a Navy psychiatrist to talk about his habit of drawing nude women with

body parts cut off, or his mother undressing him, tying him up and whipping him. Id. 23 through 26. Dr. Afield said these additional facts did not affect his opinion about Slawson's present competency, but that they "would have been brought up or should have been brought up in trial in terms of mitigation . . ." Id. 34. Dr. Afield described his evaluation this way:

> I wanted to generally get a quick picture of what was going on. There are certain assumptions one has to make when in a narrow situation. The assumption in this situation is that these issues and family histories and whatever problems he may have had, had all been explored adequately in court.
>
> This business of being at gunpoint by police, forcing him to make a confession, I assume that has been explored adequately in court. I have no information one way or the other. He was found guilty by his history, I don't have any of that information, and sentenced to death. My focus is was he competent to make a decision with his attorneys and let the sentence go ahead and I think he was. And that's all I focused on, not about what motivated him as a child or any of these other things, which I'm sure, he probably had a rather horrible background. I mean, people don't go out and commit murder unless they've got something wrong with them. . . . He's no longer in a courtroom proceeding in terms of right or wrong, or did he commit the crime, or mitigation. I assume those things had been tried. That was the assumption I was presented with by him. That's all I know on that.

(R. Supp. Vol. IV 26-27). He later said, "Basically, all I know is that he was charged with first degree murder of his family in 1989. He said he wasn't guilty, but the Court had done its thing and found him guilty, and we did not get into any

further details on it." Id. 30. According to Dr. Afield, Slawson thought that the only way he could pursue any avenue for relief was through CCRC. Id. 16. This point was addressed by the judge later in the hearing (see below). It was also evident Slawson was very hostile towards CCRC. Id. 16, 17, 30. Slawson felt he "would never have been convicted if the job had been done right" by his trial lawyers. (R. Supp. Vol. IV, 31). His postconviction lawyers "had really done nothing over eight years." Id. 30. Dr. Afield had written earlier that Slawson said "all of his appeals had been exhausted." (R. Supp. Vol. II, 146). At the hearing, he said that he thought Slawson knew that there was an appeal pending at the time Slawson filed his pro se motion to waive, but he did not discuss any further legal specifics about the case. (R. Supp. Vol. IV, 17-18). Dr. Afield attributed Slawson's wish to be executed to the length of time his case had taken and to the miserable conditions on death row:

> I think sitting on death row for ten years – I've been on death row. I've seen it, I've seen people there. I think it really is kind of a fate worse than death in my experience with it . . . We did discuss that, you know, it's a miserable experience. There's no exercise, it's a small cell, you're looking out at a wall. There's not much of anything, no opportunity to have any intermingling with the rest of the population and we discussed in detail his daily activities, which essentially are, vegetating, waiting to die.

Id. 32-33. Dr. Afield spoke directly to whether Slawson was

attempting state-assisted suicide:

> Q. Is it your view that Mr. Slawson is a competent individual who is attempting to engage in State assisted suicide?
>
> A. I think he's competent and he wants the State to do what the sentence was and I think he's competent to make that decision.
>
> Q. Was your answer, yes?
>
> A. Yes, I think so. The wording may not be the best, but, yes, I think that's the bottom line.

(R. Supp. Vol. IV, 24). The court posed a number of questions including the following:

> THE COURT: Is this any different from a person who has been diagnosed with a terminal illness and who is refusing treatment and you do an evaluation of that patient to ask him whether, in fact, they're knowingly waiving the right to treatment? Is there a similarity in judgment.?
>
> [Dr. Afield]: Very similar to the same thing. You'll also find situations I have testified in where you have someone who has very firm religious beliefs that a blood transfusion or something like that is against my religion and that I must die for this. If I have to die, I have to die. They're competent to make that decision. . .

(R. Supp. Vol. IV, 50).

Dr. Sidney Merin testified next. He also thought Slawson was competent. (R. Supp. Vol. IV, 57). He did not find that Slawson was psychotic, but he did diagnose him as having a personality disorder with "a lot of borderline personality characteristics and some narcism and some paranoidal elements in

it." Id. 67. Slawson came out in the one hundred and twenties on IQ testing. Id. Dr. Merin had testified at trial that Slawson lacked premeditation at the time of the offenses, and he still holds to that view. Id. 73. Slawson thought that the victim may have laced his beer with cocaine just prior to the crimes, and that contributed to a lack of specific intent at the time. Id. 75. At the time Dr. Merin first saw Slawson around ten years ago, Slawson was "depressed, despondent, gloomy, shaky, seclusive, feels useless, melancholic, sad, withdrawn type of personality," id. 86, "but the depression he's experiencing now is not the same as the depression he was experiencing back then." Id. 87. Dr. Merin thought that Slawson's present position was motivated by two things:

> He was fed up with what CCR was trying to do or what they were not doing on his behalf, and the second thing was he had already reflected upon, dealt with, gave considerable attention to the prospect of dying during the eight or ten years he was on death row.

(R. Supp. Vol. IV, 78). Dr. Merin agreed that Slawson has always maintained his innocence or at least entitlement to some relief, but he thought that "in my opinion in the back of his mind he is aware of what he had done." (R. Supp. Vol. IV, 79 through 81). Dr. Merin was confronted by both collateral counsel and the presiding judge with the apparent contradiction in Slawson's position: Slawson has always said, in so many words, that he wants relief, he deserves relief, and he wants to cut off

any prospect of getting relief. Dr. Merin said that Slawson may say that, but "in the back of his mind" he knows what he has done and wants to get it over with. Id. 92. He is "worn down, doesn't want to try it anymore, he doesn't want to have this feeling of feeling up and then down and then being chagrined or distressed when things don't work out." Id. 95.

