

IN THE SUPREME COURT OF FLORIDA

ROBERT BEELER POWER,

Appellant/Cross-Appellee,

vs.

CASE NO. SC96659

STATE OF FLORIDA,

Appellee/ Cross-Appellant.

_____ /

AMENDED ANSWER BRIEF OF THE APPELLEE
IN AN INTERLOCUTORY APPEAL FROM THE
NINTH JUDICIAL CIRCUIT

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This brief is presented in 12 point Courier New, a font that
is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

The State cannot accept the Statement of the Case and Facts offered by appellant's collateral counsel as it improperly contains argument.¹

Appellant was convicted of the first degree murder, sexual battery, and kidnaping of twelve-year-old Angeli Elaine Bare. Appellant was also convicted of armed robbery arising from his theft of a police officer's gun and radio near the murder scene. The jury unanimously recommended that the trial court sentence appellant to death. (V. V at 511). On November 8, 1990, the Honorable Gary Formet, Sr., Circuit Judge, followed the jury's recommendation and sentenced appellant to die in Florida's electric chair. (V. V at 524). The trial court found the following aggravating circumstances:

- 1) The defendant was previously convicted of another capital felony involving the use or threat of violence.²

¹Appellant repeatedly characterizes the State's argument below as erroneous in his statement of the case and facts. See Pawley v. Pawley, 37 So.2d 247 (Fla. 1948)(noting that it was improper for the history of the case to contain the argument of counsel); Williams v. Winn-Dixie Stores, Inc., 548 So.2d 829 (Fla. 1st DCA 1989)(granting motion to strike brief where appellant's statement of the case and facts was unduly argumentative and citations to the record were inadequate).

²As the lower court noted in its sentencing order:

It is undisputed the defendant was convicted of: robbery on March 21, 1980 in case number 79-706-CF-A

- 2) The capital offense was committed during an enumerated felony.
- 3) The murder of Angeli Bare was especially heinous, atrocious, and cruel.³
- 4) The instant murder was committed in a cold, calculated and premeditated fashion. [later struck by this Court on direct appeal].

(V. V at 511-520).

In mitigation, the trial court found the comparative cost of executing appellant versus life in prison a legitimate

in St. Lucie County, Florida; armed burglary of a dwelling, two counts of sexual battery with a deadly weapon, kidnaping, aggravated assault, aggravated battery and robbery with a deadly weapon on March 18, 1989 in case number G-87-2396-CFA in Seminole County, Florida and two counts of kidnaping with a firearm, five counts of sexual battery and armed burglary with a firearm in case number 87-1096 in Osceola County, Florida. Each of these crimes occurred prior to the killing of Angeli Bare and each of these convictions occurred before the conviction in this case. The defendant is currently serving ten consecutive life sentences followed by a term of years in excess of 200 years. (V. V at 511-512).

³The lower court summarized his finding as follows:

The defendant, at age 25, over 6 foot tall, weighing in excess of 140 pounds and armed with a gun, took a small 12 year old girl prisoner. Terrorized her to the extent she was afraid to attempt to escape when a viable opportunity was presented. Removed her pants and sexually assaulted her anally and vaginally. Hog tied and double gagged her and then, when she was entirely helpless, administered a fatal stab wound that caused her to slowly bleed to death over a period of 10 to 20 minutes. Some, if not all, of these acts had to have occurred while she was conscious. (V. V at 518-519).

argument against imposition of the death penalty in general but not legally appropriate for consideration in any individual case. The trial court found appellant's age (25) not be a mitigating circumstance in this case. The court gave very little weight to appellant's lack of future dangerousness claim.⁴ (V. V at 520-521).

On August 27, 1992, this Court this Court affirmed appellant's convictions and sentences. Power v. State, 605 So.2d 856 (Fla. 1992). The Supreme Court denied Certiorari on April 19, 1993. Power v. Florida, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1993).

The instant controversy arises from appellant's third amended motion for post-conviction relief filed in the lower court on November 23, 1998, raising thirty-eight claims. In this motion, appellant raised several claims based upon his mental condition at the time of his sentencing hearing, including the following:

a) Claim V, paragraph 15

"At an evidentiary hearing, expert testimony can be presented that Mr. Power, due to his mental condition, was not in a position to knowingly and intelligently waive the

⁴The lack of future dangerousness was based solely upon the fact that appellant was serving 10 consecutive life sentences followed by a term of years in excess of 200 years and would therefore never be released from prison. (V. V at 521).

presentation of mitigation at his penalty phase. Mr. Power was incapable of making a rational, voluntary, and knowing decision not to present any testimony at the penalty phase. At an evidentiary hearing, expert testimony will explain how Mr. Power's condition and state of mind inhibited his ability to make a decision that clearly would be in his own best interest." (V. V at 100).

b) Claim XV, paragraphs 2 and 3

"2. To waive any right guaranteed by the United States Constitution the defendant must make a 'knowing and intelligent' waiver of these rights. Mr. Power was incapable of making any such waiver because of his mental deficiencies. Mincey v. Arizona, 437 U.S. 385 (1966)."

"3. Counsel was aware, or should have been aware, that Mr. Power was suffering from depression and organic brain damage. Mr. Power was unable to knowingly waive any of his rights. To the extent trial counsel did not preserve this claim, Mr. Power received ineffective assistance of counsel. Mr. Power is entitled to Rule 3.850 relief." (V. III at 144).

d) Claim XXXII, paragraph 3

"3. ...An accused must 'knowingly and intelligently' forego the traditional benefits associated with the right to counsel. Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); Faretta. Once such benefit of the right to counsel is the right to have counsel's advice, after reasonable investigation of what mitigating evidence is available. Mr. Power was incapable of knowingly and intelligently waiving his right to present mitigating evidence, due to his organic brain damage. Had counsel investigated Mr. Power's mental condition,

he would have realized that Mr. Power was incapable of making such a waiver, and mitigating evidence would have been presented." (V. III at 102-103).

