IN THE SUPREME COURT OF FLORIDA

NORMAN BLAKE MCKENZIE,

Appellant,

v.

Case No. SC07-2101
Lower Tribunal No. CF06-10864

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST JOHNS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Randy Wayne Peacock and Charles Frank Johnston were murdered October 4, 2006, in St. Johns County. Norman Blake McKenzie was indicted for the murders on October 17, 2006. (V1, R3).[1] The State filed a Notice of Intent to Seek the Death Penalty. (V1, R12).

On July 11, 2007, McKenzie told the trial judge he had not wanted his speedy trial rights waived and counsel had requested a continuance without consulting him. (V2, R356). Defense counsel explained that they had been appointed to the case in February and McKenzie had been transported away from St. Johns County to other jurisdictions. Defense counsel had filed a motion to continue the trial that was set for March 15 and had waived speedy trial. (V2, R352, 356). McKenzie told the judge this was a "cut-and-dry case" and there was no reason to continue the trial. (V2, R358). McKenzie did not want to be in the county jail. (V2, R359). When the trial judge advised McKenzie the defense attorneys needed to prepare a defense and mitigation, McKenzie stated:

> THE DEFENDANT: They can't prepare mitigation unless I'm willing for them to prepare mitigation, correct?

[1] Cites to the pleadings and hearings are by volume number, "V___," followed by "R___" and the page number." The trial record begins anew with number "1." Cites to the trial transcripts are by volume number, "V___," followed by "TT___" and the page number.

> THE COURT: They have to prepare mitigation regardless of whether you're willing.
>
> THE DEFENDANT: No, they can only put on the stand who I want on the stand. They can only consult who I want them to consult. I'm trying to express this to them. They don't do what I want – they don't do what they want to do, they do what I want them to do.

(V2, R360). McKenzie said he would waive any claim of ineffective assistance of counsel if trial was set before counsel was prepared. Defense counsel stated he would be forced to withdraw if trial was set before he was prepared. (V2, R361).

Defense counsel said that he could not file a demand for speedy trial in good faith because he was not ready for trial. Because of the numerous charges McKenzie had in other jurisdictions, he was transported from St. Johns County before the attorneys could meet with him. Further, McKenzie indicated he was going to obtain private counsel when he was arraigned in October 2006. (V2, R363), and the Public Defender was not appointed until February 2007. (V2, R363). The trial judge asked McKenzie if he wanted to go to trial in August, and McKenzie said: "Absolutely." (V2, R364). Besides, he said: "There's nothing to discuss in this case." (V2, R364). McKenzie said there was "no discoveries to be made" and "no depositions to be made" because:

> I was the only one present during the murders when they occurred, how can there be a deposition to be made?
> . . .
> You can't depo a dead person.

(V2, R365).

At the August 7, 2007, pretrial conference defense counsel stated they filed a motion to continue the trial set for August 20, 2007. After the July 16 pretrial conference, depositions were set but very few witnesses appeared. Trial counsel was unprepared to go to trial. (V2, R369). Defense counsel Peshek advised the court that the case agent, Detective Burres, did not appear for depositions. (V2, 372). Neither did the two detectives who took McKenzie's statement. (V2, R373).

McKenzie told the trial judge he "absolutely" wanted to represent himself. (V2, R375). He was ready to go to trial on August 20. (V2, R375). A *Faretta*[2] hearing was set for the following Friday. Defense counsel stated that a psychiatrist had conducted two evaluations if that would assist with competency. (V2, R376). McKenzie repeated that he just wanted to "get this over with this month" … "whatever it takes." (V2, R380). McKenzie wanted a motion for "a fast and speedy trial." (V2, R383).

On August 10, 2007, the trial judge stated that she had not received any motion from McKenzie and inquired as to the status of the case. Defense counsel Valerino stated that he had filed a motion to continue the August 20 trial and he was not ready to proceed to trial. (V3, R387). Specifically, defense counsel was not prepared for a penalty phase. (V3, R388). McKenzie expressed a concern that he was being held in County jail rather than prison. The trial judge asked if he

[2] *Faretta v. California*, 422 U.S. 806 (1975).

would continue with trial counsel if she let him go back to state prison. McKenzie said he wanted the trial that month. (V3, R389). The trial judge explained the importance of the penalty phase. (V3, R391). McKenzie stated that:

> I understand. I personally feel that I'm ready to go to trial, and I'm ready to mitigate. I feel that way, okay? I mean, we can do it tomorrow. You can find me guilty tomorrow, and I'm ready to go into mitigation the next day. I'm ready. I don't need my attorneys to do any type of mitigation for me. I'm ready for it.

(V3, R391). When asked whether there was any other reason why he wanted to discharge his attorneys, McKenzie responded "That's not what I said. I said I'm ready." (V3, R391). McKenzie added:

> I'm well aware of how the courts function, all right, and I'm – I don't know all the – I'm – the terminology that I would have to use to be able to represent myself, it would be merely a layman's terminology. I'm not – I haven't – I'm not educated as far as the law goes, okay, buy I am intelligent enough to be able to stand up here and represent myself. I don't need help to represent myself.

(V3, R393).

McKenzie said that if the judge wanted the attorneys to be "of counsel to be by me," that was acceptable; however,

> I'm intelligent enough. I'm aware of what's going on. I'm aware of the severity of the charges. I'm aware of the severity of the consequences of being found guilty. I understand every bit of it. I know the ramifications of what's taking place. I do. I'm a hundred percent aware of it, you know.

(V3, R393). McKenzie repeatedly advised the judge that there was no reason to "drag this out" and "there's not a lot to in this case." McKenzie acknowledged that

there was nothing that "could possibly take place to alter the outcome of this matter at all." (V3, R395). He expressed dissatisfaction that an attorney would "blow" his right to a speedy trial without consulting the defendant. (V3, R396).

The judge explained the speedy trial rule to McKenzie and that a speedy trial could be obtained through a demand even though it had been previously waived. (V3, R397). The judge discussed the witnesses that should be deposed and the discovery conducted. (V3, R399). The trial judge expressed concern that McKenzie was requesting an immediate trial merely so he could go back to state prison rather than stay in the County jail. (V3, R400). The judge then asked whether McKenzie felt his lawyers were incompetent. McKenzie said he was upset they waived his right to a speedy trial. When questioned further, McKenzie expressed himself:

> THE COURT: And so – but, I mean, is it that you believe that they're incompetent and that's why you don't want to represent – them to represent you?
>
> THE DEFENDANT: I personally feel that it's not in my best interest for the path they they're taking to try to represent me. I just – I feel it's not in my, my best interest.

(V3, R402). The trial judge then told McKenzie that waving the right to speedy trial was not incompetence. (V. 3, R402). The judge continued:

> THE COURT: And you want to represent yourself.
>
> THE DEFENDANT: Yes, I do.

> THE COURT: And you want to represent yourself not because you believe your attorneys are incompetent.
>
> THE DEFENDANT: I don't feel that my – I mean, I don't think that they're incompetent. I mean, they passed the Bar exam, okay? That in itself is an accomplishment. I don't think I could pass the Bar exam, okay? So you know, I mean, no. Do I think they're incompetent? No, I don't. But do I think that they have my best interests in their – in – at hand? No, I don't. I think they have their own best interest at hand.
>
> Mr. Valerino likes to walk around and say I've represented 35 different death cases, and I've never had one to go to death row. That's his greatest saying, okay? And, and
>
> THE COURT: Well—
>
> THE DEFENDANT: I personally don't feel like that's an accomplishment on his behalf. I feel like that that's an accomplishment on the lack of the State's behalf, okay?

(V3, R405). When the trial judge again asked what specifically the attorneys did, or failed to do, in his case, McKenzie replied:

> THE DEFENDANT: Well, Your Honor, I asked them to do some things and, and I've tried to tell you that, and you sat here and batted me down and said, you know, it's not about what you want, it's about what they feel they have to do, okay? And so I can't sit here and tell you what it is because you're going to tell me again it's not about what I want, it's about what they want.
>
> And they're not the one that's going to get there and get a needle put in their arm and be killed. I am. They're not the ones that's either going to have to sit in prison for life and deal with all them idiots. I am. I've did it for 21 years in prison, Your Honor. Twenty-one years. I know what I'm facing. I just, I –
>
> THE COURT: Well, I need to know what specifically – I mean, do you believe that their representation of you is ineffective?

> It's difficult for me to understand what you're saying because you're saying they're not incompetent. You disagree, certainly, with some of the decision they've made, but –
>
> THE DEFENDANT: You asked me one time would I sign a waiver form alleviating them of any ineffective assistance of counsel, and at that time, not giving a great deal of thought to my statement that I made, I said yes immediately. All right? But then, you know, after going back to my cell and sitting there thinking about it, I am of the mind that it was ineffective assistance to be able to stand up here and deny my rights to a speedy trial by asking for a continuance. I wasn't present in this courtroom, and it's up to the State to have me present in this courtroom in order to prosecute me, all right? So—

(V3, R407).

McKenzie then discussed whether the Public Defender should have driven to Alachua County to visit him before speedy trial was waived in March. (V3, R408). The trial judge asked whether McKenzie had any further complaint besides the speedy trial issue. (V3, R409). McKenzie repeated generalizations about what the judge said about the attorneys doing what they needed to do, not what McKenzie wanted them to do. (V3, 410). Further, McKenzie felt there was no "reason to mitigate this case." He said he could: "get up on the stand during mitigation and alleviate the need of anyone else to be put on the stand on my behalf." (V3, R410).

The trial judge then asked whether McKenzie had any other reason to believe counsel was ineffective, to which McKenzie answered:

> THE DEFENDANT: I mean, Your Honor, I understand what you're asking me, and you've asked me that three or four times and I've beat around the bush three or four times, all right, and so it should be kind

> of obvious to you that I really don't want to answer that question because I'm not aware of the ramifications of the answer that I might give you to that question.

