IN THE SUPREME COURT OF FLORIDA

GARY BERNARD McCRAY, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC08-2434

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, GARY BERNARD McCRAY, III, was the defendant below; this brief will refer to Appellant as such or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee the prosecution, or the State.

The record on appeal consists of 28 volumes, which will be referenced according to the respective Roman numeral designated in the Index to the Record on Appeal. The first 13 volumes are sequentially numbered, but volumes 14-22, the trial transcript, are separately numbered. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE

McCray was charged by indictment on November 18, 2004 with four counts of first-degree murder (I 50-52). On January 30, 2006, the court found McCray incompetent to proceed (V 977-980). On December 6, 2006, the court found that McCray was then competent to proceed, based upon stipulation of counsel (XIII 2400-01). Following jury selection, another competency determination was ordered, after which the trial court found him competent to proceed (X 1814-17).

During opening statements, McCray requested to represent himself, which the court denied (XVI 5990- XVII 609). During the state's case, McCray again requested to represent himself, which the

court granted, but then withdrew after McCray failed to comply with the court's instructions (XVII 661-69). McCray testified on his own behalf, but the court terminated his "testimony" because it was improper argument and McCray refused to permit examination by questioning (XXI 1438-41).

The jury found McCray guilty as charged on all counts (X 1885-1892). During penalty phase, McCray indicated that he would not permit counsel to present mental-health experts (XXI 1559-1560). McCray was permitted to give his own penalty-phase closing argument (XXII 1618-21). The jury recommended death by a 12-0 vote (X 1921-24).

During the *Spencer* hearing, McCray entered the reports of Drs. Krop and Miller made for the pretrial competency evaluation (XIV 2674).

The court sentenced McCray to death (XI 2063-2073), finding two aggravating circumstances, previous conviction of capital felony and cold, calculated, premeditated manner, and gave both great weight. The court gave no weight to the two mental-health mitigating circumstances or to age, and gave slight weight to a number of non-statutory mitigating circumstances. The court gave great weight to the jury's recommendation.

STATEMENT OF THE FACTS

The trial evidence showed that McCray was arrested in a raid of the house at 1018-B Blanding Boulevard on February 12, 2004 arrest as a result of the execution of a search warrant (XX 1121-24). McCray was believed to be supplying the house with drugs. *Id.* Afterward,

McCray spoke to several people about the arrest, expressing his belief that someone at the house was a police informant and that he intended to find out who had told on him to police (XVIII 814-16, XX 1145-48, 1159-64).

On the night of May 23, 2004, McCray was seen in the area where the murders occurred (XVIII 747-752, 757-766). McCray was driving a white four-door car (XVIII 752).

Later that night, Eric Goodman, who was acquainted with McCray, noticed a man dressed in black lurking around the house, and peeping through the kitchen window (XVIII 778-789). Goodman intended to scare the man, but upon getting closer realized that he had a gun (XVIII 790-91). The man was wearing a hoody sweatshirt that covered his whole head, but he could see that the man had dreadlocks (XVIII 791). Goodman followed the man into the house, where he saw the man grab John Ellis and point the rifle at him (XVIII 791-95). Goodman eventually recognized the man as McCray, and was able to escape the house (XVIII 805-07). Goodman ran away, but heard multiple shots fired XVIII 807-09).

Kevin Cunningham was also at the house that night (XVIII 847-52). Cunningham, who was also acquainted with McCray, saw McCray come into the house and said to him "damn, Goldie [McCray's nickname], what did you get, a new weapon? Is that an AK-47? (XVIII 852). Cunningham also described the hoody sweatshirt that McCray had on, pulled over his head (XVIII 854-55). McCray ordered some of the occupants to the back of the house and grabbed Cunningham by his ponytail (XVIII 856). John Ellis then opened a sliding-glass door and ran out of the house,

after which Cunningham heard gunshots (XVIII 861-62). Cunningham managed to get out of the house, but heard numerous gunshots as he was escaping (XVIII 862-64).

Troy Wilson was also at the house that night and also saw a man come into the house that night and shot John Ellis and then continued shooting (XIX 894-910). After Wilson escaped the house, he hid behind a white car in a storage facility, but realized that that the car was running and someone was in it (XIX 913-915).

Eric Whitehead was also at the house, recognized McCray and recognized McCray (XIX 926-935). Whitehead saw McCray shooting (XIX 935). Responding officers found four persons dead of gunshot wounds (XIX 677-682). A black hoody sweatshirt was found at the scene, as well as shell casings (XVIII 708-729). DNA recovered from the sweatshirt showed a one in 43 billion Caucasians, one in 8 billion African Americans, and one in 80 billion southeastern Hispanics, chance that it belonged to someone other than McCray (XXI 1332).

McCray asked friends was seen later that morning driving a white Lumina (XIX 968, 1058). Two days after the killings, McCray had cut off his dreadlocks, which he had had for four or five years, and was bald (XIX 972-73). McCray and three friends then left for Tallahassee, where they went to a Wal-Mart to buy t-shirts, underwear and a toothbrush for McCray, and got a motel room (XIX 974-981). The friends also met a Wal-Mart employee who agreed to rent a second motel room, using McCray's money (XIX 983-84).

The white Lumina was recovered and found to have an unfired bullet that matched a fired cartridge found at the scene (XVIII 729, XXI 1278-87).

SUMMARY OF ARGUMENT

ISSUE I. McCray did not preserve this issue for appellate review. Moreover, the requirements of *Muhammad v. State* apply only when the defendant has waived **all** mitigation. When the defendant chooses only to limit mitigation rather than waive it altogether, *Muhammad* does not apply and the court is not required to order a PSI or to refrain from giving the jury recommendation great weight. Because McCray present several mitigation witnesses but merely chose not to present two mental-health experts, the court did not err in failing to order a PSI or in assigning great weight to the jury recommendation.

ISSUE II. While a defendant has a fundamental right to testify during his trial, he does not have an unfettered right to offer testimony that is incompetent or inadmissible, and trial judges are given the duty to exercise control over the presentation of testimony. Here, McCray was permitted to give 43 minutes of irrelevant or incompetent testimony before the court stopped him. McCray gave no indication that he intended to return to proper testimony, and refused the court's alternative of continuing his testimony upon questioning of counsel by becoming so argumentative that he had to be removed from the courtroom. Any right to testify was clearly outweighed here by McCray's improper testimony and his refusal to permit testimony by questioning.

ISSUE III. McCray did not request to represent himself. What McCray sought was hybrid representation, to which this Court has repeatedly held there is no right, so the trial court properly this

request. At a later point in the trial, McCray sought and was granted self-representation. However, McCray waived his right to self-representation by his obstructionist misconduct. Thus, the trial court properly mandated that McCray be represented by counsel.

ISSUE IV. McCray asserts that the trial court failed to conduct an adequate *Faretta* inquiry prior to allowing him to present closing argument in penalty phase. There was no need for any *Faretta* inquiry. Defense counsel was not discharged. Furthermore, even if a *Faretta* was required, one was conducted. Indeed, several *Faretta* inquiries were conducted over the course of this trial. As McCray admits, a "proper *Faretta* colloquy" was conducted by a different judge earlier in the case. The *Faretta* inquiry conducted by the trial court just prior to the closing argument of penalty phase was truncated because this judge had previously warned McCray of the dangers and disadvantages of self-representation at an earlier point in the trial. McCray knew these dangers and disadvantages from these prior *Faretta* inquiries. Two different judges on two previous occasions had explained to McCray the dangers and disadvantages of not having an attorney. Thus, the trial court properly allowed McCray to represent himself during closing argument of penalty phase.

ISSUE V. The rule regarding restoration of competency to proceed does not require such an order to be in writing, and this Court has never held that the rule invariably requires a written order. In a situation where the court's reasons for finding a defendant restored to competency are clearly in the record there is no compelling reason

to reverse to entry of a written order, especially where, as here, the parties stipulated to competency.