"...The defendant "must be competent to make the choice to proceed pro se. Orazio v. Dugger, 876 F.2d 1508, 1512 (11th Cir. 1989)." (V. III at 181, paragraph 5)

"6. Mr. Power's having purportedly instructed his trial counsel not to present mitigation was a de facto waiver of the assistance of counsel at the penalty phase, and so a Faretta inquiry was necessary. Had such an inquiry been made, it would have been revealed that Mr. Power was incapable of knowingly and intelligently waiving his right to counsel, and would have further shown that he had not been presented with information that could have been presented at a penalty phase. Not only was this waiver not knowingly or intelligently made but Mr. Power was not fully informed." (V. III at 181-182).

In addition, appellant raised a claim questioning his sanity as it relates to the execution of the death sentence:

c) Claim XXXI "MR. POWER IS INSANE TO BE EXECUTED" paragraph 2.

"2. Mr. Power is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane." (V. III at 177).

The State filed its Response to Appellant's Motion for Post-Conviction Relief on February 18, 1999. The Ninth Judicial Circuit Court, the Honorable Alice Blackwell White, held a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) on

May 6, 1999. The Ninth Judicial Circuit Court subsequently granted an evidentiary hearing on eight of his thirty-eight allegations of error. The claims included most of those relating to appellant's mental condition at the time of sentencing and his ability to make a knowing, intelligent and voluntary waiver of his right to present mitigating evidence. These included claims V, XIV, XV, XXII, XXX, and the various subclaims. (V. III at 569). Judge White set the hearing for October 11, 1999 and reserved three days for the hearing. (V. III at 569).

On July 6, 1999, Judge White convened a hearing to discuss discovery issues and the State's motion to gain access to the appellant for a psychiatric examination and an independent examination to determine whether or not appellant was competent to proceed. The first issue addressed was the State's general demand for discovery. Judge White denied the State's demand to take depositions of prospective witnesses. Defense counsel noted that witness lists had not yet been exchanged and that any such order permitting discovery was premature. Judge White denied this motion without prejudice to the State to again raise this issue later to request depositions of specific witnesses. (V. I at 9-10).

The second issue addressed at the hearing was the State's

request for access to conduct a mental status examination. This request was denied by Judge White. Judge White apparently agreed with the defense argument that appellant did not raise any issue surrounding his sanity and that appellant retained a Fifth Amendment privilege to preclude such an examination.⁵ (V. I at 20).

At a hearing held on September 27, 1999, the State asked Judge White to reconsider her earlier ruling denying the State access to the defendant so that its own mental health expert could examine the appellant. In addition, the State asked the court to order a psychiatric examination of the appellant to determine his competency to proceed (post-conviction). (V. II at 55). The State's motion was made after the defense submitted the reports of its own mental health experts who had examined the appellant. Based upon those reports and the argument of the parties below, Judge Walker ordered that appellant be examined to determine his ability to proceed and assist post-conviction counsel. Judge White stated:

Okay. Well, Mr. Lerner, I'm granting the Motion for the Pre-Evidentiary Hearing Mental Health Examination and will require that Mr. Power submit to a mental health examination so that the court can be sure that

⁵Judge Walker did not explicitly state her rationale for rejecting the State's requests for a competency examination and access to the appellant for its own expert to conduct a mental health evaluation.

there is no issue of competency while we go through these proceedings. I guess I need to appoint a mental health expert to make inquiry into those matters and will do so and send an order out in the next day or so. Okay.

(V. II at 43-44).

After initial argument, Judge White denied the State's Motion to Reconsider her earlier ruling prohibiting the State from having its own expert examine the appellant. However, immediately after that oral ruling, the following dialogue occurred between the parties below:

MR. LERNER [assistant state attorney]: Well, your Honor, I'm asking is defense counsel withdrawing claim 32, which is a direct claim that the defendant did not have the mental capacity to waive his penalty phase mitigation?

MS. IZAKOWITZ: We're not waiving anything, your Honor.

THE COURT: Are you going to use those expert witnesses for the purpose of arguing that he did not have the requisite mental status at the time to be able to waive it?

MS. IZAKOWITZ: We're using the experts to say Mr. Blankner [trial defense counsel] had an obligation to determine whether Mr. Power knew what he was waiving, if he knew what he was doing in order to waive.

THE COURT: But there's a difference, Ms. Izakowitz, between saying we don't know how it would have come out, Mr. Blankner should have made an inquiry or saying had he made even a cursory inquiry, an adequate inquiry, he would have realized that my client was not capable of making a waiver.

MS. IZAKOWITZ: We don't know what Mr. Blankner is going to say. We don't know --

THE COURT: No, no, I want to know what you're experts --you and I are not communicating. So take it easy. Listen to what I'm asking. Is there going to be testimony from your experts that at the time of the basically making decisions with regard to whether to present mitigation or not that Mr. Power did not have the requisite mental capacity to assist in making those decisions?

MS. IZAKOWITZ: The burden is on, is on trial counsel to determine whether Mr. Power was capable of making that decision. Okay. This goes to Mr. Blankner's effectiveness. Did he sufficiently talk to Mr. Power? Did he sufficiently bring forth, investigate as to whether Mr. Power had the capability to waive that?

THE COURT: All right. But there are two ways to prove that. One way is to say Mr. Blankner never made any inquiry, never asked the first question, therefore, he was ineffective.

Second way to do it is say well, he never asked any questions or he asked inadequate questions, because had he inquired, he would have learned that Mr. Power was incapable of assisting.

All I want to know is are you intending to argue the second half of that, that had he made inquiry, he would have determined Mr. Power was incapable of assisting?

MS. IZAKOWITZ: I'm not sure I understand the distinction. Why would that make any difference, as far as allowing the state to have an expert?

THE COURT: Forget that part. Talk to me about what the theory is. Let me worry about the decision. Tell me what your theory is.

MS. IZAKOWITZ: Your Honor, we're going to go on alternate theories. I can't give you a yes or no answer. I can't tell you at this, at this point yes or no.

THE COURT: Okay. So you may argue at the 3.850 that your client did not possess the requisite ability at the time of the sentencing hearing in this case, the sentencing proceeding to assist counsel?

Ms. IZAKOWITZ: Well --

MS. DAY [co-defense counsel]: Your Honor, what we're arguing is the non-intelligent and voluntary waiver is a two part entity. One side is did Mr. Blankner do the investigation and did he communicate the result of his investigation to Mr. Power. The other side of that is whether Mr. Power had the requisite ability to understand what Mr. Blankner said. And we're not waiving either of those arguments.