(V3, R413). The trial judge pressed on, stating that she really needed an answer to the question because she needed to now "whether or not to continue on with an inquiry or to move on to the *Faretta* inquiry." (V3, R413). McKenzie asked her to "just go ahead" with the *Faretta* inquiry. The trial judge then asked:

> THE COURT: So you do not believe that your attorneys are incompetent or offering ineffective assistance of counsel. You just want to try this case yourself in a week.
>
> THE DEFENDANT: I believe that my best interest is not in my attorneys. What they want is not what I want, okay? That's what I believe. Now, if that makes them ineffective assistance, then yes. All right?

(V3, R414). When questioned further about whether McKenzie had a difference of opinion regarding strategy, he agreed that it was. Defense counsel also agreed that McKenzie's complaints arose from differences in strategy. (V3, R416-417).

The trial judge proceeded with a complete *Faretta* inquiry. (V3, R417-437). The judge explained the ways a lawyer can help prior to trial, during trial, and in preparation for sentencing. (V3, 418-21). McKenzie would stop the judge at various points to discuss his rights. (V3, R420, 421, 422, 423, 424, 427). At each point, the judge answered each question posed by McKenzie and explained the colloquy she was reading. The judge explained the ramifications of presenting aggravating and mitigating circumstances, to which McKenzie said he could "do

myself." (V3, 426). The judge explained the disadvantages of representing himself and ensured McKenzie understood each element. (V3, 426-30). McKenzie expressed understanding at each segment and even stated that "Ignorance of the law is not an excuse." (V3, R430).

The trial judge questioned McKenzie on his age, language abilities, GED degree and college courses he had taken. (V3, R434). McKenzie had never been diagnosed with a mental illness and had no physical problems. He had never represented himself in a trial and understood that a lawyer would be appointed by the Court to represent him at no charge. (V3, R435). When asked whether McKenzie would like to have stand-by counsel, he stated: "That would be all right." (V3, R436). The judge then explained the role of stand-by counsel. (V3, R436-37). McKenzie was found competent to waive counsel and represent himself. The Public Defender was appointed as stand-by counsel. (V3, R437). The parties then discussed whether McKenzie wanted to proceed with depositions which had already been scheduled, and clarified other details. (V3, R 440-41).

The case was tried by jury on August 20-21, 2007. The jury found McKenzie guilty as charged of two counts of first-degree murder. (V1, R83, 84; V6, TT375-76). Before the trial judge addressed the penalty phase the next day, she renewed the offer to appoint counsel to represent McKenzie. (V6, TT380). McKenzie said he would like to have counsel appointed. (V6, TT381). The Public

Defender was appointed. (V6, TT381). Defense counsel Valerino moved for a continuance of the penalty phase in order to prepare mitigation. (V6, TT382). McKenzie agreed with the request for continuance. (V6, TT384). The trial judge indicated the penalty phase would be mid-October. (V6, TT395).

The next morning, the judge was about to tell the jury that the penalty phase would be continued to October when McKenzie asked to address the court. (V7, TT407). He wanted the penalty phase to proceed that day, August 22, and not be delayed until October. (V7, TT408). McKenzie was not alleging any incompetence on the part of defense counsel, only that he made a hasty decision after the verdict. (V7, TT408). The judge released the jury in order to conduct another *Faretta* hearing. The judge wanted to do the *Faretta* hearing, then give McKenzie time to consider his decision. The jury would return the next day at 10:00 a.m. (V7, TT411-414, 418).

The *Faretta* hearing resumed at 2:00 p.m., and McKenzie stated unequivocally that he wanted to represent himself. (V7, TT422). McKenzie assured the court that his decision had nothing to do with the attorneys' performance, but was a question of "tactics." (V7, TT423). The trial judge discussed the decision with McKenzie and the fact that the attorneys would investigate mitigation for the penalty phase, which would be scheduled for October 22. (V7, TT425-431). McKenzie reaffirmed that he wanted the penalty phase to

proceed the next day. (V7, TT431). McKenzie sated that the attorneys had helped him as much as possible, but he wanted to represent himself. (V7, TT432).

The judge then proceeded with the *Faretta* inquiry. (V7, TT432-442). When asked whether he wanted stand-by counsel, McKenzie answered: "That would be greatly appreciated, Your Honor." (V7, TT442). Stand-by counsel was appointed. (V7, TT442).

The penalty phase was held the next day, August 23, 2007. (V8, TT514-603). The State introduced the testimony of Detective Rollins that McKenzie stated during an interview that he went to the Peacock/Johnson residence to kill the victims. (V8, TT528). The State also introduced McKenzie's prior convictions. (V8, TT529: State Exhibits 32-38). McKenzie introduced four bank statements. (V8, TT565-67; Defense Exhibits 1-4). The jury returned recommendations of death for each of the murders by a vote of ten to two. (10-2). (V1, R94, 95). At the end of the penalty phase, the trial judge asked McKenzie whether he would like her to appoint counsel for the *Spencer*, hearing. McKenzie said "No." (V8, TT599).

On August 27, 2007, the trial judge held a hearing to offer McKenzie to be represented by counsel at the *Spencer*[3] hearing. (V3, R446-47). McKenzie said he would represent himself. (V3, R447). The *Spencer* hearing was held on October 12, 2007. (V3, R462-486). The parties discussed the pre-sentence investigation

[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

which was provided to McKenzie. (V3, R464). The State did not present any additional evidence. (V3, R468). McKenzie read a statement to the court. (V3, R478-480). He told the court he was high on cocaine when he committed the murder. (V3, R474-75). He did not premeditate the crime and had no idea he was going to commit the crimes until the moment the weapon was put in his hand. (V3, R475). McKenzie said he had a problem when he was a small boy and ran out of a psychologist's office in tears. He did not trust anyone in that field. He did not trust anyone except his fiancée. (V3, R478). He was in a downward spiral when he killed Johnson and Peacock. His fiancée suggested he try a psychotropic drug to help deal with problems. (V3, R478). McKenzie expressed remorse to the families of the victims. (V3, R479).

On October 19, 2007, McKenzie was sentenced to death for each of the murders. (V1, R183-196; V3, R487-517). The trial judge found the following aggravating circumstances:

(1) Prior violent felony-great weight:

(a) Burglary while armed with Firearm and Kidnapping with Firearm, Alachua County Case No. 01-2006-CF-005261;

(b) Attempted Robbery with a Firearm, Alachua County Case No. 01-2006-CF-005259-A;

(c) Robbery with a Firearm, Alachua County Case No. 01-2006-CF-00586-A;

(d) Robbery with a Firearm, Alachua County Case No. 01-2006-CF-00532-A;

(e) Robbery with a Firearm, Alachua County Case No. 01-2006-CF-00585-A;

(f) Carjacking while Armed, Marion County Case No. 42-2006-CF-004213-A;

(g) Strong Arm Robbery, Broward County Case No. 90-19206CF10;

(h) Contemporaneous murder;

(2) Engaged in the commission of or an attempt to commit the crime of robbery - great weight;

(3) Financial gain-(merged with number 2, above) - no added weight;

(4) Cold, Calculated, and Premeditated – great weight.

(V1, R185-190).

The trial judge did not find any statutory mitigating circumstances but found the following non-statutory mitigating circumstances:

(1) Defendant suffers from an addiction to cocaine – little weight

(2) Defendant suffered abuse as a child – little weight

(3) Defendant displayed good behavior during the course of this trial and all subsequent court proceedings – some weight

(4) Defendant expressed remorse – some weight

(5) Defendant cooperated with police – some weight

(6) Employment – very little weight

> (7) Defendant currently serving a life sentence and the mandatory minimum sentences for the murders of Charles Johnston and Randy Peacock is life without the possibility of parole – little weight

(V1, R190-195).

The court found the aggravators outweighed the non-statutory mitigators and entered a sentence of death for each victim. (V1, R195-196). This appeal follows.

STATEMENT OF THE FACTS

Perry Privette and Julie Aubrey worked with Randy Peacock in the pulmonary functions lab at Flagler Hospital. (V5, TT135-36, 149-150). On October 5, 2006, Peacock failed to show up for his 7:00 a.m. shift. (V1, R137, 152). Privette and Aubrey were unsuccessful in attempts to reach Peacock on his home and cellular phones. (V5, TT137, 153). They were also unsuccessful in trying to reach Peacock's roommate, Charlie Johnston. (V5, TT138-139).

It was uncharacteristic for Peacock not to show up for work or call, so Privette and Aubrey drove to Peacock's home around 11:30 a.m. (V5, TT139-140, 154). Upon arriving, Privette and Aubrey did not see Peacock's green Chrysler Sebring on the premises. (V5, TT139-140, 141, 158). Noticing a light on at the front door, Privette and Aubrey knocked loudly several times, getting no response. (V5, TT141-42, 154). They went to the back door and knocked several times. They could see through the French doors but saw no one. (V5, TT142). They also looked for Peacock in a converted garage/exercise room on the property but found

no one. (V5, TT143, 155). As they left the garage, several dogs approached them which they found peculiar. (V5, TT144, 155).

Privette and Aubrey checked the back door. Finding it unlocked, they went inside. (V5, TT144, 155). They found the lights, television, and computer all turned on. (V5, TT145, 156). Aubrey discovered Peacock in the kitchen. (V5, TT146). Based on his medical training, Privette knew Peacock was dead. Peacock was surrounded by a pool of "gelled" blood, and his body looked "mottled." (V5, TT146, 157). Fearing the perpetrator was still there, Privette and Aubrey left the house and called 911.[4] (V5, TT147, 157).

When police arrived, they observed Peacock dead in the kitchen. Johnston was found dead in a shed in the back yard. (V5, TT177, 186-187). A bloody hatchet was located inside the shed. (V5, TT116, 188-89, State Exh. 20). A butcher knife was found in the kitchen sink. (V5, TT116, 189, State Exh. 19). Police saw a gold Kia Sorrento on Peacock and Johnston's property. (V5, TT168, 184). The Kia belonged to McKenzie. (V5, TT185, 201).

