>> WE NOW MOVE TO HERNANDEZ VERSUS THE STATE OF FLORIDA.
>> MAY IT PLEASE THE COURT, I'M MARK GRUBBER WITH CCRC REPRESENTING MR. ALBERTO.
WITH ME IS STEVE MALONE ON BEHALF OF THE UNITED MEXICAN STATES.
AS FAR AS -- THE CASE
>> My problem is, and I am sympathetic, if you were his attorney and the judges helped do something so a motion could be filed.
But if the defendant is found to be competent but is still saying I don't want to -- I don't want to sign that verification, and they are told that if they don't do that, they are giving up their rights for post-conviction -- are you saying that they really needed to go through a Durocher procedure for this?
Is this the same thing as if he was waiving post-conviction in the argument?
>> My prior position would be frankly, yes because it would take a matter of minutes.
The idea behind the hearing is to establish a record and of course --
>> So what would be the colloquy that was not done if we were to decide or -- okay we will relinquish the five sentences being pronounced?
What would it be?
>> Well I actually never did write a proposed line out and if there were a relinquishment I would do that and put some time into it.
>> I guess my problem is, it seems like somebody that is just gaming the system and at some point, I mean Judge Black and all the judges try to go over it and there was competency hearings and competency experts and there is just -- it seems that every effort was made to try to accommodate the defendant.

>> Really, I am really hoping to persuade the whole court that this is not that type of situation.
>> Let me ask you this. Let's assume that it were and the individual responds just as he has before and gave reasons. He gave reasons, did he not? For not telling you?
>> He did not until towards the end.
>> Well, did he or did he not? He did?
>> At the end he said, I disagree.
>> He disagreed with that and that disrespected him and his family for those reasons. Did he not give those reasons?
>> I'm sorry?
>> That it's disrespectful to both he and his family?
>> For those reasons. I don't understand why we are having such difficulty communicating on this. Did he have reasons in this proceeding as to why he did not sign it?
>> Let's assume we do send it back and he gives those reasons again.
>> Well then --
>> The court can't force them and we cannot force him to say magic words, correct?
>> That is true.
>> So we go through that and we sent it back in those are the responses. Where are we?
>> In a situation like that, I would certainly try to get a discussion going on the record about what it is he disagrees with them the next thing, the very next thing within a matter of days would be a modified variant 51 that meets those. It wouldn't take much.
>> A modified 3.81.
>> Whatever it is that he doesn't agree with, then I will take it out.

Any problem he might have with regard to the facts.
>> But you can't as an officer of the court if you want to prove there is something -- no basis in the argument, here is the defendant that represented himself for a good deal of the trial and that was withheld so it is very little, in my view, that he could do even if he was fully cooperative.
We have party upheld that he was you know, I allowed to represent himself and therefore the counsel for his insistence on representing himself.
>> I really want to resist getting into the merits of the 38.51 that hasn't even made it to a Huff hearing yet.
>> I guess what it does is look at the whole picture.
So I think from my point of view, trying to see what has the defendant done to not only not help himself, but you know, is he doing it because he can't help it?
Or is he doing it because this is just now, this 3.851, his sentence was affirmed in 2004 so we are eight years later and we still don't have 3.851.
There is a lot of evidence in this record that this defendant is gaming the system so I would say look at the whole, I do think to look at the whole thing but I understand what you are saying is we can't say well just because there is nothing to file doesn't mean he doesn't have his day in court.
Justice Lewis is asking you, what if he says I don't agree with this but then doesn't tell you what he wants to have in it or what he wants to have then it isn't ethically something you can put in it?
>> Well, as far as anything positive or affirmative that he would say I could not agree with the data that comes out.

What he said is there a certain
things in there that he regards
to his family.
>> Are you proposing you are
going to have a full discussion
and this is just going to be
beautiful?
It hasn't occurred up to this
point after this number of years
ago --
again I go back to the basic
question.
If those answers stand, where
are we?
>> Well, okay.
One thing is that there has been
an issue and it talks about the
price gaming of the system.
There has been an issue here
about is mental illness all
along from the very beginning of
this case.
He was found to be incompetent
at different times.
There is an unopposed finding by
the judge that he is incompetent
for purposes of
self-representation under
Indiana v. Edwards
Our mental health expert said
unequivocally that he is
schizophrenic, paranoid,
psychotic and incompetent under
the basic standard.
And Dr. Taylor who was the court
expert, talked about both as
being a possibility he tilted
towards competency to proceed,
but then said he could not
render with a good degree of
medical probability.
So, the mental health issues
here have been going on a lot.
I have, as I said if you get a
defendant who --
difficult clients are routine.
>> I understand those.
Do you have an answer for where
we are?
He has got these issues that you
have explained, and where are we
at the end of that day?
>> At the end, if I understand
what I'm looking for is a
modified Durocher hearing that