(V. II at 55-58).

At the conclusion of the above dialogue with appellant's defense attorneys, Judge Walker changed her ruling, stating:

Then in this case I think the State is entitled to have an expert witness examine Mr. Power for purposes of bringing forth testimony as to whether or not he was capable of making the waiver. What you have said to me before in the prior hearing and what you said to me a few minutes ago was no, we're not focused on that part. We're focused on the first prong, which is did Mr. Blankner make an adequate inquiry and we're not worrying about the part, the second half of it.

...

You're not listening, Ms. Izakowitz. If, in fact, you're going to present evidence or argue with regard to what your co-counsel has described as the second prong of that, then the state is entitled to try to bring evidence forward in opposition to that. That's the nature of the hearing. Granted it's your burden but the nature of the hearing is that they're also entitled to try to show that you can't meet that burden.

(V. II at 58). The written order on the State's motion for reconsideration provides, in part: "The court has reviewed the motion, the argument of counsel, and the official court file, and based upon that review, the court finds that the motion has

merit. The defendant's counsel asserted at the hearing on this motion that the defendant's competency to make a decision to waive the presentation of mitigation evidence during the penalty phase of his trial will be an issue examined during the evidentiary hearing this court currently has scheduled to begin on Monday, October 11, 1999." (V. V at 601).

The next issue addressed was the State's request to depose trial defense counsel and the three defense mental health experts. (V. II at 61). The State argued that depositions were necessary, stating, in part: "Yes, basically because of the complexity of the reports and because of the things that appear to be left out, as I've already outlined, one of them in Sultan's report, I'm asking for leave of court to depose those three experts..." (V. II at 61). Defense counsel objected to the discovery depositions, arguing that the State had not shown good cause to conduct discovery and that it had the reports of the experts it planned to call at the evidentiary hearing. (V. II at 62). Defense counsel claimed the State's request to depose these witnesses did not make sense. Defense counsel argued, in part: "...Why does he need to depose them? I don't understand that. Doesn't make any sense. We object. We think there's sufficient information here for the State to go forward. They don't need depositions of these three witnesses." (V. II

at 62). After hearing the argument of counsel, Judge White denied the State's request to depose the three mental health experts, but did grant the State leave to depose the two trial defense attorneys. (V. II at 66).

The final issue addressed at the hearing was the defense Motion to Quash Subpoena and Request for a Protective Order. (V. V at 597-600). The State sought appellant's Orange County Jail medical records, the location where appellant was incarcerated while awaiting trial. The assistant state attorney argued below that such records were necessary for the following reason: "They are for Dr. Gutman to look at and see if there were any indications of some kind of bizarre conduct or any other relevant conduct by the defendant while he was incarcerated here. It's perfectly legitimate and within the scope of what's been raised by the defendant. There's no basis to quash that subpoena." (V. II at 68).

Defense counsel argued that discovery was limited in post-conviction and that the State must show "good cause for these records." (V. II at 69-70). Appellant's counsel further argued that such records were confidential. (V. II at 70). Judge White agreed with the defense, stating: "I agree, counsel, that the Lewis case basically imposes, upon proper objection, a good cause kind of standard and as I see the subpoena, it doesn't

show -- I don't believe there's been good cause stated and I'll grant the motion to quash." (V. II at 71).

SUMMARY OF THE ARGUMENT

ISSUE I--Although on appeal appellant's counsel disavows any competency concerns, counsel raised allegations in her Rule 3.850 motion directly challenging appellant's competency--i.e., "Mr. Power is insane to be executed." Further, counsel claims that due to mental defects appellant was incapable of waiving his right to present mitigating evidence. Based upon the argument of counsel below, the allegations contained in the Rule 3.850 motion and the reports submitted by the defense experts, it cannot be said the lower court abused its discretion in ordering an examination to determine appellant's competency to proceed.

ISSUE II--Appellant claims that due to his mental condition he was incapable of waiving the right to present mitigating evidence. Appellant has been examined by three defense mental health experts and plans on introducing their testimony to support his post-conviction claims. The lower court did not abuse its discretion in seeking to "level the playing field" by allowing the State's expert to examine the appellant.

CROSS APPEAL ISSUE--The lower court abused its discretion in granting appellant a protective order precluding the State from reviewing appellant's Orange County Jail medical records. These records may contain highly relevant information concerning

appellant's mental state at the time of his trial and sentencing.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ABUSED ITS DISCRETION BY APPOINTING MENTAL HEALTH EXPERTS TO EXAMINE THE APPELLANT TO DETERMINE HIS COMPETENCE TO PROCEED? (STATED BY APPELLEE).

Appellant claims that he is fully competent to proceed and that he has the ability to rationally consult with collateral counsel in preparing for an evidentiary hearing. (Appellant's Brief at 8). At the same time, however, appellant maintains that due to organic brain damage and/or other psychiatric problems he was incapable of waiving his right to present mitigating evidence at his trial. In support of this claim, appellant is offering the testimony of three mental health experts. Each of these experts submitted a report alleging that appellant suffers from serious neurological deficits. Only after reviewing these reports and hearing that counsel was preparing to argue that due to appellant's neurological and/or psychological deficits that appellant was incapable of waiving the presentation of mitigating evidence at trial, did Judge White order appellant be evaluated to determine his competence to proceed. The State views this as a prudent step given the information before Judge White at the September 27, 1999 hearing.

On February 28, 2000, this Court struck the State's brief because it referenced material outside of the record on appeal. The extra record material was included to show that the competency to proceed examinations were conducted prior to this Court granting a stay in this matter. Given the order of this Court, this issue will now be addressed for argument purposes only as if such examinations had not been conducted.⁶

In Carter v. State, 706 So.2d 873, 875 (Fla. 1997), this Court held that a "judicial determination of competency is required when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue, the development or resolution of which require the defendant's input."⁷ The State has not found a precise definition of "reasonable grounds;" however, the situation presented in the instant case should certainly qualify. See e.g. Provenzano v.