ISSUE VI. The court properly found that the testimony that McCray supplied the house with drugs and that he had been arrested for possession to be relevant to prove motive and therefore admissible. The State offered as much evidence of these collateral crimes that was necessary to prove this theory, did not put undue emphasis on it during it case or in argument.

ISSUE VII. Competent substantial evidence supported the trial court's finding that McCray was competent to proceed with trial. It was the trial court's responsibility to resolve the conflict between the experts, and it resolved it in favor of competency.

ISSUE VIII. By waiting until the conclusion of the prosecutor's closing argument to complain of improper comments, McCray has failed to preserve this issue for appeal. Even if McCray had preserved this issue, the comments were not improper, and even if they were, they did not vitiate the trial to the extent that they constituted fundamental error.

ISSUE IX. Because none of the issues individually constituted error, then they cumulatively did not constitute error either, so the court did not err in denying the motion for new trial.

ISSUE X. Because defense counsel specifically stated that he had no objections to the penalty-phase jury instructions, this issue is not preserved. Moreover, while this Court later issued new standard instructions to clarify areas of jury confusion identified

in the ABA report, there is no evidence that McCray's particular jury was confused. As such, the trial court properly instructed the jury.

ISSUE XI. This Court should not entertain cumulative error claims. Cumulative error claims improperly employ partial legal analysis rather than properly employing the whole legal analysis. Even if this Court entertains cumulative error claims, this Court has repeatedly stated that where the error individually are "either procedurally barred or without merit, the claim of cumulative error also necessarily fails." Because McCray's individual claims of error are without merit, McCray's cumulative error claim necessarily fails.

ARGUMENT
ISSUE I

DID THE COURT ERR IN GIVING GREAT WEIGHT TO THE JURY'S SENTENCING RECOMMENDATION WHEN APPELLANT CHOSE NOT TO PRESENT AVAILABLE MITIGATION? (Restated)

In this claim, McCray alleges the trial court violated the requirements of *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), when it failed to order and consider a presentence investigation (PSI), failed to consider all available mitigation, and gave great weight to the jury's recommendation, when McCray chose not to present some available mitigation.

Muhammad v. State

The defendant in *Muhammad* waived his right to a jury's sentencing recommendation and to present mitigating evidence, but the trial judge still required a jury sentencing recommendation. *Muhammad*, 782 So.2d at 350. After the jury recommended death, the trial court gave the recommendation great weight. *Id.* at 361. On appeal, this Court concluded that "reversible error occurred when the trial court gave great weight to the jury's recommendation in imposing the death penalty despite the fact that no mitigating evidence was presented for the jury's consideration." *Id.*

Moreover, in the "rare cases where the defendant waives mitigation," "the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence." *Id.* at 363. "Further, if the PSI and the accompanying

records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses," or to appoint counsel to present the mitigation. *Id.* at 364.

Since deciding *Muhammad*, this Court has made it clear that its requirements apply only when the defendant has waived **all** mitigation. See *Boyd v. State*, 910 So.2d 167, 188-89 (Fla. 2005) (Defendant who testified during the penalty phase and allowed his pastor to testify "did not waive all mitigation but only limited the matters presented on mitigation," so that the requirements of *Muhammad* did not apply); *Eaglin v. State*, 19 So.3d 935, 945-46 (Fla. 2009)(recognizing "the distinction between the waiver of the right to present mitigation and the decision to limit mitigation," and noting that this Court has extended the duties of the trial court set forth in *Muhammad* to consider all mitigating evidence contained in the record and not to give great weight to the jury recommendation "only to cases in which there is a complete waiver of all mitigation").

McCray's penalty phase

After the State presented victim testimony at the penalty phase, McCray's counsel informed the court that Dr. Krop and Dr. Miller were available to testify regarding mental-health mitigation, but that McCray had instructed him not to present their testimony (XXII 1559-1560). The court addressed McCray to ensure that he had spoken with counsel about these witnesses, that he understood that the witnesses were there to benefit him, that the witnesses would present mitigation as to why the jury ought not to recommend a death penalty,

and that he did not wish to present them because, as he claimed, their testimony was "unnecessary" (XXII 1560-61). Before the penalty phase concluded, the court had McCray's counsel speak to him again about presenting Dr. Krop and Dr. Miller, but McCray continued to instruct counsel not to present them (XXII 1585-86).

While McCray expressed doubt about whether other mitigation witnesses should be presented, he eventually allowed counsel to present them (XXII 1562-66). John Manning testified that he was a younger cousin of McCray, and considered McCray a role model and father figure (XXII 1567-1570). Manning testified that McCray had a large family that loved him and that McCray loved his family (XXII 1570). Manning testified that he had never known McCray to act in a violent way and that McCray's life was worth saving (XXII 1571).

Christopher Lewis was also a younger cousin of McCray, and considered McCray a role model and big brother figure (XXII 1572-73). Lewis testified that McCray was a positive influence in his life and the lives of other family members and took them to church (XXII 1573-74). Lewis likewise testified that the person who killed the victims was "not the Gary McCray [he] grew up with," and that McCray loved his family, and had their love and support (XXII 1574).

McCray's aunt Veronica Lewis testified that McCray was "very smart" and "had a promising future" but began to struggle, especially after deaths in the family (XXII 1576-77). Ms. Lewis, who is a pharmacist, testified that she believed that McCray "a changed person" since his arrest, that he is suffering from a "mental diminishment" (XXII 1578). Ms. Lewis testified that McCray's

courtroom behavior was not "the Gary that grew up with [her]" (XXII 1578-79). Ms. Lewis noted that McCray was very much a part of his children's lives, and was a good father (XXII 1579-80).

McCray's father Gary McCray Sr., also testified regarding McCray's upbringing, noting that McCray was close to his family and respectful to older people, that McCray endured the split of his parents when he was eight, and that he had been hit in the eye with a baseball that took his vision (XXII 1583). Mr. McCray also noted that McCray had changed since he was jailed, that he was withdrawn and no longer trusted people (XXII 1584). Mr. Agreed that McCray could still contribute to his family and to society if he were serving a life sentence (XXII 1585).

Terri Carter, the mother of McCray's children, testified that McCray was the father of three children, ages eight, six and three (XXII 1587-88). Ms. Carter testified that McCray loved his children and that they loved him. *Id.* All right. Ms. Carter testified that McCray was "just not the same person since he's been in confinement," that she had seen McCray was not the same "melt down" from a mental standpoint since he had been in jail (XXII 1589). She noticed a "drastic change" since he had been confined, and noted that he had gone to a "mental hospital." *Id.* Ms. Carter testified that a life sentence would be very beneficial because it would permit him to be part of his children's life (XXII 1590).

McCray also testified on his own behalf (XXII 1591-1600, XIII 2598-2600, XIV 2601-2602). For the most part McCray simply denied that the evidence had been sufficient to convict him, and argued that

the court had made numerous errors during trial, and that the verdict should be overturned.

At the *Spencer* hearing, McCray introduced a report from his mitigation expert, Dr. Krop's August 2008 psychological evaluation report, Drs. Miller and Myers' August 2008 psychological evaluation report, and Drs. Miller and Myers' October 2008 follow-up evaluation report (XIV 2674).

In McCray's sentencing memorandum, McCray argued for four statutory mitigators: (1) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired; (3) The age of the defendant at the time of the crime; and (4) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty (X 1943, 1954-55). McCray also argued for numerous non-statutory mitigators (X 1955-1958).