Patrick Anderson, a neighbor and friend of Peacock and Johnston, had been replacing brakes on Johnston's car at the Peacock/Johnston home in October 2006. (V5, TT164-65). On October 4, Anderson saw Peacock with McKenzie standing under the carport. Johnston had gone to the store to get car parts. (V5, TT166-67,

[4] The 911 call was published to the jury. (V5, R149; R159-162, State Exh. 23).

170). Anderson was there between 4:30 and 7:00 p.m. (V5, TT170). The next day, Anderson learned Peacock and Johnston had been murdered. (V5, TT171). Police showed Anderson photographs and asked if he could identify the man he saw Peacock talking to under the carport. Anderson identified McKenzie. (V5, TT171-173, State Exh. 2).

On October 5, 2006, McKenzie was arrested in Citrus County. He signed a *Miranda*[5] rights form and gave a statement to police. (V5, TT194-195, 207, 209). He told Det. Burres and Det. Timothy Rollins, St. Johns County Sheriff's office, that on October 4, he went to Peacock's and Johnston's home to borrow money and because of his "addiction." (V5, TT195, 212). McKenzie saw Patrick Anderson working on Johnston's car. Anderson left at dusk. (V5, TT195-96, 211-12). McKenzie asked Johnston to borrow a hammer and block of wood so he could knock a dent out of his car. Johnston gave McKenzie a hatchet, and the two went into the shed to look for the wood.

McKenzie struck Johnston several times with the hatchet. (V5, TT196-97, 212-13). McKenzie then went into the house to the kitchen where Peacock was cooking. He struck Peacock in the back of the head with the hatchet. (V5, TT197, 214). Peacock fell on top of the stove, with his elbows falling into the pot. (V5,

[5] *Miranda v Arizona*, 384 U.S. 536 (1966).

TT202). McKenzie returned to the shed where Johnston was still alive and moving. He struck Johnston a few more times with the hatchet. (V5, TT197, 214).

McKenzie took Johnston's wallet and placed the hatchet on top of a bucket in the shed. He went back into the kitchen. (V5, TT197-98, 214). McKenzie saw Peacock struggling to get up. He grabbed a butcher knife and stabbed Peacock several times. (V5, TT199, 214).). McKenzie told police he washed the knife and placed it in the sink. (V5, TT202). He also stated he had been trying to stab Peacock in the heart. (V5, TT200).

After the murders, McKenzie took Peacock's wallet and keys and left the home in Peacock's car. (V5, TT201, 215). He left his Kia at the Johnston/Peacock home. (V5, TT215). Peacock's car was later recovered in Alachua County, Florida. (V5, TT201). Peacock's wallet was found in McKenzie's pants' pocket when he was apprehended in Citrus County. (V5, R190-91). Johnston's wallet was found inside Peacock's car, which McKenzie was "recently controlled and under the operation of" McKenzie. (V5, TT192).

Dr. Terrence Steiner, medical examiner, performed the autopsies on Randy Peacock and Charles Johnston. (V6, TT276). Peacock had six stab wounds to the chest, abdomen, back and neck that caused extensive bleeding and blood loss. (V6, TT279). The wounds were consistent with being made by the butcher knife. (V6, TT284). Four blunt force trauma wounds to the back of his head fractured

Peacock's skull and caused swelling of the brain. (V6, TT279). The wounds were consistent with being made by the hatchet. (V6, R286-87). Peacock was alive when all the wounds were inflicted. Dr. Steiner could not determine whether or not Peacock was conscious at that time. (V6, TT280).

The autopsy of Charles Johnston revealed extensive trauma to his head. Four "chop wounds" to the front of his head crushed the underlying tissue and fractured the entire side and front of his skull. His skull was fractured into six or eight different pieces. (V6, TT288). The wounds were consistent with being made by the hatchet. (V6, TT290-91). Johnston died as a result of massive head trauma. (V6, TT292). Although alive when the wounds were inflicted, Johnston would have lost consciousness before his eventual death. (V6, TT292).

Dr. Steiner said it is "rarely" possible to determine the order in which the wounds were inflicted. (V6, TT289).

On August 21, 2007, McKenzie was found guilty of the murders of Randy Peacock and Charles Johnston. (V6, TT375-76).

On August 22, 2007, the court conducted a second *Faretta* hearing. McKenzie was allowed to represent himself during the penalty phase with two capital-qualified attorneys as stand-by counsel. (V7, TT422-443).

The penalty phase was held August 23, 2007. (V8, TT514-603). The State published McKenzie's previous judgments and convictions. (V8, TT527, State Exhs. 32- 38).

The State recalled Det. Timothy Rollins. (V8, TT527). Det. Rollins reiterated that he took statements from McKenzie on October 5, 2006, the day after the murders, and again on February 6, 2007. (V8, TT527-28). McKenzie told him that he had gone to the Johnston/Peacock home to kill the two men "for money." (V8, TT528).

Cheryl Johnston, Charles Johnston's daughter, read a statement to the court. (V8, TT531-535). Katherine Whitman, one of Randy Peacock's sisters, read a statement to the court written by Janet Luke, another sister. (V8, TT535-540).

McKenzie did not call any witnesses and did not make a statement. (V8, TT540-41). He introduced his bank records for the four months prior to the murders, which indicated large withdrawals during that time. (V8, TT564-566, 578-581, Def. Exhs. 1-4).

On August 23, 2007, the jury returned a recommended sentence of death for each of the victims by a vote of ten to two (10-2). (V8, TT594).

The *Spencer* hearing was held on October 12, 2007. (V3, R462-486). The State did not present any additional evidence. (V3, R468). McKenzie read a statement to the court. (V3, R478-480).

On October 19, 2007, McKenzie was sentenced to death for each of the murders. (V1, R183-196; V3, R487-517).

SUMMARY OF THE ARGUMENT

POINT I . McKenzie failed to preserve this issue by failing to (1) object to the excusal of Juror Schultz; (2) object to the jury before it was sworn; (3) object to judicial bias; or (4) file a motion to disqualify the judge. Further, this issue has no merit. The trial judge did not commit manifest error by excusing Juror Schultz after the prosecutor indicated she was going to challenge the juror. Juror Schultz's child had recently been murdered in Orlando. There was no error, much less fundamental error.

POINT II . McKenzie unequivocally requested self-representation. He repeatedly stated he was not alleging counsel was ineffective, and the need for a *Nelson* hearing never became necessary. The only issue raised by McKenzie was the waiver of speedy trial which the judge discussed fully with McKenzie. The trial judge conducted a complete *Faretta* hearing both before the trial and before the penalty phase. Additionally, she offered counsel at the *Spencer* and sentencing hearings. There was no unreasonable limitation on standby counsel, and this issue was not preserved for review.

POINT III . The trial judge did not err in using one sentencing order for both victims where each victim was treated individually and each death sentence was individually imposed.

POINT IV. McKenzie's death sentence is proportional. There were three strong aggravating circumstances, including eight (8) prior violent felonies and cold, calculated, and premeditated. Prior violent felonies and cold, calculated, and premeditated are two of the weightiest aggravating circumstances. There was sufficient evidence to convict of two counts of first-degree murder. McKenzie left his vehicle at the victims' residence and was driving one victim's vehicle before he was arrested in Citrus County. One victim's wallet was on McKenzie's person and the other victim's wallet was in the vehicle McKenzie was driving. McKenzie made a full confession.

POINT V. McKenzie's *Ring* claim was not preserved and has no merit.

POINT I

THE TRIAL JUDGE DID NOT COMMIT FUNDAMENTAL ERROR BY EXCUSING, JUROR SCHULTZ FOR CAUSE

McKenzie claims fundamental error occurred when Juror Schultz was excused for cause. The State first notes that, as McKenzie acknowledges, there was no objection to Ms. Schultz being stricken, and this issue is not preserved for appeal. *Rhodes v. State*, 638 So. 2d 920, 924 (Fla. 1994). Neither was there an objection to the jury before it was seated. *See Zack v. State*, 911 So. 2d 1190, 1204 (Fla. 2005) ("By not renewing the objection prior to the jury being sworn, it is presumed that the objecting party abandoned any prior objection he or she may have had and was satisfied with the selected jury.").

Insofar as McKenzie claims the judge was biased, there was no objection on this basis and no motion for disqualification filed. *See Overton v. State*, 976 So. 2d 536, 547 (Fla. 2007); *Schwab v. State*, 814 So. 2d 402, 407 (Fla. 2002). Although McKenzie claims fundamental error, he cites no case in which this, or any other, Court has held that a jury selection issue can be fundamental error. Fundamental error is that which "goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process. *J.B.*, 705 So. 2d 1376, 1378 (Fla. 1998); *see also State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993) (stating that "for an error to be so fundamental that it can be raised for the first time on appeal, the

error must be basic to the judicial decision under review and equivalent to a denial of due process). The doctrine of error is applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988); *see also Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994).

Further, the claim that the trial judge was biased has no merit and McKenzie's cases are inapposite. This Court distinguished both *Evans v. State*, 831 So. 2d 808 (Fla. 4th DCA 2008) and *Sparks v. State*, 740 So. 2d 33 (Fla. 1st DCA 1999), in *Williams v. State*, 967 So. 2d 735, 751 (Fla. 2007) as follows:

> [T]he cases upon which Williams relies to support his claim that the trial court departed from neutrality are clearly distinguishable because they involve situations where the trial judge prompted the prosecution to either present certain evidence or take certain actions. *See, e.g., Williams v. State*, 901 So. 2d 357 (Fla. 2d DCA 2005) (court prompted the State during trial to alter allegation in first of two counts of information to fit proof of offense); Evans v. State, 831 So. 2d 808 (Fla. 4th DCA 2002) (trial court suggested that prosecution inquire into the immigration status of the defendant); *Sparks v. State*, 740 So. 2d 33 (Fla. 1st DCA 1999) (trial court indicated evidence that prosecution could use for impeachment).