⁶The State notes, however, that appellant admitted in an official pleading filed before this Court **the only fact** sought to be established by reference to the extra record material; that the two experts appointed by the lower court examined the appellant. "While the motion to stay was pending, the two experts appointed by the court evaluated Mr. Power." (Appellant's Motion to Strike Answer Brief at 2).

⁷Certainly, appellant's post-conviction motion has raised factual allegations that require collateral counsel to consult with the appellant, i.e, appellant's recollection of what his attorney told him with regard to presentation of mitigating evidence.

State, 24 Fla.L.Weekly S406 (Fla. August 26, 1999) (recognizing that the reasonable grounds standard articulated in rule 3.811(e) [competency to be executed] has caused "some confusion."). Based upon appellant's claims in his motion for post-conviction relief, appellant's competency was directly called into question.

This Court has repeatedly recognized the right of a competent defendant to waive the presentation of mitigating evidence. See e.g., Pettit v. State, 591 So.2d 618 (Fla.), cert. denied, 506 U.S. 836, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992); Henry v. State, 586 So.2d 1033 (Fla. 1991), judgment vacated on other grounds, 505 U.S. 1216, 112 S.Ct. 3021, 120 L.Ed.2d 893 (1992); Anderson v. State, 574 So.2d 87 (Fla.), cert. denied, 502 U.S. 834, 112 S.Ct. 114, 116 L.Ed.2d 83 (1991); Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988); Chandler v. State, 702 So.2d 186 (Fla. 1997). As reiterated in Wuornos v. State, 676 So.2d 966 (Fla. 1995), cert. denied, 117 S.Ct. 395, 136 L.Ed.2d 310 (1996) "[a]t the trial level, the defendant is entitled to control the overall objectives of counsel's argument," including a waiver of the right to present a case for mitigation. Id. at 970 (citing Farr v. State, 656 So.2d 448, 449 (Fla. 1995)).

In alleging that due to serious psychological and/or neurological deficits appellant was incapable of knowingly and

voluntarily waiving his right to present mitigating evidence, appellant directly placed his competency at the time of sentencing in issue. As this Court is aware, there is no heightened level or degree of competency required to waive the presentation of mitigating evidence. "Florida Rule of Criminal Procedure 3.211(a)(1) codifies what is known as the Dusky⁸ standard of competence, that is 'whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, well as factual, understanding of the pending proceedings.' The rule 3.211 standard applies to 'any material stage of a criminal proceeding.'" Carter, 706 So.2d at 875 (quoting Fla.R.Crim.P. 3.210). Sentencing is a critical stage of the proceedings. If a defendant is competent to stand trial he is competent to waive the presentation of mitigating evidence or the assistance of counsel. See e.g. Godinez v. Moran, 509 U.S. 389, 399, 125 L.Ed.2d 321, 332, 113 S.Ct. 2680 (1993)(rejecting application of a more stringent competency standard for waiver of counsel, stating that Dusky standard

⁸In Dusky v. United States, 362 U.S. 402, 4 L.Ed.2d 824, 80 S.Ct. 788 (1960), the Supreme Court held that the standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him."

applies equally to guilty pleas and waiver of counsel).

Contrary to appellant's assertion, the State does understand the difference between a claim that trial defense counsel failed to investigate mental health issues for mitigation and a claim challenging the defendant's competency. If appellant's only claim was that counsel failed to investigate potential mental health mitigation, a competency determination might not be appropriate. However, appellant is claiming not only that counsel was ineffective for failing to investigate appellant's mental condition for mitigation, but also that he was incapable of knowingly and voluntarily waiving his right to present mitigating evidence--i.e., appellant was not competent to do so. (V. II at 55-58; V. III at 102-103, 106, 144). In support, appellant has offered reports of three experts which claim appellant suffers from long term, and presumably continuing mental deficits and psychological problems.

Dr. Faye Sultan submitted a report that concluded appellant suffered from a serious disorder which "would have greatly affected Mr. Power's ability to make clear and rational choices about what may or may not have been in his own interest." Further, Dr. Sultan stated that "[h]is ability to assist in the preparation of his defense would have been significantly impaired.'" (V. II at 41-42)(prosecutor quoting the report of

Dr. Faye Sultan). As the prosecutor noted below, the Dusky standard for competency is "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding." (V. II at 42). Under these circumstances, appellant has called his competency into question during these post-conviction proceedings. Given the record before the lower court and appellant's Rule 3.850 claims, Judge White cannot be faulted for attempting to ensure that appellant is competent to proceed.

While on appeal counsel disavows any competency concerns, below, counsel specifically stated that she was not abandoning any claims made in the Rule 3.850 motion. (V. II at 55-58). Further, when asked regarding the nature of appellant's claims, defense counsel claimed the following: "Your Honor, what we're arguing is the non-intelligent and voluntary waiver is a two part entity. One side is did Mr. Blankner do the investigation and did he communicate the result of his investigation to Mr. Power. The other side of that is **whether Mr. Power had the requisite ability to understand what Mr. Blankner said. And we're not waiving either of those arguments.**" (V. II at 55-58). Since appellant was not waiving his competency claims regarding appellant's ability to waive presentation of mitigating evidence at trial based in large part upon continuing neuropsychological

deficits, the trial court was well advised to order a competency examination. In other words, based upon appellant's Rule 3.850 allegations and the reports of his mental health experts, the trial court had "reasonable grounds" to believe appellant may be incompetent to proceed. Carter, 706 So.2d at 875.

Appellant's concern that in seeking a competency determination the State was merely seeking additional evidence to rebut his attempt to develop mental health mitigation is without merit.⁹ (Appellant's Brief at 16). In Carter, this Court stated that in the absence of rules relating to a competency determination in post-conviction, the rules relating to competency during trial proceedings should be looked to for guidance. Presumably, appellant would benefit from Rule of Criminal Procedure 3.211 (e) which limits the use of information contained in the experts' reports on a defendant's competency. Rule 3.211 (e)(1) provides: "The information contained in any motion by the defendant for determination of competency to proceed or in any report of experts filed under this rule insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant

⁹Appellant's concern that neutral court appointed experts would tend to contradict his mental health claims is probably well founded.

to this rule, shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant."¹⁰ Thus, appellant's concerns in this regard appear unjustified.

