IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1281

MARSHALL LEE GORE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged by indictment, filed on March 21, 1990, with the first degree murder of Robyn Novick and the armed robbery of her car, jewelry, credit cards and keys. (R2. 1-3)[1] The first degree murder count was charged alternatively as premeditated and felony murder. (R2. 1) The crimes were alleged to have been committed between March 10, 1988, and March 17, 1988. (R2. 1-3) The matter proceeded to trial on May 3, 1995, and Defendant was convicted and sentenced to death for the murder. (R2. 9)

Defendant appealed his convictions and sentences to this Court. This Court reversed Defendant's convictions and sentences and remanded for a new trial because improper evidence was admitted and improper comments were made. *Gore v. State*, 719 So. 2d 1197 (Fla. 1998) ("*Gore I*").

On remand, counsel informed the trial court on January 14, 1999, that he received a letter from Defendant's attorneys in his other capital case, indicating that two experts had found

[1] The symbols "R2." and "T2." will refer to the record on appeal from Defendant's convictions and sentences after retrial, FSC Case No. SC96,127. The symbol "PCR." will refer to the record on appeal from Defendant's attempt to appeal the striking of his shell motion, FSC Case No. SC02-2285. The symbols "PCR2.," "PCR2-SR." and PCT2." will refer to the record on appeal and supplemental record on appeal in FSC Case No. SC05-1848. The symbol "EH." will refer to the record from the evidentiary hearing on Appellant's Motion for Stay of Execution and Hearing pursuant to Fla. R. Crim. P. 3.811 & 3.812.

Defendant incompetent. (R2. 55-56) Counsel immediately obtained the reports of these experts and raised the issue of competency with the trial court and State. (R2. 56) The State responded by informing counsel of the fact that two other experts had found Defendant competent, that a competency hearing had been held and that a copy of the transcript of that hearing would be provided. (R2. 56) The trial court indicated that it had reviewed the reports of all of these experts, the transcript of the competency hearing from the other case and the order finding Defendant competent in that matter. (R2. 56-57) After reviewing these materials, the trial court decided to appoint Dr. Merry Haber, a forensic psychologist, to evaluate Defendant in an abundance of caution despite having no doubt that Defendant was competent. (R2. 57-58) However, Defendant refused to see Dr. Haber because he believed the competency issue had been raised to cover up allegations he had made against a public defender that morning.[2] (R2. 55-56) The following morning, the trial court and counsel explained what had happened to Defendant, and

[2] At a hearing held that morning, Defendant had insisted that his counsel needed to file a pleading seeking to restrict the testimony of Jessie Casanova because he alleged that her aunt had been engaged to a public defender who had spoken to Defendant shortly after his arrest, obtained privileged information from Defendant and allegedly shared the information with Casanova's family. (R2. 133-37) When the issue was discussed, the trial court was informed by counsel that the issue had no legal support. *Id.*

Defendant agreed to be evaluated. (R2. 55-60) Counsel then indicated that he would have formally raised the issue of competency had the trial court not taken the action it did *sua sponte*. (R2. 58) After the evaluation was completed, Dr. Haber issued a report, finding that Defendant was competent, that he did not suffer from any mental illness and that he was manipulative. (PCR2. 511-15)

The information that had been provided to counsel and the trial court from Defendant's other capital case showed that counsel in that case had moved for a competency hearing because Defendant was refusing to cooperate with counsel. (PCR2. 517) As a result, the other court ordered Defendant evaluated by Dr. Umesh Mhatre and Dr. Kevin Holbert in May 1998. (PCR2. 518) In his report, Dr. Mharte found that Defendant was competent and not mentally ill and implied that Defendant was malingering. (PCR2. 539-41) In a report based on a June 1998 evaluation co-authored by Dr. Richard Greer, Dr. Holbert also found Defendant was competent and diagnosed him with personality disorder not otherwise specified with narcissistic, paranoid and antisocial features. (PCR2. 530-37)

In addition to the court ordered evaluations, Dr. Harry McClaren and Dr. Terence Leland had evaluated Defendant for his counsel in the other case. (PCR2. 543-51) In his report, Dr.

McClaren did not come to a diagnosis of Defendant but suggested Defendant be declared incompetent so that his paranoid ideations could be intensively evaluated and treated. (PCR2. 543-47) Dr. Leland diagnosed Defendant with delusional disorder, persecutory type, and personality disorder not otherwise specified with paranoid, antisocial and narcissistic features. (PCR2. 549-51) He opined that Defendant was not competent because his delusions prevented him from communicating with counsel. *Id.*

At the competency hearing in the other case, each of these doctors testified consistently with their reports. (PCR2. 553-809) Moreover, both Dr. McClaren and Dr. Leland admitted that they believed that Defendant met most of the competency criteria but that he was unable to consult with counsel. (PCR2. 676-79, 697) After considering these reports and testimony and its observations of Defendant, the lower court in Defendant's other case had found Defendant competent and manipulative but not delusional. (PCR2. 517-28)

The matter then proceeded to retrial on January 26, 1999. (R2. 13) The jury again found Defendant guilty of first degree murder and robbery with a deadly weapon. (R2. 389-90, T2. 2699-2700) The jury did not specify under which theory Defendant was found guilty of the murder. (R2. 389-90, T2. 2699) The trial

court adjudicated Defendant in accordance with the jury's verdict. (R2. 479-80, T2. 2704)

At a hearing between the guilt and penalty phases, it came to light that Defendant had twice refused to meet with the defense mental health expert, Merry Haber. (T. 2708-25) An attempt was made to schedule another appointment with Dr. Haber, but she could not do so before the penalty phase. (T. 2740) Counsel then struck Dr. Haber. (T. 2740-41) Defendant refused to be reevaluated by any of the doctors who had previously examined him and who were available. (T. 2741-58, 2830)

During the hearing, Defendant stated that he did not wish to speak about his sisters. (T. 2722) Defense counsel then indicated that he was striking Defendant's sisters as witnesses because he had determined that they were not favorable witnesses after speaking to them. (T. 2722-23) Counsel also stated that he had spoken to Dr. Mhatre and Lee Norton and that they also had nothing mitigating to say about Defendant. (T2. 2732-33) Counsel also indicated that he had contacted the witnesses Defendant had requested and chose not to call them because he did not believe they were favorable. (T. 2732-33) Counsel also filed a memo regarding his unsuccessful attempts to have other experts who had previously evaluated Defendant present mitigation in this matter. (PCR2. 817) In the memo, counsel stated that he had

spoken to Lee Norton and Dr. Barry Crown and that both had refused to testify on Defendant's behalf. *Id.* The memo reflected that Dr. Norton had interviewed Defendant, his family and his friends but found nothing mitigating. (PCR2. 817) It also showed that Dr. Crown had conducted neuropsychological testing but found nothing useful since the results were invalid. *Id.*

Defendant then asked to represent himself, claiming that counsel was refusing to call any witnesses. (T. 2760-69) Counsel explained that he had spoken to witnesses who either refused to testify or could offer no favorable testimony. (T. 2768-69) After an inquiry, Defendant was permitted to represent himself. (T. 2760-69)

After a penalty phase proceeding at which Defendant represented himself, the jury unanimously recommended that Defendant be sentenced to death. (R2. 408, T2. 3285) The trial court sentenced Defendant to death in accordance with the jury's recommendation. (R2. 459-78, T2. 483-85) The trial court found three aggravating circumstances: prior violent or capital felonies, including the first degree murder, kidnapping and robbery of Susan Roark, the attempted first degree murder, armed burglary, armed robbery and armed kidnapping of Tina Coralis and the armed kidnapping of Jimmy Coralis - very great weight; during the course of a robbery and for pecuniary gain, merged -

great weight; and cold, calculated and premeditated (CCP) - great weight. (R2. 460-68) The trial court found no statutory mitigating circumstances. (R2. 469-72) The trial court found three non-statutory mitigating circumstances: Defendant's hearing loss - minimal weight; Defendant's migraine headaches - minimal weight; and Defendant stopping an altercation between Raul and Marisol Coto - minimal weight. (R2. 473-78) The trial court also imposed a life sentence for the armed robbery, to be served consecutively to all other sentences in this case and all other cases. (R2. 478, 483-85)

Defendant again appealed his convictions and sentences to this Court. This Court affirmed Defendant's convictions and sentences on April 19, 2001, finding all of his issues meritless. *Gore v. State*, 784 So. 2d 418 (Fla. 2001)("*Gore II*"). In affirming the convictions and sentences, this Court found that the facts presented at trial were:

> Police discovered Novick's nude body in a rural area of Dade County on March 16, 1988. Her body was hidden by a blue tarpaulin-like material. Novick suffered stab wounds to the chest and had a belt tied around her neck. According to the medical examiner, Novick died as a result of the stab wounds and mechanical asphyxia. He estimated that Novick was killed between 9 p.m. and 1 a.m. on March 11 into March 12, 1988.
>
> Novick was last seen alive on March 11, 1988, leaving the parking lot of the Redlands Tavern in her yellow Corvette. A witness testified that Novick left

with a man, whom the witness identified as [Defendant].

In the early morning of March 12, [Defendant] was seen driving Novick's automobile. David Restrepo, a friend of [Defendant's], testified that [Defendant] arrived at his home driving a yellow Corvette with a license plate reading "Robyn." Restrepo had not seen the car before and stated that when he last saw [Defendant] in February 1988, [Defendant] was driving a black Mustang. [Defendant] told Restrepo that his girlfriend had loaned him the Corvette and asked Restrepo to call him "Robyn." [Defendant] also asked Restrepo to accompany him to Coconut Grove.

On the way to Coconut Grove, [Defendant] lost control of the vehicle and "wrecked" the Corvette. [Defendant] attempted to drive the vehicle away from the scene of the accident, but abandoned the vehicle a few blocks away. Restrepo testified that shortly after the accident a marked police vehicle was coming towards them, at which time, [Defendant] told him to "run" because the car was stolen. [Defendant] also told Restrepo that he had left jewelry in the car. When the police arrived on the scene, they recovered credit cards, a driver's license and a cigarette case, all belonging to Novick, as well as a "power of attorney" executed by [Defendant].

Jessie Casanova, who was thirteen years old at the time of Novick's murder, testified that [Defendant] came to her home in the early morning hours of March 12, driving a yellow Corvette. [Defendant] had been staying with Casanova, her mother, and her mother's friend since February 1988. According to Casanova, [Defendant] returned to her home later that day, stating that he had been injured in a car accident. At that time, [Defendant] gave Casanova the keys to the Corvette. FBI Special Agent Carl Lowery testified that Novick's body was recovered "within a few hundred feet" from this house.

The following night, March 13, [Defendant] went to the house of a friend, Frank McKee, and asked him if he could borrow some money and stay the night. [Defendant] stated that the police were looking for

him. [Defendant] also informed his friend that he had recently been in a car accident involving a yellow Corvette and that he had lost some jewelry. McKee refused to allow [Defendant] to spend the night and [Defendant] subsequently left in a cab.