Lastly, the record is clear that the prosecutor was going to strike Juror Schultz and the trial judge simply cut to the chase. The facts surrounding this issue include:

During questioning, Juror Schultz stated:

> MS. SCHULTZ: I am married to a retired police officer from New York. I had five children. I have four children now. One was killed in January. My oldest daughter is 30 and my youngest one is 13.
>
> THE COURT: I'm terribly sorry to hear about your child. Was it a criminal offense or was it a tragic accident?
>
> MS. SCHULTZ: Criminal.
>
> THE COURT: Was that here in St. Johns County?
>
> MS. SCHULTZ: Orange.
>
> THE COURT: And you said you have a 30-year-old. What do they do?
>
> MS. SCHULTZ: She's right now in North Carolina, but she spent five years in the military as a police officer in Germany.

(V4, TT31).

After the *voir dire* questioning, the judge made individual inquiries of the jurors who had been exposed to media coverage. (V4, R94-102). The State requested jurors Richards and Banta be stricken for cause. McKenzie asked to strike Mr. Clayton for cause. Neither side objected to the cause challenges of the other. (V4, TT103). The judge then asked for any strikes of the first twelve jurors. (V4, TT103). The State struck Mr. Pellicer. (V4, TT104). Then the following took place:

> THE COURT: Okay. So then that would bring up Mr. Rhodes. Does the State have any objection to, I guess it would be Mr. King, Ms. Schultz, Ms. Lake, Mr. Barry, Ms. Davis, Ms. Green, Mr. Reames, Mr. Sweet, Ms. Brooks, Mr. Parsons, Mr. Neal, Mr. Rhodes?

MS. COREY (prosecutor): Your Honor, we're concerned about Ms. Schultz, based on her loss of her son as a murder victim, so –

THE COURT: That's true.

MS. COREY: -- I think we're going to go –

THE COURT: I'm going to strike her for cause. Although she indicated that she could be fair, she has a child that was recently murdered, and I'm going to strike her.

MS. COREY: We're fine, then, Your Honor.

THE COURT: That brings us to Ms. Normington.

MS. COREY: Yes, ma'am.

THE COURT: Any objections?

MS. COREY: No, ma'am.

THE COURT: Mr. McKenzie, any objections or any strikes for now? We've got Mr. King, Ms. Lake, Mr. Barry, Ms. Davis, Ms. Green, Mr. Reames, Mr. Sweet, Ms. Brooks, Mr. Parsons, Mr. Neal, Mr. Rhodes, and Ms. Normington.

MR. McKENZIE: No, ma'am, no objections.

THE COURT: No objection? Okay. How many alternate jurors do we need?

MS. COREY: I would impanel two, in an abundance of caution, Your Honor.

THE COURT: Okay. Mr. McKenzie, two alternates okay with you?

MR. McKENZIE: Yes, ma'am.

THE COURT: They would only serve if something should happen to one of the jurors.

MR. McKENZIE: I understand.

THE COURT: The next two in line would be Ms. Mason and Ms. Hand. Are there any objections to Ms. Mason or Ms. Hand?

MS. COREY: Not from the State, Your Honor.

MR. McKENZIE: No, ma'am.

(V4, TT104-106).

It is apparent from the record that the prosecutor was going to strike Ms. Schultz. Whether that strike was going to be a cause challenge or peremptory challenge is not clear.[6] McKenzie claims that the trial judge "*sua sponte*" struck the juror and "become an advocate for the prosecution." (Initial Brief at 21). This allegation is not supported by the record. It is obvious the prosecution was going to strike the juror, and the trial judge saw that the grounds were obvious and struck the juror. McKenzie concedes the trial court ruling should be overturned only for manifest error/abuse of discretion. (Initial Brief at 23). He also concedes that a reviewing court must give deference to the trial judge's determination, and a juror must be excused if there is any reasonable doubt as to whether the juror can be impartial. (Initial Brief at 23-24). In summary:

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence

[6] The State had only exercised one peremptory challenge and had nine left. Ms. Schultz would have been the second peremptory challenge for the State. After Ms. Schultz was stricken, Ms. Corey stated "We're fine, then, Your Honor." Therefore, even if Ms. Schultz had not been stricken for cause, she would have been stricken peremptorily.

> presented and the instructions on the law given by the court. *See Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995). A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency. *See Pentecost v. State*, 545 So. 2d 861 (Fla. 1989). The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. *See Gore v. State*, 706 So. 2d 1328, 1332 (Fla. 1997), cert. denied, 525 U.S. 892, 119 S.Ct. 212, 142 L.Ed.2d 174 (1998). "In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record." *Smith v. State*, 699 So. 2d 629, 635-36 (Fla. 1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1194, 140 L.Ed.2d 323 and cert. denied, 523 U.S. 1020, 118 S.Ct. 1300, 140 L.Ed.2d 466 (1998); see also *Taylor v. State*, 638 So. 2d 30, 32 (Fla. 1994). It is the trial court's duty to determine whether a challenge for cause is proper. *See Smith*, 699 So. 2d at 636.

Kearse v. State, 770 So. 2d 119, 1128 (Fla. 2000). The trial court must excuse a juror for cause "if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." *Kearse v. State*, 770 So. 2d 1119, 1128 (Fla. 2000) (citing *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995)). A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. *See Hamilton v. State*, 547 So. 2d 630, 633 (Fla. 1989)(*quoting Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985)). Close cases should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality. *Sydleman v. Benson*, 463 So. 2d 533 (Fla. 4th DCA 1985).

The trial judge did not commit manifest error in excusing Juror Schultz, whose child had recently been murdered in a neighboring county. *See Rodriguez v. State*, 816 So. 2d 805 (Fla. 3d DCA 2002) (juror comments about her experiences with domestic violence should have sent up "red flag that she had no business sitting on a case in which the defendant was charged with an offense involving domestic violence"); *Hill v. State*, 839 So. 2d 883, 887 (Fla. 3d DCA 2003) (juror comment about guns should have sent up red flag); *See also Blye v. State*, 566 So. 2d 877 (Fla. 3d DCA 1990) (crimes against friends); *Miles v. State*, 826 So. 2d 492, 493 (Fla. 3d DCA 2002) (medical social worker who worked in emergency room with sexually abused children should have been excused for cause, despite the attempts at rehabilitation).

POINT II

THE TRIAL JUDGE DID NOT COMMIT FUNDAMENTAL ERROR IN CONDUCTING *NELSON* AND *FARETTA* HEARINGS, OR IN LIMITING THE ROLE OF STANDBY COUNSEL

***Faretta* hearing.** McKenzie claims the trial judge conducted an inadequate *Faretta* hearing, but does not specify which *Faretta* hearing was supposedly inadequate. The judge conducted two full *Faretta* hearings: before trial and before the penalty phase. McKenzie's only record cite is to the pre-trial hearing, and it appears the only alleged defect is that the trial judge "failed to inquire about appellant's experience with the criminal justice system." (Initial Brief at 26).

The complete history of the *Faretta* hearings follows:

On July 11, 2007, McKenzie told the trial judge he did not want his speedy trial rights waived and counsel had requested a continuance without consulting him. (V2, R356). Defense counsel explained that they had been appointed to the case in February and McKenzie had been transported away from St. Johns County to other jurisdictions. Defense counsel filed a motion to continue the trial that was set for March 15 and waived speedy trial. (V2, R352, 356). McKenzie told the judge this was a "cut-and-dry case" and there was no reason to continue the trial. (V2, R358). McKenzie did not want to be in the county jail. (V2, R359). When the trial judge advised McKenzie the defense attorneys needed to prepare a defense and mitigation, McKenzie stated:

> THE DEFENDANT: They can't prepare mitigation unless I'm willing for them to prepare mitigation, correct?
>
> THE COURT: They have to prepare mitigation regardless of whether you're willing.
>
> THE DEFENDANT: No, they can only put on the stand who I want on the stand. They can only consult who I want them to consult. I'm trying to express this to them. They don't do what I want – they don't do what they want to do, they do what I want them to do.

(V2, R360). McKenzie said he would waive any claim of ineffective assistance of counsel if trial was set before counsel was prepared. Defense counsel stated he would be forced to withdraw if trial was set before he was prepared. (V2, R361).

Defense counsel said that he could not file a demand for speedy trial in good faith because he was not ready for trial. Because of the numerous charges McKenzie had in other jurisdictions, he was transported from St. Johns County before the attorneys could meet with him. Further, McKenzie indicated he was going to obtain private counsel when he was arraigned in October 2006. (V2, R363). The Public Defender was not appointed until February 2007. (V2, R363). The trial judge asked McKenzie if he wanted to go to trial in August, and McKenzie said: "Absolutely." (V2, R364). Besides, he said: "There's nothing to discuss in this case." (V2, R364). McKenzie said there was "no discoveries to be made" and "no depositions to be made" because:

> I was the only one present during the murders when they occurred, how can there be a deposition to be made?
> . . .
> You can't depo a dead person.

(V2, R365).

At the August 7, 2007, pretrial conference defense counsel stated they filed a motion to continue the trial set for August 20, 2007. After the July 16 pretrial conference, depositions were set but very few witnesses appeared. Trial counsel was unprepared to go to trial. (V2, R369). Defense counsel Peshek advised the court that the case agent, Detective Burres, did not appear for depositions. (V2, 372). Neither did the two detectives who took McKenzie's statement. (V2, R373).

McKenzie told the trial judge he "absolutely" wanted to represent himself. (V2, R375). He was ready to go to trial on August 20. (V2, R375). A *Faretta* hearing was set for the following Friday. Defense counsel stated that a psychiatrist had conducted two evaluations if that would assist with competency. (V2, R376). McKenzie repeated that he just wanted to "get this over with this month" … "whatever it takes." (V2, R380). McKenzie wanted a motion for "a fast and speedy trial." (V2, R383).