Mitigating circumstances in the sentencing order

With regard to the "extreme mental or emotional disturbance" mitigator, the court found that "no testimony explicitly established that [McCray] was under the influence of any mental or emotional disturbance at the time of the murders," and found the mitigator to be unproven (X 2065-66). With regard to the "capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law" mitigator, the court considered the evaluations of Drs. Krop and Miller, but concluded from other evidence

that mitigator was also unproven (X 2066-2067). With regard to the age mitigator, the court found that McCray had failed to provide evidence to suggest that the murders were the result of immaturity or mental problems, and that the mitigator was therefore unproven (X 2067). The court found that McCray failed to provide evidence to support the "other factors" mitigator (X 2068). The court gave slight weight to each of the non-statutory mitigating circumstances, except those which it found unproven (X 2068-2070).

Moreover, the court gave great weight to the jury's recommendation of death, indicating that it "fully agrees with the jury's assessment of the aggravating and mitigating circumstances," which, in addition to its consideration of additional mitigating circumstances presented to this Court," led it to conclude that the death sentence was appropriate in this case (X 2071).

Analysis

First, McCray failed to preserve this issue for review. McCray never requested a PSI or objected to the lack of a PSI. Nor did McCray object to the assignment of great weight to the jury's recommendation as a *Muhammad* violation. As such, McCray is not entitled to appellate review of this claim. § 924.051(1)(b) & (3), Fla. Stat.

Even if McCray had presented this issue to the trial court and the trial court had refused to comply with *Muhammad*, he would not be entitled to relief. McCray claims that the sentencing court violated the requirements of *Muhammad* by failing to order a PSI and giving the jury recommendation of death great weight. This argument fails for the simple reason that the requirements of *Muhammad* apply only when

the defendant has refused to present **any** evidence of mitigating circumstances before the jury penalty phase. Because McCray presented penalty-phase evidence before the jury, the court was not required to comply with the *Muhammad* procedures.

Muhammad sets forth a limited circumstance where the sentencing court is required to seize control of the defendant's sentencing defense and seek out and consider evidence over the defendant's objections, and is prohibited from giving the jury recommendation great weight. This circumstance occurs in the "rare cases where the defendant **waives** mitigation." *Muhammad* at 363 (e.s.). The court must prepare a PSI "in every case where the defendant is not challenging the imposition of the death penalty and **refuses to present mitigation evidence**." *Id.* By its very terms *Muhammad* applies only when the defendant refuses to present any mitigation at all, not when the defendant simply chooses not to present some evidence.

This Court made this distinction clear in *Boyd v. State*, 910 at 188-89. Boyd's counsel had several witnesses to testify before the jury in penalty phase, but Boyd chose not to present those witnesses; however, Boyd "elected to testify during the penalty phase and allowed his pastor to testify." *Boyd* at 188. On appeal, Boyd claimed that the court failed to conduct a waiver-of-mitigation colloquy pursuant to *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993) and erred in giving great weight to the jury's recommendation of the death sentence in violation of *Muhammad*. This Court rejected these claims. This Court held that "the requirements of *Koon* are not applicable in this case because Boyd presented mitigating evidence." *Id.* Moreover, this Court rejected

the claim that the great weight given to the jury's recommendation violated *Muhammad*, because Boyd "did not waive all mitigation but only limited the matters presented on mitigation." *Id.* As such this Court held that "*Muhammad* is inapplicable to this case."

This Court reached the same conclusion in *Eaglin v. State*, 19 So.3d at 944-46. Eaglin had instructed his counsel to forego the presentation of some mitigation evidence, but on appeal argued that "the jurors were unable to fulfill their duty to determine the validity and weight of the aggravating and mitigating evidence because they were not made aware of all available mitigating evidence." *Eaglin* at 945. This Court rejected that part of Eaglin's claim because Eaglin himself had prompted the exclusion of some evidence, and to the extent that counsel had decided not to present other evidence, Eaglin could not assert ineffectiveness on direct appeal. *Id.*

Eaglin also claimed that the sentencing court erred in failing to "consider all available mitigation in the record." because the sentencing order did not address substance abuse and mental disorder evidence. *Id.* Noting that Eaglin did not waive all mitigation, this Court recognized "the distinction between the waiver of the right to present mitigation and the decision to limit mitigation." *Id.* "[T]he duty of the trial court to consider all mitigating evidence contained in the record to the extent it is 'believable and uncontroverted' [extends] only to cases in which there is a complete waiver of all mitigation." *Id.* at 945-46. As such, this court rejected Eaglin's claim.

Boyd and *Eaglin* apply here. McCray presented significantly more mitigation evidence that Boyd, so he cannot argue that his limitations on mitigation invoke *Muhammad*.[1] As such, the court below was not required to refrain from assigning great weight to the jury recommendation, to request a PSI, or to seek out mitigation not presented by McCray. This conclusion is consistent with the rationale of *Muhammad*. *Muhammad* represents a rare and limited circumstance where the court is required to impose itself into the mitigation process against the defendant's wishes. When the defendant makes the decision to present some mitigation evidence to the jury but not to present other evidence, or to present it only at the *Spencer* hearing, there is no compelling reason to require the court to independently seek mitigation evidence or to refuse to afford the jury recommendation great weight. *Muhammad* simply does not apply here.

[1]McCray claims that *Jackson v. State*, 18 So.3d 1016 (Fla. 2009), stands for the proposition that the requirements of *Muhammad* apply where "very little mitigation was presented" (IB 26). This argument misreads *Jackson* and ignores *Boyd* and *Eaglin*. In *Jackson* the defendant "was offered multiple opportunities to present mitigation evidence **but he declined to do so**." *Id.*, 18 So.3d at 1024 (e.s.). Jackson present **no** mitigation evidence before the jury. McCray's attempt to suggest that this Court has applied *Muhammad* when only a "little" mitigation was presented is false and should be rejected.

While the court was not required to affirmatively seek out mitigation evidence under *Muhammad*, McCray seems to be making a related argument that the court failed to address Dr. Miller's October 2008 report or other evidence of other possible sources of mitigation in the sentencing order (IB 28-29). A review of the sentencing order shows that the court considered these matters. With regard to the "extreme mental or emotional disturbance" mitigator, the court found that "no testimony explicitly established that [McCray] was under the influence of any mental or emotional disturbance at the time of the murders" (XI 2066).[2] McCray has indicated no evidence inconsistent with this finding. See *Hoskins v. State*, 965 So.2d 1 (Fla. 2007)(holding that the "extreme mental or emotional disturbance" mitigator is not established when evidence shows that the defendant was under the influence of any mental or emotional disturbance *at the time of the murder*).

In the "capacity" section of the sentencing order, the court specifically addressed the Dr. Miller's conclusions, including his suggestion that McCray's symptoms were "consistent with a phase of schizophrenia" (XI 2066). However, the court rejected this mitigator based upon Dr. Meadows' evaluation, which suggested that McCray was malingering and suffered from antisocial personality

[2]McCray refers to his "diagnosed schizophrenia" in this claim (IB 29). Nothing in the record indicates an actual diagnosis of schizophrenia. Dr. Miller's report indicated that McCray exhibited symptoms "consistent with the 'prodromal' phase of schizophrenia" (X 1989). In other words, McCray exhibited symptoms that may have indicated that he may *later* suffer from schizophrenia. This is not "diagnosed schizophrenia."

disorder, and upon his observation of McCray's courtroom actions, which suggested that McCray was in control of his actions and knew what to do to conform his conduct with the law. In short, the court did not fail to consider McCray's mental-health evidence, it merely concluded that they did not establish either mental-heath mitigator in light of other evidence. Accordingly, McCray is not entitled to reversal on this claim.

Finally, even if McCray had established a *Muhammad* violation, the remedy, at most, would require the sentencing court to order a PSI and consider it in a new sentencing order, in which the court would not give great weight to the jury recommendation. Even assuming a *Muhammad* error, no error occurred during the penalty-phase before the jury, so there would be no reason to order a new penalty phase.