Perhaps the State and Judge White erred in taking the allegations in appellant's Rule 3.850 motion at face value. Appellant's collateral counsel may be raising claims without any factual basis--i.e, "Appellant is insane to be executed" and that "Mr. Power was incapable of making any such waiver [mitigating evidence] because of his mental deficiencies." (V. III at 144, 177). Nonetheless, since appellant's collateral counsel specifically asserted that she was not waiving any claims regarding appellant's mental condition presented in the final amended Rule 3.850 motion, in the State's opinion, it can only ignore appellant's claims at its own peril.¹¹ The State and Judge Walker cannot be faulted for assuming, at least preliminarily, that appellant is making legitimate claims

¹⁰Of course, the concerns regarding self-incrimination behind the rule are largely if not entirely absent from a post-conviction proceeding. Such a proceeding is civil in nature and the State is not seeking additional evidence of appellant's guilt; appellant has already been convicted. Carter, 706 So.2d at 875 (recognizing that Rule 3.850 proceedings are civil in nature).

¹¹In Jones v. State, 740 So.2d 520, 523 (Fla. 1999), this Court noted that retrospective competency determinations are inherently difficult.

regarding his mental condition in his motion for post-conviction relief. Based upon the argument of counsel below, the allegations contained in the Rule 3.850 motion and the reports submitted by the defense experts, it cannot be said that Judge White abused her discretion in ordering an examination to determine appellant's competency to proceed.¹²

¹²While the State has not found a case directly on point addressing the standard of review on appeal for a trial court's ordering a competency determination, it appears this allegation of error would fall under an abuse of discretion review. C.f. Medina v. State, 690 So.2d 1241 (Fla. 1997)(In addressing reasonable grounds for a competency determination on a claim the defendant was insane and could not be executed, this Court stated: "We conclude that in this case the reports of the two psychologists and the psychiatrist meet the reasonable-ground threshold of rule 3.811(e) and that it was **an abuse of discretion** not to have an evidentiary hearing pursuant to rule 3.812 in view of the conflicting opinions of the experts.")(emphasis added).

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION FOR AN EXPERT OF ITS OWN CHOOSING TO EXAMINE THE APPELLANT TO MEET THE EXPECTED TESTIMONY OF THREE DEFENSE EXPERTS WHO HAVE CONDUCTED A MENTAL STATUS EXAMINATION? (STATED BY APPELLEE).

Appellant claims that Judge White erred in granting the State access to the appellant for the limited purpose of conducting a mental status examination. Appellant's argument on appeal is devoid of any merit.

As the State noted in its motion to reconsider Judge White's earlier ruling, the appellant recently had been examined by three mental health experts. (V. V at 594). The defense planned to utilize these experts during the evidentiary hearing to support his various mental health mitigation and competency claims.¹³ Thus, appellant placed his mental condition into issue for the evidentiary hearing below.

Resolution of this issue should rest upon this Court's decision in Dillbeck v. State, 643 So.2d 1027, 1031 (Fla. 1994), cert. denied, 514 U.S. 1022, 115 S.Ct. 1371, 131 L.Ed.2d 226 (1995). In Dillbeck, the trial court allowed the State to have

¹³The recently enacted Death Penalty Reform Act of 2000, House Bill 1-A, Laws of Florida, Section 9 [924.059] provides that "if the defendant intends to offer expert testimony of his or her mental status, the state shall be entitled to have the defendant examined by an expert of its choosing."

its own expert examine the defendant prior to the sentencing phase of his capital trial. 643 So.2d at 1031. In affirming the trial court's decision, this Court stated:

We note that Dillbeck planned to, and ultimately did, present extensive mitigating evidence in the penalty phase through defense mental health experts who had interviewed him. Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dillbeck to submit to a prepenalty phase interview with the State's expert. See *Burns*. No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.

Dillbeck, 643 So.2d at 1031. Thus, this Court held that a defendant who plans to call a mental health expert who has examined the defendant will be subject to the following choices: "1) having her expert testify directly about her case, in which instance the state may have her examined by its expert, or 2) both sides may present the testimony of experts who have not examined the defendant and who will not testify about the facts of her case.'" (quoting State v. Hickson, 630 So.2d 172 (Fla. 1993)). See Fla.R.Crim.P. 3.216 (f) ("If the notice to rely on any mental health defense other than insanity indicates the defendant will rely on the testimony of an expert who has examined the defendant, the court shall upon motion of the state order the defendant to be examined by one qualified expert as to the mental health defense raised by the defendant...").

As far as the State can surmise, appellant's claim that Dillbeck does not apply rests upon the following two arguments: 1) applying the rule of law articulated in Dillbeck would violate the prohibition against *ex post facto* laws and, 2) that a compulsory mental health examination would violate appellant's fifth amendment right against self-incrimination. (Appellant's Brief at 28). Neither of these arguments possesses any merit.

The rule articulated in Dillbeck is one of fundamental fairness. Where the defense has had its own experts examine the defendant and plans on introducing their testimony in court, the State may be granted limited access to a defendant for an examination so that it may fairly rebut such testimony. Appellant's cryptic argument does not even begin to explain how this rule violates the *ex post facto* prohibition. Allowing the State to have its own expert examine the appellant rests upon the discretionary authority of the trial court and does not meet any of the common measures used to test a potential violation of the *Ex Post Facto* Clause. See Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed.2d 344, 356 (1977) ("the law was not *ex post facto* because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to

convict."); United States v. Botero, 604 F.Supp. 1028, 1031 (U.S.D.C. Fla. 1985), aff'd 853 F.2d 928 (1988)("If the provisions are merely procedural or regulatory rather than punitive, there is no *ex post facto* violation even if the operation of the Act disadvantages the defendant."). Further, while Dillbeck was decided prior to appellant's sentencing in this case, it was decided after Estelle v. Smith, 451 U.S. 454 (1981) and Buchanan v. Kentucky, 483 U.S. 402, 97 L.Ed.2d 336, 107 S.Ct. 2906 (1987), which placed a criminal defendant on notice that where he has been examined by a defense expert and plans to use that expert testimony in court he opens himself up to the possibility of an examination by a State expert. And, Dillbeck was decided well before appellant was examined by the three mental health experts he plans to call as witnesses at the evidentiary hearing below.