In its case-in-chief, the State also introduced *Williams* [FN2] rule evidence that [Defendant] committed similar crimes against Roark and Coralis. The State presented evidence that [Defendant] had murdered Roark shortly after her disappearance in January 30, 1988, by inflicting trauma to her neck and chest. In addition, evidence established that [Defendant] stole Roark's black Ford Mustang and other personal property, then left her nude body in a rural area used as a trash dump. Similarly, the State presented evidence that [Defendant] attacked Coralis on March 14, 1988, two days after the murder of Novick. Coralis herself testified against [Defendant], stating that he beat her with a rock, raped, choked and stabbed her, and left her for dead on the side of the road near the scene where Novick's body was found. [Defendant] proceeded to steal Coralis's red Toyota sports car and personal property.

FBI agents finally arrested [Defendant] in Paducah, Kentucky on March 17, 1988. At the time of his arrest, [Defendant] was in possession of Coralis's red Toyota automobile and he had her bank and credit cards in the pocket of his jacket. Police officers subsequently questioned [Defendant] regarding the Coralis and Roark crimes. According to the police, [Defendant] denied knowing Roark or Coralis and denied all involvement in the crimes. [Defendant] also denied knowing Novick. When police prepared to show [Defendant] a photograph of Novick, Gore stated "just make sure it is not gory" because his "stomach could not take it." At the time that [Defendant] made such statements, the police had yet to inform [Defendant] that Novick was dead. Detective David Simmons of the Miami-Dade Police Department testified that when [Defendant] looked at Novick's picture, [Defendant's] eyes "swelled with tears." [Defendant] also stated that "if I did this, I deserve the death penalty."

In his defense, [Defendant] took the stand and testified on his own behalf. [Defendant] claimed that prior to his interrogation by police in Miami concerning the Novick murder, reporters previously had told him upon his arrest that Novick was dead. He also claimed that during his interrogation, police had placed gruesome photographs of the murders all over the interview room. Moreover, [Defendant] stated that police had given him a polygraph examination, which he claimed he had passed. [FN3]

[Defendant] testified that he was the owner of an escort service and claimed that Coralis, Novick, Roark, and Restrepo all worked for the escort business. [Defendant] maintained that Novick worked for him as a nude dancer and he admitted that he was with Novick at the Redlands Tavern on the evening of March 11, 1988. [Defendant], however, denied killing her. [Defendant] explained that he was driving Novick's Corvette and that he had arranged for both Novick and Coralis to work as escorts that night. [Defendant] claimed that after leaving the Redlands Tavern, he drove Novick to a club where Coralis worked. According to [Defendant], Novick, Coralis, and another woman left the club with three men in a Mercedes. [Defendant] claimed that he followed this group in Novick's vehicle to a warehouse in Homestead, Florida. [Defendant] stated that he called the warehouse later that night and that the phone was answered by a member of a pro-Castro group, with which one of the men was affiliated.

[Defendant] testified that he spoke with Novick later that night and informed her about the accident and told her to report the car stolen so that she could collect the insurance proceeds. During this conversation, Novick told [Defendant] that Coralis had left in the middle of the night because there were "problems" with the three clients who were angry about missing drugs and drug money. [Defendant] claimed that he knew that Coralis previously had sold some drugs and used the proceeds to buy a new car.

[Defendant] also testified that he spoke with Coralis a few days later, and that she was scared because someone was looking for her. [Defendant]

claimed that Coralis wanted a gun and that he had arranged a meeting with her in an effort to assist Coralis in selling the remainder of her drugs. Furthermore, [Defendant] claimed that he later saw the men who were with Novick and Coralis on the night of the Novick murder and they told him that Novick "was picked up" from the warehouse.

Addressing his relationship with Susan Roark, [Defendant] admitted that he knew her for many years. He acknowledged that he was with Roark on the last night that she was seen alive. He stated, however, that Roark had visited him during his incarceration in Miami, indicating that it was impossible for him to have murdered Roark. [Defendant] also asserted that Dr. William Maples, a forensic anthropologist, could testify that Roark had been dead for only three weeks when her remains were recovered and that [Defendant] had been in jail for six months at that time. Furthermore, [Defendant] asserted that the evidence found at the site where Roark's body was found did not link him to the crime.

On cross-examination, [Defendant] admitted that he previously had been convicted of committing fifteen felonies. [Defendant] denied trying to kill Coralis and claimed that her injuries were the result of her jumping out of a moving car. [Defendant] also asserted that all of the State witnesses had lied and he refused to explain why he was in possession of the property of people who were either killed or attacked.

Ana Fernandez testified on [Defendant's] behalf. Fernandez worked for [Defendant] in 1984 or 1985 when she was fifteen years old, answering phones for the escort service. Fernandez claimed to have known Roark, Coralis, and Novick through her association with [Defendant]. However, she could not state when, where, or how many times that she had met Coralis or Novick and was unable to describe them. Moreover, when presented with a photograph of several women, she could not identify Coralis.

* * * *

[FN2] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

> [FN3] [Defendant's] claims concerning the officers' use of gruesome photographs and that he was given a lie detector test were refuted by Detective Steven Parr and Detective Lou Passaro of the Miami-Dade Police Department. Both testified during the State's rebuttal.

Id. at 423-26.

On August 10, 2001, R. Glenn Arnold was appointed to represent Defendant in the post conviction proceedings in this matter. (PCR2-SR. 18) At the time, Mr. Arnold was already representing Defendant regarding post conviction litigation in Defendant's other capital case. (PCR2-SR. 44) On November 13, 2001, Mr. Arnold moved to withdraw from representing Defendant in this matter because Defendant had created a conflict of interest by filing repeated complaints about his representation in the other capital case. (PCR2-SR. 44-53) On January 11, 2002, CCRC-South filed a notice stating that it could not assume representation of Defendant because of its existing caseload and its employment of an attorney that Defendant had previously discharged based on a conflict during the post conviction proceedings in Defendant's other capital case. (PCR2-SR. 54-59) On January 15, 2002, the state post conviction court discharged Mr. Arnold and decided to find Defendant a new registry attorney rather than appointing CCRC-South. (PCR2. 23) In its written order, the state post conviction court stated it was not basing

its decision on the conflict on Defendant's complaints but on the breakdown in the attorney/client relationship those complaints had caused. (PCR2-SR. 61-62) On January 17, 2002, the trial court entered an order appointing Steven Hammer to represent Defendant. (PCR2. 23, PCR. 15)

On May 9, 2003, Defendant filed a Motion for Post Conviction Relief, which was not verified but was accompanied by a motion requesting a competency determination. (PCR2. 75-152) In the competency motion, Defendant's counsel claimed that Defendant was not communicating with him rationally and believed that his lawyers were involved in a conspiracy. *Id.*

At a hearing held after this motion was filed, Defendant brought up his request for a competency evaluation. (PCR2. 203) The State indicated that it did not believe that Defendant had sufficiently alleged that there were issues that required Defendant's input but agreed to have Defendant evaluated in an abundance of caution. (PCR2. 204) The fact that Defendant had been repeatedly evaluated for competency in connection with his cases and was claiming that he was incompetent at the time of trial was considered during the discussion regarding which experts to appoint. (PCR2. 205-12) The State and state post conviction court indicated that it might be better to appoint experts who had evaluated Defendant previously under these

circumstances. *Id.* However, Defendant indicated that he preferred to have an expert who did not know Defendant's history. *Id.* The court decided to give the parties three weeks to submit recommendations of experts. (PCR2. 212) At the next hearing, the State recommended Dr. Sonia Ruiz and Dr. Enrique Suarez. (PCR2. 223-25) Defendant indicated that he had not yet determined whom to recommend but that he expected to have a name within a couple of days. (PCR2. 226-28) On June 18, 2003, the court entered an order appointing Dr. Ruiz, Dr. Suarez and Dr. L. Alison McInnes. (PCR2. 218-20)

Dr. Ruiz and Dr. Suarez conducted their evaluations on September 19, 2003, and subsequently issued reports finding Defendant competent. (PCR2. 236-50) Dr. Suarez found that Defendant was not mentally ill but did diagnose Defendant with personality disorder, not otherwise specified with antisocial, obsessive-compulsive, narcissistic and paranoid features. (PCR2. 236-41) Dr. Ruiz found him somewhat distrustful, very manipulative and domineering and highly intelligent. (PCR2. 248-50) She noted that any lack of cooperation was the result of a volitional choice by Defendant. *Id.*

Dr. McInnes conducted her evaluation on October 21, 2003, and subsequently issued a report finding Defendant incompetent. (PCR2. 253-58) She did not have sufficient information to reach

a diagnosis but believed that Defendant was delusional and probably was brain damaged. *Id.* She did not believe Defendant was malingering. *Id.*

At the competency hearing, Dr. Suarez, a psychologist with extensive experience in conducting competency evaluations in the criminal justice system, testified consistently with his report. (PCT2. 56-85) During cross examination of Dr. Suarez, questions were asked regarding the timing of the various aspects of the evaluation and a lunch break. (PCT2. 90-104) During this questioning, Dr. Suarez indicated that he had eaten lunch with two other people. (PCT2. 90) The lower court had assumed that Defendant was one of these people and asked questions about what was occurring as they were eating. (PCT2. 93-94) Dr. Suarez clarified that he had eaten lunch outside the prison with Dr. Ruiz and one of Defendant's attorneys. After the clarification was made, Defendant commented that "[i]t would have been nice" to have joined the group for lunch. (PCT2. 94)

Dr. McInnes, a psychiatrist who had conducted one competency evaluation, opined that Defendant did not believe he was facing the death penalty because he told her that he did not know what would happen if he was found incompetent, that he would not be found incompetent because he was not mentally ill and that he would eventually be exonerated because Jeb Bush had

been a client of his escort service. (PCT2. 172) When Dr. McInnes testified about Gov. Bush, Defendant interrupted the proceedings to state that he had never claimed Gov. Bush was a client and that he had merely stated that Gov. Bush's phone numbers were in the phonebook seized from him at the time of his arrest. (PCT2. 173)

Dr. McInnes also opined that Defendant exhibited loosening of associations and incoherence in his speech. (PCT2. 174) She defined loosening of associations as responding to questions with a large amount of information that was not directly relevant to the question and then forgetting what the question was. (PCT2. 174) Her example of this was Defendant drafting pleadings that his attorneys believed were irrelevant. (PCT2. 175) Her example of incoherence was that Defendant complained that his attorneys did not draft the motion for post conviction relief correctly because the facts supporting the claims were not specified. (PCT2. 174) Dr. McInnes believed this was incoherent because she did not understand the comment. *Id.*