Dr. Merin himself described Slawson's chance of success in collateral proceedings as "some sort of magic." Id. 96. Dr. Merin had not read any pleadings or briefs filed on Slawson's behalf and he did not know if Slawson had done so either:

> Q. Have you read the 3.850 or any of he briefs that have been filed in this case that are being, essentially, cut off by these proceedings?
>
> A. No.
>
> Q. Do you know if they're based on anything meritorious or not?
>
> A. I don't know
>
> . . . .
>
> Q. Do you know if he's read them himself?
>
> A. I don't know.
>
> Q. Do you know whether he has refused correspondence with CCR attorneys?
>
> A. That might be consistent with his feelings and his attitudes towards CCR.

(R. Supp. Vol. IV, 97). Dr. Merin would not agree to the use of the phrase "state assisted suicide" because suicide is an

affirmative act as opposed to a passive action. Id. 82.

Dr. Maher, who had also examined Slawson and testified for the defense at the time of trial, was the third expert to testify at the hearing. Dr. Maher had reexamined Slawson on February 8, 1999, and concluded that he was not competent to proceed. He reported then that:

> 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.

(R. Supp. Vol. II, 135). At first he stuck with this opinion. (R. Supp. Vol. IV, 128). On motion of collateral counsel, the hearing was then adjourned to give Dr. Maher an opportunity to review Slawson's prison records over the last ten years. Id. 150. When the hearing was reconvened, Dr. Maher changed his opinion and said Slawson was at least minimally competent. Id. 164. The change was based on his expectation that Slawson's prison record would show more clinically significant entries. Id. 166. The records showed that Slawson had seen a mental health expert on two or three occasions at most, and that there had been no in depth mental health evaluations at all. Id. 169-70. Dr. Maher also had some concern that Slawson would become incompetent in the future:

> [Witness]: I think it's more likely than not that his competency will remain stable. However, he is in a high stress situation. He has a very serious underlying mental illness. I certainly have some concern that he may at some point be rendered by those stresses and his underlying illness.
>
> [The Court]: Do you have some confidence he will not or will?
>
> A. I have some concern that he may become.
>
> Q. What might trigger that? What might give rise to that?
>
> A. Beyond the general stress of facing execution and dealing with the legal system, I can't point to specific factors that I think would be relevant.

(R. Supp. Vol. IV, 170-71).

In Dr. Maher's judgment, Slawson's present diagnosis is "paranoid personality" that is associated with "underlying psychotic delusional beliefs." Id. 173. Presently, he has very minimal symptoms, but they could become worse in the future. Id. Dr. Maher also testified about Slawson's visit with a Navy psychiatrist, and he agreed with the court's assertion that the mental illness noted at that time was the same thing he had just described. Id. 173-74. It has existed since Slawson was in the Navy and it has been documented. Id.

In the testimony he gave before he reviewed Slawson's prison records, Dr. Maher had explained that his opinion was that Slawson was rendered incompetent by his delusions.

> With regard to the delusions in particular,

> it is my belief that he has an involuntary and irrational belief that any and all attorneys appointed to assist him or represent him are in fact working contrary to his interest. They are directed by unknown and unseen powerful forces behind the scenes and they will never truly represent his interests or consider his wishes or desires in proceeding with his case.

(R. Supp. Vol. IV, 130). Dr. Maher did think that if Slawson could, or would, get along with an attorney, his mental state might be "adequate" for competency purposes. (R. Supp. Vol. IV, 139). Although he later said that Slawson met the "minimal criteria for competency," id. 178, Dr. Maher was still of the view that Slawson's capacity to understand the adversarial nature of the proceedings against him was "impaired."

> It is impaired and to the extent that I believed previously that it was impaired, and I still believe it is impaired, my opinion is the same. The difference is, I previously believed that it was impaired as a result of an underlying delusional psychotic belief and it was impaired sufficiently to render him incompetent. And I now believe it is impaired in a more limited manner, not involving psychotic beliefs and does not render him incompetent.

(R. Supp. Vol. IV, 179). Dr. Maher also thought that Slawson's persistent and contradictory position, that he wanted and deserved relief and still wants to forego relief, might be attributed to his underlying delusions. Id. 182. On the other hand, he acknowledged that Slawson's position might also be attributed on a pragmatic level to simply giving up hope. Id.

He equated Slawson's actions and mental state to attempted suicide:

> [Dr. Maher]: I think he has essentially given up. He's given up on his legal appeals. He's given up on life. He finds the quality of his life to be of such minimal value and the prospects for his future life on this earth to be of such poor quality that he prefers to die rather than live presently.
>
> Q. Is that the kind of thinking that you've seen in suicide cases?
>
> A. Yes.
>
> Q. In a mental health as opposed to a prison context?
>
> A. Yes.
>
> [The Court]: Doctor, isn't it also the same type of thinking you see in terminally ill patients?
>
> [A]: Yes.

(R. Supp. Vol. IV, 180-81). During the hearing the following exchange with Dr. Maher took place:

> Q. I'll just ask you: Given the distinction between the imposition of just punishment and committing suicide, which of those two do you believe applies in this case?
>
> A. Mr. Slawson is interested in ending his life in any way he can with all expediency possible. I don't think he has – his attitude toward life is typical of a person who wants to commit suicide.
>
> Q. Do you think that he thinks that it will be right and just if he were put to death?