ISSUE II

DID THE TRIAL COURT ABUSE ITS DISCRETION IN TERMINATING APPELLANT'S TESTIMONY BECAUSE IT WAS IRRELEVANT AND IMPROPER? (Restated)

A court's decision to limit testimony is reviewed for abuse of discretion. See *England v. State*, 940 So.2d 389, 405 (Fla. 2006).

McCray's testimony

After the close of the state's case, McCray's counsel informed the court that he, against advice of counsel, wanted to testify (XXI 1397-98). Counsel noted that McCray refused to disclose his testimony to his counsel, so it would be "problematic" for counsel to ask him questions. *Id.*

Before McCray even began to testify, he demanded 12 copies of depositions so he could demonstrate inconsistent statements from the state's witnesses (XXI 1411). When the court told him that those depositions were not relevant to his testimony, McCray claimed that it was "proof in the court of law in the United States of America." (XXI 1412).

McCray began his testimony by informing the jury that the state was not permitted to call any more witnesses unless it related to testimony defense witness (XXI 1413-14).

McCray then stated that he had an alibi, that he believed he was at Karlon Johnson sister's house "or somewhere in the Orange Park area" (XXI 1414). McCray then explained why he had cut his hair, because he was about to start a prison sentence and he did not like to have his hair cut in the jail or detention facilities (XXI 1414-15). McCray also explained that he left town because he was wanted for questioning and decided to "speak to the officers later" because he knew he would be arrested when he spoke to them on account of a warrant for his arrest (XXI 1415). He also denied that he ran from police when he was located in Tallahassee. *Id.* This was the conclusion of McCray's appropriate testimony.

The remainder of McCray's testimony, a total of 43 minutes on the witness stand, were devoted to a series of arguments about the unreliability of the DNA evidence (XXI 1414-15); legal materials stolen from McCray's cell at the order a superior officer or maybe the State Attorney's Office (XXI 1415-19, 1423-24, 1430-31); how the prosecution or judge should be recused (XXI 1417); "illegal acts and

procedures" of the trial court; stolen DNA evidence (XXI 1419-1422); the trial court's improper handling of objections (XXI 1422-23); the improper use of subpoenas (XXI 1425-27; the improper denial of McCray's motion to suppress (XXI 1427-30); about the illegality of his arrest because he should have been charged the same day the police received the sworn witness statements (XXI 1431-32); and about the unreliability and inconsistency of the witness statements (XXI 1432-37). During this presentation, the prosecutor objected once to the relevance of the testimony, to which the court instructed McCray to "move on" (XXI 1420).

After listening to 43 minutes of this improper testimony, the court recessed for lunch (XXI 1437). When the parties returned, the court asked McCray how much longer he expected to testify. *Id.* McCray indicated that he had a "whole lot of testimony" about the witnesses, and estimated that it may take an hour. The court informed McCray that when he returned to the witness stand, he would be answering counsel's questions rather than testifying in narrative, because "you're not going to sit up here and just make argument for your case" (XXI 1437-38). McCray defended his testimony by claiming that he "was showing the jury evidence by the defense statements, specifically legal things that was taking place in the Court and ... why the prosecution chose theirself to be untrustworthy before the Court ...." (XXI 1439). McCray insisted that the jury should know that "these illegal acts are being made, and that they are "arguments the jury needs to hear," specifically accusing the prosecution of illegal acts and calling him untrustworthy (XXI 1439-1440).

McCray's counsel indicated that he did not have any questions for him (XXI 1442). McCray continued to argue with the court that the jury needed to hear about the "illegal acts taking place in this court" (XXI 1442-43). The court informed McCray that his "testimony has ended" and that the State would be permitted to cross-examine him (XXI 1443). McCray continued to argue until the court had McCray removed from the courtroom (XXI 1443-45). McCray's counsel moved for a mistrial due to McCray's "outburst," which the court denied (XXI 1445-46).

Analysis

Before turning to the propriety of the court's order to terminate McCray's testimony, the State will address the portions of his testimony that he argues on appeal were "relevant" and presumably appropriate testimony. The State agrees that testimony related to the alibi, the haircut, the reasons for his flight to Tallahassee, and his denial that he ran from police when he was located was all appropriate testimony.

However, McCray has identified six other areas that he claims were appropriate: 1) the DNA evidence was "not a good match;" 2) stolen DNA and why the State needed DNA to prove its case; 3) the getaway vehicle and why it should not be considered; 4) the DNA evidence did not match the bandanna found in the vehicle; 5) items in evidence including a swab from his mouth, the bandanna, a cigarette found at the scene, and how his DNA did not match them; and 6) the eyewitnesses were under the influence of drugs and described the assailant differently (IB 33-34).

While these matters may have been "relevant" to the case in a general sense, none of it was proper testimony. McCray was not testifying regarding to facts within his personal knowledge; he was rendering opinions and making argument regarding the probative force of the evidence admitted in the State's case. See § 90.604, Fla. Stat. ("a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter"). The fact is, approximately five minutes into his testimony McCray stopped providing competent testimony and spent the remaining 43 minutes discussing matters that were wholly inappropriate for him to testify about.

"A criminal defendant has a fundamental right to testify on his own behalf during his trial." *Beasley v. State*, 18 So.3d 473, 495 (Fla. 2009). However, the court here did not deny McCray his right to testify. McCray testified at length, and had clearly presented all possible testimony that could have been deemed proper. The issue here is whether the court abused its discretion in terminating McCray's testimony under the circumstances presented here.

While a criminal defendant enjoys a fundamental right to testify, "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 653 (1988). Moreover, section 90.612, Florida Statutes, gives trial judges the duty to "exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence," in order to "[f]acilitate, through

effective interrogation and presentation, the discovery of the truth" and "[a]void needless consumption of time." See *Robinson v. State*, 707 So.2d 688, 695 (Fla. 1998) ("section 90.612(1)(b) also 'recognizes the trial judge's responsibility to reasonably control the interrogation of witnesses and the presentation of evidence so as to "avoid a needless consumption of time."'" citing Charles W. Ehrhardt, *Florida Evidence* § 403.1 at 135 (1997 ed.)). In short, a defendant's right to testify is not absolute and can be limited by the court in the exercise of its duty to control proceedings.

"Simply stated, a criminal defendant does not have an absolute, unrestrainable right to spew irrelevant-and thus inadmissible-testimony from the witness stand." *United States v. Carter*, 410 F.3d 942, 951 (7th Cir. 2005). See also *United States v. Bentson*, 220 Fed.Appx. 643 (9th Cir. 2007)(limitation on time to present narrative narrative testimony was not abuse of discretion because "the trial court was entitled to limit Bentson's testimony when his arguments became repetitive, irrelevant, and excessively confusing").

These principles show that the court did not abuse its discretion in terminating McCray's testimony. The record in the case reflects a defendant who, even prior to his testimony, consistently obstructed proceedings in an effort to call the court's attention to matters that were irrelevant or inappropriate. McCray was permitted to testify in narrative form because he refused to inform his counsel about the substance of his testimony. The court indulged McCray's testimony in spite of the fact that nearly all of it was clearly improper, even

overruling the State's meritorious objection to the testimony in order to allow McCray his opportunity to present what he wished to present. After listening to 43 minutes of improper testimony without the court's interruption, the court recessed for lunch.

When the parties returned, the court seemed inclined to allow McCray to continue, provided that he conclude his testimony in a reasonable amount of time. McCray's responses demonstrated that he intended neither to conclude his testimony in a reasonable amount of time, nor to stop testifying about matters that were clearly inappropriate.[3] The court decided to allow McCray to continue, but only upon questioning of counsel rather than in narrative form. McCray refused to accept this alternative,[4] becoming so argumentative that the court was obligated to have McCray removed from the courtroom and concluded his testimony.