This Court rejected a similar claim against a compelled mental status examination in Elledge v. State, 706 So.2d 1340 (Fla. 1997), cert. denied, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998). In Elledge, the defendant claimed "that the trial court should not have subjected him to a compelled mental health examination by the state's expert because there was no authority to compel the exam." 706 So.2d at 1345. This Court disagreed, stating:

Although rule 3.202 became effective three years after Elledge's resentencing,[] we find that the trial court did not abuse its discretion by compelling the exam in order to "level the playing field." See *Dillbeck v. State*, 643 So.2d 1027, 1030 (Fla. 1994), cert. denied, 514 U.S. 1022, 115 S.Ct. 1371, 131 L.Ed.2d 226 (1995). In *Dillbeck*, we reasoned that

[a]llowing the state's expert to examine a defendant will keep the state from being unduly prejudiced because a defendant will not be able to rely on expert testimony that the state has no effective means of rebutting.

Id. at 1030 (quoting *State v. Hickson*, 630 So.2d 172, 176 (Fla. 1993)). The procedures undertaken in the instant case are consistent with the requirements set forth in rule 3.220 and in *Dillbeck*. We find no error.

Elledge, 706 So.2d at 1345 ([footnote omitted]).

Allowing the State to examine the appellant does not violate the *Ex Post Facto* Clause of the Constitution. Nor does appellant's Fifth Amendment claim protect him against examination by a State expert. This is a post-conviction proceeding and Fifth Amendment concerns are diminished if not eliminated. See generally *State v. White*, 470 So.2d 1377 (Fla. 1985)("These post-conviction collateral remedies are not steps in a criminal prosecution but are in the nature of independent collateral civil actions governed by the practice of appeals in civil actions from which either the government or the defendant (petitioner) may appeal.")(citing *State v. Weeks*, 166 So.2d 892

(Fla. 1964); State v. Jackson, 414 So.2d 281 (Fla. 4th DCA 1982); Tolar v. State, 196 So.2d 1 (Fla. 4th DCA 1982); C.f. State ex. rel. Butterworth v. Kenny, 714 So.2d 404, 409 (Fla. 1998)("Consequently, postconviction relief proceedings, while technically classified as civil actions, are actually quasi-criminal in nature because they are heard and disposed of by courts with criminal jurisdiction.").¹⁴

Appellant has already been convicted and sentenced. His convictions have been affirmed on appeal and are considered final. The State neither seeks additional evidence of his guilt nor does it require such evidence. The State merely seeks a "level playing field" in order to rebut appellant's collateral attack upon his convictions. Certainly, appellant is not entitled to any more protection in a post-conviction proceeding

¹⁴In Kenny this Court observed:

Technically, habeas corpus and other post-conviction relief proceedings are classified as civil proceedings. Unlike a general civil action, however, wherein parties seek to remedy a private wrong, a habeas corpus or other post-conviction relief proceeding is used to challenge the validity of a conviction and sentence. See, e.g., Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)(O'Connor, J., concurring)(post-conviction proceeding is a civil action designed to overturn a presumptively valid criminal judgment).

714 So.2d at 409.

than he would receive at trial. As noted above, where a defendant offers mental health expert testimony at trial or sentencing from an expert who has examined him, the State is entitled to have its own expert examine the defendant. There is no reason in law or logic for this rule of fundamental fairness not to apply to post-conviction proceedings.

Deaton v. Dugger, 635 So.2d 4 (Fla. 1993), provides no support for appellant's position on appeal. Deaton does not in any way address or discuss the State's right to have a defendant examined by its own expert to rebut mental health evidence presented by defense experts. In Deaton, trial counsel was found ineffective for failing to investigate the existence of mitigating circumstances, including mental health mitigation. Consequently, based upon defense counsel's lack of investigation, the lower court found that the defendant's waiver of mitigation was not knowing, voluntary or intelligent.

Unlike Deaton, in this case, counsel's argument is two fold: 1) that the waiver was not voluntary because counsel did not adequately investigate the existence of mental health mitigation and, 2) that appellant, due to his mental condition, was incapable of waiving the presentation of mitigating evidence. Moreover, even if appellant's claim were limited to showing that counsel failed to develop mental health mitigators, the State

would still be entitled to rebut this evidence with testimony from its own mental health experts to address the prejudice prong of under Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).¹⁵ Appellant's attempt to offer mental mitigation would open the door to compelling rebuttal from the State.

Appellant's reliance upon Estelle v. Smith, 451 U.S. 454 (1981), is also misplaced. In Smith, the Court stated that "[a] criminal defendant, **who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence,** may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." 451 U.S. at 468 (emphasis added). Smith does not apply *sub judice* because appellant initiated this post-conviction proceeding and claimed that he was incapable of making a knowing, intelligent, and voluntary waiver of mitigating evidence due to his mental condition. Appellant has

¹⁵The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. A claim of ineffective assistance fails if either prong is not proven. Kennedy v. State, 547 So. 2d 912 (Fla. 1989). Prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 113 S.Ct. 838, 122 L.Ed 2d 180 (1993); Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988).

been examined by at least three mental health experts and plans to introduce their testimony at the evidentiary hearing below. See, Buchanan v. Kentucky, 483 U.S. 402, 97 L.Ed.2d 336, 107 S.Ct. 2906 (1987) (noting that Smith provides that where a defendant plans to use psychiatric evidence the defendant waives the Fifth Amendment privilege so that the state may rebut that evidence).

