

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,659

ROBERT BEELER POWER,

Appellant/Cross Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

PAMELA H. IZAKOWITZ
Florida Bar NO. 0053856
Assistant CCRC - South

CAPITAL COLLATERAL
REGIONAL COUNSEL - SOUTH
303 S. Westland Avenue
P.O. Box 3294
Tampa, FL 33601-3294
(813) 259-4424

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves an interlocutory appeal of the circuit court's orders granting a competency evaluation and a compelled mental health evaluation of Mr. Power. The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court.

"PC-R." -- record on instant appeal.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Power has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture.

STATEMENT OF FONT

Courier 12 point not proportionately spaced.

TABLE OF CONTENTS

PRELIMINARY STATEMENT ii

REQUEST FOR ORAL ARGUMENT ii

STATEMENT OF FONT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT I

THE LOWER COURT ERRED IN GRANTING THE STATE’S
MOTION TO DETERMINE MR. POWER’S COMPETENCE TO
ASSIST COLLATERAL COUNSEL AT EVIDENTIARY
HEARING WHEN COUNSEL FOR MR. POWER HAS NOT
RAISED A COMPETENCY CLAIM AND HAS NO FACTUAL
INDICATIONS OF MR. POWER’S INCOMPETENCE. 8

ARGUMENT II

THE TRIAL COURT ERRED IN GRANTING THE STATE’S
MOTION TO COMPEL MR. POWER TO UNDERGO A
MENTAL HEALTH EVALUATION BY THE STATE, WHEN THE
STATE WAIVED ACCESS TO MR. POWER BY FAILING TO
REQUEST A PRIOR MENTAL EXAMINATION; WHEN THERE
IS NO AUTHORITY FOR SUCH AN EVALUATION; AND THE
ISSUES TO BE ADDRESSED AT AN EVIDENTIARY
HEARING DEAL WITH COUNSEL’S INEFFECTIVE
ASSISTANCE OF COUNSEL. 19

A. The State was not entitled nor did it
request access to conduct a mental health
evaluation of Mr. Power at trial 22

B. The State is not entitled to a
compelled mental health evaluation now. 30

CONCLUSION 36

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

CASES

Blanco v. Singletary, 943 F. 2d 1477 (11 th Cir. 1991) . . .	11, 32
Burns v. State, 609 So. 2d 600 (Fla. 1992)	26
Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987)	16
Carter v. State, 706 so. 2d 873 (Fla. 1998)	6, 9, 13, 18
Cassamassima v. State, 657 So. 2d 906 (Fla. 5 th DCA 1995) . . .	25
Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994)	31, 32
Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994)	27
Dusky v. United States, 362 U.S. 402 (1960)	12
Estelle v. Smith, 451 U.S. 454 (1981)	28, 30
Eutzy v. Dugger, 746 F. Supp 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990)	32, 33
Furman v. Georgia, 92 S. Ct. 2726 (1972)	25
Galowski v. Berge, 78 F.3d 1176 (7 th Cir. 1996)	12
Gregg v. Georgia, 96 S. Ct. 2909 (1976)	25
Huff v. State, 622 So. 2d 982 (Fla. 1993)	2
In re Gault, 387 U.S. 1 (1967)	29
Lockett v. Ohio, 98 S. Ct. 2954 (1978)	25
Malloy v. Hogan, 378 U.S. 1 (1964)	28
Medina v. Singletary, 59 F. 3d 1095 (11 th Cir. 1995)	12
Peede v. State, 24 Fla. L. Weekly S391 (Fla. 1999)	15
Power v. Florida, 113 S.Ct. 1863 (1993)	2

Power v. State, 605 So. 2d 856 (Fla. 1996)	2
Spaziano v. Florida, 104 S.Ct. 3154 (1984)	25
State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973)	28, 29
State v. Lewis, 656 So. 2d 1248 (Fla. 1995)	20, 23
Strickland v. Washington, 466 U.S. 668 (1984)	30
Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986)	33
United States ex rel. Foster v. DeRobertis, 741 F.2d 1007(7 th Cir. 1984)	12
Woodson v. North Carolina, 96 S. Ct. 2978 (1976)	25
Wuournos v. State, 676 So. 2d 966 (Fla. 1996)	24
<u>MISCELLANEOUS AUTHORITY</u>	
Fla. R. Crim. P. 3.202	28
Fla. R. Crim. P. 3.211(2)(A)(i-iv)	13
Fla. R. Crim. P. 3.211(a)(1) 1999	12

STATEMENT OF THE CASE

On February 24, 1989, Robert Beeler Power was indicted in Orlando, Orange County on charges of first-degree premeditated murder, sexual battery, kidnapping, armed burglary and armed robbery (R. 2676-2678).

Mr. Power went to trial and was found guilty on all counts. After a delay of five (5) months, the jury unanimously recommended a sentence of death (R. 3254). On November 8, 1990, the trial court imposed a sentence of death (R. 3254).

The trial court found four aggravating circumstances: Mr. Power had previously been convicted of another violent felony; the capital offense was committed during an enumerated felony; the capital offense was especially heinous, atrocious and cruel; and the capital offense was committed in a cold, calculated and premeditated fashion (R. 3258-3271).

The trial court found the mitigating circumstance of the comparative cost and degree of executing Mr. Power versus life in prison to be strong and heavily weighted, however, the trial court found this mitigating circumstance to be legally inappropriate for consideration or deserved little weight (R. 3258-3271). The trial court found Mr. Power's age and lack of future dangerousness not mitigating circumstances (R. 3258-

3271).

On direct appeal, the Florida Supreme Court struck the aggravating circumstance of cold, calculated and premeditated, but nonetheless, upheld Mr. Power's death sentence. Power v. State, 605 So. 2d 856 (Fla. 1996). The United States Supreme Court denied a petition for writ of certiorari on April 19, 1993. Power v. Florida, 113 S.Ct. 1863 (1993).