Under these circumstances, the court did not abuse its discretion in terminating McCray's testimony. The court in *Carter* noted that the defendant there "provided no reasonable indication that he would end his rant and resume testifying about relevant matters." *Carter*, 410 F.3d at 952. The same is true here. McCray gave every indication that he planned to continue arguing about the

[3]McCray's comments about his intended testimony (XXI 1438, as well as his demand for witness depositions, demonstrated that he intended to point out discrepancies and inconsistencies in the testimony of the State's witnesses.

[4]McCray accuses the court of terminating his testimony "without exploring other alternatives" (IB 37). To the contrary, the court indicated that it would allow McCray to continue testifying, but only if counsel asked questions.

State's case rather than providing any competent testimony, which he had stopped long before the court terminated his testimony. McCray refused the court's alternative of allowing him to continue testifying upon questioning of counsel, and became so argumentative that he had to be removed, effectively ending his testimony. It clearly appears that McCray was not denied the opportunity to present any testimony that would have been proper. McCray's right to testify was not violated in this case, and the court's actions constituted proper exercise of its control of the courtroom pursuant to section 90.612. See also *Allen v. State*, 232 S.W.3d 776 (Tex. App. 2007)(court's termination of defendant's sentencing-phase testimony because he persisted in providing improper testimony was a proper exercise of the judge's duty to control the court and did not violate the defendant's right to testify).

Accordingly, the court here did not commit reversible error.

ISSUE III

DID THE TRIAL COURT PROPERLY DENY THE REQUEST TO ALLOW HYBRID REPRESENTATION? (Restated)

McCray asserts that the court erred by denying him the right to represent himself. McCray did not request to represent himself. What McCray sought was hybrid representation, to which this Court has repeatedly held there is no right, so the court properly denied this request. At a later point in the trial, McCray sought and was granted self-representation. However, McCray waived his right to

self-representation by his obstructionist misconduct. Thus, the court properly mandated that McCray be represented by counsel.

The trial court's ruling

During the prosecutor's opening statement in the guilt phase, the defendant, although represented by counsel, objected (XVII 597-598). The court excused the jury (XVII 598). McCray stated that he was "going to represent myself" (XVII 598). The court explained to McCray that he could either represent himself or be represented by counsel but he could not do both (XVII 598). McCray responded: "I'm going to represent myself right now at this time" (XVII 599). The court stated "No, you're not. You're going to do one of the other" (XVII 599). The court asked McCray if he wanted to discharge his attorneys (XVII 599). McCray refused to answer and the court instructed him to answer that question. (XVII 599). McCray responded: "yes, sir"(XVII 599). The court explained that if McCray represented himself, his attorneys would "go back to their office" (XVII 600). When the court asked McCray if he wanted the attorneys to represent him "at all during the trial," McCray refused to answer that question and responded "I would like to represent myself right now at this time" (XVII 600). The court instructed McCray to listen to him and repeated the question did McCray want to represent himself "throughout the trial or not" (XVII 600). McCray responded: "Yes, sir, I do" (XVII 600). The court asked McCray if he wanted to discharge his two attorneys and McCray responded: "Yes" (XVII 600).

McCray asserted that his attorney refused to "obey" him (XVII 605). Defense counsel also refused to call Terry Brayboy, a

"surviving eyewitness" as a defense witness (XVII 605). McCray asserted that if he hired an attorney, the attorney "would do exactly what I ask" whether it was unprofessional or not because he was "paying him" whether the attorney thought it was a good idea or not (XVII 605-607). McCray asserted that he was "head of the defense"(XVII 606).

The court started to conduct a *Faretta* inquiry (XVII 607),[5] asking McCray about his education and employment history (XVII 607-608). McCray then stated "I can still keep my counsel right now at this time and defend myself before this Court at the same time" (XVII 608). The court clarified that McCray wanted to keep his lawyers "plus you want to talk on your own" (XVII 608). The court explained that McCray did not have a right to speak when he was represented by counsel (XVII 609).

The court removed McCray from the court based on his conduct of interrupting which, as the court noted, McCray had also done during jury selection (XVII 609). As he was being removed, McCray stated that he did not want his counsel, that he did not "want them to help me right now" (XVII 609). The court stated that McCray was not capable of representing himself in this type of case anyway (XVII 609). McCray again stated that he prefer that they not help me "at all right now" and that he wanted to "dismiss them all" because he was "the head of the defense"(XVII 609). The court ordered the jury returned and informed defense counsel that they were "still on the

[5] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975)

payroll" (XVII 609). Basically, the court denied McCray's request for hybrid representation at this point.

Defense counsel then presented the defense opening statement in the guilt phase (XVII 610). After opening statement, the court took a recess. Before the jury returned, the court addressed the defendant (XVII 651). McCray was basically insisting that he was co-counsel and had a right to hybrid representation (XVII 651-652). McCray believed that the "prosecution was lying right in front of the jury" and was committing "perjury" (XVII 652-653). The court inquired of McCray whether he was able to hear his counsel's opening statement in the holding cell (XVII 654). McCray asserted that he could not "hear that much" (XVII 654).

The court inquired of defense counsel regarding their preparation for trial (XVII 654). Mr. Eler responded that during the course of the years he was representing McCray that he deposed all of the witnesses; had defense experts review the DNA; consulted with McCray on defense matters; reviewed and indexed thousands of pages of discovery including FDLE reports, evidence tech reports, crime scene photos, etc. (XVII 654-655). The defense they intended to present was mistaken identity (XVII 655). The court noted that the defense was prepared for trial (XVII 655). The court ruled that the defense counsels were going to continue their representation of McCray (XVII 656).

The court also ruled that McCray would be excluded from the courtroom because the judge was not "going to have any more disturbances" from McCray, noting that he had put up with McCray's

interruptions “for two or three days” (XVII 656). The court instructed defense counsel to speak with McCray after each witness to see if McCray had any questions that he wanted counsel to ask that particular witness. Counsel agreed to do so. The jury then returned (XVII 656).

The State then presented Gary Logan (XVII 657). During this witness testimony, defense counsel asked the court if he could approach and a off-record sidebar was conducted (XVII 657-658). McCray had informed counsel that he wanted to represent himself (XVII 660). The court asked McCray if he wanted to discharge his lawyers and McCray responded: “Yes, sir” (XVII 660). The court explained that McCray would be representing himself without counsel (XVII 660). The court started to conduct a *Faretta* inquiry, asking the defendant about his age. *Id.* The court asked McCray about his education and about his experience in the legal field (XVII 661). The court warned McCray that if he represented himself he was bound by the same rules of evidence and procedure that the lawyers are and explained that he would get no help from anyone if he represented himself, and that he, the judge, could not help him (XVII 661). The court explained to McCray that if an objection should be made and McCray did not make the proper objection, due to his lack of legal training (XVII 661). The court also explained that the penalty was “very serious,” noting to McCray that he was charged with four counts of first degree murder and that the penalty was either life without parole or death. *Id.* The court asked again if knowing all of this whether McCray wanted to represent himself (XVII 662). McCray asserted that the case was

"very simple" and that he could represent himself "easily" (XVII 662). The court asked McCray of he thought he could represented himself and McCray responded: "Yes, Very simple case" The court then discharged counsel (XVII 662). The court directed counsel to act as stand-by counsel.

The court permitted McCray to represent himself (XVII 662). The court, however, warned McCray that he was not allowed to interrupt at any time except to make objections. McCray stated that he understood (XVII 662).

Defense counsel Eler stated that he was providing the defendant with his trial files (XVII 663). McCray stated that he wanted all the defense motions that he did not have (XVII 663). The court noted that there were no outstanding motions to be ruled on (XVII 663-664). McCray stated that he needed those motions because they were part of the defense (XVII 663). McCray stated that he had not read all the motions because defense counsel had not given him a copy of every motion (XVII 663). The court explained that the motion had already been ruled on and that McCray was conducting the trial. McCray stated that he was entitled to see the motions (XVII 663). The court ordered the trial to proceed (XVII 664). McCray asked if he was entitled to see the motions. The court explained yet again that McCray was entitled to see the motions but that he had already ruled on the motions (XVII 664).