Dr. McInnes also believed that Defendant exhibited profound paranoia and delusional thought processes. (PCT2. 175) Her example for this conclusion was that Defendant claimed that he was framed, he asserted that the husband of a woman he had sex

with was responsible and he believed his lawyers were not representing him properly. (PCT2. 175-76)

Dr. McInnes did not believe that Defendant had the capacity to assist counsel. (PCT2. 179) She based her opinion on the fact that Defendant distrusted his attorneys and felt they were being ineffective. (PCT2. 180) She also believed that distrust of counsel meant that Defendant could not understand the proceedings or convey information to counsel. (PCT2. 182-83)

During cross examination, Dr. McInnes admitted that Defendant might be manipulative and that he was bright. (PCT2. 193) However, she did not believe that actions such as Defendant's refusal to come to the evaluation initially to be attempts at manipulation because it was not in his interest. (PCT2. 195) When the lower court inquired if it might be in Defendant's interest by delaying the proceedings, Dr. McInnes originally stated that she did not think that delaying things was to Defendant's benefit. (PCT2. 195-96)

Dr. Ruiz, a psychologist with extensive experience conducting competency evaluations in the criminal justice system, also testified consistently with her report. (PCT2. 207-26) After the attorneys finished questioning Dr. Ruiz, Defendant personally questioned Dr. Ruiz about whether Dr. McInnes might have observed loosening of associations because Defendant was

under stress prior to her evaluation that was not present when Dr. Ruiz and Dr. Suarez evaluated him. (PCT2. 247-51) Dr. Ruiz acknowledged that stress and anxiety levels could have such an effect. *Id.*

After considering this evidence and the argument of counsel, the lower court found Defendant competent. (PCT2. 265) It noted that Defendant was intelligent and was able to question Dr. Ruiz appropriately. (PCT2. 265-66) It further found that Defendant was manipulative and was voluntarily choosing not to assist his counsel. (PCT2. 266-67)

After conducting a *Huff* hearing on September 17, 2004, the state post conviction court granted an evidentiary hearing on the claim of ineffective assistance of counsel at the *Spencer* hearing and summarily denied the remaining claims. (PCT2. 316-69, PCR2. 908-09) Thereafter, Defendant's post conviction counsel in this case moved to compel Defendant's post conviction counsel in his other capital case to provide him with access to files concerning Defendant. (PCR2. 902-05) Defendant's other post conviction counsel had refused to allow access to the files because Defendant personally objected to his counsel in this matter seeing the records. *Id.*

During the course of the litigation that occurred over the access to the files that occurred after the *Huff* hearing and

before August 8, 2005, Defendant initially refused to allow counsel to call his family members as witnesses at the evidentiary hearing. (PCT2. 465-67) However, at a status hearing on August 8, 2005, Defendant refused to allow the presentation of any evidence or to proceed further with the evidentiary hearing. (PCT2. 668-69) After discussing the ramification of Defendant's refusal with Defendant, the state post conviction court determined that Defendant's refusal waived the claim upon which an evidentiary hearing had been granted and denied post conviction relief. (PCT2. 669-88, PCR2.1125-28)

Defendant appealed the denial of his motion for post conviction relief to the Florida Supreme Court, raising, *inter alia*, a claim that his waiver of the claim on which an evidentiary hearing had been granted was not voluntary and a claim that he had never been competent to proceed. On June 25, 2009, the Florida Supreme Court affirmed the denial of post conviction relief. *Gore v. State*, 24 So. 3d 1 (Fla. 2009). In doing so, it rejected Defendant's claim regarding his competency:

> We begin with an examination of the issue of [Defendant's] competency. We start with the issue of competency because [Defendant's] mental status has been a recurrent theme throughout the trial, direct appeal, and postconviction proceedings in this case as well as in the proceedings concerning the first-degree murder of Susan Roark in Columbia County, in which [Defendant] was also sentenced to death and in which

the issue of [Defendant's] competency to proceed was also raised. *See Gore v. State*, 846 So. 2d 461 (Fla. 2003) (affirming denial of postconviction relief and denying petition for habeas corpus in Roark conviction); *Gore v. State*, 599 So. 2d 978 (Fla. 1992) (affirming conviction and sentence for murder of Roark) (hereafter referred to as "the Columbia County case").[FN9] **While [Defendant's] current counsel asserts that [Defendant] is "mentally deranged," the trial judges who have evaluated this issue have concluded that, rather than being incompetent or seriously mentally ill, [Defendant] has intentionally manipulated and attempted to obstruct the ongoing proceedings against him.** The question of whether [Defendant's] actions are the product of a serious mental illness or the result of purposeful manipulation is best analyzed by a thorough review of the record in this case and the Columbia County case.[FN10]

[Defendant's] claims of incompetency arise from both his trial and postconviction proceedings. As to his trial-related claims, [Defendant] asserts the following: (1) the trial court erred in finding that he was competent to proceed to trial; (2) his trial counsel was ineffective in advocating his incompetency claims; and (3) the trial court erred in failing to instruct the jury on the extreme mental disturbance mitigator.

As to his postconviction-related claims, [Defendant] alleges that the trial court erred in finding that he was competent at the time of the postconviction proceedings and he claims that he is possibly incompetent and/or insane at present. To provide context to these claims, we will first provide a history of the competency proceedings in [Defendant's] case and then analyze his postconviction and trial-related incompetency claims.

1. History of Competency Proceedings

a. Competency in Columbia County Collateral Proceedings

We turn first to the Columbia County case because the proceedings in that case gave rise to some of the

trial court's decisions regarding competency in this case. In 1998, after the filing of [Defendant's] rule 3.851 motion in the Columbia County case involving the murder of Susan Roark, counsel in that case filed a motion to determine [Defendant's] competency to proceed. In the motion, counsel stated that [Defendant] had "no present ability to consult with and communicate with postconviction counsel regarding factual matters at issue in his postconviction proceedings." In the absence of the State's objection to the examination, the court appointed two experts to evaluate [Defendant's] competency, Dr. Richard Greer and Dr. Umesh Mhatre, who concluded that Gore was competent to proceed. At the competency hearing, Gore had the opportunity to cross-examine these experts and also presented testimony from Dr. Harry McClaren and Dr. Terence Leland, both of whom found Gore to be incompetent.

In finding that [Defendant] was competent to proceed in the postconviction proceedings, the court noted that two of the doctors had found [Defendant] to be controlling and manipulative. Moreover, the court stated:

> [Defendant] is also a notoriously difficult client. There is, however, no right to a meaningful attorney-client relationship, when the client's conduct prevents a meaningful relationship. *Morris v. Slappy*, 461 U.S. 1, 13, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). Based on this Court's observations of [Defendant], both during his trial and over the last several years of these postconviction proceedings and the reports and testimony of the experts, the Court finds that [Defendant's] current dislike of and refusal to cooperate with collateral counsel are not the result of a delusional disorder. Instead, such behavior is consistent with [Defendant's] personality disorder.
>
> The Court finds that the greater weight of the evidence supports the conclusions that [Defendant] has both a rational and

factual understanding of these proceedings and that he has the ability to consult with counsel if he chooses to do so.

b. Competency Evaluation at Retrial in Novick Case

On January 14, 1999, prior to the retrial in this case, defense counsel received a letter stating that [Defendant] had previously been found to be incompetent by two experts in the Columbia County case. When counsel raised the issue before the court, the court sua sponte appointed Dr. Merry Haber to conduct [Defendant's] evaluation "to make sure [[Defendant] was] okay and still competent." Counsel then formally requested that the trial court have Dr. Haber perform an evaluation. The parties stipulated that the defense would not request a second evaluation unless Dr. Haber concluded Gore was incompetent.

On January 15, 1999, Dr. Haber conducted a one-hour competency evaluation of [Defendant]. In addition, Dr. Haber reviewed the reports of the four experts who examined [Defendant] in the Columbia County proceedings. In her report, Dr. Haber opined that [Defendant] "was cooperative, but also manipulative and seductive." She also stated that his "thought processes were coherent, logical, and productive" although he would become "overproductive" in explaining his situation. Dr. Haber believed that [Defendant's] thought processes were "goal-oriented with no loosening of associations." She found no evidence of delusional activity, depression, significant anxiety, or any major mental illness. She ultimately concluded that [Defendant] was competent to proceed with his trial.[FN11] The issue of [Defendant's] competency was not raised on appeal from the retrial.

c. Competency at Postconviction Proceedings in Novick Case

In this current postconviction proceeding, [Defendant] filed a motion to determine his competency to proceed in the collateral proceedings. At a subsequent hearing, the State agreed to a competency hearing. Ultimately, the court appointed three experts

to evaluate [Defendant]: Dr. Lynne Alison McInnes, Dr. Enrique Suarez, and Dr. Sonia Ruiz.

At the competency hearing, the defense presented the testimony of Dr. McInnes, a psychiatrist, who conducted a five-hour interview of [Defendant]. She opined that [Defendant] had loosening of association, displayed incoherence, paranoia, and delusional thoughts, and was suspicious of counsel. Dr. McInnes did not administer the Minnesota Multiphasic Personality Inventory (MMPI) test to [Defendant], a test which evaluates personality and "characterological" traits, because she did not believe it would be of assistance to the issue of his competency. [Defendant] denied that he had psychiatric symptoms, but Dr. McInnes testified that it was very difficult to fake a thought disorder and therefore she did not believe that [Defendant] was malingering. She also did not believe that [Defendant] was capable of conveying consistent information or understanding the facts at hand. Thus, she concluded that [Defendant] was incompetent. On cross-examination, Dr. McInnes stated that [Defendant] had indicated that he had suffered some head trauma but she also conceded that there was a possibility that [Defendant] was attempting to produce symptoms to influence the outcome of his case and that she suspected that [Defendant] was manipulative. She also stated that she did not review [Defendant's] prior evaluations.

The State presented the testimony of Dr. Suarez, a psychologist who performed [Defendant's] evaluation, and Dr. Ruiz, a clinical psychologist. Dr. Suarez testified that [Defendant] was compulsive and had a tendency to obsess. [Defendant] informed Dr. Suarez that he had a number of different head injuries and had experimented with drugs before prison. However, based on [Defendant's] interactions with his attorney, who was present during the evaluation, the doctor believed that [Defendant] had the ability to respond to any question that was asked of him. Dr. Suarez also did not see any signs of [Defendant] being psychotic or delusional. Dr. Suarez administered the MMPI, which showed "answers that are known to reflect or be indicative of certain psychological condition or show abnormality." However, the test results were invalid,

which Dr. Suarez opined could have been the result of exaggeration. Ultimately, Dr. Suarez found [Defendant] to be competent. On cross-examination, Dr. Suarez conceded that the MMPI results did not necessarily correlate to an individual's competency.