says if this is said, you are rejecting the post-conviction third version that has been filed by the CCRC, and you have some reaction all regions for not liking not.
>> Again, and you are supposing it will have this wonderful colloquy and is just going to flow.
Again going back to the basic question and it's not a trick question or an adverse question.
Where are we?
If that answer is again given.
>> Okay, one of the arguments that I have here is that he says, as he said a number of times on the record that he wants to fight, that should be expected.
Under the particular circumstances of this case with recognition of the mental health history here that should be accepted as if it were a verification.
>> We should then go ahead with the post-conviction proceeding?
>> Yes, Sir.
>> Without a signed pleading?
That is where we are?
And we don't have a rule that addresses that.
Because it has to be signed so what you are saying is the circumstances carb out some kind of an exception that needs to be applied so we have full justice in a case?
That is sort of what you are saying.
>> Yes, Sir.
>> Let me ask you this.
If we accept the view or a recommendation to have this modified Durocher and allow you to file a 3.851 motion, that does not have the issues that he has contested.
At some point it is determined that these really are the best issues that he has to present.
Where does that leave us?
Do we now several years down the

road have to give him another opportunity to file a motion that has really may be some meritorious issues?
I understand you are thinking about this but it seems to me we then get into a real piecemeal situation of allowing you to raise these issues now and then where we are going to be in the future, especially if the death warrant is signed.
We are going to be running around trying to figure out these other issues that could have been brought but he didn't want those brought at that time.
>> Well, partly because he asked the question what I would envision doing is litigating those issues one way or the other.
But I am really speculating here about how I might cope with it under the circumstances.
>> Would the answers the two if we were to have this modified procedure or something that is close enough that he has done something that he won't be able to do change.
In other words this dismissal is it.
The death warrant is signed and trying for something else but he waived whatever he would have in the initial and it seems to me the colloquy would be, whatever you now file is your opportunity and because we have defendants that keep on filing, not a lot thankfully, that keep on attacking their guilt.
The defendant says I want to attack my guilt.
There is no basis to attack the guilt.
I know you don't want to get into the merits of it but it doesn't seem there is a whole lot to attack to begin with and maybe that is the problem that he has not yet faced the reality that he has admitted --
How many victims?

>> There were two murder victims.
So that is your best, I mean that is your best argument.
I think the court, I would say in turn we are opening the door to allowing somebody to manipulate the post-conviction process, and you say people have found him to be not confident but I thought that the DOC guard that observed him said that he has been very polite, talks to people in appropriate ways and is not disheveled.
There is nothing that indicates that he is mentally ill when he is going about what he is doing on his day-to-day things.
>> I have to say all the things that you're saying come from Dr. Annis and we have counter facts that have been established on the record over and over again.
>> How many times has this judicial determination of confidence been --
>> I did not count them all out but --
Partial incompetent.
>> It wasn't partially incompetent.
It's the idea that we look to, and I'm not even sure if it would apply in the post-conviction setting.
I think there are other reasons we would want to have attorneys for the defendants since we don't want the death warrant to be signed and nobody be there by Judge Black made a determination that he was not in a mental state that he could prosecute the 3.851 by himself.
That is different competency for the purposes of being able to stand trial or be subjected to a death warrant or anything else.
Would you agree with that?
>> Two things.
I did want to get in there the sort of limited thing that might very well be by way of an

unpublished order that would say
it might benefit the court to
have a Durocher hearing so as
far as opening the door.
But the other thing, that
episode where we were
reappointed according to
Indiana v. Edwards that
occurred after the judge had
conducted representation and
Mr. Hernandez comes back in
accord with a copy of of the
constitution apparently and you
know demanded that his trial be
a public trial.
The judge then conducted a
lengthy colloquy at the time.
>> He is trying to act and say
things that were inappropriate
for what was going on.
>> What is the purpose of the
verification of this particular
motion and not other motions?
>> Why are required in this
particular motion?
>> In this particular motion, I
have no idea.
I don't think it does serve a
purpose and I've argued that it
is a meaningless ritual.
Now, the caselaw goes case law
goes back a very long ways,
requiring a verification and the
reasons for it apply to
non-capital pro se prisoner
additions, a barrage of
frivolous positions sometimes
where the court then has the
power to deny gain time or the
prisoner may be charged with
perjury and obviously that
doesn't have much impact on the
capital case at all.
In this particular case, the
only purpose that would be
served by verification in any
death sentence capital case
would be to get the lawyer and
the defendant together and
struggling around that of course
for quite some time.
Beyond that I don't see where
verification is necessary in a
capital case.
>> Having have a lot of