A. No, he certainly doesn't think that.

(R. Supp. Vol. IV, 183).

The lower court found Slawson to be competent and entered a four page written order to that effect dated October 25, 2000. (R. Supp. Vol. III, 172 through 176). In it, the court noted that all three doctors had found that Slawson was competent. With regard to the criteria set out in Fla. R. Crim. P. 3.211(a)(2) the court's order reads:

> Based upon the totality of the testimony of all three (3) doctors the Court makes the following findings of fact:
>
> 1. The Defendant does appreciate the charges against him.
>
> 2. The Defendant appreciates the sentence that may be imposed.
>
> 3. Understands the adversarial nature of the legal process.
>
> 4. That he can disclose facts pertinent to the proceedings.
>
> 5. Manifest appropriate courtroom behavior.
>
> 6. Testify relevantly.

Id. 174. The order noted that Drs. Merin and Afield had analogized Slawson's present condition to that of a person with a terminal disease. Id. 172. The judge wrote: "It is evident from the testimony of all three professionals that the Defendant suffers from a mental infirmity described as paranoid

personality." Id. 174. The judge also noted Dr. Maher's testimony that Slawson suffers from delusional beliefs, and that: "Dr. Maher did testify that Mr. Slawson may reach a point while he is awaiting execution on death row that [] his delusions may interfere with his behavior and cause him to be incompetent." Id.

The court reconvened the hearing on November 9, 2000 to conduct a DuRocher/Faretta-type hearing. (R. Supp. Vol. VI, 195 through 230). The court had earlier said that it would do so if Slawson were found to be competent. (E.g., R. Supp. Vol. IV, 190-91). The State also agreed that the court should conduct such an inquiry. (R. Supp. Vol. VI, 199-200). On the other hand, the judge said he was not certain he had the jurisdiction to do so, based on the language of the remand. Id. The State repeated that it did not have an objection to conducting the inquiry, id. 203, and collateral counsel argued in favor of it as well. Id. 203 through 205. The court decided to conduct the inquiry, but incorporated the earlier proceeding where his predecessor judge had also conducted a Faretta-type hearing. (R. Supp. Vol. I, 80 through 119). Collateral counsel had submitted a series of proposed questions which were in part simply adapted from Fla.R.Crim.P. 3.111. To the preliminary, routine questions Slawson gave routine, unremarkable answers. To some questions which addressed the issues presented in these

relinquishment proceedings, he gave more expressive answers. The judge asked Slawson whether he had ever read the motion for postconviction relief filed on his behalf. (R. Vol. VI, 211). He said he had not:

> [The Court]: Have you had any time to read the copy of your motion for Post Conviction Relief--
>
> [Mr. Slawson]: No, I have not.
>
> [The Court]: – filed on your behalf?
>
> [Mr. Slawson]: I have not at any time ever even been allowed to read them until after they've been filed.
>
> [The Court]: But my question is, did you – have you read them?
>
> [Mr. Slawson]: I have not read them because my C.C.R.C. purged the files and released my case until I moved to dismiss them. And then after the fact they said, we'll let him see them now.
>
> [The Court]: Do you wish to see them now?
>
> [Mr. Slawson]: There's no point, Your Honor. I've withdrawn my appeals. They're moot.

(R. Supp. Vol. VI, 212). The court then asked Slawson "[D]on't you think it would be advantageous for you . . . to see your motion?" Id. Slawson again said that he did not see the point. Id. The inquiry went on:

> THE COURT: During the time that you were represented by counsel in this case, did you discuss your case with them?

> MR. SLAWSON: I tried to. They told me how it was going to be. They fabricated a certification of verification in my name, falsified, filed it with the Supreme Court in order to get the appeal in behind my back, and up until the time I moved to withdraw that appeal, I never had the opportunity to see that appeal. They wouldn't allow it. They didn't discuss [it] with me, Your Honor. They told me. I wasn't allowed to have input. I was told to basically shut up, sit down, and be quiet.

(R. Supp. Vol. VI, 212-13).[2] Slawson also said he had not been provided with a copy of the State's response to the motion for postconviction relief. Id. The court offered him the opportunity to review both pleadings, which he declined. Id. The inquiry went on:

> THE COURT: Do you know what issues were raised on your behalf?
>
> MR. SLAWSON: As I've stated, I have no idea. I was never allowed to even participate in my appeals.
>
> THE COURT: Do you believe you were adequately represented at trial?
>
> MR. SLAWSON: No, sir, I do not.
>
> THE COURT: Do you believe that you received a fair trial?
>
> MR. SLAWSON: No, sir, I do not.
>
> THE COURT: Are you still claiming innocence?

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[2]Problems with a verification evidently are not jurisdictional. E.g. Anderson v. State, 627 So.2d 1170 (Fla.1993); Gorham v. State, 494 So.2d 211 (Fla.1986).

> MR. SLAWSON: Yes, sir, I am. And there are witnesses who will verify that and I can't get anyone to find them for me. However, it's all moot.
>
> THE COURT: Why is it moot? If you are claiming innocence and you are claiming that you did not commit the crime and you are claiming that you did not receive a fair trial, why is it you are abandoning your right to preserve your life?
>
> MR. SLAWSON: Because the life I have and the life I anticipate based on the lack of information I've been given by the attorneys and the way I've been treated by the attorneys leads me to believe that there is no life worth fighting for either now or in the future.
>
> I am a realist and I am also a fatalist. I've already moved to withdraw and terminate my appeals, Your Honor.