Mr. Power filed his initial Rule 3.850 motion on June 27, 1994. An amended motion was filed on March 17, 1995. The third and final amended motion was filed on November 23, 1998 and raised thirty-eight (38) claims.

The trial court held a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) on May 6, 1999. The trial court issued an order granting an evidentiary hearing on eight of Mr. Power's claims and set the evidentiary hearing for October 11-13, 1999(PC-R. 568-571). Among the claims to be heard at an evidentiary hearing were whether trial counsel was ineffective for failing to present mitigating evidence and whether Mr. Power's counsel was ineffective for failing to obtain an adequate mental health and background evaluation on Mr. Power for the penalty phase of the trial (PC-R. 569).

On July 6, 1999, the trial court held a hearing on various State motions. In its effort to obtain discovery, the

State in its Motion for Order Providing for Pre-Hearing Discovery, wrote:

3. No mental health experts were called during the defendant's trial, and mental health testimony does not form a part of the record on appeal.

4. Over nine years have elapsed since defendant was convicted. During that period of time defendant has been incarcerated. These are factors which may have alerted defendant's mental state from what it was closer in time to defendant's conviction. See, State Motion for Order Providing for Pre-Hearing Discovery.

The State also filed a motion seeking Access to Defendant to Conduct Mental Health Examination. In support of that motion, the State argued in the context of insanity, something that Mr. Power has never raised or alleged in any proceeding or pleading:

2. In the related context of an insanity defense, Florida law provides that the State and defendant may call experts of their own choosing. Rule 3.216, Fla. R. Crim. P. ("The appointment of experts by the Court shall not preclude the state or the defendant from calling additional expert witness to testify at the trial.") The few appellate decisions addressing the scope of the Rule (and its predecessor rule), have held that the State is absolutely entitled to a compelled evaluation by an expert of his own choosing. See, e.g. State v. Baist, 660 So. 2d 1144 (Fla. 3rd DCA 1995); State v. Battle, 302 So. 2d 782 (Fla. 3rd DCA 1974). With regard to the

issue of the state's right to evaluation of a defendant's mental state, Florida Supreme Court has also stated:

psychiatric evaluations conducted in good faith and with proper authorization are clearly acceptable means for the state to employ, especially when competency or sanity may be in issue. Walls v. State, 580 So. 2d 131 (Fla. 1991).

See, State Motion for Order Granting Access to Defendant to Conduct Mental Status Examination filed June 22, 1999.

The trial judge rejected the State's motions and denied the state an opportunity to conduct a mental status examination of Mr. Power (PC-R. at 20). The judge ordered both parties to simultaneously submit a witness list and expert reports by September 7, 1999 (PC-R. 11).

In late September, 1999, two weeks after Mr. Power submitted a witness list and defense expert reports, the State again sought access to evaluate Mr. Power. This time, the State confused mitigation with competency and filed several motions. Among those motions was a Motion to Determine Competency to Assist Collateral Counsel at the Evidentiary hearing, although Mr. Power has **never** raised the issue of his competency to proceed in post-conviction, and a Motion to Gain Access to the Defendant to Conduct a Mental Status Exam.

In these motions, the State relied on material obtained by three defense experts to erroneously argue that because Mr. Power has brain damage and suffered from depression, he may be incompetent to proceed in post-conviction. The State also erroneously argued "the issue of defendant's competency to waive presentation of his extensive personal history is an entirely new issue where the state should be allowed to take discovery." See, Motion to Reconsider State's Motion for Order Granting Access to Defendant to Conduct Mental Status Examination (PC-R. 594-596).

Contrary to her previous rulings, the trial court granted both State motions. On September 28, 1999, Judge Blackwell White ordered that two mental health experts be appointed to evaluate Mr. Power for competency and report their findings at the start of the evidentiary hearing. Judge Blackwell White also authorized a compelled mental health evaluation of Mr. Power by a State expert(PC-R.601-602; 605-606; 615).

Counsel for Mr. Power orally asked Judge Blackwell White to stay the proceedings so she could file an interlocutory appeal. The request was denied (PC-R. 60). Counsel for Mr. Power sought in writing a Motion to Stay Proceedings Pending Appeal to the Florida Supreme Court in the Circuit Court. This motion also was denied on September 29, 1999.

Mr. Power filed a Notice of Appeal in the Circuit Court (PC-R. 607-611) and Motion to Stay Proceedings Pending Interlocutory Appeal in the Florida Supreme Court. On October 8, 1999, this Court granted a stay pending an interlocutory appeal. One week later, on October 15, 1999, this Court denied the State's Motion to Dismiss the Appeal.

On October 8, 1997, the State filed a Notice of Cross-Appeal, seeking review of the Circuit Court's order quashing the subpoena and granting the Defense Request for Protective Order preventing the State from obtaining access to Mr. Power's Orange County Jail Medical Records (PC-R at 617).

SUMMARY OF ARGUMENT

1. The lower court's order compelling a competency evaluation of Mr. Power should be quashed and/or reversed. The State sought to have Mr. Power evaluated for competency to proceed in post-conviction when Mr. Power's attorneys have not asserted that he is incompetent; have not asserted that he is unable to understand the proceedings against him; and have not asserted that he is unable to assist his attorneys in a meaningful way. Under Carter v. State, 706 so. 2d 873 (Fla. 1998), the State has not alleged that there are factual matters at issue that require Mr. Power's input. The State only alleged that Mr. Power may be incompetent to proceed in

post-conviction after the defense was required to submit expert reports before the scheduled evidentiary hearing. Those reports detail Mr. Power's depression and brain damage but nowhere do those reports indicate that Mr. Power may be incompetent to proceed. It was only after receiving those reports that the State sought to have Mr. Power evaluated for competency to proceed in post-conviction. It is clear that the State, in seeking a competency evaluation of Mr. Power, is attempting to find evidence to rebut mental health mitigation and sway the evaluators appointed for competency beyond their mandate and purpose.