experience as a trial judge in this area, it seems to me like this is the kind of thing that someone facing the death penalty, you basically prolong his life as long as he possibly can.
>> The judge cited exactly that reason for denying my request for a Durocher hearing.
>> I don't think it's true. One way the case can move forward by addressing the individual claims are the case can move forward, at least by having it on the record there is a confrontation and the defendant is told by the court that this is going to be the consequence of what you do.
>> The judge has rendered basically two choices. One, is dismissive with prejudice, or two, as you are saying, go through the hearing and pretend he cited it.
>> He could, after conducting such a hearing, say this is it. The defendant has now been told he is sticking to this course of conduct and the case is dismissed with prejudice.
>> You want the defendant to have the procedure under 3.851, correct?
>> Yes.
Didn't the trial judge give the defendant an opportunity to file the motion under that?
>> Yes.
>> And no motion was filed?
>> That is when we were reappointed.
>> I will give you an additional minute.
>> Good morning, Your Honors. May it please this honorable court.
My name is Katherine Blanco with the Attorney General's Office. Justice Labarga having to do with a verification and Mr. Gruber's representation or his belief that it was meaningless, and it was

certainly not meaningless
vitriol.
It is required under Florida law
and the claims that have been
raised in Martinez out of the
United States Supreme Court
allegations that the defendant
was unaware of what his trial
counsel, what is post-conviction
counsel was raising or waiving
claims so it could -- it's a
very significant requirement and
it's one that was repeatedly
made clear to Mr. Hernandez.
I believe Mr. Gruber just calls
him Mr. Hernandez so I will call
him Mr. Hernandez.
By the trial courts in the
conviction in this case --
>> The purpose is what again?
>> Certainly, there is an aspect
of it that has to do with the
under penalty of perjury.
As a practical matter someone
who is serving a life sentence,
or a death penalty, certainly
you say okay if we are going
to -- for perjury how
significant can that be?
But the greater import of that
rule is the defendant's
acknowledgment he has signed and
verified and he knows what
claims are being raised because
we are defending these years
later as this court is has
recently seen on claims that, I
didn't know that was being
raised or my counsel did not
raise what I wanted them to
raise so it's certainly a very
important requirement under
Florida rules for procedure
3.850 and 3.851.
>> This is my real serious
problem with this kind of case
and with a dismissal of this
case as prejudice.
This defendant has been around,
how long?
>> Well, the murders were
committed in 1999 and the trial
was held in 2001.
The post-conviction proceedings
direct appeal is affirmed and

they got an extension of time.
The initial post-conviction
filed motion.
>> Now we have dismissed with
prejudice as a 3.851 motion,
correct?
>> Correct, Your Honor.
>> Now he gets to go to Federal
Court?
Without those issues that could
have been raised in a 3.851
motion.
He gets to go to Federal Court.
>> Assuming he is timely and
assuming that, you certainly can
file any pleadings.
Whether it be a viable pleading
in Federal Court, that is up to
the Federal Courts to determine
whether it's timely, whether
their claims are procedurally
barred.
This particular defendant by his
affirmative conduct, has waived.
>> I just want to get to where
we are and what happened in this
case.
He goes to Federal Court and may
or may not get any kind of
relief in Federal Court.
That is assuming he does and
then there is this case that
becomes --
Before a warrant.
What are we going do about these
issues that now are going to be
raised at the last minute that
we never actually dealt with on
the merits?
What are we going to do with
that?
>> If it has to do with issues
that were recognizable and
post-conviction Your Honor, this
court's finding that the trial
court correctly dismissed this
case with purge bridge it is
based on the affirmative
conduct, his affirmative conduct
to the waiver of those claims,
we would only be dealing with
any claims that would lead save
the newly discovered evidence
that would be properly raised or
that can come under some