(R. Supp. Vol. VI, 214-15). The judge told Slawson that he would "feel more comfortable" if Slawson were withdrawing his appeals because he felt himself to be guilty and said that Slawson's position would appear to be illogical to most people. Id. 215. Slawson replied that his circumstances were far from ordinary, and that even if he got a "crackerjack" team to help him, it would take another ten or fifteen years at which point he would be sixty years old. Id. 216. He said, "My life – any life I could win is just too much – it's not worth having." Id. The judge then asked Slawson a few questions about his views on death and an afterlife. Id. Then the court continued with the

questions that had been submitted by collateral counsel:

> THE COURT: Do you remember killing anyone in this case?
>
> MR. SLAWSON: No, sir, I do not remember any of that.
>
> THE COURT: Do you remember if you testified in this case?
>
> MR. SLAWSON: Yes, sir, I remember testifying. And there are reasons I testified that I was not able to articulate at the time, and if I tell you now, you'll still think I'm crazy. Nobody wants to hear it, Judge.
>
> THE COURT: Was your testimony at trial true?
>
> MR. SLAWSON: No, it was not. It was coerced. I was threatened with death. My family – I was – I received threats against my family's lives unless I took the stand and incriminated myself. Otherwise –
>
> THE COURT: Do you understand that if you could prove that, that that would be the basis of a new trial?
>
> MR. SLAWSON: Oh, yeah, but I can't prove it because I can't get these people to move on it and I can't do it. And quite frankly, I don't know of anyone you could assign who would do it because it's just so unbelievable. I acknowledge that. It is just unbelievable, but it happened. I'm tired of fighting it, Judge.
>
> THE COURT: Did the police threaten you in any way?
>
> MR. SLAWSON: Oh, yes. I described Detective Dan Gross's handgun in detail. I even called out correctly the color of the part that sits on the back of the front plate off his purple handgun, a detail you can't

> see with that gun in the holster. But if he draws it, the first thing you see is the back of the front plate sight before he turns it around.
>
> I signed that confession under the point of a gun, under the threat of death and I described that asshole's gun to a detail, one hundred percent accuracy and nobody wants to hear it.

(R. Supp. Vol. VI, 217 through 219). There followed an exchange where the judge advised Slawson that the court would be willing to appoint separate counsel and investigators to investigate Slawson's allegations. Slawson again declined this. (R. Supp. Vol. VI, 220).

The court then entertained argument, which included argument from collateral counsel about an issue that was pending before this Court and scheduled for oral argument, when Slawson had filed his motion to waive counsel and further proceedings. The argument, ineffective assistance for failure to object to improper expert testimony, is raised in this brief below. In response, the court then made further inquiry of Slawson:

> THE COURT: If what he's saying is accurate, then conceivably a 3.850 motion would be granted by the Supreme Court and remanded for a hearing just based on that allegation alone.
>
> . . . .
>
> THE COURT: I find myself in the very awkward position basically trying to convince you that you need to have a lawyer, sir. Do you understand that?

> MR. SLAWSON: Yes, Your Honor. I've put you on the spot and I apologize for that. But be that as it may, I stand by my decision.

(R. Supp. Vol. VI, 224-25).

The court then granted Slawson's motion. There is no written order resulting from this Faretta/Durocher colloquy, so the judge's oral pronouncement is quoted here in full:

> THE COURT: One side of the argument is basic to the extent that it may be true that the Defendant is drawing the Court into a potential suicide. But the Court has to be mindful that all of us have individual rights beyond a theoretical basis. That's the right to representation under the [Six]th Amendment, which also incorporates by its very nature the right to refuse representation, to represent one's self, and I think that is a fundamental right that a person has. And if a person is competent to make that decision, they could proceed irrespective of the fact that the Court thinks it is a very foolish act on your part.
>
> Everything I've heard here based on what has been told to me by the attorney from C.C.R.C. is that you have potentially a 3.850 motion that would be granted to be at least heard, and I think it is foolish on your part to waive that right.
>
> I think that the State has an interest in both seeing that capital punishment is enforced when it's appropriate, and not enforced when it's not appropriate. And that all the persons – you know, I have no objections to all multiple – I'll say that for the record and before force – the State takes a persons life, I want to see every assurance made that that person's rights have been upheld and that they are found guilty in accordance with our rules and our laws, and you have that right and I think you're being

> very foolish and I think you jeopardize other persons who sit in your same position when persons give up those rights. I'm not saying what will happen eventually. But I urge you, sir, to reconsider your position again.
>
> I'll grant your – I'm going to grant your motion, but I'm urging you not to.

(R. Supp. Vol. VI, 225 through 227). Slawson said he would "stand by [his] decision." Id.

SUMMARY OF THE ARGUMENT

Argument I is that this court should resolve the issues raised in the appeal of the lower court's summary denial of postconviction relief before approving any waiver. At the conclusion of the hearing here on review, the lower court judge told Slawson, "Everything I've heard here based on what has been told to me by the attorney from C.C.R.C. is that you have potentially a 3.850 motion that would be granted to be at least heard, and I think it is foolish on your part to waive that right." On direct appeal, this Court as much as found that at least a first prong Strickland violation had occurred. After raising mental impairment as his only defense, trial counsel failed to object to, and in fact helped to elicit, what this Court found to be improper expert testimony that such defenses were a "sham" and a "charade." After the circuit court summarily denied claims based on this and other issues in Slawson's motion for postconviction relief, the case was appealed to this Court, had been fully briefed, and was scheduled for oral argument, when

Slawson filed his “pro se motion to terminate” his appeal. Even if the Court is satisfied as to Slawson’s competency, it should still resolve at least the patent constitutional error which is fully briefed and now properly before it.