2. The lower court's order compelling that Mr. Power undergo a compelled mental health evaluation by the State should also be quashed and/or reversed. The State's request to have Mr. Power evaluated is untimely. The State never previously requested access to evaluate Mr. Power. Moreover, had the State requested access in 1990, it would have been denied because the State was not entitled to conduct a mental health evaluation of Mr. Power at trial. Applying this rule at this point in time would violate Mr. Power's constitutional protection against any ex post facto application of new laws and rules of criminal procedure. Also, without any legal authority, allowing the State to perform a compulsory mental

health examination against Mr. Power would violate his Fifth Amendment rights by forcing him to become a witness against himself, and in fact, would aid the State in its effort to execute him. Additionally, the evidentiary hearing ordered in this case revolves around trial counsel's ineffectiveness at trial in failing to present mental health and other mitigating evidence. Mr. Power has not placed his competency to proceed or sanity at issue - a fact that undermines the State's claim that an examination is necessary to rebut a mental health defense.

ARGUMENT I

THE LOWER COURT ERRED IN GRANTING THE STATE'S MOTION TO DETERMINE MR. POWER'S COMPETENCE TO ASSIST COLLATERAL COUNSEL AT EVIDENTIARY HEARING WHEN COUNSEL FOR MR. POWER HAS NOT RAISED A COMPETENCY CLAIM AND HAS NO FACTUAL INDICATIONS OF MR. POWER'S INCOMPETENCE.

Mr. Power is competent. Mr. Power has a rational understanding of the proceedings against him. Mr. Power has the present ability to consult with collateral counsel in preparing for an evidentiary hearing. Mr. Power has given his attorneys no indication whatsoever that he is unable to understand the proceedings against him or assist his lawyers in a meaningful way.

The State, however, is of the erroneous opinion that Mr. Power may not be competent to proceed in post-conviction and has asked the trial court to order a competency evaluation to determine if Mr. Power is competent in post-conviction. The trial court granted the State's request and appointed two mental health experts (PC-R. 605-606).

The State is attempting to gain access to Mr. Power through these experts that has been previously and consistently denied. The State's initial request to have Mr. Power evaluated was not predicated on Mr. Power's competency and was denied. Initially, the State did not even allege that

Mr. Power may have been incompetent. Undaunted, the state tried again after counsel for Mr. Power was required to submit defense expert reports. This time, the State attempted to gain access to Mr. Power under the guise of competency.

In Carter v. State, 706 So. 2d 873 (Fla. 1998), the Florida Supreme Court held that a judicial determination of competency is required during post-conviction only when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in post-conviction proceedings in which factual matters are at issue and the development or resolution of which require the defendant's input.

Counsel for Mr. Power has not alleged any grounds to believe that he is incompetent to proceed in post-conviction proceedings. Counsel for Mr. Power has not alleged that there are factual matters at issue that require Mr. Power's input to which he is unable to participate.

The State, however, believes that Mr. Power may not be competent to proceed in post-conviction. The State, however, has failed to allege any factual matters to support its position.

In motions filed in the trial court on June 22, 1999, the State sought access to evaluate Mr. Power. The State argued in the context of insanity that it was entitled to evaluate

Mr. Power and cited cases specifically relating to insanity. See, Motion for Order Granting Access to Defendant to Conduct Mental Status Examination.

THE COURT: ...I guess the distinction I'm trying to draw is would you also be trying to inquire into the insanity defense? Are we also talking about the issue of sanity at the time of committing a crime or are we really talking about the ineffective assistance of counsel issue at the time of the trial? Do you understand?

THE STATE: The limit would include both of these, for this reason, your honor. Your order allowing an evidentiary hearing allows ineffective assistance at the time of trial and for the penalty phase, is my recollection. I go back over it. So that would necessarily then have to include the issue of whether or not an insanity defense should have been presented. So that would - then I necessarily would have to inquire into that in order to be able to address it properly at the evidentiary hearing.

(PC-R. 13).

No where in any of Mr. Power's pleadings or motions has he raised the issue of insanity or counsel's ineffectiveness in failing to raise an insanity defense. It was not raised as a defense at trial nor is Mr. Power suggesting it should have been. Yet, the State and the judge completely ignored this fact. Also ignored at this time was any effort by the State to have Mr. Power evaluated for competency. The trial court denied the State's efforts to have Mr. Power evaluated. (PC-R.

20).

On September 7, 1999, counsel for Mr. Power was required to submit a list of witnesses for the evidentiary hearing and expert reports.¹ Two weeks later, on September 22, 1999, the State again attempted to gain access to Mr. Power. This time, the State's efforts were focused on Mr. Power's competency to proceed in post-conviction (PC-R. 572-593).

A review of the expert reports submitted by Mr. Power for the evidentiary hearing indicate that Mr. Power suffered from brain damage and depression. These were the exact same findings that were found in 1987 when Mr. Power was evaluated on his Seminole County case.²

No where in the expert reports does it indicate that Mr. Power may not be competent to proceed in post-conviction. The State and the trial court failed to understand the difference between competency to proceed and the presence of neurological impairments.

As the Eleventh Circuit Court of Appeals said in Blanco

¹None of the expert reports mention that Mr. Power is incompetent to proceed in post-conviction.

²Dr. James Merikangas, who evaluated Mr. Power for competency in 1987, reported to the Seminole County Court that Mr. Power was depressed and that neuropsychology testing was indicated (PC-R. at 102). The State was aware of this evaluation.

v. Singletary, 943 F. 2d 1477, 1502 (11th Cir. 1991):

...[t]here is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing judge and jury should have had an opportunity to consider.