exception, new rule of constitutional law retroactively applied.
So I cannot foresee with this particular defendant is going to raise.
>> He was given a question though, and I appreciate what you said about the importance of the requirement, especially in light of Martinez.
I think it's an important one but if the defendant is appearing before a judge and essentially there is, either Mr. Hernandez, you either agree to this motion being filed with that or you want out of their or there is no further post-conviction relief for you on these claims.
And affirmatively get some sworn before the judge, we have almost better than the verification which he has never done in front of the judge.
I appreciate and let me say it again, I appreciate what the state has had to deal with and what the trial judges have had to deal with and what the DRC had to deal with, but we know it and we get these cases.
In 1990 time we got this case two or three or four years in the federal court comes up with something but the question is whether this case is tied together in a way that is fair, it is just and does it need one further colloquy to ensure that it is now laid to rest so we don't have these issues later?
I realize the state says no the judges did it up and I don't fault any judges but that is my concern, whether we are better off having one last hearing to have that done.
And again Durocher -- and all of these cases have presented issues for these courts.
These are all difficult situation so if the state said no, no that would be bad

precedent and no we can't do that, in this situation, would not have to be the best way to finalize the end of this post-conviction representation or the first post-conviction case?
>> Justice Pariente, you are right, the state's position is the trial court went above and beyond the call of duty but I also understand that this court if it has a level of confidence that it would like to be higher, certainly can relinquish jurisdiction for a 90-day period, 30 days to bring Mr. Hernandez back to the trial court, 30 days to work with Mr. Gruber.
Mr. Gruber represented this morning, I can strike some of those claims or change some of those claims.
>> Can't we do that?
>> He was given that opportunity and the articulation of the claim that, or the objection that Mr. Hernandez hat was made in July 2010.
In August of 2010 is when the order dismissing the case without prejudice.
>> Okay, you were responding to a question.
The question is, I think, does the state have a problem with us relinquishing this case for further proceedings to give him another chance?
>> Do I have a problem with it?
No, Your Honor, candidly no.
I don't think it's necessary that I certainly respect this court.
>> Why are we here?
Why are we here, exactly.
Why are we here at the state thinks they should go back for further proceedings?
>> Your Honor, with all due respect I don't think you should go back.
I think it is sufficient.
I respect the court's authority.

>> I understand.
I'm not trying to play a
semantic game here.
You need to articulate the
position of the Attorney General
with respect to what should
happen in this case.
>> This case should be affirmed
and the trial court dismissal
with prejudice should be
affirmed because the defendant
was given multiple opportunities
to verify his post-conviction
motion.
He was explicitly given the
opportunity to represent himself
in state court in
post-conviction.
He declined to file his own
post-conviction and after that
they were back on the case in
the case was a minute.
He was given again a 60-day
extension to file a verified --
he did not do that.
He was essentially signing a
verification that he failed to
do the opportunities so I would
say the case should be affirmed
with prejudice.
>> Here's the thing and maybe
you didn't intend to go this way
but when the judge found that
there was enough issues about
his mental status, that he
couldn't proceed without an
attorney.
That is what he found.
Was that in 2010 or 2009, when
counsel was reappointed?
>> The judge who has heard,
observed the defendant, and who
has heard from the experts, that
he can't really do this himself
because of his mental state.
He had all these opportunities
and we are dealing with a
completely rational actor.
I read the brief from the
Mexican consulate about
Dr. Annis, who they say took 12
minutes and was not bilingual to
evaluated competency so we are
not dealing with somebody that
we could say without a doubt is

a rational, bright, focused person.
We are dealing with somebody that has, at least from the trial judge's point of view somebody that cannot navigate the system on his own.
And so that is why again in terms of saying given all the chances, enough was observed to have felt that the council needs to be reappointed under Indiana v. Edwards
>> Your Honor, let me clarify the sequence.
In 2008, October of 2008 is when the inquiry was conducted and Mr. Hernandez was allowed to represent himself pro se.
In January 2009 is when Judge Black reappointed DCR.
The second competency hearing was held in June of 2010.
In October 2008 hearing, where Judge Black is inquiring of the defendant and informing him again of the need to sign a verification, he advises him, and volume 32, and this is when he is requesting to represent himself.
If you want to represent yourself a move forward on this unique to find a verification.
Do you understand what I'm saying?
On page 283 the first thing you need to do is find a verification so you have a motion pending the court.
Then you can ask me what you want.
You can file what you wanted I will respond to that but until you've signed a verification pertaining to your motion he don't even have a motion pending before the court that I can do anything about.
I believe your lawyers have a verification here and you need to sign it otherwise you have no business to discuss.
At 285, well okay, sign your motion so that I have a motion