Argument II is that the lower court erred in accepting Slawson’s waiver of collateral counsel and further proceedings. At the urging of both the State and collateral counsel, the court below conducted a Durocher/Faretta-type inquiry to determine if Slawson’s waiver was knowing, intelligent and voluntary. Consistently with everything Slawson has done or said before, Slawson said, in so many words, that he had not read any of the briefs or pleadings filed in his case and did not intend to, did not know what issues were involved in these proceedings and did not want to know about them either, he was innocent of the charges, he had been forced to confess at the point of a gun, he had not been given a fair trial, he had been grossly misrepresented at trial and thereafter and if any of his lawyers had done their jobs he would not be where he is now, he is entitled to relief, and he wants to give up any prospect of getting relief. The lower court accepted this as a waiver. It should not have done so. This is not a valid waiver.

Argument III is that the lower court erred in finding Slawson competent. The lower court’s order contains only conclusions with regard to the criteria set out in Fla. R.

Crim. P. 3.211, which are required to be used in these postconviction pursuant to Carter v. State, 706 So.2d 873 (Fla. 1997). In particular, there is conflicting evidence with regard to Slawson's understanding of the adversarial process. Although Dr. Maher said that Slawson met the "minimal criteria for competency," he was still of the view that Slawson's capacity to understand the adversarial nature of the proceedings against him was "impaired." The lower court also erred with regard to the first criterion. The language of the Rule, which refers to the "charges or allegations against the defendant," must be adapted to the present postconviction proceedings. The record clearly shows that Slawson knows little or nothing about his postconviction case. A competency determination is a legal decision to be made by the courts, not the doctors. Fla. R. Crm. P. 3.211(a)(1) and Dusky v. United States require a factual, as well as rational, understanding of the proceedings in order to establish competency. The record does not show that Slawson has a factual understanding of the proceedings. The lower court erred by failing to address the first criterion with any specificity.

ARGUMENT I

This Court Should Resolve Issues Raised in the Appeal of the Lower Court's Summary Denial of Postconviction Relief Before Approving Any Waiver.

On direct appeal, this Court as much as found that at least

a first prong Strickland violation had occurred. Slawson's defense had been lack of premeditation due to a combination of intoxication and mental problems, and the State had called an expert to say that such defenses are essentially bogus. This Court expressly disapproved the State's expert's testimony that a legally recognized defense is a "charade." However, this Court could only review the testimony in question for fundamental error because the issue had not been preserved by defense counsel by an objection. Some of the improper testimony had in fact been elicited by defense counsel while cross examining the State's expert. In its opinion on direct appeal, this Court observed:

> This entire line of questioning proceeded without objection. . . . In fact, it was defense counsel who elicited Dr. Samenow's opinion on "impairment defenses" in general. On cross-examination, defense counsel asked, "Is it fair to say that your basic position is that mental health defenses are a sham?" Dr. Samenow replied, "I'm hesitating at the words 'mental health defenses.' I would say that the insanity defense and the, um, impairment defense is [sic] essentially a charade."

Slawson v. State, 619 So.2d 255, 258 (Fla.1993). The Court then compared this case with Carter v. State, 469 So.2d 194 (Fla. 2d DCA1985) (fundamental error to give inherently misleading self-defense instruction that is an incorrect statement of law and that has the effect of negating defense), whereas here, the judge gave a proper instruction on the voluntary intoxication defense.

Claim IV of the motion for postconviction relief filed by C.C.R.C. on Slawson's behalf alleged ineffective assistance of trial counsel for failure to object to this improper expert testimony. (PC Vol.II, 211). It is apparent that Judge Barbas, who conducted the hearing on review here, thought this issue would warrant an evidentiary hearing. After hearing collateral counsel's argument on this issue he told Slawson, " Everything I've heard here based on what has been told to me by the attorney from C.C.R.C. is that you have potentially a 3.850 motion that would be granted to be at least heard, and I think it is foolish on your part to waive that right." (R. Supp. Vol. VI, 226).

The predecessor judge who first considered the motion for postconviction relief in this case summarily denied all of the claims, other than his allegation of present incompetency, finding that they were "procedurally barred, without merit, or otherwise insufficient to warrant the granting of an evidentiary hearing, for the reasons stated in the State's Response to the Motion." The State's two and a half page response to Claim IV said only that the testimony in question had been addressed on direct appeal and that defense counsel aggressively cross examined the State's expert at trial. The circuit court's denial of at least this issue without the benefit of an evidentiary hearing was clearly an error. The summary denial of the postconviction motion in its entirety is the subject of the

appeal still pending before this Court. The denial of Claim IV of the motion for postconviction relief is raised in Argument III of the initial brief. Thus, now that the relinquishment proceedings have been concluded, this issue, along with all other issues raised in the postconviction proceedings, is presently pending before this Court for review.