On August 10, 2007, the trial judge stated that she had not received any motion from McKenzie and inquired as to the status of the case. Defense counsel Valerino stated that he had filed a motion to continue the August 20 trial and he was not ready to proceed to trial. (V3, R387). Specifically, defense counsel was not prepared for a penalty phase. (V3, R388). McKenzie expressed a concern that he was being held in County jail rather than prison. The trial judge asked if he would continue with trial counsel if she let him go back to state prison. McKenzie said he wanted the trial that month. (V3, R389). The trial judge explained the importance of the penalty phase. (V3, R391). McKenzie stated that:

> I understand. I personally feel that I'm ready to go to trial, and I'm ready to mitigate. I feel that way, okay? I mean, we can do it tomorrow. You can find me guilty tomorrow, and I'm ready to go into mitigation the next day. I'm ready. I don't need my attorneys to do any type of mitigation for me. I'm ready for it.

(V3, R391). When asked whether there was any other reason why he wanted to discharge his attorneys, McKenzie responded "That's not what I said. I said I'm ready." (V3, R391). McKenzie added:

> I'm well aware of how the courts function, all right, and I'm – I don't know all the – I'm – the terminology that I would have to use to be able to represent myself, it would be merely a layman's terminology. I'm not – I haven't – I'm not educated as far as the law goes, okay, buy I am intelligent enough to be able to stand up here and represent myself. I don't need help to represent myself.

(V3, R393).

McKenzie said that if the judge wanted the attorneys to be "of counsel to be by me," that was acceptable; however,

> I'm intelligent enough. I'm aware of what's going on. I'm aware of the severity of the charges. I'm aware of the severity of the consequences of being found guilty. I understand every bit of it. I know the ramifications of what's taking place. I Do. I'm a hundred percent aware of it, you know.

(V3, R393). McKenzie repeatedly advised the judge that there was no reason to "drag this out" and "there's not a lot to in this case." McKenzie acknowledged that there was nothing that "could possibly take place to alter the outcome of this matter at all." (V3, R395). He expressed dissatisfaction that an attorney would "blow" his right to a speedy trial without consulting the defendant. (V3, R396).

The judge explained the speedy trial rule to McKenzie and that a speedy trial could be obtained through a demand even though it had been previously waived. (V3, R397). The judge discussed the witnesses that should be deposed and the

discovery conducted. (V3, R399). The trial judge expressed concern that McKenzie was requesting an immediate trial merely so he could go back to state prison rather than stay in the County jail. (V3, R400). The judge then asked whether McKenzie felt his lawyers were incompetent. McKenzie said he was upset they waived his right to a speedy trial. When questioned further, McKenzie expressed himself:

> THE COURT: And so – but, I mean, is it that you believe that they're incompetent and that's why you don't want to represent – them to represent you?
>
> THE DEFENDANT: I personally feel that it's not in my best interest for the path they they're taking to try to represent me. I just – I feel it's not in my, my best interest.

(V3, R402). The trial judge then told McKenzie that waving the right to speedy trial was not incompetence. (V 3, R402). The judge continued:

> THE COURT: And you want to represent yourself.
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: And you want to represent yourself not because you believe your attorneys are incompetent.
>
> THE DEFENDANT: I don't feel that my – I mean, I don't think that they're incompetent. I mean, they passed the Bar exam, okay? That in itself is an accomplishment. I don't think I could pass the Bar exam, okay? So you know, I mean, no. Do I think they're incompetent? No, I don't. But do I think that they have my best interests in their – in – at hand? No, I don't. I think they have their own best interest at hand.

> Mr. Valerino likes to walk around and say I've represented 35 different death cases, and I've never had one to go to death row. That's his greatest saying, okay? And, and
> THE COURT: Well—
>
> THE DEFENDANT: I personally don't feel like that's an accomplishment on his behalf. I feel like that that's an accomplishment on the lack of the State's behalf, okay?

(V3, R405). When the trial judge again asked what specifically the attorneys did, or failed to do, in his case, McKenzie replied:

> THE DEFENDANT: Well, Your Honor, I asked them to do some things and, and I've tried to tell you that, and you sat here and batted me down and said, you know, it's not about what you want, it's about what they feel they have to do, okay? And so I can't sit here and tell you what it is because you're going to tell me again it's not about what I want, it's about what they want.
>
> And they're not the one that's going to get there and get a needle put in their arm and be killed. I am. They're not the ones that's either going to have to sit in prison for life and deal with all them idiots. I am. I've did it for 21 years in prison, Your Honor. Twenty-one years. I know what I'm facing. I just, I –
>
> THE COURT: Well, I need to know what specifically – I mean, do you believe that their representation of you is ineffective?
>
> It's difficult for me to understand what you're saying because you're saying they're not incompetent. You disagree, certainly, with some of the decision they've made, but –
>
> THE DEFENDANT: You asked me one time would I sign a waiver form alleviating them of any ineffective assistance of counsel, and at that time, not giving a great deal of thought to my statement that I made, I said yes immediately. All right? But then, you know, after going back to my cell and sitting there thinking about it, I am of the mind that it was ineffective assistance to be able to stand up here and deny my rights to a speedy trial by asking for a continuance. I wasn't

> present in this courtroom, and it's up to the State to have me present in this courtroom in order to prosecute me, all right? So—

(V3, R407).

McKenzie then discussed whether the Public Defender should have driven to Alachua County to visit him before speedy trial was waived in March. (V3, R408). The trial judge asked whether McKenzie had any further complaint besides the speedy trial issue. (V3, R409). McKenzie repeated generalizations about what the judge said about the attorneys doing what they needed to do, not what McKenzie wanted them to do. (V3, 410). Further, McKenzie felt there was no "reason to mitigate this case." He said he could: "get up on the stand during mitigation and alleviate the need of anyone else to be put on the stand on my behalf." (V3, R410).

The trial judge then asked whether McKenzie had any other reason to believe counsel was ineffective, to which McKenzie answered:

> THE DEFENDANT: I mean, Your Honor, I understand what you're asking me, and you've asked me that three or four times and I've beat around the bush three or four times, all right, and so it should be kind of obvious to you that I really don't want to answer that question because I'm not aware of the ramifications of the answer that I might give you to that question.

(V3, R413). The trial judge pressed on, stating that she really needed an answer to the question because she needed to now "whether or not to continue on with an inquiry or to move on to the *Faretta* inquiry." (V3, R413). McKenzie asked her to "just go ahead" with the *Faretta* inquiry. The trial judge then asked:

> THE COURT: So you do not believe that your attorneys are incompetent or offering ineffective assistance of counsel. You just want to try this case yourself in a week.
>
> THE DEFENDANT: I believe that my best interest is not in my attorneys. What they want is not what I want, okay? That's what I believe. Now, if that makes them ineffective assistance, then yes. All right?

(V3, R414). When questioned further about whether McKenzie had a difference of opinion regarding strategy, he agreed that it was. Defense counsel also agreed that McKenzie's complaints arose from differences in strategy. (V3, R416-417).

The trial judge proceeded with a complete *Faretta* inquiry. (V3, R417-437). The judge explained the ways a lawyer can help prior to trial, during trial, and in preparation for sentencing. (V3, 418-21). McKenzie would stop the judge at various points to discuss his rights. (V3, R420, 421, 422, 423, 424, 427). At each point, the judge answered each question posed by McKenzie and explained the colloquy she was reading. The judge explained the ramifications of presenting aggravating and mitigating circumstances, to which McKenzie said he could "do myself." (V3, 426). The judge explained the disadvantages of representing himself and ensured McKenzie understood each element. (V3, 426-30). McKenzie expressed understanding at each segment and even stated that "Ignorance of the law is not an excuse." (V3, R430).

The trial judge questioned McKenzie on his age, language abilities, GED degree and college courses he had taken. (V3, R434). McKenzie had never been

diagnosed with a mental illness and had no physical problems. He had never represented himself in a trial and understood that a lawyer would be appointed by the Court to represent him at no charge. (V3, R435). When asked whether McKenzie would like to have stand-by counsel, he stated: "That would be all right." (V3, R436). The judge then explained the role of stand-by counsel. (V3, R436-37). McKenzie was found competent to waive counsel and represent himself. The Public Defender was appointed as stand-by counsel. (V3, R437). The parties then discussed whether McKenzie wanted to proceed with depositions which had already been scheduled and clarified other details. (V3, R 440-41).

After conviction and before the penalty phase the next day, the trial judge renewed the offer to appoint counsel to represent McKenzie. (V6, TT380). McKenzie said he would like to have counsel appointed. (V6, TT381). The Public Defender was appointed. (V6, TT381). Defense counsel Valerino moved for a continuance of the penalty phase in order to prepare mitigation. (V6, TT382). McKenzie agreed with the request for continuance. (V6, TT384). The trial judge indicated the penalty phase would be mid-October. (V6, TT395).

The next morning, the judge was about to tell the jury that the penalty phase would be continued to October. McKenzie asked to address the court. (V7, TT407). He wanted the penalty phase to proceed that day, August 22, and not be delayed until October. (V7, TT408). McKenzie was not alleging any

incompetence on the part of defense counsel, only that he made a hasty decision after the verdict. (V7, TT408). The judge released the jury in order to conduct another *Faretta* hearing. The judge wanted to do the *Faretta* hearing, then give McKenzie time to consider his decision. The jury would return the next day at 10:00 a.m. (V7, TT411-414, 418).