McCray then asserted that he had new evidence to present to the court regarding the theft of FDLE case tracking forms (XVII 664). The court stated that that was enough and that he did not want to hear

any more of that (XVII 664). McCray then inquired of the court: "you don't want to hear the evidence?" (XVII 665). The court informed McCray that he was not to speak unless he had an objection (XVII 665). The court informed McCray that a witness had been testifying and that the trial was going to proceed with that witness' testimony. McCray refused to comply, stating "this is evidence, Your honor" The court noted that it was not evidence at this point (XVII 665). McCray responded: "Not evidence? Objection, your Honor" (XVII 665).

The court called a recess to talk with the lawyers. The court spoke with the defendant telling him that he was representing himself. The court explained that the witness was going to be testifying once the jury returned. The state was going to ask the witness questions which is called a direct examination (XVII 665). The court told the defendant if he had a valid objection to the witness' testimony, he could make that objection but that McCray could not talk about things that were unrelated to the witness' testimony (XVII 665). The court asked McCray if this was clear (XVII 665). McCray responded that he understood (XVII 665-666).

The court instructed McCray that he was not to blurt anything out in the presence of the jury except objections to the witness' testimony (XVII 666). The court warned McCray that if he did not follow the rules and procedures he would reinstate his lawyers and remove McCray from the courtroom (XVII 666). McCray responded: "objection" and then asserted that he should be able to speak in front of the jury and that the jury was supposed to know everything about the case (XVII 666). McCray asserted that the State was not allowed to talk about

illegal evidence in front of the jury but the defendant can talk about illegal evidence (XVII 666).

The court inquired of McCray whether he understood about the rules regarding the witness testimony (XVII 667). The court explained that when a witness testifies any objection deal with that "witness and that witness alone" and then when the next witness testifies the same rule applies (XVII 667). The court explained that "you don't intermingle things that are unrelated to the witness that is on the stand who is testifying at the particular moment"(XVII 667).

McCray stated that he understood (XVII 667). McCray stated that he would follow the procedure (XVII 667). McCray, then, immediately stated: "still objection, your Honor" and returned to his discussion of the taking of the FDLE tracking forms (XVII 667). The court asked McCray what he was talking about (XVII 667). McCray responded: "FDLE tracking forms." The court observed that "we're already off track again" (XVII 667). The court informed McCray that he could not seem to stay focused (XVII 667). The court explained that a witness was testifying at this point and that he did not want to hear about FDLE (XVII 667-668). McCray again stated: "Objection, your Honor" (XVII 668). The court explained to McCray that there would come a time when he could talk about that. *Id.* McCray yet again stated: "objection, your Honor" and "this was evidence that law material were stolen out of the defendant's room." *Id.*

The court then stated that that "settles it." The court reappointed the defense lawyers and removed McCray from the courtroom. McCray stated the he did not want them representing him

and that his objections were reasonable. McCray argued that his objection was a "necessary objection" because someone stole legal materials out of his cell and "the State was not supposed to be stealing out of the defendant's rooms." *Id.*

The court then noted for the record that he had "no choice" but to remove McCray from the courtroom and reappoint counsel (XVII 669). The court observed that McCray kept interrupting the court and could not "stay on task as to what we're dealing with" McCray was talking about issue that had "absolutely nothing to do with this witness." *Id.* The court reappointed defense counsel as counsel, and informed defense counsel Tassone that he wanted him to talk with McCray after each witness to see if McCray had any questions of the witnesses. *Id.*

The court then recalled the witness to the stand and the jury to the courtroom (XVII 669). After the prosecutor finished the direct examination of witness Logan, defense counsel cross-examined the witness (XVII 669, 671-676). The prosecutor then called Lt. Keith Perry of the Clay County Sheriff's office to testify (XVII 676 - XVIII 680), and defense counsel cross-examined Lt. Perry (XVIII 682-687). After the jury was excused for lunch recess, defense counsel Tassone informed the court that, while he was with McCray, as previously instructed to do by the court, McCray wanted defense counsel to tell the court that he wanted to represent himself (XVIII 687-688). McCray also requested that he be allowed to sit in the courtroom (XVIII 688). McCray said that he would not interrupt (XVIII 688).

After the recess, the court noted that the defendant had been placed in a holding cell based on his disruptions (XVIII 689). The court noted that there was a TV in the holding cell, so McCray could see and hear the trial. *Id.* Defense counsel Tassone requested that McCray be permitted be in the courtroom if McCray agreed to follow the rules (XVIII 690). The court noted that McCray had previously told the court, "five or six times," that he would not disrupt the trial but did so anyway. The court permitted McCray to return to the courtroom on the condition that he not disrupt the trial, and warned counsel that if McCray disrupted the trial one more time, McCray would be removed from the courtroom permanently. The court stated that McCray was not going to interfere with the testimony as he had "been doing throughout this trial." McCray was returned to the courtroom and present in the courtroom for the trial. *Id.*

Preservation/waiver

This issue is preserved. McCray requested that he be allowed to proceed with hybrid representation. At a later point, McCray requested that counsel be discharged and that he be allowed to represent himself, which was granted. The court discharged counsel and allowed McCray to proceed *pro se* temporarily.

McCray, however, waived his right to self-representation by his conduct. The right of self-representation, however, is not a right to disrupt the courtroom. As the *Faretta* Court itself explained, a "trial judge may terminate self-representation by an accused who deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46, 95 S.Ct. at 2541. This Court has also

stated that it will not permit a defendant to "manipulate the proceedings by willy-nilly leaping back and forth between the choices of self-representation and appointed counsel and that it will refuse to permit "an intransigent defendant to completely thwart the orderly processes of justice" using the Sixth Amendment right to counsel. *Waterhouse v. State*, 596 So.2d 1008, 1014 (Fla. 1992). A defendant who abuses his right to self-representation may have that right revoked and have an attorney forced on him. Indeed, a court that removes a pro se defendant from the courtroom must appoint counsel in the defendant's absence. *People v. El*, 126 Cal.Rptr.2d 88, 90 (Cal. App. 2002)(explaining that a court who removed a defendant acting pro se from the courtroom for making repeated frivolous objections during the prosecutor's opening statement should have counsel to act in the defendant's absence rather that have the defendant be unrepresented but finding the error harmless).

In *United States v. Long*, 597 F.3d 720 (5th Cir. 2010), the Fifth Circuit explained that a defendant's disruptive and obstructionist conduct can waive the right of self-representation. Long was convicted of four counts of wilfully failing to file income tax returns. At first appearance, Long refused the services of the Public Defender but the district court appointed the public defender as stand-by counsel. A magistrate attempted to conduct a *Faretta* inquiry on several occasions but Long refused to answer the questions. *Long*, 597 F.3d at 723. The Fifth Circuit explained that the right to self-representation may be waived by a defendant's actions. *Long*, 597 F.3d at 726. Relying on *Faretta* itself, the Fifth Circuit

explained that a trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. *Long*, 597 F.3d at 726 citing *Faretta*, 95 S.Ct. at 2541 & n. 46. The Fifth Circuit characterized Long's behavior as "disruptive and obstructionist" and "extremely uncooperative." The Court noted that Long refused to answer the judge's questions, instead merely replying with "nonsensical statements." *Long*, 597 F.3d at 726. The district court concluded that Long's "Republic of Texas 'psychobabble'" was "intended to intimidate the court and frustrate the administration of justice." *Long*, 597 F.3d at 727. The Fifth Circuit concluded that Long's behavior may well have resulted in the waiver of his right to self-representation. *Long*, 597 F.3d at 727. *See also United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998)(concluding that the defendant's "obstreperous conduct" resulted in a waiver his right to represent himself and affirming district court's revoking the defendant's pro se status and mandating the appointment of counsel over the defendant's wishes).