Defense counsel's failure to object, while potentially waiving the issue for direct appeal purposes, may itself be an instance of ineffective assistance of counsel cognizable in postconviction proceedings. Davis v. State, 648 So.2d 1249, 1250 (Fla. 4th DCA 1995); Mannolini v. State, 2000 WL 763764, 25 Fla. L. Weekly D1428 (Fla. App. 4 Dist. Jun 14, 2000) (NO. 4D99-4266); Jackson v. State, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998); Vento v. State, 621 So.2d 493, 495 (Fla. 4th DCA 1993); 15 Fla. Jur 2d Criminal Law § 2904. In considering a claim of ineffective assistance of counsel, a finding that some action or inaction by defense counsel was tactical is generally inappropriate without the benefit of an evidentiary hearing. Anthony v. State, 660 So.2d 374, 376 (Fla. 4th DCA 1995)(Citing Davis); Williams v. State, 642 So.2d 67 (Fla. 1st DCA 1994); Anderson v. State, 627 So.2d 1170, 1171 (Fla.1993). This Court's recent jurisprudence also lends support to the view that the Court would ordinarily require at least an evidentiary hearing on this issue. Mordenti v. State, 711 So.2d 30, 33 (Fla.1998); Gaskin v. State, 737 So.2d

509 (Fla.1999); Allen v. Butterworth, 756 So.2d 52 (Fla.2000). In any event, a failure to object to improper and damaging evidence only makes strategic sense if cross examination can get the lawyer's case back to zero and at least somewhat beyond, so to speak. The facts cited in this Court's opinion on direct appeal show that defense counsel's cross examination made things worse.

Slawson has a right to self determination, but that right is limited. Muhammad v. State, 2001 WL 40365 (Fla. Jan 18, 2001) (NO. SC90030)(In a case in which a capital defendant does not challenge imposition of the death penalty and refuses to present mitigating evidence, and in which the sentencing court has been alerted to the probability of significant mitigation, should the court prefer that counsel present mitigation rather than calling its own witnesses, the court possesses the discretion to appoint counsel to present the mitigation or to utilize standby counsel for this limited purpose). This Court has "repeatedly emphasized the duty of the trial court to consider all mitigating evidence 'contained anywhere in the record, to the extent it is believable and uncontroverted.' Farr v. State, 621 So.2d 1368, 1369 (Fla.1993) ('Farr I '); see, e.g., Hauser v. State, 701 So.2d 329, 330- 31 (Fla.1997); Robinson v. State, 684 So.2d 175, 176, 179 (Fla.1996). This 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.' Farr I 621 So.2d at 1369." Muhammad, id.; Klokoc v. State, 589 So.2d 219 (Fla.1991)(regardless of a defendant's contrary wishes, appellate counsel in a capital case must "proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests." Id. at 222). A defendant's right to self-representation is limited when the defendant is not able or willing to abide by the rules of procedure and courtroom protocol. McKaskle v. Wiggins, 465 U.S. 168, (1984); Price v. Johnston, 334 U.S. 266 (1948)(a prisoner has no absolute right to argue his own appeal).

This Court and others have repeatedly expressed a reluctance to be drawn into a state assisted suicide while also recognizing a defendant's limited right to control his own destiny. E.g. Hamblen v. State, 527 So.2d 800 (Fla. 1988); DuRocher v. Singletary, 623 So.2d 482 (Fla. 1993; Muhammad, supra. At the conclusion of the November 9, 2000 hearing, the judge said, "One side of the argument is basic to the extent that it may be true that the Defendant is drawing the [c]ourt into a potential suicide."(R. Supp. Vol. VI, 225). Drs. Maher and Afield both agreed that Slawson demonstrated the same kind of thinking that they had seen in suicidal patients in a mental health context. (R. Supp. Vol. IV, 24, 180-81). Dr. Afield appeared to agree with the use of the phrase "state assisted suicide" in this case.

Id. 180. Dr. Merin would not agree to the use of the phrase "state assisted suicide" because he regarded suicide as an affirmative act as opposed to passive acceptance of the inevitable. (R. Supp. Vol. IV, 82).

The lower court also noted that Drs. Merin and Afield had analogized Slawson's present condition to that of a person with a terminal disease. (R. Supp. Vol. VI, 172). It is apparent from this conclusion and the questions asked by the court during the hearing that the court believed this to be a useful analogy. Dr. Afield also suggested an analogy with patients refusing needed medical treatment because of religious beliefs. (R. Supp. Vol. IV, 50)

The United States Supreme Court has held that there is a logical and recognized distinction between the right to refuse medical treatment and assisted suicide. Vacco v. Quill, 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997); cited in Krischer v. McIver, 697 So.2d 97, 100 (Fla.1997). The distinction is usually made in terms of passive acceptance of an act of God or nature versus active human intervention. See Krischer, Kogan, CJ, dissenting. ("The notion of 'dying by natural causes' contrasts neatly with the word 'suicide,' suggesting two categories readily distinguishable from one another. How nice it would be if today's reality were so simple.")

Execution is not a case of letting nature take its course.

It is not death by natural causes. It is a form of homicide by definition. The argument advanced here is that this Court can and should draw a principled distinction between a death sentence that has withstood judicial scrutiny, and one that has patent constitutional error on the record that is pending before this Court for review.[3] The latter is a form of state assisted suicide that this Court has traditionally tried to avoid. In other words, the argument here is that this Court, at least, when confronted with a capital waiver situation, should review the record to determine whether error warranting relief exists and has been properly placed before the Court for resolution. If so, the Court should resolve it before accepting the waiver.