Dr. Ruiz described [Defendant] as very coherent and intelligent. She stated that [Defendant] was sometimes unresponsive to questions, but she deemed that behavior to be purposeful, occurring when he did not wish to discuss certain topics. She also stated that [Defendant] did not have any loosening of associations but was a highly verbal individual. She opined that [Defendant] obsesses with details but that he was not psychotic, out of contact with reality, or mentally retarded, and showed no evidence of a thought disorder or major mental disorder. She concluded that "[Defendant] is very capable of consulting with counsel in a reasonable manner and very capable of testifying if he choosing [sic] to do so."

[Defendant] himself questioned Dr. Ruiz and asked her if the loosening of associations could exhibit itself on some days but not on others due to the stress on an individual, and she agreed it was a possibility.[FN12] When [Defendant] continued to question her, Dr. Ruiz also stated it was possible that an individual under stress could provide incorrect answers to questions.

After hearing testimony from the doctors and arguments from counsel, the court stated:

> I do find [Defendant] to be competent. . . . Maybe more competent than a lot of people that appear before me, some of the lawyers included. I find him to be bright, intelligent, he has good contact with reality. He has no communication difficulty. He certainly does not in front of me or with the doctors, at least Dr. Ruiz and Suarez, have any difficulty with rambling or loosening association. I just observed here that he was able to ask a mental health expert a very good question and follow it

through the answer to another follow-up question. I thought he did very well there.

Further, when questioned by the court on whether he felt competent to proceed, [Defendant] stated, "I'm absolutely competent. I'm absolutely lucid."

2. Standard for Competency

Under the Due Process Clause of the Fourteenth Amendment, a defendant may not be tried and convicted of a crime if he is not competent to stand trial. See Amend. XIV, § 1, U.S. Const. In order to determine whether a defendant is competent to proceed at trial or in postconviction proceedings, the court must discern whether he "has sufficient present ability to consult with counsel with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the pending ... proceedings." *Alston v. State*, 894 So. 2d 46, 54 (Fla. 2004) (quoting *Hardy v. State*, 716 So. 2d 761, 763 (Fla. 1998) (applying competency criteria to collateral proceedings)); *see Peede v. State*, 955 So. 2d 480, 488 (Fla. 2007) (holding that the trial court must decide whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him") (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)); see also Fla. R.Crim. P. 3.211(a)(1) (setting forth the same test).

Moreover, when analyzing a competency determination on appeal, this Court applies the competent, substantial evidence standard of review to the trial court's findings. In other words, a trial court's determination of competency supported by competent, substantial evidence will not be disturbed on appeal. *See Hernandez-Alberto v. State*, 889 So. 2d 721, 727-28 (Fla. 2004).

3. Analysis of Postconviction and Trial-Related Competency Claims

Applying this standard and based on the evidence presented to the postconviction court on the issue of [Defendant's] competency, we conclude that competent,

substantial evidence supports the postconviction court's finding that [Defendant] was competent to proceed. Although the court heard testimony from Dr. McInnes that [Defendant] was incompetent, the court also heard conflicting evidence from Dr. Ruiz and Dr. Suarez that [Defendant] was competent. The trial court also observed [Defendant's] behavior first-hand and had the benefit of the record from the prior competency proceedings at trial in this case, as well as the Columbia County case. Because the court's competency determination is supported by the testimony from Dr. Ruiz and Dr. Suarez, the court's own observations of [Defendant's] behavior, and the prior proceedings in the Columbia County case, the court did not err in finding [Defendant] competent to proceed in his postconviction proceedings.

We also reject [Defendant's] competency claims arising from his retrial. We first note that [Defendant's] claims alleging that he was incompetent at the time of trial and that the trial court erred in removing the extreme mental disturbance mitigator from the jury instructions are procedurally barred because they could have been raised on direct appeal. *See Carroll v. State*, 815 So. 2d 601, 610 (Fla. 2002) (rejecting as procedurally barred the postconviction claim that defendant was incompetent to stand trial); *see also Farina v. State*, 937 So. 2d 612, 625 n.7 (Fla. 2006) (argument that age mitigator should be reweighed was procedurally barred as it should have been raised on direct appeal).

As to [Defendant's] claim that counsel rendered ineffective assistance at his trial in his failure to "advocate the issue of his competency," we find no merit in this claim. Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), this Court held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under

> prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted). In this case, the trial court summarily denied this claim without an evidentiary hearing, concluding it was insufficiently pled. In determining whether the trial court's ruling on the facial sufficiency of this claim was proper, this Court must apply *Strickland*'s two-pronged test. *Spera v. State*, 971 So. 2d 754, 758 (Fla. 2007).

Because [Defendant] received a competency evaluation at his trial, this claim is unlike other cases where the defendant alleged that counsel was ineffective in failing to request a competency evaluation. *See Lamarca v. State*, 931 So. 2d 838, 847-48 (Fla. 2006). Instead, [Defendant] argues that counsel failed to further develop the information that Gore had previously been found incompetent by two experts in another case. However, this claim of deficient performance is conclusively refuted by the record in that the record shows that trial counsel brought the fact of the prior experts' conclusions to the attention of the trial court, who immediately ordered an additional competency evaluation. Subsequently, in an abundance of caution, counsel formally requested that the trial court read the transcript from the Columbia County case, review the earlier reports on [Defendant's] competency, and order another competency evaluation.

As to the second prong of prejudice, there is simply no basis to conclude that our confidence in the outcome of the competency proceedings at trial, and ultimately confidence in the trial proceedings, is undermined. **This is especially true in light of [Defendant] having been found competent by every trial**

court that has held a hearing on this issue, including determinations that were made after the extensive proceedings in Columbia County and after the proceedings by the trial court in these postconviction proceedings. Therefore, we conclude that [Defendant's] claim of ineffective assistance of counsel in failing to "advocate" the issue of competency is without merit.

* * * *

[FN9] Although postconviction relief was denied and that denial affirmed, [Defendant] brought a successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.853 for DNA testing. That motion was summarily denied and is pending on appeal in this Court in Case No. SC07-678.

FN10. The issue of whether [Defendant] has intentionally manipulated the proceedings was the subject of an earlier case in which [Defendant] was convicted of attempted murder, kidnapping, sexual battery, burglary, robbery, and theft. *See Gore v. State*, 573 So. 2d 87, 88 (Fla. 3d DCA 1991). There, [Defendant] filed a motion to exclude electronic media from the courtroom. Several months prior to the trial, a psychologist diagnosed [Defendant] with attention deficit disorder and a severe personality disorder and concluded that the presence of television cameras would distract [Defendant]. After the psychologist's testimony was presented at an evidentiary hearing, the court found [Defendant] competent to testify and denied the motion. When [Defendant] took the stand and stated he was "not going to be able to do this," the court appointed three doctors to examine [Defendant] and determine whether the presence of the cameras truly was affecting [Defendant's] ability to participate in the trial. Notably, the first psychiatrist that testified stated that "[Defendant] did not suffer from any major illness, was manipulative, and was simply 'making an issue' of the presence of the camera." *Id.* The trial court ultimately denied the motion to exclude. *Id.*

> FN11. The record also indicates that the trial court appointed Dr. Haber on February 10, 1999, to examine [Defendant's] competency for the penalty phase.
>
> FN12. The trial court granted [Defendant's] request to question Dr. Ruiz after the State and [Defendant's] counsel completed their examinations.

Id. at 6-11 (emphasis added).

In October 2006, while the post conviction appeal remained pending in the Florida Supreme Court, Defendant, *pro se*, attempted to file an original petition pursuant to 28 U.S.C. §2242 directly in the Eleventh Circuit. The Eleventh Circuit transferred the petition to the Southern District, where it was filed on November 8, 2006. Petition, Case No. 06-CIV-22736-Graham.

While his motion for rehearing of the affirmance of the denial of post conviction relief was pending before the Florida Supreme Court, the district court then scheduled a telephonic hearing regarding counsel for Defendant and made arrangements for Defendant to be part of this hearing personally. However, Defendant refused to come to the phone at the time of the hearing. As such, the district court, on November 10, 2009, appointed Defendant's state post conviction counsel to represent him in this matter.

On November 17, 2009, Defendant served a *pro se* pleading requesting that this attorney be discharged and new counsel

appointed. In this pleading, Defendant admitted that he had refused to come out of his cell at the time of the district court's hearing but asserted that he had not realized he was being taken to a telephonic hearing. The district court referred this motion to a magistrate who then scheduled and conducted an *ex parte* hearing on this motion. (Doc 57, 58, 59) The magistrate entered an order denying Defendant's request for new counsel but stated that it would permit Defendant to supplement his amended petition to raise any claims that he felt his counsel had omitted.

On January 29, 2010, Defendant's counsel also filed a new habeas petition without moving for leave to amend. Defendant's counsel simultaneously moved for a stay of proceedings, claiming that Defendant was incompetent to proceed. Defendant's counsel presented no evidence in conjunction with this motion. Instead, Defendant's counsel simply made unsworn allegations that she had always believed Defendant was incompetent, that Defendant had been moved to Florida State Prison and that Defendant had been unfocused during phone calls and unkempt during a meeting with counsel. (Doc 62-1-4) Counsel suggested that she believed the move indicated a problem with Defendant that might involve Defendant's mental health even though counsel had not determined the real reason for the move. (Doc 62-2) Counsel averred that

the problem with Defendant's communications was that Defendant was focused on his complaints with his other post conviction counsel, who Defendant believed would cause his death and that Defendant made claims of innocence without factual support.

The State responded in opposition to the motion for stay. In this pleading, the State pointed out that Defendant had not overcome the presumption of correctness regarding the state court factual finding that Defendant was competent and that there was no right to be competent during a federal habeas proceeding.

On May 25, 2010, the district court denied the motion to stay, finding that Defendant had not overcome the presumption of correctness regarding the state court finding of competence and that its observation of Defendant during the *ex parte* hearing confirmed that Defendant was competent. As such, the district court did not determine whether there was a right to be competent.

On February 4, 2011, the district court determined that the federal habeas petition was untimely but granted Defendant leave to file a supplemental pleading requesting equitable tolling. Defendant's state post conviction court then moved the district court to appoint Defendant additional counsel to file the supplemental pleading without relieving her of responsibility

for the case. Alternatively, she requested that new counsel be appointed. On February 23, 2011, the district court discharged Defendant's state post conviction counsel and appointed Todd Scher to represent Defendant and expressly provided that Mr. Scher was counsel "unless relieved by court order."

The district court subsequently determined that the federal habeas petition was untimely and meritless. Both the district court and the Eleventh Circuit denied Defendant leave to appeal the denial of his federal habeas petitions. The United States Supreme Court denied certiorari regarding the federal habeas proceedings on April 22, 2013. *Gore v. Crews*, 133 S. Ct. 2003 (2013).

On May 10, 2013, Defendant's state post conviction counsel served a motion to withdraw. In this motion, state counsel's only basis for withdrawal was that he had taken a job with a civil law firm and did not wish to continue representing Defendant. He further noted that Mr. Scher had stated that he did not plan to continue to represent Defendant either.

