SUPREME COURT OF FLORIDA

RIGOBERTO SANCHEZ-VELASCO, Appellant,	
vs.	**Case No.** 89,511
STATE OF FLORIDA, Appellee.	Circuit Court No. F86-37102 (Dade)

ON APPEAL FROM THE CIRCUIT COURT FOR DADE COUNTY
THE HONORABLE VICTORIA PLATZER, CIRCUIT COURT JUDGE PRESIDING

REPLY BRIEF IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

ARGUMENT

Introduction

Once the State gets around to addressing the issues actually raised by this appeal, it quickly betrays the fundamental problem with its position by depicting the Ruiz Report as a trivial detail, of at most marginal relevance, to the decision below. (State's Brief at 42). That depiction defies the record. The trial court relied explicitly and unambiguously on the Ruiz Report and on one prior evaluation. The State cannot effectively defend the decision below without defending the Ruiz Report, and that report is functionally indefensible.

I. THE TRIAL COURT SHOULD HAVE CONDUCTED AN EVIDENTIARY HEARING ON PETITIONER'S COMPETENCE BEFORE ACCEDING TO PETITIONER'S INHERENTLY CONTRADICTORY REQUESTS BELOW.

A. The State Cannot Defend the Ruiz Report by Ignoring It, or by Relying on the Presumption of Competence.

The State devotes most of its brief to an evasion of the issue raised by this appeal. The question before the court below was not whether petitioner was competent at the time of the original trial that resulted in petitioner's conviction for murder, The question was whether he was competent years later, in October, 1996, to make the literally

life-and-death decisions to discharge counsel and drop his post-conviction challenge. The issue here is whether, under the circumstances presented by this record, the trial court should have answered that question without an evidentiary hearing.

The State's heavy reliance on the presumption of competence arising from past determinations is misplaced. As discussed in more detail below, the State's attempt to deal with the contradictory character of the demands that petitioner made and with his paranoid in-court outburst does not withstand scrutiny. Contending that that behavior did not raise sufficient doubt about petitioner's current mental condition to warrant current and independent inquiry invites plain error by effectively ignoring the Constitutional standard involved. See Drape v. Missouri, 420 U.S .162m 172 (1975) (test for competency includes whether a defendant "'has a rational as well as a factual understanding of the proceedings against him."' citing and quoting from Dasky v. U.S., 362 U.S. 402 (per curiam)).

The trial court apparently did not feel that either the presumption of competence or the past evaluations from which that presumption arose was enough, in light of the nature and character of petitioner's behavior. The trial

court observed petitioner's behavior, and after observing it ordered a further evaluation and then explicitly relied upon that evaluation.

This basic fact decisively undermines the State's attempt to pass off the Ruiz examination and report as a superfluous afterthought, ordered by the trial court in an excess of caution, on the off-chance that it might be helpful. It was nothing of the kind. The trial court must be assumed to have ordered the Ruiz evaluation advisedly, because petitioner's in-court demeanor and behavior, particularly in combination with the other circumstances disclosed by the record, raised legitimate and inescapable doubt about petitioner's competence.

Those circumstances emphatically included, although they were not limited to, the reports of Drs. Herrera and Whyte. Those reports were not only formally before the trial court as a part of petitioner's Rule 3.850 motion; they were a key part of the evidentiary foundation for the two bases for post-conviction relief that the trial court had recently determined were sufficiently meritorious to warrant an evidentiary hearing.

Part of the burden of those reports was, precisely, to raise specific and troubling doubts about prior evaluations

from which, the State insists, a presumption of competency arises. The State disparages the Herrera and White reports and suggests that the trial court could properly have disregarded them. (State's Brief at 45). The State fails to deal, however, with the inconvenient fact that the trial court did not disregard them. The trial court did not conclude they could be brushed aside without meaningful inquiry into the substance of their conclusions. The trial court ordered an evidentiary hearing into the merits of the conclusions those reports reached. The prima facie merit of those reports did not change when petitioner made his irrationally contradictory demands a short time before that evidentiary hearing was to occur.

The trial court ordered the Ruiz evaluation and report, in short, not in an abundance of caution but in inescapable recognition of facts before it that simply could not be ignored. That examination took place but, despite the express demand of counsel, did not address the very behavior that had provoked it. Dr. Ruiz passed in silence over the very facts that had apparently caused the trial court to send petitioner to her.