Similarly, "Not every manifestation of mental illness demonstrates incompetence to stand trial; rather the evidence must indicate a present inability to assist counsel or understand the charges." United States ex rel. Foster v. DeRobertis, 741 F.2d 1007, 1012 (7th Cir. 1984); Galowski v. Berge, 78 F.3d 1176, 1182 (7th Cir. 1996); Medina v. Singletary, 59 F. 3d 1095, 1107 (11th Cir. 1995)("[N]either low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial.").

Competency in post-conviction is similar to competency to stand trial. Florida has adopted the standard cited in Dusky v. United States, 362 U.S. 402 (1960), per curiam, that a defendant may not be tried unless he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding....[and] a rational as well as factual understanding of the proceedings against him." See, Fla. R. Crim. P. 3.211(a)(1) 1999. In addition to incorporating the

Dusky standard, Florida Rule of Criminal Procedure 3.211 offers various considerations to be used when evaluating a defendant's competency to be tried. These considerations include a defendant's capacity to appreciate the charges or allegations against him as well as the range and nature of possible penalties; to understand the adversary nature of the legal process; to disclose to counsel facts pertinent to the proceedings at issue; manifest courtroom behavior, and testify relevantly. Fla. R. Crim. P. 3.211(2)(A)(i-iv).

In post-conviction proceedings, the standard to be followed is the same as set forth in the Rules of Criminal Procedure governing competency to stand trial. In post-conviction proceedings, experts also should consider any areas of inquiry specified by the trial court.³ Carter, 706 So. 2d. 873 (Fla. 1997).

At no time has post-conviction counsel believed that Mr. Power did not meet these qualifications. The State submitted a transcript from a November 6, 1996 status hearing, in which the court inquired about Mr. Power's competency. In 1995,

³In Judge Blackwell White's Order Granting State of Florida's Motion for Pre-Evidentiary Mental Health Examination, the court ordered the experts to examine Mr. Power as to his competency to assist his counsel during the evidentiary hearing that was scheduled for October 11, 1999. The court failed to specify any other areas of inquiry. (PC-R. 605-606).

there was some concern among Mr. Power's attorneys about his failure to sign a verification on a Rule 3.850 motion. At the time of the 1996 hearing, however, Mr. Power had signed the verification and collateral counsel had no indication whatsoever that Mr. Power was not competent to proceed. As collateral counsel repeatedly said at the time:

Your Honor, I think if I felt a need for an evaluation I would bring that to the court's attention. If and when I do feel there is a need for an evaluation, I will do so.

(PC-R. 581).

The court persisted in forcing collateral counsel to say whether she thought her client was incompetent.

THE COURT: Do you assert at this time he is competent?

MS. GARDNER: Again, Your Honor, I feel that I'm being placed in a difficult position at this point, that I did not wish to waive any claim of competency or mental mitigation claims that we have raised.

I, again, I'm not a mental health expert. I do not feel that it is necessary to have a competency evaluation. If it is necessary, then I will again petition the court to have such an evaluation.

(PC-R. 581).

After collateral counsel was repeatedly asked and repeatedly told the court she believed Mr. Power to be

competent, the trial court said:

All I needed you to say, 'Judge, I think's he's competent based on my conversations with him and the records of your conversations.' That's all I need. As an officer of the court, I can accept that representation. I see no reason not to accept it. I don't have any indication otherwise.

(PC-R. 589).

It is unclear why the trial court was willing to accept collateral counsel's statement about Mr. Power in 1996, but rejected collateral counsel's statement in 1999 when she said she believed her client to be competent and saw no indication that he was incompetent to proceed.

In Mr. Power's case, there has never been any indication in post-conviction that he is unable to understand the proceedings and consult with his attorneys.⁴

⁴From the beginning, the State has taken a unique role in Mr. Power's case. It has tried to act as defense attorney and prosecutor at the same time. The State conducted the majority of the investigation into Mr. Power's background and mitigation at penalty phase and handed that evidence over to the defense attorney. The State obtained background materials on Mr. Power when his trial attorneys failed to do so. Before the penalty phase was to begin, the State Attorney was concerned about defense counsel's lack of preparation for the penalty phase because the State received no witness list and no follow up on medical reports. The State urged the court to inquire in-camera (R. 3329).

The State continues to act as defense attorney and prosecutor even at this juncture, by it asking for a competency evaluation when Mr. Power's own attorneys have not

The State argued that:

[P]resent collateral counsel has known for years of the fact that defendant may presently have a brain defect. Given the record of instruction the Court has given defense counsel regarding the issue of defendant's competence to proceed, it is incomprehensible why these facts were not promptly brought to the attention of this Court.

(PC-R. at 573-574).

The State clearly is confused as to the distinction between competency to proceed and other mental health issues.⁵ Organic brain damage does not necessarily mean that a defendant is incompetent to stand trial. Diminished capacity is not equivalent to being incompetent to stand trial. Learning disabilities, a passive and dependent personality, and possible diffuse organic brain damage do not, when taken together, sufficiently raise a valid question as to a

raised the issue. At the September 27, 1999 hearing, the State erroneously cited to Peede v. State, 24 Fla. L. Weekly S391 n. 5 (Fla. 1999), implying that collateral counsel was ineffective for failing to request a competency evaluation when she has no indication that her client is incompetent. Such a patriarchal role is not within the duties of the State Attorney.

⁵The State's comment that it "is somewhat concerned that this would come up as an appellate issue down the road if it's not addressed at this time" shows that it fails to understand the changing nature of competency. (PC-R. at 43).

defendant's competency to stand trial. Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987).

The State's transparent purpose in seeking a competency evaluation has little to do with Mr. Power's competency, but lies in its attempt to find evidence to rebut mental health mitigation.⁶ This was made clear in a September 29, 1999 letter to the experts appointed by the court to evaluate Mr. Power for competency. In that letter, the State Attorney presented the experts with a list of thirty-six (36) documents relating to Mr. Power. The majority of these documents had nothing whatsoever to do with whether Mr. Power is able to assist collateral counsel at the present time in post-conviction.