On May 13, 2013, the Governor signed a warrant, scheduling Defendant's execution for June 24, 2013, which was served on Mr. Scher. On May 14, 2013, the state post conviction court issued a scheduling order, requiring that Defendant file any successive motions for post conviction relief by noon on May 20, 2013. It

denied the motion to withdraw without receiving any response from the State.

Shortly before 9 a.m. on May 20, 2013, Defendant's counsel filed a pleading he entitled "Notice of Potential Conflict of Interest Resulting in Inability to Comport with Scheduling Order." In this pleading, counsel stated that he had spoken to Defendant on the phone, that he believed Defendant's behavior during the call was irrational and that he could not reason with Defendant. He noted that he had sent an investigator to obtain a release necessary for counsel to obtain his medical records, that Defendant had signed the release only after adding language preventing the release of the records to counsel, that Defendant made statements indicating a distrust of counsel and the legal system, that Defendant was combative with the investigator and that Defendant allegedly made statements that counsel believes are "irreconcilably irrational." He further noted that one of the guards had described Defendant as combative and verbally abusive. He attached to this pleading a letter he sent to the Governor, stating that he believed Defendant was not sane to be executed.

On May 22, 2013, the Governor issued an order appointing Dr. Wade Myers, Dr. Alan Waldman and Dr. Tonia Werner to evaluate Defendant's sanity to be executed. The order

specifically noted that Defendant's execution would proceed as scheduled if he was found competent. On May 28, 2013, the doctors met with Defendant and determined that he was competent to be executed. On May 30, 2013, the Governor issued an order finding Defendant competent and ordering the execution to proceed as scheduled.

Within hours of each other on May 31, 2013, both state counsel and Mr. Scher moved to withdraw from representing Defendant. State counsel claimed that he could not represent Defendant because Mr. Scher had accused him of misconduct in federal court, he had started a civil trial after he was aware that the warrant had been signed and he would not be permitted to withdraw, Defendant was refusing to cooperate with him and counsel believed that he could not ethically represent Defendant. Mr. Scher claimed that his appointment had ended because certiorari had been denied, his appointment in the case had limited his role and he had a conflict of interest because Defendant had previously sued an attorney at CCRC-South.

On June 4, 2013, state counsel's motion to withdraw was denied. State counsel filed a notice of appeal regarding this, and other nonfinal orders. The State filed a motion to dismiss the appeal because it concerned nonfinal orders, it did not contain the information necessary to be a petition for review of

nonfinal orders and there was no basis to grant relief as none of the orders were even erroneous. State counsel then filed a response, asserting that this Court should treat the nonfinal orders as final orders because he did not intend to file any substantive pleadings. On June 6, 2013, this Court entered an order denying the relief sought in the notice of appeal and denying the State's motion to dismiss as moot. *Gore v. State*, 2013 WL 2492921 (Fla. Jun. 6, 2013).

On June 10, 2013, the district court denied Mr. Scher's motion to withdraw, finding it "not well taken." At approximately 8 p.m. on June 12, 2013, Mr. Scher filed motions in federal court seeking discovery regarding his medical records and information regarding the commission's evaluation. He attached to the pleading the waiver of confidentiality that state counsel had Defendant sign, which Defendant had altered so that it did not waive confidentiality. On June 18, 2013, the district court entered an order granting Defendant some of the discovery he had sought. Mr. Scher then moved the district court to appoint an expert to assist him, which the district court granted without objection by the State.

At approximately 7 p.m. on June 21, 2013, Defendant filed a second federal habeas petition in federal court, raising a claim that he was incompetent to be executed. He acknowledged that the

claim had not been raised in state court but suggested that the claim would not be rejected on an adequate and independent state law ground and that his state counsel's failure to raise the claim constituted cause to overcome this procedural default. Before 8:30 a.m., the State responded to this petition, arguing that the failure to have presented this claim to the state courts made it unexhausted and required its dismissal or denial under 28 U.S.C. §2254(b). It further noted that there was no state law that would prevent consideration of the merits of the claim such that the claim was not procedurally barred and there was no reason to discuss cause to overcome the nonexistent bar. It also pointed out that the case Defendant was relying on precluded its application even if there had been a bar. It argued that the claim was insufficient to grant relief in any event and that there was no basis to stay the federal habeas petition pending exhaustion. Defendant then filed a reply insisting that he did not want the federal habeas stayed pending exhaustion.

On June 24, 2013, the district court dismissed the petition because the claim was not exhausted and found that the case Defendant was relying upon to show cause expressly precluded its application to this situation. However, it granted leave to appeal regarding whether the case should be expanded. The

Eleventh Circuit granted a temporary stay and ordered briefing and telephonic oral argument. At approximately 6:30 p.m. on June 27, 2013, the Eleventh Circuit issued its opinion affirming the dismissal of the second petition and denied a stay of execution. *Gore v. Crews*, 2013 WL 3233303 (11th Cir. Jun. 27, 2013). In that opinion, the Eleventh Circuit determined that the appeal was frivolous because 28 U.S.C. §2254(b) required that the petition be dismissed, that Petitioner was not entitled to a stay as a result and that the district court had erred in granting leave to appeal. *Id.* at *3, *5. The Eleventh Circuit also specifically held that Petitioner's "federal habeas counsel has not adequately explained his failure to attempt to appear" in state court. *Id.* at *2 n.1.

The following morning, Defendant filed a third federal habeas petition, re-raising the same unexhausted claim. He also sought a stay of his execution and a stay of the federal habeas proceedings pending exhaustion. He further moved the federal court to expand his appointment to cover the state court proceedings. The State responded to the requests for stays. As part of its response, it pointed out that Petitioner could have moved to substitute as counsel in state court or requested the federal court to pay for the representation in state court earlier. It also moved to dismiss the petition because the claim

remained unexhausted. The State took no position on the motion regarding Defendant's counsel's appointment.

On July 1, 2013, the district court dismissed the petition and denied the stays. It found the request for it to appoint counsel for state court proceedings premature because Defendant had not asked the state court to allow him to substitute as counsel. On July 2, 2013, Mr. Scher finally moved the state court to allow him to substitute as counsel.

On July 9, 2013, Defendant filed a motion seeking a stay of execution based on his alleged insanity to be executed pursuant to Fla. R. Crim. P. 3.811. In the motion, Defendant's counsel alleged that there were reasonable grounds to believe Defendant was insane because Defendant had made statements that his counsel and the district court considered delusional, Defendant was refusing to cooperate with counsel, his experts believed there were red flags about Defendant's mental state that needed to be explored, excerpts from Defendant's prison records indicated he had a personality disorder and he believed there were bases to impeach the Governor's commission. That same day, the State filed a response, providing the lower court with the records of the prior proceedings in this matter and documents related to Defendant's litigation of a claim that the presence of television cameras in the courtroom would render him

incompetent to testify at the trial that resulted in Defendant's convictions for crimes committed against Tina Corolis and her son. It also provided copies of pleadings Defendant filed *pro se* in federal court. It argued that counsel's assertions about his interactions with Defendant were insufficient to create reasonable grounds to believe that Defendant was insane to be executed in the face of repeated expert opinions and court findings that Defendant did not suffer from any mental illnesses.

On July 9, 2013, the lower court found that Defendant had presented reasonable grounds to believe that he might be insane to be executed. It then ordered an evidentiary hearing regarding the claim.

At the hearing, Defendant called Dr. Jethro Toomer, a psychologist. (EH. 587) He stated that he spent about 4½ hours evaluating Defendant for competence to be executed on July 8, 2013, which he felt was an adequate period. (EH. 590-91, 593) He reviewed materials, including the report of the Governor's commission, both before and after doing so. (EH. 591)

Dr. Toomer averred that when he arrived at the prison, he was escorted into an interview room, and Defendant was then brought into the room. (EH. 592) Dr. Toomer then provided Defendant with a letter of introduction from his attorney, and

Defendant checked the signature on the document by wetting his finger and running it over the signature. (EH. 592-93) Dr. Toomer believed that this action was indicative of a pattern of paranoia and distrust. (EH. 593) Dr. Toomer then spoke to Defendant about his experiences in the system and his behavior and feelings. (EH. 593-94)

Dr. Toomer opined that Defendant understood that he would be executed for murdering Ms. Novick but felt that Defendant's underlying psychopathology distorted his understanding of the linkage between the execution and the reason for it. (EH. 594-95, 612-14) He based this conclusion on his assessment that Defendant's presentation and his history showed paranoid behavior and a belief system with a lot of delusional material. (EH. 595) He relied on Defendant's statements regarding an organ harvesting conspiracy and Satan worshippers to reach this conclusion. (EH. 595-96) He averred that the organ harvesting conspiracy included Defendant's present and past attorneys, the Governor and a number of other people. (EH. 602)

Dr. Toomer stated that to conduct a proper psychological evaluation, one interviewed the individual, tested the individual and obtained collateral information for records and people familiar with the individual's functioning. (EH. 596-97) He averred that he found corroboration here in Defendant's

history. (EH. 597)

Dr. Toomer stated that a delusional system was entrenched when it has existed over an extended period of time, detailed and fixed. (EH. 597-98) He noted that Defendant was resistant to treatment, which was consistent with a delusional belief system. (EH. 598-99)

Dr. Toomer believed that Defendant was of at least average intelligence and was aware that Defendant had filed *pro se* pleadings. (EH. 599) He insisted that Defendant's ability to do so was not inconsistent with his opinion because his understanding of Defendant's delusions would not prevent him from functioning. (EH. 599-600)

Dr. Toomer averred that sinequan, haldol and vistaril were all antipsychotic medication and stated that Defendant told him he had been given antipsychotic medications in the past but not consistently. (EH. 600-01, 641-44) He averred that corrections records usually accurately recorded observations. (EH. 601-02)

Dr. Toomer stated that he had suggested that a comprehensive psychiatric evaluation was needed because there were a number of possible diagnoses for Defendant. (EH. 603-04) These included bipolar disorder, delusional disorder, paranoid personality disorder and cognitive disorder NOS. (EH. 604)

Dr. Toomer stated that he had seen two disciplinary reports

(DR's) that had been given to Defendant. (EH. 605) Both included statements about Defendant referring to devil worshippers, which Dr. Toomer found consistent with delusions. (EH. 605-06)

Dr. Toomer was aware that the commission had given Defendant the MMSE-2 test and the MFAST test. (EH. 606) The score on the MFAST was at the cutoff for malingering and was not given with an MMPI. (EH. 609-10) He did not believe that MMSE-2, a test of cognitive functioning, was designed to detect malingering. (EH. 610-11) He admitted that he gave Defendant no tests. (EH. 606) He averred that he had instead considered malingering through three models (criminal, pathogenic and adaptational) and found Defendant was not malingering based on the totality of the information. (EH. 606-09)