In Savino v. Murray, 82 F.3d 593 (4th Cir. 1996), cert. denied, 117 S.Ct. 1, 135 L.Ed.2d 1098 (1996), the Fourth Circuit recognized that Smith and subsequent Supreme Court precedent did not limit the State's right to meet or rebut the presentation of defense psychiatric evidence. The Savino Court stated:

In Smith, the Court differentiated between a defendant who intends to introduce psychiatric evidence on his own behalf and one who "neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence. *Id.* at 468, 472, 101 S.Ct. At 1875-76, 1877-78. When a defendant asserts a mental status defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination or he may be required to submit to an evaluation conducted by the prosecution's own expert. *Buchanan v. Kentucky*, 483 U.S. 402, 42-23, 107 S.Ct. 2906, 2917-18, 97 L.Ed.2d 336 (1987); *Smith*, 451 U.S. at 465, 101 S.Ct. At 1874. That defendant has no Fifth Amendment privilege against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence. *Powell v. Texas*, 492 U.S. 680, 684-85, 109 S.Ct. 3146, 3149-50, 106 L.Ed. 2d 551 (1989); *Buchanan*, 483 U.S. at 422-23, 107 S.Ct. at 2917-18. In essence, the defendant waives his right to remain silent--but not his right to notice--by

indicating he plans to introduce psychiatric testimony.

82 F.3d at 604.

Appellant finally claims that the State has not established any compelling reason for an expert of its own choosing to examine the appellant.¹⁶ In support of this contention, appellant claims that "[t]he State is entitled to depose the defense mental health experts, to review their background materials and to cross-examine them at the evidentiary hearing." (Appellant's Brief at 36). The State will give appellant's collateral counsel the benefit of the doubt and assume that counsel forgot she successfully opposed the State's attempt to depose her mental health experts. Ms. Izakowitz noted below: "Yes, We Object, your Honor. I don't think they've shown any good cause..." (V. II at 62). Judge White denied the State's request to depose the defense mental health experts. (V. II at 66). Thus, contrary to appellant's assertion, in this case the State cannot simply prepare for appellant's experts by conducting discovery depositions. In any case, even if the State could depose the defense experts in this case, discovery is not a substitute for having its own expert examine appellant

¹⁶Of course, the State is not required to offer a compelling reason. It is reason enough for such an examination that appellant is offering the testimony of three experts who have examined him at the evidentiary hearing below.

in order to counter the testimony of defense experts who have actually examined the appellant.

Based upon this record, appellant has not established that Judge White abused her discretion in allowing the State limited access to the appellant for the purpose of conducting a mental status examination.

CROSS APPEAL ISSUE

WHETHER THE TRIAL COURT ABUSED ITS
DISCRETION IN GRANTING A PROTECTIVE ORDER
PROHIBITING THE STATE FROM REVIEWING
APPELLANT'S MEDICAL RECORDS FROM THE ORANGE
COUNTY JAIL?

The State maintains that Judge White abused her discretion in granting a protective order prohibiting the State from receiving and reviewing appellant's¹⁷ Orange County jail records. Appellant's post-conviction claims rendered the records relevant and there were less oppressive means to vindicate any privacy concerns that appellant may have had in the requested medical records.

On September 20, 1999, the State submitted a notice to counsel for the appellant of its intent to subpoena Orange County jail records "for any and all medical records pertaining to treatment or observations while incarcerated." According to the notice, the subpoena would not issue until on or after September 24, 1999. Before the subpoena was issued, the defendant filed a motion for protective order, claiming that the State had not shown "cause, relevance, materiality as to these records." (V. V at 597-598).

At a hearing held on September 27, 1999, the State argued

¹⁷Although this issue falls under a cross-appeal and appellant is the appellee, for consistency purposes Mr. Power will be identified as the appellant.

why these records were relevant:

...We always send them out, these notices out when they subpoena medical records. They are for Dr. Gutman to look at and see if there were any indications of some kind of bizarre conduct or any other relevant conduct by the defendant while he was incarcerated here. It's perfectly legitimate and within the scope of what's been raised by the defendant. There's no basis to quash that subpoena.

(V. II at 68). The State concluded its argument in opposition of a protective order, stating:

...He was incarcerated at the time and the medical records and the other records of his incarceration in the Orange County Jail where he was at the time will assist the state and the defense and the court in deciding whether or not he exhibited any conduct that showed he lacked the mental status to do what he did and what he had to do under Wournos which is waive the mitigation. That's the main focus of this case.

There's been a lot of what I would call obfuscation but that is the main fact. These are relevant records. They are not confidential. We are entitled to them. We would ask the court to deny the motion to quash the subpoena.

(V. II at 70).

In response, appellant's counsel argued that the records should not be disclosed:

...I believe that Lewis v. State sort of trumps this. We're in post-conviction. Discovery is limited in post-conviction. They have to show good cause for these records. They haven't shown good cause. They want all of his records while he was incarcerated. I don't believe they've shown any good cause for these records.

(V. II at 68-69). Appellant's counsel also claimed that the

defense had not raised a medical issue that would entitle the State to review appellant's confidential medical records. (V. II at 69).

Judge White apparently agreed with defense counsel, stating that the State had failed to show good cause for the subpoena to issue. (V. II at 71). After this oral ruling, the State asked the Court to revisit or clarify the Court's ruling, noting that the defendant's own experts had reviewed appellant's Department of Corrections files and inmate medical records. (V. II at 75-76). Judge White mentioned that the Department of Corrections is a different entity from the Orange County jail, but did not explain how or why those records are different or any less relevant to the issues before the court. Id.

On September 28, 1999, the trial court entered a written order granting the defense request to quash the subpoena and granting a protective order, precluding the State from receiving or reviewing appellant's Orange County Jail medical records. (V. V at 603). The written order did not address the court's rationale in granting the protective order, but stated that upon review of "the motion, the argument of counsel, and the official court file," the court found the motion possessed merit.

The trial court's ruling on post-conviction discovery is subject to an abuse of discretion standard of review. State v.

Lewis, 656 So.2d 1248, 1250 (Fla. 1994). In deciding whether to allow discovery, the trial judge should consider "the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." (citing People ex. rel. Daley v. Fitzgerald, 123 Ill.2d 175, 121 Ill.Dec. 937, 941, 526 N.E.2d 131, 135 (1988)). This Court stated that discovery is not automatically allowed and that "this inherent authority should be used only upon a showing of good cause." Lewis, 656 So.2d at 1250.