Rather, these documents given to the competency experts were an attempt by the State to gain access to Mr. Power beyond the competency evaluation and to sway the evaluators beyond their mandate and purpose.

For example, the State submitted Mr. Power's school records; his criminal records from 1973 and 1990; a 1979

⁶In the Circuit Court's order appointing experts to evaluate Mr. Power, the court allowed both parties to submit documents it wanted the doctors to consider in reaching an opinion on Mr. Power's mental state (PC-R. 605). Counsel for Mr. Power submitted the expert reports from Doctors Crown, Sultan and Hyde.

handwritten pleading from Mr. Power; pre-sentence investigation reports on Mr. Power from 1981, 1986, and 1989; a 1989 psych evaluation; Mr. Power's 1983 California prison records; state attorney notes about Mr. Power's medial treatment from 1983; a 1985 statement by Mr. Power to the Florida Highway Patrol; a 1986 Department of Correctional physical exam report; psychological reports of Mr. Power from 1987 and 1988; trial notes of Mr. Power from 1990; statements of Mr. Power's family members from 1990; in-camera hearings on Mr. Power's case from 1990; defense investigator notes on Mr. Power from 1990; and state attorney reports on their investigation into Mr. Power. See, September 29, 1999 letter from State Attorney to Judge Blackwell White providing thirty-six (36) items as background materials for court-appointed experts.

These records have little to do with Mr. Power in the present. The only information presented to the experts relevant to Mr. Power's current condition was the three expert reports submitted by the defense. These reports show that Mr. Power has brain damage and suffered from severe depression. None of the reports suggest that Mr. Power is not competent.

Mr. Power's attorneys have not alleged he is incompetent. The State exceeded its authority in requesting that Mr. Power

be evaluated for competency when there are no factual matters at issue. Carter. Moreover, the State sought information that has nothing to do with competency in a back-door attempt to gain insights into Mr. Power that it will use to rebut mental health mitigation.

Mr. Power suggests that this is an improper means of strong arming defense counsel into allowing unfettered access to her client. Mr. Power requests that the trial court order granting a competency evaluation be quashed and/or reversed.

ARGUMENT II

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO COMPEL MR. POWER TO UNDERGO A MENTAL HEALTH EVALUATION BY THE STATE, WHEN THE STATE WAIVED ACCESS TO MR. POWER BY FAILING TO REQUEST A PRIOR MENTAL EXAMINATION; WHEN THERE IS NO AUTHORITY FOR SUCH AN EVALUATION; AND THE ISSUES TO BE ADDRESSED AT AN EVIDENTIARY HEARING DEAL WITH COUNSEL'S INEFFECTIVE ASSISTANCE OF COUNSEL.

In 1990, after the guilt phase, Mr. Power purportedly "waived" mental health mitigation. Despite the available evidence of Mr. Power's depression and organic brain damage, Mr. Power's trial counsel failed to look into Mr. Power's mental state at the time of the penalty phase. As a result of Mr. Power's purported "waiver" of mitigation, trial counsel never conducted a full investigation into Mr. Power's background and never presented mitigating evidence to the jury (PC-R at 103). Mr. Power raised this issue in his Third Amended Motion to Vacate Judgments of Conviction and Sentence with Request to Amend and for Evidentiary Hearing (PC-R at 99; 138; 144; 180).

In post-conviction, the State sought to have Mr. Power evaluated by a mental health expert. After initially denying the State's request, the trial court granted the State's motion to compel Mr. Power to be evaluated by a state expert

(PC-R at 601-602).⁷

In its request for a compelled State examination, the State failed to cite to any binding authority for the proposition that it is entitled to a mental health examination of Mr. Power to rebut mental health mitigation evidence presented by the defense. Rather, the State argued that at the time of Mr. Power's trial in 1990, it was precluded from completing discovery because Mr. Power "blocked" access by waiving mitigation in the penalty phase. And because of that purported waiver, the State, now, in post-conviction, is entitled to compel Mr. Power to undergo a mental health evaluation by a State expert. In other words, the State is now entitled to discovery in the form of a compelled mental health evaluation even though it failed to request it in 1990.

In a recent post-conviction proceeding, the State initially argued that contrary to State v. Lewis, 656 So. 2d 1248 (Fla. 1995), this is a "civil proceeding either side can initiate discovery... and it is perfectly appropriate for me to move that discovery be initiated. That's what I'm doing." (PC-R. at 3).

⁷It should be noted that the Court and the State's reconsideration of a compelled mental health evaluation of Mr. Power occurred only after the defense was required to submit its expert reports to the State.

As the State argued:

What happened here is we sort of began the process of going into the defendant's background, doing some research into that; but then the defendant himself blocked that, which gives rise to two issues. Number one, what is the substance of his background? I don't know and I probably will not be able to be properly prepared for the hearing because the defendant blocked that process. There were two different proceedings before the court. He told the trial court he did not want his attorney to proceed. There was an issue of some California prison records, which, as I recall, the State never fully got access to because he wouldn't sign the release. There was also issues of his background, like his mother and so forth, that we never really fully got into, again, because he blocked access to that; and it became clear that was not going to be an issue in the case. It wasn't appropriate for the State to proceed any further. So you do not have a situation here where a complete discovery process was had on the defendant's background, either his - the facts of his growing up or the facts of his psychological background.

Issue number two that's raised by the situationis the issue of what the defendant's mental state was at the time of the trial. There again, it was the defendant himself who didn't want to raise that kind of a defense, who didn't really want to cooperate in that situation, and we never had full discovery. An M.R.I. scan was ordered at the State's -- the State initiated this, but if you will look at the order, we never got a copy of it. We never deposed the doctor. We never - in other words, that's completely uncompleted at that point. That was for the defense's benefit. They decided after consultation with the defendant's apparently not to make use of that. So another - we have another thread that doesn't run all the way through, discovery wasn't had on.