In *Diaz v. Sec'y for the Dep't of Corr.*, 402 F.3d 1136, 1145-1146 (11th Cir. 2005), the Eleventh Circuit rejected a claim of ineffective assistance of appellate counsel for failing to raise the issue of the denial of the right of self-representation. The trial court had allowed previously allowed Diaz to represent himself but due to Diaz's conduct, the court mandated that Diaz be represented by counsel in the penalty phase. The Eleventh Circuit reasoned that the trial court properly forced Diaz to have counsel at the penalty because "Diaz sought to frustrate the completion of his trial by repeatedly

changing his mind regarding self-representation at the guilt phase of the trial" and "Diaz abused his right to self-representation to delay his trial." The Eleventh Circuit explained that the trial court properly decided that Diaz should be represented by counsel at the penalty phase.

Here, as in *Long*, the defendant waived his right of self-representation by his obstreperous conduct. McCray's behavior, just like Long's behavior, was "disruptive and obstructionist" and "extremely uncooperative." McCray would not follow the court's instructions regarding cross-examination of the particular witness. Instead, McCray insisted on addressing the matter of the missing FDLE forms rather than cross-examining the witness. The theft of these forms was totally irrelevant to this witness's testimony. Witness Logan was not from FDLE or the jail. Logan was a neighbor who heard the gunshots at 3:00am and called 911. Indeed, the subject of the missing FDLE forms was totally irrelevant to the entire trial. Who stolen the FDLE form from McCray's cell was not relevant in the slightest to the determination of whether McCray committed four counts of first- degree murder. Moreover, defense counsel no doubt had a copy of these forms.

McCray, like Diaz, abused the right of self-representation. It was perfectly proper for the court to mandate that McCray be represented by counsel, just as the trial court in *Diaz* did. Diaz changed his mind several times about whether to proceed pro se. Diaz's behavior was vacillating, not obstructionist. McCray's behavior was obstructionist.

A trial court is not required to tolerate this type of behavior and nonsense from a *pro se* defendant on pain of violating the Sixth Amendment right to counsel. The court had no choice but to terminate self-representation and to reappoint counsel to represent McCray. McCray waived his right to self-representation.

Standard of review

The standard of review of a request for self-representation is abuse of discretion. *Aguirre-Jarquin v. State*, 9 So.3d 593, 602 (Fla. 2009)(concluding that the standard of review of a court's handling of a request for self-representation is abuse of discretion, citing *Holland v. State*, 773 So.2d 1065, 1069 (2000)). While a motion for self-representation made before trial is reviewed *de novo*, a motion made during trial is reviewed for abuse of discretion. *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997)(explaining that after trial has begun with counsel, the decision whether to allow the defendant to proceed pro se rests in the sound discretion of the trial court); *State v. Pina*, 2010 WL 963485, 14 (Idaho 2010)(reviewing a denial of an motion for self- representation made after trial started for abuse of discretion); *People v. Lawrence*, 205 P.3d 1062, 106 (Cal. 2009)(explaining that while a timely, unequivocal *Faretta* motion invoked the non-discretionary right to self-representation, a midtrial motion was "addressed to the sound discretion of the court."). The first requests McCray made, however, were for hybrid representation.

Merits

The Sixth Amendment guarantees both the right to be represented by counsel and the right to self-representation. *Faretta v.*

California, 422 U.S. 806, 95 S.Ct. 2525 (1975). Of the two rights, however, the right to counsel is preeminent and hence, the default position. *United States v. Singleton*, 107 F.3d 1091, 1096-1097 (4th Cir. 1997).

While a defendant has a Sixth Amendment right to represent himself at trial, a defendant has no Sixth Amendment right to hybrid representation. *McKaskle v. Wiggins*, 465 U.S. 168, 183, 104 S.Ct. 944 (1984)(explaining that "*Faretta* does not require a trial judge to permit 'hybrid' representation."); *United States v. Cano*, 519 F.3d 512, 516 (5th Cir. 2008)(noting that there is no constitutional right to hybrid representations whereby the defendant and his attorney act as co-counsel); *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992)(noting that representation by counsel and self-representation are mutually exclusive rights). A defendant is not entitled to both represent himself and have counsel under either the federal constitution or Florida's constitution. *Sheppard v. State*, 17 So.3d 275, 279 (Fla. 2009) (reiterating the holding that there is no state constitutional right to hybrid representation at trial citing *State v. Tait*, 387 So.2d 338, 339-40 (Fla. 1980); see also *Mora v. State*, 814 So.2d 322, 328 (Fla. 2002)(observing "there is no constitutional right for hybrid representation at trial.")). It has been the law in Florida for over three decades that there is no right to hybrid representation.

As this Court explained in *Logan v. State*, 846 So.2d 472, 474-475 (Fla. 2003), the Sixth Amendment does not "guarantee that the accused can make his own defense personally and have the assistance of

counsel." *Logan*, 846 So.2d at 474, citing *State v. Tait*, 387 So.2d 338, 339-40 (Fla. 1980). "Likewise, article I, section 16 of the Florida Constitution does not embody a right of one accused of crime to representation both by counsel and by himself." *Logan*, 846 So.2d at 474 citing *Tait*, 387 So.2d at 340. A defendant "has no right, however, to partially represent himself and, at the same time, be partially represented by counsel." *Logan*, 846 So.2d at 475.

McCray was attempting to choreograph special appearances by himself while represented by counsel. *McKaskle*, 465 U.S. at 183, 104 S.Ct. 944 (explaining that a "defendant does not have a constitutional right to choreograph special appearances by counsel"). McCray's repeated statements that he was going to represent himself "right now at this time" were requests to act as co-counsel (XVII 599,600). That McCray was actually requesting hybrid representation became even clearer during the *Faretta* inquiry. During the inquiry, McCray stated: "I can still keep my counsel right now at this time and defend myself before this Court at the same time" (XVII 608). Appellate counsel even characterizes this as a "unequivocal request by McCray for self-representation or hybrid representation" (IB 57). The trial court properly denied the request for hybrid representation.

No *Faretta* inquiry was required because McCray did not represent himself at the guilt phase. He had counsel. Appellate counsel is fundamentally confused about when a *Faretta* inquiry is required. When a defendant is not permitted to represent himself and proceeds with counsel, whether correctly so or not, no *Faretta* inquiry is required. See *Butler v. State*, 767 So.2d 534, 536 (Fla. 4th DCA

2000)(noting that the landmark case of *Faretta*, "was not about the right of a defendant in a criminal case to be represented by counsel; it was about a defendant's right not to be represented by counsel."). A *Faretta* inquiry, which informs a defendant of the dangers and disadvantages of proceeding *pro se*, obviously, is only necessary when defendant is, in fact, requesting to represent himself. If the defendant has counsel, no *Faretta* inquiry is mandated. It is only at those points where McCray proceeded pro se that a *Faretta* inquiry was necessary.

McCray's reliance on *Tennis v. State*, 997 So.2d 375, 379 (Fla. 2008), is misplaced. In *Tennis*, this Court held that the failure to hold a *Faretta* hearing was per se reversible error. Tennis was convicted of first-degree murder and sentenced to death. Tennis filed two written motions to discharge counsel. At the hearing on one of the motions, Tennis stated: "I refuse to go to trial with him. I would like to go pro se ..." *Tennis*, 997 So.2d at 377. The trial court denied the motions and did not address Tennis' request to represent himself. This Court concluded that Tennis' statement at the hearing coupled with his pro se motions was an unequivocal and clear request for self-representation. This Court concluded that a *Faretta* inquiry was mandated after Tennis' unequivocal request for self-representation. *Tennis*, 997 So.2d at 380. The Court rejected the argument that the request was an attempt by *Tennis* to delay and frustrate the proceedings because there were no findings by the trial court that the purpose of the request for self-representation was to delay the trial.