The *Faretta* hearing resumed at 2:00 p.m., and McKenzie stated unequivocally that he wanted to represent himself. (V7, TT422). McKenzie assured the court that his decision had nothing to do with the attorneys' performance, but was a question of "tactics." (V7, TT423). The trial judge discussed the decision with McKenzie and the fact that the attorneys would investigate mitigation for the penalty phase, which would be scheduled for October 22. (V7, TT425-431). McKenzie reaffirmed that he wanted the penalty phase to proceed the next day. (V7, TT431). McKenzie sated that the attorneys had helped him as much as possible, but he wanted to represent himself. (V7, TT432).

The judge then proceeded with the *Faretta* inquiry. (V7, TT432-442). When asked whether he wanted stand-by counsel, McKenzie answered: "That would be greatly appreciated, Your Honor." (V7, TT442). Stand-by counsel was appointed. (V7, TT442).

At the end of the penalty phase, on August 23 the trial judge asked McKenzie whether he would like her to appoint counsel for the *Spencer*, hearing. McKenzie said "No." (V8, TT599).

On August 27, 2007, the trial judge held a hearing to offer McKenzie to be represented by counsel at the *Spencer* hearing. (V3, R446-47). McKenzie said he would represent himself. (V3, R447). The *Spencer* hearing was held on October 12, 2007. (V3, R462-486). Before the defense case, the trial judge again asked McKenzie whether he wanted to represent himself or have counsel appointed. (V3, R474). McKenzie stated: "I'm fine with myself. Thank you." (V3, R474).

Sentencing was held October 19, 2008. (V3, R487-516). At the beginning of the sentencing hearing, the trial judge again asked McKenzie whether he wanted to represent himself or have counsel appointed. (V3, R489). McKenzie said he was "fine representing myself." (V3, R489).

The trial judge conducted two full *Faretta* hearings (before the trial and before the penalty phase) following the model colloquy approved by this Court. *Amendment to Fla. Rule of Criminal Procedure 3.111(d)(2)-(3),* 719 So. 2d 873, 876-78 (Fla. 1998). She advised McKenzie of his right to counsel at every stage of the proceedings. Although McKenzie complains there was not an extensive inquiry into his experience with the criminal justice system, the model colloquy asks only "Have you ever represented yourself in a trial? What was the outcome of

that case?" *Amendment to Fla. Rule of Criminal Procedure 3.111(d)(2)-(3),* 719 So. 2d at 878. Likewise, Rule 3.111(d)(e) provides that:

> Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination that the defendant has made a knowing and intelligent waiver of the right to counsel.

Faretta instructs that "although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *State v. Bowen*, 698 So. 2d 248, 250 (Fla. 1997). Under *Faretta*, lack of legal experience is not a reason to deny self-representation. *See Bell v. State*, 699 So. 2d 674, 677 (Fla. 1997); *Bowen*, 698 So. 2d at 250 (finding Faretta made no provision for "an additional layer of protection requiring courts to ascertain whether the defendant is intellectually capable of conducting an effective defense"). If lack of education and legal skills were a basis for denying self-representation, few, if any, criminal defendants would ever qualify to represent themselves.

In *Bowen*, this Court faced a certified question, and answered it in the negative:

> Once a trial court has determined that a defendant has knowingly and intelligently waived his or her right to counsel, may that court

> nonetheless require the defendant to be represented by counsel because of concern that the defendant might be deprived of a fair trial if tried without such representation?

698 So. 2d at 249. This Court held that when a waiver of counsel is knowing and intelligent, a lack of education does not preclude the right to represent oneself. *Id*. at 252.

Under *Faretta* a trial judge has to be sensitive both to the right to counsel as well as the right to self-representation; however, judges have little leeway in either direction, since there are two constitutional rights at stake here. If a defendant has met the requirements of *Faretta* for self-representation, but the court denies self-representation because of the court's concern that the defendant's ignorance of the law will result in the defendant not receiving a fair trial, it may well violate *Faretta*. *Morris v. State*, 667 So. 2d 982, 986 (Fla. 4th DCA 1996). However, both the Florida and the United States Supreme Courts require that courts honor a defendant's request for self-representation, if the defendant knowingly and intelligently waives the right to counsel. As stated in *McKinney v.* State, 850 So. 2d 680, 682 (Fla. 4th DCA 2008): "The trial court can lead a defendant to the water of an intelligent decision about the dangers of self-representation, but it cannot make him drink." *See also LaMarca v. State*, 931 So. 2d 838, 847 (Fla. 2006); *Weaver v. State,* 894 So. 2d 178, 193 (Fla. 2004) (purpose behind Faretta inquiry is

to determine whether defendant is competent to waive his right to counsel, "not whether [the defendant] is competent to provide an adequate defense").

Standby counsel. McKenzie claims that the trial judge interfered with standby counsel's attempts to assist him, thus denying him a fair trial. (Initial Brief at 27-31). He claims he has a constitutional right to standby counsel who should be allowed to participate fully "even when the *pro se* defendant has not specifically requested such participation." (Initial Brief at 32-33). He cites no case or law to support this argument.

There was no objection to any limitation on standby counsel's participation, and this issue is not preserved.

This issue has no merit. The trial judge properly advised McKenzie during the August 10 *Faretta* hearing that standby counsel's role was to assist McKenzie if he had a question he wanted to ask the attorneys. The judge told McKenzie that if he needed to know something, the attorneys would be there to help him. (V3, R436-437). McKenzie cites to one instance in which the trial judge advised standby counsel that McKenzie needed to ask for assistance and that counsel should not be giving advice unless McKenzie requested that assistance. (V7, TT497-98). McKenzie concedes that standby counsel may not interfere with the defendant's self-representation and that standby counsel may aid the defendant *if* the accused requests help. (Initial Brief at 30). Yet he claims that the trial judge's

ensuring there was no interference with McKenzie's constitutional right to self-representation violated his Sixth Amendment right to counsel. This argument does not make sense. The trial judge thoroughly advised McKenzie of the rights he was waiving by insisting on self-representation. Included in that colloquy was the proviso that standby counsel would answer his questions but would not conduct the defense or interfere with that right to self-representation. In *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984), the United States Supreme Court stated:

> First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded.

In *State v. Knight*, 866 So. 2d 1195, 1205 (Fla. 2003), this Court addressed a similar situation in which the defendant unequivocally asserted the right to self-representation. The trial judge, like the trial judge in the present case, told the defendant that standby counsel would be available to answer his questions and assist if requested. Any limitation placed on standby counsel in the present case was reasonable and in accordance with the teachings of *Faretta* that standby counsel should not be allow to interfere with the right to champion one's own defense.

McKenzie also seems to make a due process claim and states he has a constitutional right to standby counsel. (Initial Brief at 32). Again, he cites no case to support this conclusion. He fails to inform this Court of the extent to which the trial judge went to ensure McKenzie's rights were protected. In fact, the very charge conference cited to this Court as being a denial of due process shows that the trial judge gave McKenzie her rules book to help him with the instructions. (V7, TT444). The judge made sure McKenzie found the jury instruction section. (V7, TT445). At each stage of the charge conference, the judge made sure McKenzie had the proposed instructions and the relevant judgments and sentences the State sought to admit. (V7, TT450, 454-56). McKenzie was prepared with a list of documents to which he would stipulate, and the judge went through each one. (V7, TT451-456). McKenzie was completely in control of the proceeding and even corrected the prosecutor and judge at various points. (V7, TT460, 464). McKenzie conducted the entire proceeding without any problems, stating his positions openly to the judge. (V7, TT444-511). During one conversation with the judge in which McKenzie was posing an objection, standby counsel appears to interrupt and the judge simply asked him to wait until he was asked for assistance before he tried to interrupt. (V7, T497). This is entirely within the discretion of the trial judge and consistent with *Faretta*. *See* §90.612, Fla. Stat. In fact, after the judge asked standby counsel to stand down unless asked for assistance, McKenzie

told the judge "Well, I have this already written down, Your Honor." (V7, TT497). McKenzie did not ask the judge to be allowed to speak with counsel, even after the judge advised that standby counsel was available *if* McKenzie wanted him. Thus in 67 pages of transcript during which McKenzie participates in the charge conference, one segment is now cited for a denial of due process.

Inadequate *Nelson* hearing. McKenzie claims he was raising complaints of ineffective assistance of counsel which required a *Nelson* hearing, and the trial judge failed to conduct a proper *Nelson* hearing. (Initial Brief at 33-36). He claims the trial judge never adequately addressed the complaint that the attorneys waived McKenzie's right to a speedy trial. (Initial Brief at 37-38).

The colloquy shows that the trial judge did address McKenzie's desire for a speedy trial. McKenzie was clear that he was not complaining that counsel was ineffective, only that he wanted an immediate trial. The trial judge explored this area fully, and told McKenzie that the mere act of waiving speedy trial is not incompetence. (V3, TT402). The only specific claim McKenzie made was fully explored with both McKenzie and defense counsel.

The record shows that McKenzie made no further specific allegations that counsel were ineffective. McKenzie assured the court that his decision had nothing to do with the attorneys' performance, but was a question of "tactics."

(V7, TT423). McKenzie believed there was no need for preparation because the trial was "cut and dry." (V2, R359).

In *Guardado v. State*, 965 So. 2d 108 (Fla. 2007), this Court addressed the situation in which a defendant makes an unequivocal request for self-representation but makes no specific complaints of ineffectiveness. Guardado argued, as McKenzie does here, that the trial court erred by failing to comply with the requirements outlined in *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973). This Court stated:

> A trial court's decision involving withdrawal or discharge of counsel is subject to review for abuse of discretion. *See Weaver v. State*, 894 So. 2d 178, 187 (Fla. 2004). Where a defendant seeks to discharge his lawyer on grounds of ineffective assistance, the trial court is required to make a series of inquiries. *See Hardwick v. State*, 521 So. 2d 1071, 1074-75 (Fla. 1988) (*quoting Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973)). **However, any inquiry by the trial court can only be as specific as the complaints made by the defendant. When the defendant makes generalized complaints about counsel, the trial court need not make a *Nelson* inquiry**. *See Morrison v. State*, 818 So. 2d 432, 441 (Fla. 2002); *Sexton v. State*, 775 So. 2d 923, 930-31 (Fla. 2000); *Gudinas v. State*, 693 So. 2d 953, 962 n. 12 (Fla. 1997). (Emphasis supplied)

Guardado v. State, 965 So. 2d at 113.This Court described Guardado's complaints as:

> [t]hat counsel spent less than an hour in actual conference with him before the trial. He constantly asked his attorney for information about the case and did not receive anything. Guardado also stated that when the trial court ruled on his motions, he asked counsel when he would see him again because he needed to speak with him and counsel said he would see him on Monday, the day of trial. In essence, Guardado

> generally did not like his counsel's performance. Guardado also made general complaints about the evidence that counsel presented and about counsel's failure to object to other evidence. In the final analysis, Guardado was complaining that he wanted to be sentenced on that day, that he did not want a *Spencer* hearing, and that his case was not proceeding in an expeditious manner.