(PC-R. at 3-5).

The State's argument in post-conviction made on July 6, 1999 is that since it did not complete discovery at trial, it is entitled to do so now to take care of "unfinished business." The State argued that because Mr. Power waived mitigation at his penalty phase he was responsible for the State's failure to request a mental health examination and that the State is now entitled in post-conviction to do what the law prohibited it from doing at trial.

A. The State was not entitled nor did it request access to conduct a mental health evaluation of Mr. Power at trial.

In its motion for a compelled mental health evaluation, the State failed to mention that it was responsible for the bulk of the mitigation investigation into Mr. Power's background. As it investigated Mr. Power background, the State handed the material -- prison and medical records, pre-sentence investigations and school records -- directly over to the defense. This was a preemptive attempt by the State to keep Mr. Power from later filing a claim of ineffective assistance of counsel.

At trial, the State completed discovery prior to the penalty phase proceeding in 1990. There were five months between the end of the guilt phase and the beginning of the

penalty phase. The State had conducted extensive investigations into Mr. Power's background and provided it to the defense counsel to present at penalty phase.

Mr. Power had undergone a mental health evaluation for competency in 1987 before his trial on an unrelated charge in Seminole County (PC-R. at 102)⁸. The State had access to that information.

In this case, however, the State never made a request for additional discovery nor did it indicate that it could not complete it. There was no unfinished business until the State learned of the change in law in 1996, granting the State in a capital case in which the State seeks death to compel the defendant to undergo a mental health examination. Never before 1999 did the State complain that it could not complete discovery or complain that Mr. Power "blocked" its ability to get discovery. In fact, the State had gathered the majority of discovery and gave it to the defense in 1990.

In an attempt to capitalize on the change in the law, the State suddenly in 1999 makes an untimely request for a mental health evaluation of Mr. Power. The state's initial request

⁸Dr. James Merikangas, who evaluated Mr. Power for competency in 1987, reported to the Seminole County Court that Mr. Power was depressed, that he presented a risk for suicide; that he is in need of psychiatric assistance, and that neuropsychology testing is indicated (PC-R. at 102).

was filed on June 22, 1999 (See, the State's Motion for Order Granting Access to Defendant to Conduct Mental Status Exam, June 22, 1999). The trial court denied the State's request for a compelled mental health exam on July 6, 1999, but reversed itself a few months later, even though the State failed to show "good cause" as it is required to do under Lewis, which allows for limited discovery in post-conviction into matters that are relevant and material **if good cause is shown**.

On September 27, 1999, the State again sought access to evaluate Mr. Power's mental health. This time, the State again relied on a perceived claim of insanity (PC-R. at 53), which was **not** raised by Mr. Power. The State also relied on the three mental health reports that the defense was required to submit. The State argued that the defense "opened the door" by filing a claim of ineffective assistance of counsel and arguing that Mr. Power was unable to make a valid waiver of mitigation (PC-R. at 47.)

The State erroneously relied on Wuournos v. State, 676 So. 2d 966 (Fla. 1996), which it said allowed access to Mr. Power. However, the Wuournos case was a direct appeal opinion in which Ms. Wuournos argued that her behavior during the penalty phase was sufficiently "irrational" and that the trial court erred in not ordering a new competency evaluation. *Id.*

at 970.

The Wuournos case clearly is distinguishable from Mr. Power's case and has nothing whatsoever to do with having Mr. Power undergo a compelled mental health examination to rebut an ineffective assistance of counsel claim. Ms. Wuournos' case was in a different procedural posture on direct appeal, while Mr. Power is litigating in post-conviction proceedings. Unlike Ms. Wuournos, Mr. Power has never alleged in post-conviction that he is incompetent and should be evaluated for competency. See Argument I.

The State also cited the case of Cassamassima v. State, 657 So. 2d 906 (Fla. 5th DCA 1995) to support its position. The only similarity between Cassamassima and Mr. Power's case is the judge -- the Honorable Blackwell White.

In Cassamassima, Judge Blackwell White ordered the defendant, a probationer who was convicted of lewd assault on a child, to undergo polygraph tests at regular intervals to provide information for his supervision, to confirm or deny his location at a particular time and to explain his non-criminal conduct. Mr. Cassamassima, however, could refuse to answer questions if it was within his Fifth Amendment rights to do so.

Mr. Power's case is procedurally and factually different

from the Cassamassima case. Mr. Power has a death sentence, and not a lewd assault on a child. Mr. Power is not on probation, but is on death row where he awaits a date with the executioner.⁹ Even under Cassamassima, Mr. Power still has Fifth Amendment rights, and the State is seeking to have Mr. Power answer questions about his mental abilities. Mr. Power is not being asked to explain his non-criminal conduct or provide information about his supervision. The State is seeking information from Mr. Power that it will actively use against him to aid in his execution.

In 1990, when Mr. Power was at penalty phase, the State failed to ask that it be given access to evaluate Mr. Power for a mental health examination. No where in the trial record does the State seek to have Mr. Power evaluated by a mental health expert at any time during the proceedings.¹⁰ The State's argument that Mr. Power "blocked" discovery is absurd.

⁹Despite the State's arguments to the contrary, Mr. Power's case is a death penalty case and death is different from any other penalty and any other case. Woodson v. North Carolina, 96 S. Ct. 2978 (1976). Such a case requires strict scrutiny and may only be administered under stringent safeguards. Furman v. Georgia, 92 S. Ct. 2726 (1972); Gregg v. Georgia, 96 S. Ct. 2909 (1976); Lockett v. Ohio, 98 S. Ct. 2954 (1978). Moreover, fact-finding procedures aspire to a heightened standard of reliability. See, e.g. Spaziano v. Florida, 104 S.Ct. 3154 (1984).