On cross, Dr. Toomer admitted that he had testified for defendants on numerous occasions but had never been retained by the State. (EH. 615-17) He insisted that he interviewed Defendant beginning shortly after 9:30 a.m. and continuing until approximately 2 p.m. and that he was in the interview room before Defendant. (EH. 619-23, 635-36)

Contrary to defendant's claims, Dr. Toomer admitted that, while he had reviewed a federal habeas petition written by Defendant's counsel, he had not reviewed any of Defendant's *pro se* pleadings. He did not think it was important because "one's

intellectual capacity has nothing to do" with the issue. (EH. 624-25) He averred that he had read reports from a number of other experts but could not remember the names of the other experts. (EH. 626-27) He admitted that he was aware that Dr. Barry Crown, Dr. Anastasio Castiello, Dr. Merry Haber, Dr. Enrique Suarez and Dr. Sonia Ruiz had all previously found Defendant to be malingering. (EH. 627-30) He stated that he had read the direct appeal opinion but not the post conviction opinion. (EH. 630-31) He admitted that he had not reviewed Defendant's corrections file or spoke to corrections personnel. (EH. 631-32) He claimed to have gleaned information about the guards' observation of Defendant's functioning from the reports he had read. (EH. 633)

Dr. Toomer stated that he had included rule out diagnoses in his report and that a rule out diagnosis was a diagnosis. (EH. 634) He admitted that he could have done testing but did not do so. (EH. 634-35, 636-37) He reluctantly admitted that he questioned Defendant pursuant to a pre-written checklist. (EH. 637-38) He acknowledged that he had relied on Defendant for his history and took the information at face value. (EH. 639)

Dr. Toomer relied on Defendant's reports as to medication he had received over the years, but admitted did not know if Defendant received the medication or if he took the medication

as prescribed. (EH. 641-44) Dr. Toomer also admitted that he did not understand what elavil and sinequan did because he was not a medical doctor. (EH. 640) He stated that he believed that Defendant was given medication because a mental health professional deemed it necessary to medicate Defendant. (EH. 642)

Dr. Toomer stated that he always gave the MFAST when he did a complete evaluation but gave no tests for malingering in this case. (EH. 645 However, he insisted that he did do a complete evaluation in this case. (EH. 645-46) He also admitted that he did not ask about Defendant's familial or criminal history. (EH. 647) He insisted that knowing that Defendant had changed his story over the years would not change his opinion. (EH. 649-50) He admitted that knowing that Defendant was behaving lucidly before he arrived but started to rocking back and forward when Dr. Toomer arrived would probably show that Defendant could control his behavior. (EH. 652)

Dr. Toomer acknowledged that Defendant knew he was being executed because he had been convicted of murder. (EH. 653-55) However, he insisted that Defendant's mental condition eradicated the link between crime and punishment. (EH. 655) He stated that he had relied on Dr. Quiroga's report regarding her review to determine that Defendant had a documented history of

mental illness dating back to the 1990's and insisted that the fact the information he was relying upon had already been rejected by a court was irrelevant. (EH. 655-57) He admitted that he was aware that the records showed that Defendant was a manipulator. (EH. 658) He admitted that he had decided that Defendant was mentally ill with delusions before he began his evaluation. (EH. 662)

In attempt to explain Dr. Toomer's report that he had only reviewed the documents provided by defense counsel which included the petition for writ of habeas corpus, mental health evaluations from various experts, notes and testing data of Drs Meyers and Werner and the direct appeal opinion, on redirect, Dr. Toomer was questioned about the documents he reviewed. He explained that the federal habeas petition included a handful of documents from Defendant's prison records. (EH. 669-79) One of these documents noted that Defendant had not had any diagnosed mental illness since 1997 but had received a provisional diagnosis of a paranoid personality disorder in 1997. (EH. 672) He believed that all the prior experts had evaluated Defendant for competence to proceed and that none of the evaluations had been done in the past 10 to 12 years. (EH. 680-81) He did not testify that he had reviewed Defendant's medical records from the Department of Corrections.

After Defendant rested, the State presented Lt. Dennis Cauwenberghs, the confinement lieutenant for death row and death watch at Florida State Prison. (EH. 698-700) One of Lt. Cauwenberghs' duties was to bring inmates whose death warrants have been signed to the colonel's area so that the warden can read the inmates their warrants. (EH. 701) When Lt Cauwenberghs went to get Defendant after his warrant was signed, Defendant immediately asked Lt. Cauwenberghs if his warrant had been signed. (EH. 701-02) When the warrant was read, Defendant did not respond but appeared to understand what was happening. (EH. 703) He was given the opportunity to call his family and attorneys and called his girlfriend in Holland. (EH. 703) When asked about the disposition of his body, Defendant originally was unsure but finally decided that his body should be cremated and his ashes given to his girlfriend or spiritual advisor. (EH. 704) He stated that his attorney would pick up his 80 some boxes of legal work. (EH. 704-05)

After that meeting, Defendant was taken to the death watch area of the prison. (EH. 705-06) When he first arrived there, Elmer Carroll and William Van Poyck were also there, and Defendant was quiet. (EH. 706) Defendant interacted some with Van Poyck but not with Carroll. (EH. 708, 723) After Van Poyck was executed, Defendant became nervous. (EH. 706) Defendant

spent most of his time sitting on his bunk doing legal work. (EH. 709)

Lt. Cauwenberghs stated that Defendant behaved appropriately with the prison staff when he was getting his way. (EH. 709) When Defendant did not get his way, he would throw a temper tantrum and call the guards names like child molester and devil worshipper under his breath. (EH. 709-10) With the regular prison staff, Defendant behaved normally, but when the wardens were around, he would not look at them and claim they were trying to steal his eyes. (EH. 710-11) Seven days before his execution was scheduled, his property was removed from his cell and a guard was placed in front of the cell. (EH. 705-06, 711) Defendant had no difficulty communicating his needs to the guards, behaved normally and had a clean and orderly cell. (EH. 711-12)

On the day that execution was originally scheduled, Defendant was pacing and nervous. (EH. 712-13) Lt. Cauwenberghs pacified Defendant with smokeless tobacco, and Defendant calmed down. (EH. 713) When Defendant's counsel called to tell him about the stay issued by the Eleventh Circuit, Defendant gave Lt. Cauwenberghs a thumbs up and appeared relieved. (EH. 714) Defendant then worked on his legal work and behaved normally. (EH. 714)

Lt. Cauwenberghs stated that he was informed of Dr. Toomer's evaluation before it was to occur. (EH. 716) The evaluation was scheduled to last from 9 a.m. to 4 p.m. so Lt. Cauwenberghs had Defendant sitting in the interview room at 8:55 a.m. (EH. 717-18) Lt. Cauwenberghs escorted Dr. Toomer into the interview room at 9:37 a.m. (EH. 720) As he was walking Dr. Toomer through security, Lt. Cauwenberghs noticed that Defendant saw them coming and started rocking back and forth. (EH. 720) When they entered the room, Defendant pretended to be startled. (EH. 720-21) When Lt. Cauwenberghs asked whether Dr. Toomer intended to test Defendant, Dr. Toomer stated that he did not plan to do any testing. (EH. 720) During the time Defendant was with Dr. Toomer, Defendant needed to use the bathroom so he was taken to the bathroom, a procedure that took at least 10 to 15 minutes. (EH. 722) At 12:50 p.m., Lt. Cauwenberghs escorted Dr. Toomer from the prison. (EH. 721) Dr. Toomer never asked to look at Defendant's records. (EH. 722)

When Warden Palmer informed Defendant of the second stay, Defendant appeared happy, smiled and gave a thumbs up. (EH. 723) Defendant stated he had a lot of work to do. (EH. 723) Lt. Cauwenberghs then informed Defendant that he was being placed on disciplinary confinement because he had threatened and

disrespected the staff. (EH. 724) Under disciplinary confinement, Defendant lost his TV and radio privileges and was unable to get food and tobacco from the canteen. (EH. 725) Defendant was upset about the DR's and responded that they might as well kill him since they were going to kill him anyway. (EH. 725)

A week prior to his second execution date, Defendant started coughing violently. (EH. 726) However, he stopped coughing immediately after being informed of the second stay. (EH. 726) Defendant is able to pace for hours but has a limp, which is exaggerated when he is walking in a place where others can see him. (EH. 726) Defendant does not wear a hearing aid and is able to hear with speaking with the regular staff. (EH. 727-28) However, when the prison administration is present, Defendant acts as if he cannot hear. (EH. 727) Defendant does not like most of the prison food but eats the food he does like and food from the canteen. (EH. 728) Lt. Cauwenberghs had never seen Defendant exhibit compulsive behaviors or complain of a headache. (EH. 730)

On cross, Lt. Cauwenberghs stated that Defendant had referred to prison staff as demons and devil worshippers in both of the DR's he received recently. (EH. 743)

Dr. Wade Myers, a board certified psychiatrist, testified

that he was contacted by the Governor's office to be a part of the commission to evaluate Defendant. (EH. 748-54) In preparation for the evaluation, he reviewed CD's containing prior court records about Defendant's mental health and Defendant's prison records.[3] (EH. 755)

When he, Dr. Werner and Dr. Waldman arrived at the prison, they first went to the medical records department and reviewed Defendant's latest medical records to make sure there hadn't been any changes beyond the medical records they had already been provided. (EH. 757-58) These records showed that Defendant was classified as S-1 from 1997 to 2011, meaning no need for psychiatric treatment. (EH. 758, 774) They also showed that while there were a couple of complaints about paranoia over 20 years of records, but then he would be assessed and there was never any finding of a psychotic disorder or actual delusion. (EH. 765)

The commission also spoke to two guards to obtain collateral information about Defendant's daily functioning. (EH. 775, 790) The information they provided was inconsistent with a delusional disorder and consistent with antisocial personality disorder, which is not a mental illness. (EH. 775-76)

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[3] The documents included on the CDs were included in the supplement to the record on appeal.