in front of me and then we will talk about discovery because the defendant was asking for discovery.
>> The trial court tells them in 286, I'm just going to dispense it and then we are going to be done for today.
Then you can file your own and when I get it I will do what I need to do.
In 287 I'm going to dismiss. That is the one the lawyer prepared for you because it is unverified and you don't want to sign it.
That is now dismissed.
You are now representing yourself and free to file your own motion.
>> Was there anywhere in all of these proceedings, was there discussion and we are trying to talk you into something.
Was there a point in the finality of all of this presented to this individual that -- I hear what you just said -- and it does say to lawyers I am dismissing, I do understand that but in lay terms, this is over and this is your last chance and this is the game buddy.
Is there anything in there that you point to that makes that, I mean, clear or addresses that.
Am I communicating, asking that this is it?
That seems to say you can continue playing this game is what that seems to be saying.
>> That was the 2008 hearing and at the 2010 hearing of July 29, 2010, where you have the inquiry with Mr. Hernandez Alberto about why he won't sign, there is a discussion by the trial court that says the question I have to ask you before we can decide what is going to happen is there is a motion that needs to be signed by you under oath.
I've placed you under oath.
I don't know if we have a copy

of that.
Do you understand the motion and then they get into the dialogue about that.
>> The Indiana versus Evertz determination been made?
>> That have been made in 2009.
>> In between when he is told to file something himself in 2008, the point when he comes back to talk about problems in the prison, and there is enough to that goes on that Judge Black says, you cannot represent yourself.
Although I am not finding you in confident I am finding you not competent to represent yourself in the post-conviction preceding and now he has an attorney.
>> He was appointed CCR in January of 2009.
In June 2010 is when we have the second competency hearing again with the two experts testifying so we have the second competency hearing and then on July 29, 2010 --
>> Are you now referring to Justice Lewis' question?
I'm sorry Justice Polston.
I'm trying to get back to the question of what actually happened in the hearing.
>> Words of finality and words that communicate this is it?
>> In this colloquy the judge tells him specifically in order for us to proceed, I have to have a motion, according to our law.
I hope this answers your question.
>> August 17, that is the hearing where the first one was dismissed they gave him another opportunity.
What does he actually saved there?
I think that might answer the question.
>> The defendant was not present.
The defendant was present at the July 29, 2010 hearing and that

is the colloquy that we have included, much of it, in our brief as well.
That is the July 29, 2010 hearing and the defendant is present those hearings.
Mr. Gruber, in the presence of the defendant and in front of the court discusses and the conversations I'm describing to some length, Mr. Gruber speaking, there were substantial discussions of all in the issue of whether the claims, the procedural necessities meet the requirement including the requirement for a verification.
That is 475.
And at 485, in the presence of the defendant the judge says the state will file a motion to discuss.
He has found -- is not going to sign in the rules require him to sign.
That is the response that is given.
Is there a sentence in there that says, and the court is the party telling the judge, dismissal with prejudice means that you cannot come back?
There is not, Your Honor.
>> Thank you.
>> You are welcome, Your Honor.
Indeed the trial court did make several efforts to make sure that Mr. Hernandez understood that he was expected to sign.
The August 17 hearing where the dismissal was without prejudice, Mr. Gruber agreed that it is up to them.
One moment, Your Honor.
Let me get the correct passage.
>> As I understand, on August 17, the judge said I'm dismissing this case without prejudice.
I am giving the defendant 60 days to send his own plea in and was there another 60-day extension?
This is the point where he adds an additional 60-day extension

from there?
>> There was only one.
On August 17, Mr. Hernandez was
not in the courtroom.
Mr. Gruber was present.
The trial court says I have my
order here and I am existing
without prejudice.
Mr. Gruber says in response, I
think the next procedural
step -- Mr. Gruber states I
agree.
I think it's up to us and there
is discussion about the ball
being in their court.
That order of August 17 states
with the trial court will do if
they verified session is not
filed within 60 days.
An order will be entered
dismissing the case with
prejudice.
And so the defense is on notice,
they know the ball is in their
court.
The clock ticks and nothing else
happens.
I would ask the court to a firm
the trial court in this case in
light of the multiple hearings
and more full opportunities the
defendant was given to verify.
The issue of relying on the
arguments presented in our
brief.
Thank you for allowing me to
present these arguments before
you.
>> I'm going to thank the court
for its attention and unless
there are any question I will
sit down.
>> We thank you both for your
arguments and the court will now
stand in recess for 10 minutes.
>> All rise.