¹⁰The State requested that Mr. Power undergo a MRI exam. An MRI is an X-ray and not a mental health examination.

It was only after the penalty phase began that Mr. Power purportedly "waived" mitigation. Up until that time, the State had completed discovery, and in fact, did the bulk of discovery investigation into Mr. Power's background, with little or no help from the defense attorney.

Florida law at the time of Mr. Power's penalty phase in 1990 provided no authorization for the State to have its own penalty phase experts examine a defendant for purposes of rebutting mental health mitigation.

This issue first arose in 1992 in Burns v. State, 609 So. 2d 600 (Fla. 1992) when the Florida Supreme Court addressed a defendant's claim of error that a state mental health expert had been allowed to remain in the courtroom during the testimony of the defense expert, contrary to the witness sequestration rule. Id. at 606. The Court determined that error had not occurred because the defendant was not "required to submit to an examination by the state's expert because there appeared to be no authority for such an examination" and that "this was the only avenue available for the state to offer meaningful expert testimony to rebut the defense's evidence of mental mitigation." Id.

In a footnote, the Court emphasized that "there is no rule of criminal procedure that specifically authorizes a

state's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or nonstatutory mental mitigating factors during the penalty phase of the trial." Id. at 606 n. 8.

In 1994, the Florida Supreme Court issued its decision in Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994) where it issued an interim rule whereby the State would be entitled to examine a defendant found guilty of murder only when the defense intends to call an expert who has interviewed the defendant and where the State has certified that it will seek the death penalty. Id. at 1031.¹¹ This rule applies to penalty phase. It has not been extended to post-conviction.

Applying this rule at this point in time would violate Mr. Power's constitutional protection against any ex post facto application of new laws and rules of criminal procedure. Additionally, without any legal authority, allowing the State to perform a compulsory mental health evaluation would violate Mr. Power's Fifth Amendment rights by forcing him to become a witness against himself and in fact, would aid the State of

¹¹See also, Fla. R. Crim. P. 3.202, Expert Testimony of Mental Mitigation during Penalty Phase of Capital Trial: Notice and Examination by State Expert that became effective January 1, 1996. This rule only applies in capital cases in which the State gives written notice of its intent to seek the death penalty. Nothing in the rule allows for a state mental health examination in post-conviction.

Florida in its effort to execute him.

The prohibitions against self-incrimination and the right to remain silent are violated when a defendant is compelled to undergo a state mental health exam. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973); accord Estelle v. Smith, 451 U.S. 454 (1981). The privilege against self-incrimination is secured only when a criminal defendant has the right "to remain silent unless he choose to speak in the unfettered exercise of his own free will, and to suffer no penalty...for such silence." Estelle v. Smith, quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964).

The State erroneously argued that Mr. Power has no Fifth Amendment rights:

He doesn't have any Fifth Amendment rights.
There's case law we could call him as a witness
in any of these proceedings if we wished.
(PC-R. 44).

I strongly point out to the court this
is a civil matter, at least in the nature
of a civil matter. The defendant does not
have his Fifth Amendment rights.
(PC-R at 50).

Mr. Power continues to have Fifth Amendment protections. A defendant cannot be compelled to testify and even if he testifies, he cannot be compelled to provide evidence for aggravating circumstances. State v. Dixon, 283 So. 2d at 7-8.

[T]he availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. In re Gault, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed. 2d 527 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made "the deluded instrument of his own conviction," Culombe v. Connecticut, supra, at 581, 1867, quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824) it protects him as well from being made the "deluded instrument" of his own execution. We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees....Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.

Estelle v. Smith, 451 U.S. 454 (1981).

B. The State is not entitled to a compelled mental health evaluation now.

The evidentiary hearing ordered in this case revolves around trial counsel's ineffectiveness at trial for not presenting mental health and other compelling mitigation. (PC-R. at 568-571). Mr. Power has not placed his competency to proceed or sanity at issue, a fact that undermines the State's claim that an examination is necessary to rebut a mental

health defense. The presentation of mental health testimony as mitigation is entirely separate from the defendant relying on mental health testimony as a legal defense to guilt or a claim of incompetency. Mr. Power bears the burden of proof with respect to both deficient performance and prejudice under Strickland v. Washington, 466 U.S. 668 (1984). This is vastly different from a pre-trial issue of competency or an insanity defense, where the State would bear the burden of proof.

Mr. Power has alleged that his trial attorneys were ineffective for failing to investigate and present mitigation, and that Mr. Power lacked the ability to make a valid waiver of mitigation based on counsel's ineffectiveness (PC-R at).¹²

A similar situation was presented to this Court in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994). In Deaton, the Circuit Court Judge found that trial counsel rendered prejudicially deficient performance in failing to adequately investigate

¹²The State erroneously argued that Mr. Power has "in fact, been hiding this and keeping it in reserve, so to speak, to try to use in a surprise way so that state could not prepare" (PC-R at 49). Mr. Power has alleged ineffective assistance of counsel in each and every Rule 3.850 motion that he has filed since 1994. Moreover, in 1987, Dr. Merikangas who evaluated Mr. Power for competency in a Seminole County case, reported to the court that Mr. Power was "severely depressed" and was in need of neuropsychological testing (PC-R. at 102). Mr. Power takes issue with the State's allegation that Mr. Power has hidden any claims in an effort to surprise the State.

potential mitigating evidence, thereby rendering Jason Deaton's purported "waiver" of mitigation invalid:

While the court does not find that the evidence presented by the defendant at the evidentiary hearing would necessarily have been beneficial to his cause at the sentencing phase, the court finds that the defendant was not given the opportunity to knowingly and intelligently make the decision as to whether or not to testify or to call these witnesses. For this reason, defendant's third issue, as it alleges the ineffective assistance of counsel during the sentencing phase of the trial, is granted[.]