The commission began its interview with Defendant by asking about his history. (EH. 760) Defendant was evasive and indirect throughout the interview, including refusing to provide his birthdate. (EH. 760-61) However, he was able to state that he had been convicted for murder and attempted murder and sentenced to death. (EH. 762-63) Dr. Myers stated that these actions were not indicative of mental illness but were consistent with antisocial personality disorder. (EH. 763-64) Dr. Myers stated that Defendant gave an involved story regarding organ harvesting and was very forthcoming in doing so. (EH. 766, 768) Dr. Myers believed this story was a clear attempt to malinger because Defendant changed his behavior based on with whom he was interacting. (EH. 766-67) Because he suspected malingering, Dr. Myers administered the MFAST and MMSE-2. (EH. 769-70) The results on both tests indicated malingering. (EH. 770) Dr. Myers noted that he had just conducted a study on the use of the MMSE-2 to detect malingering, which found that it was more effective at doing so that the Rey-15 item test. (EH. 770-71)

Dr. Myers had reviewed *pro se* pleadings Defendant had written. (EH. 771-72) He stated that they showed that Defendant's thought processes were intact and that he knew he was being executed and why. (EH. 772)

Based on the information gleaned from the records review, the collateral interviews and the interview with Defendant, Dr. Myers diagnosed Defendant with antisocial personality disorder and opined that Defendant had the capacity to understand rationally that he was being executed for murdering Ms. Novick. (EH. 765-66, 776) As such, he believed that Defendant was competent to be executed and malingering. (EH. 778)

Dr. Myers stated that the commission had used the report regarding John Ferguson as a template for the format of their report and a great deal of difficulty formatting its report because of computer problems. (EH. 776-78) He noted that there was a typographical error in which Ferguson's name had been substituted for Defendant's name in one place in the report. (EH. 778)

On cross, Dr. Myers stated that he had been part of about ten similar commissions in the past. (EH. 780) Neither he nor another member of these commissions had ever found a defendant incompetent to be executed. (EH. 780-81)

Dr. Myers acknowledged that one of the guards interviewed had provided information that Defendant's cell was dirty, which concerned there being dust under his bed and ants under his footlocker. (EH. 791) One of the guards had used the word paranoid as well. (EH. 792) However, on further questioning,

the guard explained that he meant that Defendant was wary of other inmates and that Defendant had a reason to be concerned because he had scammed other inmates. (EH. 792) As such, the word paranoid was not put in the report. (EH. 792-93)

Dr. Myers admitted that Defendant expressed a concern about being forced to be evaluated at the beginning of the interview but agreed to participate after being informed he was not being forced. (EH. 797) During the interview, Defendant spoke freely but was evasive and indirect and attempted to control the doctors. (EH. 797)

Dr. Myers was aware that Defendant's records showed that he was prescribed sinequan, an antidepressant, in the 1990's. (EH. 798-99) He stated that haldol was an antipsychotic but saw no evidence that Defendant was ever prescribed that drug. (EH. 799) He averred that it was important to know why haldol was prescribed if it was because haldol is given in correctional settings to control aggressive behaviors. (EH. 800-01)

Dr. Myers stated that he decided to test Defendant because Defendant appeared to be malingering. (EH. 801-02) He admitted that he had not felt a need to do testing during his examination of Ferguson because Ferguson had already been tested extensively. (EH. 802-04) He denied that he did not test out of concern that Defendant was mentally ill. (EH. 804-05) He

explained that Defendant scored a 6 on the MFAST and stated that scores of 6 and above indicated malingering. (EH. 806-07)

Dr. Myers stated that the commission used the Ferguson report as a template in drafting this report. (EH. 810) He stated that the reports would have similar layouts and statements about the purpose of the evaluation and the manner in which it progress but insisted that the substantive content of the reports would be different. (EH. 810-11)

Dr. Myers acknowledged that the report discussed Defendant throwing his TV in a fit of rage and averred that this information came both from Defendant and the records. (EH. 811-12) He found it unremarkable that Defendant would have been evaluated by medical staff over this temper tantrum. (EH. 812-13)

On redirect, Dr. Myers stated that Defendant had not taken any medication for more than a week or two. (EH. 819) The one he took the longest was vistaril, which was an antihistamine used for sedation. (EH. 819-20) He had taken elavil, an antidepressant, for three days in 1990 for anxiety. (EH. 820) The prison records showed that Defendant was never given an antipsychotic. (EH. 821) Some of the post conviction competency evaluations suggested that a delusional disorder should be ruled out, which was not the same as an actual

diagnosis of a mental illness. (EH. 821-22) The report issued by the medical staff after Defendant threw his TV showed that Defendant was not diagnosed with any mental ill and that Defendant's TV had been broken and he wanted it fixed. (EH. 823) This report was consistent with manipulation and not mental illness. (EH. 823-24)

Sgt. Phillip Kraszewski, a prison guard who supervised death row at Florida State Prison, testified that he had never had any concerns about Defendant's mental health in the two years he had known Defendant. (EH. 833-34) He averred that Defendant had been caught replacing the contents of can of smokeless tobacco with toilet paper and selling them to other inmates, which angered the other inmates. (EH. 835) Defendant did not go to the yard with other inmates and spent most of his time writing legal pleadings and watching TV. (EH. 835)

Sgt. Kraszewski had been interviewed by the Governor's commission and used the word paranoid during that interview. (EH. 836) In using that word Sgt. Kraszewski meant that Defendant was cautious of the other inmates. (EH. 836)

On cross, Sgt. Kraszewski stated that he had supervised Defendant from the time he was transferred to Florida State Prison in 2011 until Defendant's warrant was signed. (EH. 837-38) He stated that he had told the commission that Defendant's

cell was dirty. (EH. 840) He explained that Defendant had dusty under his bed and ants under his footlocker. (EH. 840) However, the rest of the cell was orderly and his content of the footlocker were organized. (EH. 842)

Sgt. James Williams, another guard, testified that Defendant was housed on the first cell on death row when he was there. (EH. 844-45) He had observed Defendant orienting new inmates to life on death row. (EH. 846) He never had any concerns about Defendant's mental health. (EH. 846-47) Defendant did not go to the yard, which was not unusual. (EH. 847) He had never known Defendant to suffer headaches, wear a hearing aid, have a problem hearing or engage in compulsive behaviors. (EH. 847, 49) Defendant behaved well when he got his way but threw temper tantrums when he did not. (EH. 847) Defendant does not like the prison food but eats food from the canteen. (EH. 850)

While on deathwatch, Defendant's behavior with the regular prison staff was consistent with his behavior while on death row. (EH. 848) However, Defendant ignores and is disrespectful to the prison administration. (EH. 848) Sgt. Williams had spoke to Defendant about his treatment of the administration, and Defendant indicated that he did not respect the administration because they were involved in his execution.

(EH. 848)

On cross, Sgt. Williams acknowledged that he had written a DR for Defendant that involved Defendant using the phrase devil worshippers and word demon. (EH. 855-56) He considered that behavior to be normal name-calling. (EH. 860)

Sgt. Lance Willis, another guard, testified that he worked the night shift so Defendant spent the majority of his shift sleeping. (EH. 862-65) Defendant never exhibited any problems sleeping. (EH. 865) Sgt. Willis had observed Defendant pacing in his cell and had no trouble walking when he did so. (EH. 866) However, Defendant limped when the nurses and high-ranking prison officials were present.

Dr. Tonia Werner, a board certified psychiatrist, testified that she was a member of the Governor's commission regarding Defendant. (EH. 881-87) Before going to the prison, Dr. Werner reviewed CD's containing the prior competency reports, competency-hearing transcripts, information about the mitigation investigation in this matter and prior court opinions, as well as Defendant's prison records. (EH. 889-91)

Dr. Werner also reviewed *pro se* pleadings Defendant had written. (EH. 891) This writing clearly indicated that Defendant understood that he was being executed because he had been convicted of murdering Ms. Novick. (EH. 906) She stated

that while reviewing materials before an evaluation was important, it was unethical to form a diagnosis before evaluating a person. (EH. 892)

On the day of the evaluation, she met the other commissioners and proceeded to the medical records office to review Defendant's latest records. (EH. 893-95) After doing so, she, Dr. Myers and Dr. Waldman spoke to Off. Cooper and Sgt. Kraszewski to obtain collateral information about Defendant. (EH. 895) The guards related that Defendant spent most of his time doing legal work and watching TV. (EH. 895-96)

Dr. Werner averred that obsessive compulsive disorder (OCD) was not a major mental illness but could be debilitating. (EH. 896) OCD would not go away without treatment. (EH. 897) Because the records indicated that Defendant might have OCD, the commission particularly questioned the guards about behaviors associate with that disorder. (EH. 896) The guards had not observed any compulsive behaviors. (EH. 896, 905) They noted that Defendant's cell was neat and orderly but not clean, which was inconsistent with OCD. (EH. 897-98, 905)

The guards also stated that Defendant's personal hygiene and sleep were good. (EH. 898) They described Defendant as not socializing with the other inmates, not going to the yard and staying on his bed most of the time. (EH. 899-900) They

explained that Defendant had scammed other inmates and owed money to other inmates. (EH. 900) Moreover, Defendant also yelled and cursed at the other inmates and blamed them for his behavior. (EH. 901-02) As such, Dr. Werner found this behavior unremarkable even though Sgt. Kraszewski used the word paranoid. (EH. 901-02)

Dr. Werner stated that the guards did not mention Defendant having any hearing problems. (EH. 902-03) Moreover, Defendant engaged in behavior that was inconsistent with him having a profound hearing deficit. (EH. 903-04) Defendant was not wearing a hearing aid during his interview with the commission and only had difficulty hearing Dr. Waldman, who was seated the furthest from him. (EH. 904)

Dr. Werner stated that Sgt. Kraszewski had told the commission that Defendant threw a temper tantrum during which he threw items, including a TV, from his cell. (EH. 905) She was aware that Defendant had been complaining about the TV being broken when he threw it. (EH. 905) Dr. Werner stated that Defendant had expressed concern about having his death warrant signed several times before it was signed. (EH. 905)

When the commission interviewed Defendant, he was not on any medication. (EH. 906) Defendant had previously been prescribed vistaril, an antihistamine and anti-anxiety drug, for

about a month, which was the longest period any medication had been prescribed for Defendant. (EH. 906-07) Defendant has also briefly been prescribed elavil and sinequan, which were both antidepressants and not antipsychotics. (EH. 907-08) Dr. Werner had seen nothing indicating that Defendant took haldol, which is an antipsychotic, but stated that haldol was sometimes given in jails because of its sedative effect to individuals who are not mentally ill. (EH. 908-09) Dr. Werner stated that Defendant was not mentally ill at the time of the evaluation or any other time. (EH. 909-10)

During the commission's interview with Defendant, Defendant claimed to be unable to remember his age or birthdate. (EH. 910-12) She found this behavior consistent with malingering, not mental illness. (EH. 912-13) When he was asked about the death penalty, Defendant launched into a story about organ harvesting. (EH. 915-16) Dr. Werner believed the story was an attempt to convince the doctors he had delusions. (EH. 916) Dr. Werner did not believe it was a true delusion because it was inconsistent with his medical history and had not been consistent over time. (EH. 916-17) Moreover, Defendant claimed his attorneys were part of the conspiracy against him, but Dr. Werner had observed him interacting with his attorneys during the hearing in a manner inconsistent with such a delusional

belief about them. (EH. 917) When Dr. Werner challenged Defendant's statements and caught him in inconsistencies, Defendant got irritated and frustrated and attempted to manipulate Dr. Werner. (EH. 917-23)

At the end of the interview, Dr. Myers administered malingering tests. (EH. 923-24) Dr. Werner believed the results of the tests were indicative of malingering. (EH. 924)