Guardado v. State, 965 So. 2d at 114.

McKenzie cites to *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988), as authority, however, in *Guardado*, this Court distinguished *Hardwick*, stating:

> In *Morrison v. State*, 818 So. 2d 432, 440 (Fla. 2002), this Court cited to the procedure to be followed when a defendant complains that his counsel is incompetent. We noted that "the trial judge is required to make a sufficient inquiry of the defendant to determine whether or not appointed counsel is rendering effective assistance to the defendant." *Morrison*, 818 So. 2d at 440 (*citing Howell v. State*, 707 So. 2d 674, 680 (Fla. 1998)). However, "as a practical matter, the trial judge's inquiry can only be as specific as the defendant's complaint." *Id*. (*citing Lowe v. State*, 650 So. 2d 969 (Fla. 1994)). We found in *Morrison* that although Morrison made several requests to replace counsel, the claims "centered principally around Morrison's dissatisfaction with the amount of communication between him and counsel." *Id.* at 441. Furthermore, we noted, "[a] lack of communication, however, is not a ground for an incompetency claim." *Id.* Additionally, Morrison "expressed displeasure with counsel's refusal to provide copies of legal documents and efforts in contacting witnesses." *Id*. We found Morrison was not entitled to a *Nelson* hearing because "[t]hese complaints can best be described as general complaints about his attorney's trial preparation." Id. The record reflects Guardado made several general complaints that did not warrant a *Nelson/Hardwick* hearing. Guardado complained that counsel did not spend a lot of time with him and that he did not receive information about his case. This type of general complaint does not rise to the requisite level to warrant a *Nelson/Hardwick* hearing. In *Sexton v. State*, 775 So. 2d 923, 931 (Fla. 2000), we found defendant's statement asking for a delay of trial until he could obtain attorneys he could have confidence in merely expressed general

> dissatisfaction with the trial preparation of his lawyer. We found it was not a sufficient basis to support a contention that his attorney was incompetent. Similarly, in *Gudinas v. State*, 693 So. 2d 953, 961-62 (Fla. 1997), the defendant objected to his exclusion from an in-chambers discussion between the attorneys and the trial judge. We found defendant never specifically claimed defense counsel was acting in a legally incompetent manner and thus was essentially making a general complaint about trial strategy, a complaint that did not require a Nelson inquiry. Pursuant to *Morrison*, *Sexton*, and *Gudinas*, a *Nelson* inquiry is not required where defendant states generalized grievances.

Guardado v. State, 965 So. 2d at 115. This Court proceeded to hold that the trial judge did not abuse its discretion in its handling of Guardado's complaints about the lack of expediency he desired and the "indifference" of counsel. This Court characterized those complaints as "the type of general grievance that does not require a *Nelson* hearing." *Guardado v. State*, 965 So. 2d at 115.

In the present case, the trial judge repeatedly explored the issue whether McKenzie was claiming ineffective assistance of counsel. She explored the speedy trial issue and found no incompetence. McKenzie made the same generalized grievances as in *Guardado*. The trial judge did not abuse her discretion.

POINT III

THE TRIAL JUDGE DID NOT ERR IN DRAFTING THE SENTENCING ORDER

McKenzie argues that the trial judge abused her discretion in entering one sentencing order because there were two victims. He concedes that the "trial court discussed the individual facts relating to each of the two murders." (Initial Brief at

39). He cites no case to support this argument. Instead, he cites to concurring opinions and cases which generally stand for the proposition that a sentencing order is important. Additionally, he cites to *Snelgrove v. State*, 921 So. 2d 560, 571 (Fla. 2005), a case which deals with a single, undifferentiated **jury** recommendation and has nothing to do with the present case.

This Court has stated:

> There is no prescribed form for the order containing the findings of mitigating and aggravating circumstances. The primary purpose of requiring these findings to be in writing is to provide an opportunity for meaningful review by this Court so that it may be determined that the trial judge viewed the issue of life or death within the framework of the rules provided by statute. It must appear that the sentence imposed was the result of reasoned judgment.

Holmes v. State, 374 So. 2d 944, 950 (Fla. 1979). *See also Williams v. State*, 967 So. 2d 735, 761 (Fla. 2007).

The sentencing order is comprehensive and detailed. It is fifteen (15) pages long, single-spaced. (V1, R183-196). The judge made detailed findings of fact as to each victim. (V1 , R184-185). The three aggravating circumstances were:

> (1) Eight (8) Prior violent felonies from seven (7) separate cases, including: Burglary while Armed with a Firearm, Kidnapping with a Firearm, Attempted Robbery with a Firearm, Robbery with a Firearm, Robbery with a Firearm, Robbery with a Firearm, Carjacking while Armed, and Strong Arm Robbery. (V1, R185-186). The judge wrote that the evidence proved these convictions "as to each victim." (V1, R186).
>
> (2) During a robbery/financial gain (merged): The judge made findings that McKenzie went to the victims' home to steal, that he

> stole Peacock's car, and that when he was arrested he was found in possession of Peacock's wallet and Johnson's wallet was in Peacock's car. (V1, R187). The judge separated out the victims and made individualized findings.
>
> (3) Cold, calculated and premeditated: the judge made concise, individual findings as to each victim. (V1, R187-190). She then stated that "this aggravating circumstance has been proven beyond and to the exclusion of every reasonable doubt as to both victims."

The trial judge then carefully analyzed the mitigating circumstances presented by McKenzie, stating repeatedly that this was offered as mitigation for the time of the "murders" and when he killed the "victims." (V1, R190, 191, 192). One must remember that the murders were intertwined. The defendant struck Johnson in the shed with the hatchet, proceeded to the kitchen where he struck Peacock with the hatchet multiple times, returned to the shed where Johnson was moving and finished off Johnson, then returned to the kitchen where he stabbed Peacock to death with a knife. (V1, R188).

Last, the trial judge imposed sentences of death as to each victim. (V1, R195).

The conciseness of this order shows that the trial judge independently weighed aggravating and mitigating circumstances as to each victim. The sentencing order reflected the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive.

There was no reversible error. *See Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003); *Randolph v. State*, 853 So. 2d 1051, 1058 (Fla. 2003); *Jones v. State*, 845 So. 2d 55, 64-65 (Fla. 2003). If this Court should determine that rhetoric rules reason, the remedy would be to remand for the trial court to make further findings, not to reverse the sentence.

POINT IV

THERE WAS SUFFICIENT EVIDENCE FOR TWO FIRST-DEGREE MURDER CONVICTIONS, AND THE SENTENCE OF DEATH IS PROPORTIONAL.

Although not raised by McKenzie, because this Court independently reviews the evidence in capital cases,[7] [8]the State directs this Court to the findings of the trial judge in the sentencing order.

In the "Facts" section, the trial judge found:

> The evidence presented at trial establishes that on October 4, 2006, the Defendant, Norman Blake McKenzie, drove to the home shared by his victims, Randy Wayne Peacock and Charles Frank Johnston, with the intent to rob and kill them. The Defendant and the victims were not strangers. The Defendant, a contractor, had done some work for them in the past.
>
> Patrick Anderson, the victims' neighbor, testified that he was at the house for several hours on October 4, 2007, working on the victims' brakes. He testified that he left around 7:00 p.m. after several hours of work, and that at the time he left, the Defendant and Mr. Peacock

[7] McKenzie was indicted on, and convicted of, two counts of first-degree murder.

[8] *See Guardado v. State*, 965 So. 2d 108, 118 (Fla. 2007).

were working on their cars under the carport. At some point, Mr. Peacock begins cooking soup in the kitchen, leaving the Defendant and Mr. Johnston outside. According to the Defendant, he asked Mr. Johnston for a piece of wood and a hammer to pound out a dent in his vehicle; a gold Kia Sorrento. The Defendant was given a hatchet with a hammer end and a blade end. When Mr. Johnston went into the shed to find a piece of wood, the Defendant followed him with the hatchet in hand. When Mr. Johnston was toward the back corner of the shed, the Defendant struck him in the head with the blade end of the hatchet, which knocked the victim to the ground. The Defendant then struck Mr. Johnson again once or twice and left the shed.

The Defendant, with hatchet in hand, then entered the residence, where Randy Peacock was cooking soup on the stove. The Defendant approached Mr. Peacock from behind and struck him multiple times in the head with the hammer end of the hatchet. The Defendant then returned to the shed, where he noticed Mr. Johnston was still alive. He struck Mr. Johnston again with the hatchet then placed the hatchet on top of a bucket in the shed. The Defendant left the shed and returned to Mr. Peacock. Mr. Peacock was struggling to get up. The Defendant then grabbed a butcher knife and stabbed Mr. Peacock multiple times.

Mr. Johnston died after suffering four “chop wounds” to the head. Mr. Peacock suffered four blunt force trauma wounds to the back of the head and six stab wounds to the chest, abdomen, back, and neck. He died as a result of his injuries.