The State makes no effort to defend the Ruiz report. That omission is fatal. If the record warranted an examina-

tion by Dr. Ruiz, it warranted a genuine examination that went beyond a pro forma exercise. Contrary to the trial court's expressly articulated expectation, Dr. Ruiz conducted the examination without consulting petitioner's counsel, and apparently without learning from any other source the details of the very in-court behavior that had led to the examination in the first place. Her report left a hole in the record that only an evidentiary hearing, involving an opportunity for examination and the presentation of contrary evidence, could fill.

B. The State's Attempt to Explain Petitioner's Contradictory Positions as Rational, Lucid and Coherent Defies Common Sense.

The State does not deny the facial contradiction between petitioner's demand, on the one hand, to discharge counsel on the ground that counsel lacked the background and experience to press petitioner's Rule 3.850 challenge effectively; and, on the other, to drop that challenge altogether. Instead, the State tries to rationalize the contradiction by contending that petitioner's assault on counsel's competence was merely a pretext for removing the obstacle counsel represented to fulfillment of petitioner's professed desire to be executed -- a professed to desire that

Judge Glick, for example, had earlier found to be insincere. There are at least three things wrong with the argument.

First, it overlooks petitioner's demand that counsel not only be discharged but replaced by Florida counsel who (in petitioner's view) would be better able to protect him. Petitioner's demand for new counsel cannot be squared with the State's pretext hypothesis. Indeed, it flatly contradicts that hypothesis.

Second, the pretext argument also contradicts the position that the State took below. The State insisted below that petitioner was seeking to discharge counsel in a tactically misguided effort to win delay of his execution by putting off the evidentiary hearing on his Rule 3.850 challenge indefinitely, pending appointment of new counsel. The State cannot have it both ways. If there was a good faith basis for the position it took in the trial court, then the contradiction between petitioner's demands below was not only apparent but real.

Third, the State's argument does not deal adequately with petitioner's characterization of counsel as his enemy. That characterization was perfectly lucid from petitioner's standpoint, the State says, because counsel was the only obstacle standing between petitioner and his supposed desire

to be executed. The problem with that rationalization is what petitioner actually said. He did not say that counsel was his enemy because counsel was obstinately continuing to fight against petitioner's execution; he said that counsel was his enemy because he insisted on pressing that fight himself despite (as petitioner perceived) an inability to do so competently and effectively.

The State earnestly attacks strawmen when it insists that all of the mental health professionals whose opinions it likes could not have been wrong and that petitioner's professed desire to be executed, alone, is not per se evidence of incompetence, The first is beside the point, for it was Dr. Ruiz and Dr. Ruiz, not ten other professionals, who opined on the issue before this Court; and the brief submitted in support of petitioner not only did not argue the second, but expressly disclaimed it.

The insurmountable problem confronting the State is that Dr. Ruiz simply overlooked the most critical facts bearing on the question she was asked to answer. The State cannot overcome that problem by ignoring it or diverting attention from it.

II. THE RECORD REFUTES THE STATE'S PROCEDURAL ARGUMENTS.

The State's contention that the Whyte and Herrera reports were not properly before the trial court (State's Brief at 44-45) is disingenuous. As noted above, the trial court had expressly ordered an evidentiary hearing into the merits of Rule 3.850 contentions depending specifically upon those reports.

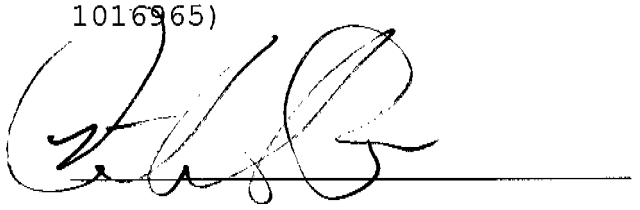
The State's insistence that counsel raised no objection to the procedure followed below is likewise impossible to reconcile with the record. Counsel expressly asked to have Dr. Ruiz made aware of the very facts that Dr. Ruiz ignored. The trial court expressed the expectation that Dr. Ruiz would contact counsel to learn those facts and had counsel leave his phone number with the court for that purpose. The procedural objections upon which this appeal depends were preserved below and certainly come as no surprise to the State.

CONCLUSION

For the reasons outlined in this brief and in the principal brief submitted on behalf of petitioner, it is respectfully requested that the order appealed from be vacated and that the cause be remanded for further appropriate proceedings.

Dated this 27th day of August, 1997.

MICHAEL A. BOWEN (WBN 1016965)



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