Deaton, 635 So. 2d at 8 (quoting from Broward County Circuit Court Judge Moe's order partially granting Rule 3.850 relief). This Court, in addressing a cross-appeal taken by the State, agreed with Judge Moe's conclusions:

In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton's waiver of those rights was not knowing, voluntary, and intelligent. The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a Faretta type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made.

Id. (footnotes omitted). Because "clear evidence was

presented that defense counsel did not properly investigate and prepare for the penalty phase proceeding[,] . . . counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id. at 8-9. Further, "evidence presented in the rule 3.850 evidentiary hearing established that a number of mitigating circumstances existed." Id. at 8. Because of counsel's deficient performance in failing to investigate this evidence prior to consulting with Deaton about the decision to waive or present mitigating evidence, "such ineffective assistance was prejudicial." Id. at 9. Deaton directly controls Mr. Power's case.

Mr. Power's purported "waiver" of mitigating evidence did not terminate counsel's responsibilities during the sentencing phase of a death penalty trial. Blanco v. Singletary, 943 F.2d 1477,1502 (11th Cir. 1991). Eleventh Circuit case law rejects the notion that a lawyer may "blindly follow" the commands of the client. Eutzy v. Dugger, 746 F. Supp 1492, 1499 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990) (quoting Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986)). As the Eutzy court explained:

Although a client's wishes and directions may limit the scope of an attorney's investigation, they will not excuse a lawyer's failure to conduct any

investigation of a defendant's background for potential mitigating evidence. Id. at 1451; Thomas v. Kemp, 796 F.2d 1322 (11th Cir.), cert. denied, 479 U.S. 996, 107 S.Ct. 602, 93 L.Ed.2d 601 (1986); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983). At a minimum, a lawyer must evaluate the potential avenues of investigation and then advise the client of their merit. Trial counsel in this case neglected to perform his duty to investigate and to discuss with his client the merits of alternative courses of action. Such neglect--albeit because counsel expected a different result--fell below an objective standard of reasonableness, and as a result, trial counsel's representation fell outside the range of competent assistance.

Eutzy, 746 F. Supp. at 1499-1500 (emphasis added).

Mr. Power has alleged that he lacked the "competency" to make a valid waiver (PC-R. at 180). The ability to waive mitigation can comprise two elements. The first element is information. In order to make a valid waiver of mitigation, Mr. Power had to know and understand what he was waiving. If, through counsel's failure to investigate the available mitigation, or to present it to Mr. Power, Mr. Power was not given the requisite information, then no valid waiver occurred.

The second element is the cognitive ability on the part of Mr. Power to make such a waiver. If, for example, Mr. Power was suffering from major depression or other psychiatric

disorder, his perception of the potential outcome of presenting such mitigation to the sentencers would have been severely distorted. His purported choice to waive mitigation would therefore not have been truly knowing and voluntary. Mr. Power plead and can prove both these elements. However, since this ability to waive mitigation is not in any way related to Mr. Power's competency to proceed either at trial or in post-conviction, the State is not entitled to its own mental health expert to evaluate Mr. Power. The State does not carry the burden of proof, the defense does.

The State also has argued that because of what was written in the defense reports that Mr. Power was required to submit before the evidentiary hearing, the State is entitled to evaluate Mr. Power. But, the defense reports do not decide the scope of a claim in a Rule 3.850 motion. In fact, the State argued that it was entitled to a compelled mental health examination because one defense expert wrote in her report that she relied on various materials in her evaluation but omitted mentioning that she relied on a report from jail personnel. Because of that omission, the State found the expert to be "someone who is not impartial," and the State's own "impartial expert" should be allowed to evaluate Mr. Power (PC-R. at 48).

As the State argued:

[I]t's just one example and given the fact that this is a civil proceeding and the defendant is the proponent, not the State, I would ask the Court to reconsider allowing us a fair chance at addressing the evidence and the issues here. This is not an issue that we've been able to address before, because the defense never raised it.

(PC-R at 49).

The State failed to address how its own "impartial expert" would have any bearing on a defense expert's failure to list a document in a report. A more appropriate avenue would be to cross examine the defense expert at the evidentiary hearing and determine why she omitted a document from her list of background materials. Having Mr. Power evaluated by an "impartial" State expert has no connection whatsoever to what was listed on a defense report or why an expert omitted a document.

Moreover, the reports do not set the stage for an evidentiary hearing. If counsel is unable to prove her case in an evidentiary hearing, the claim will be denied and Mr. Power will be denied relief. The reports are not "proof" of what will be presented at the evidentiary hearing. The evidentiary hearing will deal with whether Mr. Power was given the requisite information by defense counsel to make a valid waiver of penalty phase mitigation.

There is no compelling reason provided by the State that justifies a compulsory examination of Mr. Power to assist in preparing for the evidentiary hearing. The State has received mental health reports submitted by the defense. The State is entitled to depose the defense mental health experts, to review their background materials and to cross examine them at the evidentiary hearing. The State, however, is not entitled to a compelled mental health examination of Mr. Power.

CONCLUSION

Mr. Power submits that this Court reverse and/or quash the orders of the Circuit Court ordering that Mr. Power undergo a competency evaluation and a compelled mental health evaluation by the State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on December 17, 1999.

PAMELA H. IZAKOWITZ
Florida bar No. 0053856
Capital Collateral Regional Counsel -
South
303 S. Westland Avenue
P.O. Box 3294
Tampa, FL 33601-3294
(813) 259-4424
Attorney for Appellant

Copies furnished to:

Scott Browne
Department of Legal Affairs
Office of the Attorney General
2002 N. Lois Avenue, Suite 700
Tampa, FL 33607