At this juncture the holdings of Hauser v. Moore, 767 So.2d 436 (Fla.2000) and Durocher v. Singletary, 623 So.2d 482 (Fla.1993) are not implicated. Unless the Court reschedules the oral argument that was cancelled when Slawson filed his pro se motion to waive, there is no further advocacy to be done in the appeal of the summary denial of Slawson's postconviction motion. Initial and answer briefs had already been submitted at that time. If the Court accepts the argument offered here, the only further work in the appeal will be the Court's. If the Court

[3]Not argued here are situations where a capital defendant waives collateral proceedings at any time from when the judgment becomes final and before the time (if any) that error warranting relief is properly raised and presented to the appropriate court.

concludes that no relief is warranted, there will not be any further advocacy. Moreover, at no time during these relinquishment proceedings has undersigned counsel asserted that he was representing Mr. Slawson. If the Court determines that the error urged here warrants any further proceedings, then the issue arises as to whether Slawson's waiver applies to them or not. Slawson's pro se motion was for "Withdrawal and Termination of Appeal." (R. Supp. Vol. I, 1). He did not plead guilty, he went to trial. The argument is made below that Slawson's waiver as it stands is not a valid waiver. To every fact and argument made there should be added the fact that this record overwhelmingly shows that Slawson has no hope. Should the Court determine that relief or further proceedings are warranted, at a minimum the case should be remanded for a brief waiver hearing in light of its new posture.

ARGUMENT II

The Lower Court Erred in Accepting Slawson's Waiver of Collateral Counsel and Further Proceedings.

This argument was presented to this Court in Argument III of the first supplemental initial brief based on the record then available. The standard of review in a waiver case is competent substantial evidence. Potts v. State, 718 So.2d 757, 759 (Fla.1998), citing Willacy v. State, 696 So.2d 693, 695-96 (Fla.) ("[O]ur task on appeal is to review the record to determine

whether the trial court applied the right rule of law ... and, if so, whether competent substantial evidence supports its finding.").[4]

In the hearing now under review, Slawson remained true to form. The judge asked Slawson whether he had ever read the motion for postconviction relief filed on his behalf. (R. Vol. VI, 211). He said he had not. Id. The court then asked Slawson "[D]on't you think it would be advantageous for you . . . to see your motion?" (Supp. Vol. VI, 212). Slawson again said that he did not see the point. Id. The judge asked whether Slawson had discussed the case with collateral counsel while he was represented by them. He replied, "They wouldn't allow it. They didn't discuss [it] with me, Your Honor. They told me. I wasn't allowed to have input. I was told to basically shut up, sit down, and be quiet." (R. Supp. Vol. VI, 212-13). Slawson also said he had not been provided with a copy of the State's response to the motion for postconviction relief. Id. The court offered him the opportunity to review both pleadings, which he declined. Id. The inquiry went on:

> THE COURT: Do you know what issues were raised on your behalf?
>
> MR. SLAWSON: As I've stated, I have no idea. I was never allowed to even participate in my appeals.

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[4]But see Holland v. State, 25 FLW S796 (Fla. 2000) applying abuse of discretion standard of review.

THE COURT: Do you believe you were adequately represented at trial?

MR. SLAWSON: No, sir, I do not.

THE COURT: Do you believe that you received a fair trial?

THE COURT: Are you still claiming innocence?

MR. SLAWSON: Yes, sir, I am.. . .

(R. Supp. Vol. VI, 214-15). He was asked whether he had been threatened in any way. With regard to both his confession and trial testimony he said: "It was coerced. I was threatened with death. My family – I was – I received threats against my family's lives unless I took the stand and incriminated myself . . . . I signed that confession under the point of a gun, under the threat of death. . . ." (R. Supp. Vol. VI, 217 through 219). The judge advised Slawson that the court would be willing to appoint separate counsel and investigators to investigate Slawson's allegations. Slawson again declined this. (R. Supp. Vol. VI, 220).

To constitute a valid waiver, there must be an intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); United States v. Brown, 569 F.2d 236 (5th Cir. 1978); Durocher v. Singletary, 623 So.2d 482, 485. (Fla.1993)("[W]e also recognize that the state has an obligation to assure that the waiver of collateral counsel is knowing, intelligent, and voluntary.

Accordingly, we direct the trial judge forthwith to conduct a Faretta-type evaluation of Durocher to determine if he understands the consequences of waiving collateral counsel and proceedings”). Florida Rules of Criminal Procedure 3.111(d)(2) provides:

> (2) A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make an intelligent and understanding waiver. Id.

The record presented in this case is like that of a bad plea under Fla. R. Crim. P. 3.172 and Boykin v. Alabama, 395 U.S. 238 (1969). It is as if a defendant, tendering a plea, responded to the appropriate questions by saying that he did not what he was charged with and did not want to know, did not know what rights he was giving up and did not want to know about those either, had not talked to a lawyer and did not want to do so, and so far in the case been grossly misrepresented by the lawyers he did have, had been forced into the situation he was in by having a gun pointed at his head, and had generally been treated unfairly by the system from the beginning of the case to the present day. Normally a judge would not be able to accept a plea under these circumstances.

As things stand, no one – no court – has told Slawson that he must at least familiarize himself with the motion for

postconviction relief and the appeal briefs sufficiently to know what it is he is giving up. As a result, what appears on the record is that he does not know anything about the substance of his case. He has also consistently maintained that he has been driven to his present situation by various violations of his rights – violation of his right to counsel because he has never been adequately represented, right to a fair trial because he did not get one, right to remain silent because he and his family were threatened with death, and so on. Slawson may be intelligent, but, based on results of the Faretta/Durocher inquiry, the waiver in this case is neither knowing nor voluntary.

ARGUMENT III

The Lower Court Erred in Finding Slawson Competent.