In the State's opinion, this issue raises a question of fundamental fairness. Appellant has raised post-conviction issues concerning his mental condition at the time of his sentencing in state court. Further, he has alleged defense counsel was ineffective in failing to investigate and present evidence of mental health mitigation. See e.g. State v. Lecroy, 641 So.2d 853 (Fla. 1994)(where defendant claims ineffective assistance of counsel he waives attorney client privilege and such waiver includes at least a limited right of the State to review/copy the defense attorney's file). In support, he has offered the reports of three experts, at least two of whom have reviewed all kinds of personal records of the appellant,

including corrections records, psychiatric records, and school records. At the same time, appellant has blocked the State's effort to obtain and review his Orange County jail medical records for the period of 1987 through 1990. Such records are necessary so that its own experts may review them for any signs of mental impairment, medications prescribed, or indications of bizarre behavior. Such records may also be relevant for use in cross-examining appellant's experts during the evidentiary hearing.

A State Attorney is a constitutional officer with a number of duties prescribed by law. "Among these are a mandatory duty of appearing in the circuit court and prosecuting or defending on behalf of the state all suits, applications or motions, civil or criminal, in which the state is a party." State v. Michell, 188 So.2d 684, 687 (Fla. 4th DCA 1966). "The vigor of the state attorney in the use of the processes of the court should be sustained and commended in all instances except where the rights of others are impaired or denied." Id.

In this case, the assistant state attorney provided notice to the appellant of the medical records sought by the State through issuance of a subpoena.¹⁸ (Appendix B). Section 455.667

¹⁸In Accosta v. Richter, 671 So.2d 149, 151 (Fla. 1996), this Court observed that Section 455.241 provides for a waiver of confidentiality for patient records in three circumstances: "1)

(5)(c), Fla.Stat. (1999). The records are relevant to full and fair litigation of appellant's post-conviction claims. Assuming appellant even retains a right to privacy in documents relating to his treatment at the State's expense while incarcerated, appellant's privacy rights were not impaired by the State's demand. At the hearing on appellant's motion to quash and request for a protective order, the State demonstrated that the requested records were relevant. See generally Hunter v. State, 639 So.2d 72, 73 (Fla. 5th DCA 1994), rev. denied, 649 So.2d 233 (1994)("...where a patient whose records are being sought properly raises an objection, it is the state's burden to present evidence and argument to show the nexus between the medical records sought and a pending criminal investigation.").

In the State's opinion, the defendant cannot call into question his mental condition at the time of sentencing, allowing his own experts to selectively view reports, materials or documents that might support his claim, then at the same time prevent the State from obtaining highly relevant materials that it could use to meet or refute his post-conviction claims. For instance, appellant's experts reviewed various records,

in a medical negligence action, when a health care provider is or reasonably expects to be named as a defendant, 2) by written authorization of the patient, or 3) when compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given."

including appellant's entire inmate Department of Corrections file for the years "1980-1994." (Summary of Dr. Faye Sultan, page 1).¹⁹ Dr. Sultan also claimed to have examined appellant's Department of Corrections Medical records for the years 1987 to 1993. Id. at 2. Dr. Sultan even examined appellant's jail records from Monterey County, California, dating back to 1982. Id. Another defense expert reviewed appellant's California Department of Corrections file from 1982 and 1983, noting that appellant had previously been prescribed various drugs. (Report of Dr. Thomas Hyde at 1). Thus, appellant's own experts have generally been reviewing various medical reports generated over a number of years.

The Orange County jail records may contain highly relevant evidence regarding appellant's behavior, and any medical treatment he received at the time of trial and sentencing. For instance, these records might establish that appellant was not taking any psychotropic medication at the time of trial and sentencing. The period of his incarceration at the Orange County jail is the most relevant time frame for purposes of the evidentiary hearing below because appellant is claiming that due

¹⁹Appellant's motion to supplement the record with reports from his mental health experts was granted by this Court on January 5, 2000. However, since the supplemental record has not been received by the State, citation is made to the individual reports rather than pages from the record.

to his mental condition at the time of sentencing he was incapable of waiving his right to present mitigating evidence.

As noted above, the appellant's own experts have already reviewed and utilized appellant's Department of Corrections Records, including his medical records, in making a diagnosis concerning appellant's mental condition. It is highly suspect that while these experts viewed appellant's Department of Corrections records, including his medical records, and even some medical records from California where appellant was previously incarcerated, there is nothing in these reports to suggest that they reviewed appellant's Orange County jail medical records.

In conclusion, this record establishes that appellant placed his mental condition into issue in an attempt to obtain post-conviction relief. It is also clear that appellant's own experts were reviewing appellant's medical records, including appellant's Department of Corrections medical records, prior to forming an opinion as to appellant's mental condition. The State provided appellant notice and an opportunity to object prior to issuing a subpoena for the medical records. After appellant objected, the State demonstrated how such records were relevant at a hearing before Judge White below. Based upon this record, Judge White abused her discretion in granting appellant

a broad protective order preventing the State from reviewing appellant's Orange County Jail medical records.²⁰

²⁰Although not argued below, Judge White could have protected any of appellant's legitimate privacy interests by ordering an in camera inspection of the requested records and allowing the State to review only those documents directly relating to appellant's mental condition and any treatment or medications that may have been prescribed. Instead, Judge White granted a protective order precluding the State from examining any documents relating to appellant's medical treatment while awaiting trial in Orange County. C.f. State v. Rutherford, 707 So.2d 1129, 1131 (Fla. 4th DCA 1997) ("This statutory procedure [Section 395.3025(4)(d)] allows the trial court to narrow the scope of a subpoena, to separate information relevant to the criminal investigation from facts that are protected from disclosure by the patient's right to privacy."). In addition to "opening the door" to his medical records by raising claims concerning his mental condition, the State observes that privacy expectations for a convicted murderer residing on death row are certainly somewhat diminished from those of most Florida citizens.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to deny appellant any relief on his interlocutory appeal and affirm the decision of the Ninth Judicial Circuit Court below. The State also asks this Court to overturn the Ninth Judicial Circuit Court's order quashing the State's subpoena and granting a protective order which precludes the State from examining Powers' Orange County jail medical records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Pamela H. Izakowitz, Post Office Box 3294, Tampa, Florida 33601-3294, this _____ day of March 2000.

COUNSEL FOR STATE OF FLORIDA