After stabbing Mr. Peacock, the Defendant searched for his victims’ wallets. He found wallets and keys, left his personal vehicle at the residence, and drove off in Mr. Peacock’s green Chrysler convertible. The Defendant abandoned Mr. Peacock’s car in Alachua County and was later arrested in Citrus County. At the time of his arrest, the Defendant was found in possession of Randy Peacock’s wallet. Charles Johnston’s wallet was found when Mr. Peacock’s car was recovered in Alachua County.

The Defendant was interviewed twice by detectives from the St. Johns County Sheriff’s Office; once on October 5, 2006 and again on February 6, 2007. On both occasions, post Miranda, the Defendant confessed to killing Mr. Johnston and Mr. Peacock. According to

> Detective Rollins, the Defendant told him he went to the home of Randy Peacock and Charles Johnston, planning to kill them for money.

(V1, R184-85).

In the aggravating circumstance regarding the robbery, the judge stated:

> The Defendant gave two statements to detective regarding his motive for the offense. According to Detective Burres, the Defendant told him he went to the victim's home for the purpose of stealing their money. He told Detective Rollins, in a separate interview, that he went to the victims' home intending to kill them and steal there money. In addition, the evidence introduced at trial established that after killing Randy Peacock and Charles Johnston, the Defendant took their wallets, money and credit cards, and also stole Randy Peacock's car. Upon arrest, the Defendant was found in possession of Randy Peacock's wallet. Charles Johnston's wallet was found in Randy Peacock's abandoned car.

(V1, R187).

In the aggravating circumstance regarding CCP, the judge held:

> The State has proven beyond a reasonable doubt that the killing was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or fit of rage. The Defendant told Detective Rollins that he went to the victims' home with the intent to rob and kills them. The evidence shows the Defendant was at the victims' home for several hours working on his car before he committed the murders. He waited until the victims' 21 year old neighbor, Patrick Anderson, went home and the second victim, Randy Peacock, went inside the house before he carried out his plan to kill his first victim, Charles Johnston. There is no evidence at all to suggest that the defendant was enraged or in the middle of some sort of emotional frenzy or panic. He calmly asked Mr. Johnston for a hammer and a piece of wood to pound out a dent in his car. When Charles Johnston handed the Defendant a hatchet, which had a blade end and a hammer end, and then proceeded to look for a piece of wood in the shed, the Defendant coolly and calmly followed him. When the victim got to

the back corner of the shed, the Defendant struck him with the blade end of the hatchet. The victim fell to the ground and the Defendant struck him once or twice again. According to the Defendant, the victim had no idea what was about to occur.

After striking Charles Johnston with the hatchet, the Defendant left the shed and walked to the house. The Defendant, hatchet in hand, quietly entered the home and came up behind Mr. Peacock, who was cooking soup on the stove in the kitchen. He struck Mr. Peacock multiple times in the head with the hammer end of the hatchet. Mr. Peacock fell into the pot of soup. Like Mr. Johnston, Mr. Peacock had no idea what the Defendant was about to do.

After striking Randy Peacock multiple times in the head, the Defendant returned to the shed. When he noticed Charles Johnston moving, he struck him one more time with the hatchet. When he had finished the job he had come to do, the Defendant laid the hatchet on a bucket in the shed and returned to Mr. Peacock.

When the Defendant re-entered the home he noticed Mr. Peacock struggling to stand up. The Defendant grabbed a knife and began stabbing the victim multiple times. After stabbing Mr. Peacock, the Defendant washed the knife and placed it in the kitchen sink. He then began searching for the victims' wallets. The Defendant found the victims' wallets and keys and left the home in Randy Peacock's car.

The State has proven beyond a reasonable doubt that the Defendant had a careful plan or prearranged design to commit murder before the fatal incident. Again, the evidence establishes that the Defendant went to the victims' home with the intent to rob and kill them. He knew his victims, having done work for them in the past. He waited for hours until the opportunity was right. When the neighbor leaves and Mr. Peacock returns to the house, the Defendant is left alone with his first victim. It is at this time that the Defendant asks for his weapon, a hammer, under the guise of needing it to pound out a dent in his car. When Mr. Johnston enters the shed at the request of the Defendant to find a piece of wood, the Defendant follows him in and carries out his plan. Once the first victim is left incapacitated in the shed, the Defendant turns his sights on his second victim, Randy Peacock, who is alone inside the home. Once the Defendant's plan to kill the victims

> had been done, he took their wallets and stole their car, thereby carrying out his prearranged design to rob and kill.
>
> The State has proven beyond a reasonable doubt that the Defendant exhibited heightened premeditation. Heightened premeditation is demonstrated by a substantial period of reflection. The Defendant was at the home for hours before he committed the murders. He waited for the opportune moment before carrying out his plan. In total, he struck Charles Johnston in the head with the hatched four separate times. He struck him once and Mr. Johnston fell to the ground. He struck him once or twice again and then left the shed. The Defendant then approached his second victim in the house, which is a good distance from the shed. Once inside the house, he struck Randy Peacock four times in the head with the hammer end of the hatchet. He then left Mr. Peacock and returned to the shed where he found Mr. Johnston was still alive. The Defendant struck Mr. Johnston again with the hatchet, killing him. The Defendant left the hatchet in the shed and returned to the house, where he noticed Randy Peacock was attempting to get up off the floor. Having left the hatchet in the shed, the Defendant grabbed a butcher knife and stabbed Randy Peacock six times in the chest, abdomen, back, and neck, killing him. These facts show a particularly lengthy, methodic or involved sense of atrocious events and a substantial period of reflection and thought by the Defendant.

(V1, R188-190). There was sufficient evidence of the two first-degree murders.

McKenzie argues that his death sentence is not proportional, but cites no case to support this argument. He seems to argue that McKenzie's presentation to the jury was inadequate because he represented himself, a claim that was repeatedly waived by McKenzie when he insisted on representing himself despite the repeated warnings of the trial judge. Insofar as McKenzie attempts to reargues issues raised in Claim II herein, those arguments were never made to the trial judge

and are waived. Further, this issue is non-specific and non-reviewable. *See Duest v. Dugger,* 555 So. 2d 849, 852 (Fla. 1990).

McKenzie's case is proportional to other death-sentenced defendants who brutally murder two victims in a cold, calculated way and have eight (8) prior violent felonies. This Court has affirmed the death penalty even in single-aggravator case. *See, e.g., Rodgers v. State,* 948 So. 2d 655 (Fla. 2006); *Ferrell v. State,* 680 So. 2d 390 (Fla. 1996); see also *Duncan v. State,* 619 So. 2d 279 (Fla. 1993). In McKenzie's case, there are three strong aggravators, including CCP and eight prior violent felonies. The prior violent felony conviction aggravator is one of the "most weighty" in Florida's sentencing scheme. *Bevel v. State,* 983 So. 2d 505, 525 (Fla. 2008); *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002). In fact, this Court has held that the prior-violent-felony and CCP are the "weightiest of aggravators." *Deparvine v. State,* 33 Fla. L. Weekly S784 (Fla. Sept. 29, 2008).

In addition, there was very little substantial mitigation. *See Offord v. State,* 959 So. 2d 187, 191 (Fla. 2007). This Court has previously held the death penalty to be proportionate in cases involving multiple murders where the only aggravating circumstance was a prior violent or contemporaneous felony and the mitigation was minimal. *See Lindsey v. State,* 636 So. 2d 1327, 1329 (Fla. 1994) (finding death proportionate in a double homicide case, where the only aggravator was based on prior violent felony convictions, including a prior second-degree murder

conviction for the first count and the contemporaneous first-degree murder conviction for the second count, and minimal nonstatutory mitigation including the defendant's poor health); *see also Porter v. State*, 564 So. 2d 1060, 1062 n.2, 1064-65 (Fla. 1990) (finding death proportionate in a double homicide case, where two aggravators, prior violent felony and contemporaneous felony, and no mitigation were found). In addition, the Court has held that the death penalty was proportionate in a single aggravator case, based on two prior violent felony convictions, attempted sexual battery and kidnapping, and minimal nonstatutory mitigation, including appropriate courtroom behavior (very little weight) and mental disorders (very little weight). *See LaMarca v. State*, 785 So. 2d 1209, 1216-17 & n.4 (Fla. 2001) (noting that proportionality was supported by the fact that LaMarca committed the murder soon after being released from prison on the prior violent felony convictions); *see also Ferrell*, 680 So. 2d at 391 (finding death proportionate where the only aggravator was a prior violent felony conviction for second-degree murder (weighty) and a number of nonstatutory mitigating circumstances that were all assigned little weight).

POINT V

FLORIDA'S DEATH SENTENCING SCHEME IS NOT UNCONSTITUTIONAL; THIS ISSUE WAS NOT PRESERVED FOR REVIEW.

McKenzie argues that Florida's capital sentencing procedures violate *Ring v. Arizona*, 536 U.S. 584 (2002). He concedes this issue was not preserved at the trial level and is not reviewable on direct appeal. *See Evans v. State*, 946 So. 2d 1, 15 (Fla. 2006).

Furthermore, this claim has no merit. This Court has previously rejected this contention. *See Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003) (citing *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002)). Additionally, this Court has repeatedly upheld the constitutionality of Florida's capital sentencing procedures in cases, such as this one, that include the prior violent felony aggravator. *See Evans, supra; Robinson v. State*, 865 So. 2d 1259, 1265 (Fla. 2004) ("[A] prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with *Ring*.") (citing *Owen v. Crosby*, 854 So. 2d 182, 193 (Fla. 2003)). Accordingly, McKenzie is not entitled to relief. *See also Buzia v. State*, 926 So. 2d 1203, 1217 (Fla. 2006).

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests this Honorable Court affirm the convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished to **Chris Quarles**, Office of the Public Defender, 444 Seabreeze Blvd., Daytona Beach, FL 32118, by hand delivery**,** this _____ day of November, 2008.

BARBARA C. DAVIS
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CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

_____

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