With regard to the criteria set out in Fla. R. Crim. P. 3.211(a)(2) the court's order reads:

> Based upon the totality of the testimony of all three (3) doctors the Court makes the following findings of fact:
>
> 1. The Defendant does appreciate the charges against him.
>
> 2. The Defendant appreciates the sentence that may be imposed.
>
> 3. Understands the adversarial nature of the legal process.
>
> 4. That he can disclose facts pertinent to the proceedings.

5. Manifest appropriate courtroom behavior.

6. Testify relevantly.

(R. Supp. Vol. III, 174). In Carter v. State, 706 So.2d 873 (Fla. 1997), this Court held that "[u]ntil such time as the Florida Rules of Criminal Procedure are amended to specifically address competency during capital collateral proceedings, the rules for raising and determining competency at trial should be looked to. See Fla. R.Crim. P. 3.210-3.212." Id. 875. The lower court's findings with regard to the criteria set forth in Rule 3.211(a)(1) are simply a conclusory copy of the wording of the rule. The lower court erred in failing to make specific findings of fact with regard to each of the listed criteria. Padmore v. State, 743 So.2d 1203 (Fla. 4th DCA 1999)("We review the trial court's competency determination in light of these specific factors") citing Livingston v. State, 415 So.2d 872 (Fla. 2d DCA 1982)("Compliance with the rules will facilitate intelligent appellate review."). In particular, there is conflicting evidence with regard to Slawson's understanding of the adversarial process. Although Dr. Maher said that Slawson met the "minimal criteria for competency," (R. Supp. Vol. IV, 178), he was still of the view that Slawson's capacity to understand the adversarial nature of the proceedings against him was "impaired."

It is impaired and to the extent that I

> believed previously that it was impaired, and I still believe it is impaired, my opinion is the same. The difference is, I previously believed that it was impaired as a result of an underlying delusional psychotic belief and it was impaired sufficiently to render him incompetent. And I now believe it is impaired in a more limited manner, not involving psychotic beliefs and does not render him incompetent.

(R. Supp. Vol. IV, 179). Dr. Maher also thought that Slawson's persistent and contradictory position, that he wanted and deserved relief and still wants to forego relief, might be attributed to his underlying delusions. Id. 182.

The lower court also erred with regard to the first criterion. The language of the Rule, which refers to the "charges or allegations against the defendant," must be adapted to the present postconviction proceedings. Carter, supra ([T]he examining experts should follow the basic procedures set forth in Florida Rule of Criminal Procedure 3.211 and, to the extent that they are relevant to a postconviction competency determination, should consider the factors set forth in subdivision (a)(2), subdivision (B) of which specifically provides for consideration of 'any other factors deemed relevant by the experts.'"). The record contains no evidence that Slawson understands the nature of the pleadings filed in his postconviction case, what claims have been raised, or anything about the substantive issues in his appeal. Coupled with his mental illness, Slawson's persistent refusal to inform himself of the claims raised on his behalf and

the legal proceedings still pending in his case renders him incompetent. The question of competency is a legal question and not a medical question, and it must be "legally" decided. Alexander v. State, 380 So.2d 1188 (Fla. 1980); Butler v. State, 261 So.2d 508 (Fla. 1st DCA 1972). In the hearing now under review, the judge asked Slawson whether he had ever read the motion for postconviction relief filed on his behalf. (R. Vol. VI, 211). He said he had not. Id. The court then asked Slawson "[D]on't you think it would be advantageous for you . . . to see your motion?" (Supp. Vol. VI, 212). Slawson again said that he did not see the point. Id. The judge asked whether Slawson had discussed the case with collateral counsel while he was represented by them. He said he had not, although he blamed that on the lawyers. Id. It is true that the court advised Slawson not to represent himself, not to waive proceedings, and to at least read the motion for postconviction relief and related pleadings and briefs. However, in Rogers v. Singletary, 698 So.2d 1178 (Fla.1996), this Court observed that "'The ultimate test is not the trial court's express advice, but rather the defendant's understanding.' " 698 So.2d at 1181 (quoting Fitzpatrick v. Wainwright, 800 F.2d 1057, 1064 (11th Cir.1986)). Fla. R. Crm. P. 3.211(a)(1) and Dusky v. United States, 362 U.S. 402 (1960) require a factual, as well as rational, understanding of the proceedings. The record does not show that

Slawson has a factual understanding of the proceedings.

It is true that the lower court conducted an evidentiary hearing at which the three mental health experts testified and were subject to cross examination on the issue of Slawson's present competency to waive collateral counsel and proceedings, and it is also true that Dr. Maher changed his opinion and now all three of the doctors say that Slawson is competent. Having said that, it is clear that Slawson is mentally ill. The lower court's order contains the following finding: "It is evident from the testimony of all three professionals that the Defendant suffers from a mental infirmity described as paranoid personality disorder." (R. Supp. Vol. III, 174).

Dr. Maher also had some concern that Slawson would become incompetent in the future. (R. Supp. Vol. IV, 170-71). He said, "[Slawson] is in a high stress situation. He has a very serious underlying mental illness. I certainly have some concern that he may at some point be rendered by those stresses and his underlying illness." Id. The failure of the lower court to address these issues with any specificity was reversible error.

CONCLUSION AND RELIEF SOUGHT

The lower court erred in finding that Slawson is incompetent, but if the Court is satisfied as to his competency, it should find that the lower court erred in accepting Slawson's purported waiver. In any event, this Court should address and

rule on the issues presently before it. Should the Court determine that error warranting relief did occur, the Court should at least remand the case for a brief waiver hearing conducted in light of the Court's rulings.

CERTIFICATE OF SERVICE AND FONT

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief 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 the 29 day of January, 2001.

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