Dr. Werner stated that she found Dr. Toomer's description of Defendant checking his attorney signature to be evidence of distrustfulness but not mental illness. (EH. 911) Dr. Werner observed none of the behaviors that Dr. Toomer described in his report. (EH. 929)

Dr. Werner stated that corrections classified inmates' mental states as S-1, S-2 and S-3. (EH. 924) Inmates classified as S-1 had no mental health problems. (EH. 924) Inmates classified as S-2 needed therapy but might not be mentally ill. (EH. 924-25) Inmates classified as S-3 were being given medication but may not be suffering from any major mental illness. (EH. 925) She saw no evidence that Defendant was ever mentally ill regardless of his classification. (EH. 929-30) The medical records indicated that Defendant was an S-1 when his warrant was signed and at the time of the evaluation. (EH. 924-25)

Based on this information, Dr. Werner opined that Defendant was not mentally ill at all. (EH. 925) Instead, she diagnosed him with antisocial personality disorder, which is not a mental illness. (EH. 926) She believed that Defendant had the capacity to understand that he was going to be executed and why rationally. (EH. 927)

Dr. Werner stated that the commission used the report regarding Ferguson as a template to write its report in this matter. (EH. 927-28) She stated that the beginning of the report, which addressed appointing the commission and the limits of confidentiality were the same. (EH. 928) She acknowledged the report contained a typo and stated that the commission had a number of computer problems when drafting it. (EH. 928)

On cross, Dr. Werner stated that she received no extra pay for being on the commission. (EH. 934) She stated that during the interview with Defendant, she led the discussion, and Dr. Myers and Dr. Waldman jumped in when they wanted to do so. (EH. 935-36) She stated that Defendant was given vistaril because he asked for it. (EH. 940) She did not recall the dates of the *pro se* pleadings she reviewed and noted that Defendant's claims about organ harvesting were only briefly mentioned in one of them. (EH. 943-45) The commission did not interview Defendant's counsel, and Dr. Werner did not recall if she

reviewed any pleadings by him. (EH. 945-46) The commission did not test Defendant for brain damage other than the mental status evaluation because there was nothing to indicate brain damage. (EH. 950)

At the end of the hearing, the lower court ordered the parties to provide proposed orders by 8 a.m. on July 18, 2013. (EH. 952-53) The parties submitted their orders that morning. That afternoon, the lower court entered its order denying the claim and lifting the stay. It found that Defendant had not carried his burden of proof because he relied on unconvincing evidence, he presented no credible evidence and he was not mentally ill. This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court's order, finding Defendant competent to be executed, is supported by competent, substantial evidence and should be affirmed. The propriety of this ruling is all the more clear when one considers that the evidence Defendant presented does not even show that he is incompetent to be executed under the express language of *Panetti* as his own expert did not diagnose him with a psychotic disorder. As such, the lower court's finding that this testimony did not carry Defendant's burden of proof, that Dr. Toomer was unconvincing, that Defendant was not mentally ill and that he presented no credible evidence, should be affirmed by this Court and any request to further delay this execution denied.

ARGUMENT

THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT HE WAS INCOMPETENT TO BE EXECUTED.

Defendant contends that the lower court erred in finding that he was competent to be executed. However, this claim is meritless because the lower court's finding that Defendant is competent to be executed is supported by competent, substantial evidence.

As this Court has held, a defendant must prove that he "lack[s] the capacity to understand the nature of the death penalty and why it was imposed." *Ferguson v. State*, 112 So. 3d 1154, 1156 (Fla. 2012); *Provenzano v. State*, 760 So. 2d 137, 140 (Fla. 2000). Once a trial court has found that a defendant failed to carry that burden of proof, this Court reviews that decision to determine whether it is supported by competent, substantial evidence. *Ferguson*, 112 So. 3d at 1156.

Here, the lower court's finding that Defendant did not prove that he lacked the capacity to understand the nature of the death penalty and why it was imposed on him is supported by competent, substantial evidence. Both Dr. Werner and Dr. Myers testified that Defendant has this capacity. Moreover, the testimony of the lay witnesses showed that Defendant had engaged in behaviors designed to manipulate them but never exhibited symptoms of a true mental illness. Defendant's prison records

confirmed that Defendant has never been diagnosed with any mental illness and, instead, simply engaged in manipulative behavior. Further, after Defendant's death warrant was signed, he personally filed numerous *pro se* pleadings showing that he understood that he was being executed because he had been convicted of murdering Ms. Novick. In fact, Defendant's own expert opined that Defendant understands that he was being executed because he murdered Ms. Novick. Given these circumstances, the lower court's finding that Defendant did not carry his burden of proof is supported by competent, substantial evidence and should be affirmed.

In an attempt to avoid this result, Defendant argues that *Panetti v. Quarterman*, 551 U.S. 930 (2007), altered the standard for adjudicating claims regarding competence to be executed and that he met this altered standard because his expert opined that the Defendant was delusional. However, this Court has already rejected the argument that *Panetti* altered Florida law regarding the standard for adjudicating claims of incompetence to be executed. *Ferguson*, 112 So. 3d at 1157. As such, this contention is without merit and should be rejected.

The propriety of this ruling is all the more clear when one considers that the evidence Defendant presented does not even show that he is incompetent to be executed under the express

language of *Panetti*. While the Court has noted that a court considering this issue must consider whether a defendant has a rational understanding of the fact he is being executed and why, it stated that the alleged lack of a rational understanding had to be based on a diagnosis of a psychotic disorder. As the Court in *Panetti,* explained:

> ...The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality. Those states of mind, even if extreme compared to the criminal population at large, are not what petitioner contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.

551 U.S. at 959-60.

Here, Defendant's expert did not diagnose him with a psychotic disorder. The lower court found that Defendant was not mentally ill. As such, the lower court properly found that this testimony did not carry Defendant's burden of proof. The denial of the claim should be affirmed.

Moreover, the lower court also properly rejected the defense expert's testimony because it was contrary to the facts.

Defendant's expert stated that testing and review of collateral information was necessary to do a complete evaluation but did neither. Instead, he relied on statements by Defendant about his symptoms, which were inconsistent with the other evidence. Moreover, Defendant's prison records showed no diagnosed mental illness. The medical records are consistent with this Court's prior ruling that Defendant is not mentally ill and the lower courts' similar findings. *Gore*, 24 So. 3d at 6-11. Since Defendant's expert relied on information that was not consistent with Defendant's medical records and other evidence, the lower court properly found that the presentation of this opinion did not carry Defendant's burden of proof. The denial of the claim should be affirmed.

Defendant also seems to believe that the prior findings regarding his mental state should have been ignored and his expert's reliance on a history that had been rejected accepted. However, there is no legal basis for this argument. In *Panetti*, the Court stated nothing more than that a prior determination of competence did not foreclose a claim regarding competence to be executed. *Panetti*, 551 U.S. at 935. However, the mere fact that a claim is not foreclosed does not mean that prior evidence regarding the defendant's mental state is irrelevant. In fact, Justice Powell in his opinion in *Ford v. Wainwright*, 477 U.S.

399 (1986), which *Panetti*, 551 U.S. at 949, acknowledged was the controlling United States Supreme Court opinion on the issue, stated that a defendant was not raising his claim against a neutral background and needed to overcome the prior rulings on his mental state. *Ford*, 477 U.S. at 425-26. As such, the prior evidence and rulings regarding his mental state were properly considered. *See also Ferguson v. Secretary, Florida Dept. of Corrections*, 716 F.3d 1315, 1320 (11th Cir. 2013). The lower court should be affirmed.

Finally, Defendant argues for the first time that the lower court erred in failing to consider the timing of the evaluations and give more credit to Dr. Toomer's evaluation because it occurred more than a month after the Governor's commission evaluated and tested Defendant. Dr. Toomer did not testify to any evidence that established any mental health change between the two evaluations.

To the contrary, Lt. Cauwenberghs' testimony concerning Defendant's behavior during that period refutes any such contention. Lt. Cauwenberghs testified that after Van Poyck was executed, Defendant became nervous and spent most of his time sitting on his bunk doing legal work. (EH. 706-09) He had no difficulty communicating his needs to the guards, behaved normally and had a clean and orderly cell. (EH. 711-12) On the

day that execution was originally scheduled, Defendant was pacing and nervous. (EH. 712-13) Lt. Cauwenberghs pacified Defendant with smokeless tobacco, and Defendant calmed down. (EH. 713) When Defendant's counsel called to tell him about the stay issued by the Eleventh Circuit, Defendant gave Lt. Cauwenberghs a thumbs up and appeared relieved. (EH. 714) Defendant then worked on his legal work and behaved normally. (EH. 714) When Warden Palmer informed Defendant of the second stay, Defendant appeared happy, smiled, gave a thumbs up and said he had a lot of work to do. (EH. 723) A week prior to his second execution date, Defendant started coughing violently. (EH. 726) However, he stopped coughing immediately after being informed of the second stay. (EH. 726)

As Defendant presented no evidence of a change in behavior, there was nothing for the lower court to consider. Further, in light of the lower court's finding that Dr. Toomer was unconvincing, that Defendant was not mentally ill and that he presented no credible evidence, this Court should reject any attempt by Defendant to inject such a claim at the eleventh hour, affirm the lower court and deny any request to further delay this execution.

This is all the more true as the United States Supreme Court has held that courts should employ "a strong equitable

presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). Here, the Governor informed Defendant that he would not move the execution date if he found Defendant competent at the time he ordered the competency evaluation on May 23, 2013. After Defendant was evaluated and found competent, the Governor lifted the stay, ordered the execution to go forward as planned and provided a copy of the experts' report to Defendant on May 30, 2013. Yet, Defendant did not file any pleadings raising this claim in any court until June 21, 2013, three days before his execution was originally scheduled. The Eleventh Circuit informed Defendant that he could not have this claim considered on the merits in federal court until he had received a decision on the claim from the state courts on June 27, 2013. *Gore v. Crews*, 2013 WL 3233303 (11th Cir. Jun. 27, 2013). Yet, he waited to file this motion until approximately 3 p.m. on July 9, 2013, 27 hours before his rescheduled execution. While Defendant's federal counsel suggested that he could not have raised the claim earlier because he did not have leave to represent Defendant in state court, the Eleventh Circuit has already found that Defendant's federal counsel was dilatory in making a request to come to state court. *Gore*, 2013 WL 3233303

at *2 n.1. Moreover, even after the Eleventh Circuit had made that finding, it took Defendant's federal counsel until July 2, 2013, to file a motion asking the state court to allow him to substitute as counsel, which was quickly granted without objection by the State. Given this delay, the strong equitable presumption against a stay applies. As such, the denial was proper and should be affirmed.

CONCLUSION

For the foregoing reasons, the denial of the Rule 3.811 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to **Todd Scher**, TScher@msn.com, this 2nd day of August 2013.

s/ Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

s/ Sandra S. Jaggard
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