Tennis does not apply. *Tennis* did not involve a request to proceed with hybrid representation. Nor was *Tennis* a case where the trial court attempted to allow the defendant to proceed pro se but had "no choice" but to reappoint counsel when the defendant refused to "stay on task." Here, unlike *Tennis*, there was a judicial finding that McCray was frustrating the trial. The trial court properly denied the request for hybrid representation and then properly made the defendant proceed with counsel once the defendant frustrated the trial.

Harmless error

The erroneous denial of the right to counsel or the right to self-representation is not subject to harmless error analysis. *Wiggins*, 465 U.S. at 177, n.8, 104 S.Ct. at 950. However, the denial of hybrid representations is not error.[6]

ISSUE IV

DID THE TRIAL COURT PROPERLY ALLOWED McCRAY TO PRESENT CLOSING ARGUMENT DURING PENALTY PHASE? (Restated)

McCray asserts that the trial court failed to conduct an adequate *Faretta* inquiry prior to allowing him to present closing argument in

[6] While not raised as an issue on appeal, the trial court properly ordered McCray temporarily removed from the courtroom for his improper interruptions. *Wilson v. State*, 753 So.2d 683, 689 (Fla. 3rd DCA 2000)(rejecting a claim that the trial court improperly removed the defendant from the courtroom whose "obstructive behavior began during a pre-trial hearing and continued throughout the trial" and characterizing that claim as one "in what can only be described as an attempt to expand the parameters of the Yiddish word 'chutzpah'").

penalty phase. There was no need for any *Faretta* inquiry. Defense counsel was not discharged. Furthermore, even if a *Faretta* was required, one was conducted. Indeed, several *Faretta* inquiries were conducted over the course of this trial. As McCray admits, a "proper *Faretta* colloquy" was conducted by a different judge earlier in the case. The *Faretta* inquiry conducted by the trial court just prior to the closing argument of penalty phase was truncated because this judge had previously warned McCray of the dangers and disadvantages of self-representation at an earlier point in the trial. McCray knew these dangers and disadvantages from these prior *Faretta* inquiries. Two different judges on two previous occasions had explained to McCray the dangers and disadvantages of not having an attorney. Thus, the trial court properly allowed the defendant to represent himself during closing argument of penalty phase.

The trial court's ruling

On December 1, 2004, Judge Buttner, conducted the arraignment on the grand jury indictment (XII 2220-2250). After the prosecutor read the indictment, McCray plead not guilty to the four counts of first-degree murder (XII 2224). McCray then told the court that he wanted to "deselect" his attorney (XII 2225). McCray did not want Mr. Tassone representing him "any longer for various number of reasons" (XII 2225). McCray asserted, among other complaints, that Mr. Tassone refused to file a motion to suppress the DNA evidence (XII 2226). McCray was not satisfied with Mr. Tassone and wanted to "deselect" him (XII 2226). McCray stated that "for the time being" he wanted "to represent himself and seek his own counsel" (XII

2226-2227). The court inquired into the complaints (XII 2227-2230). The court inquired of McCray how many cases he had tried and McCray responded: "None" (XII 2230). The court explained to McCray that discovery takes time and to work with, not against, his attorney (XII 2231-2232). The court found Mr. Tassone was being effective (XII 2233).

The court explained that while he had the right to represent himself, he did not have the right to pick and choose his lawyer (XII 2233). The court noted that McCray would be representing himself at his "own peril" (XII 2234). The court noted that the "last person that came in here and represented themselves I think the jury was out about 15 minutes." *Id.* The court told McCray that if he was getting advice in jail to represent himself, he should not listen to it. *Id.* The court advised McCray to listen to Mr. Tassone. *Id.*

McCray asserted that competent counsel would have argued the DNA evidence to the grand jury (XII 2234). The court asked McCray where he got the information about what the DNA showed. *Id.* McCray admitted he received that information from his lawyer (XII 2235). The court pointed that McCray received that information because the attorney was doing what he was supposed to. *Id.* The court attempted to explain grand jury proceedings to McCray (XII 2224). The court explained that he was not going to appoint a different attorney because he found Mr. Tassone to be acting as competent counsel (XII 2235-2236). The court explained that if McCray wanted to represent himself, he had a few question for him (XII 2239-2240). The court asked McCray if

was going to persist in firing his attorney and McCray responded: "Yeah" (XII 2240).

The court informed McCray that he wanted to go over some ways that having a lawyer represent him would be to his advantage (XII 2240). An attorney knows how to obtain information through discovery. An attorney could identify violations of constitutional rights. *Id.* Any attorney could ensure compliance with the speedy trial rule and the statute of limitations. *Id.* A lawyer has "experience and knowledge of the entire trial process" which could "enhance the jury selection process on your behalf" (XII 2240-41). A lawyer could advise "you on whether you should testify, the consequences of that decision and what yo have a right not to say." (XII 2241). "A lawyer has studied the rules of evidence and knows what evidence can or cannot come into you trial." *Id.* A lawyer could assist in assuring that the jury was given complete and accurate jury instructions. *Id.* Attorneys make effective closing argument and prevent improper argument by the prosecutor. *Id.*

A lawyer could ensure that trial errors were properly preserved for appellate review (XII 2241). An attorney experience could be useful in filing an appeal. *Id.* If he was convicted, a lawyer could bring favorable facts to the attention of the court for sentencing purposes. *Id.*

The court stated that is was "almost always unwise to represent yourself" (XII 2241-42). The court asked McCray if he understood that he would not get any special treatment form the court because he was representing himself (XII 2242). The court informed McCray

that he would not get a continuance of trial or hearing merely because he was representing himself. *Id.*

The court informed McCray that he would be limited to the legal resources that were available in jail (XII 2242). The court the explained that an attorney would not have such restrictions. *Id.* McCray asked whether he would get regular hours in the jail library (XII 2243).

The court explained that while McCray was not required to have the legal knowledge or skills of an attorney to be allowed to represent himself, but he would be required abide by the rules of criminal and courtroom procedure (XII 2243). The court explained that it took lawyers years to learn these rules.

The court also explained that if McCray did not abide by the rules, the court could terminated his self-representation (XII 2243). McCray responded: "Yes, sir." *Id.* The court explained to McCray that if he was disruptive the court would terminate self-representation and remove him from the courtroom and the trial would continue in his absence. *Id.*

The court explained that McCray access to the prosecutor would be "severely reduced" compared to a lawyer would could easily contact that prosecutor (XII 2243-2244). McCray responded: "Yes, sir" (XII 2244). The court also explained that the prosecutor was an experienced lawyer that would not go easier on the defendant because he was representing himself. *Id.*

The court noted that if McCray was convicted, he could not claim on appeal that his own lack of knowledge or skills was a basis for

a new trial (XII 2244). McCray responded: "Yes, sir." The court asked McCray if he understood these dangers and disadvantages? McCray responded: "Yes, sir, I do." The court asked McCray of he had any questions regarding the these dangers and disadvantages. McCray responded: "No, sir." *Id.*

The court explained that McCray was charged with four counts of first-degree murder (XII 2245). The court informed McCray that the penalty was life imprisonment or death. *Id.* The court informed McCray that the minimum sentence was life without parole. *Id.* The court asked McCray if he had any questions regarding the charges or penalties (XII 2246). McCray responded: "No, sir." *Id.*

The court explained that he needed to ask some questions to determine if McCray was competent to make a knowing and intelligent waiver of counsel (XII 2246). The court asked McCray how old he was and McCray responded: "25." *Id.* The court asked McCray if he could read and McCray responded: "Yes, sir." *Id.* The court asked McCray if he had any difficulty understanding English and McCray responded: "No, sir." *Id.* The court asked McCray how many years of school he had completed and McCray responded: "twelve" (XII 2246-2247). The court asked McCray if he graduated and McCray responded: "Yes, I did" (XII 2246). The court asked McCray where he graduated from and McCray responded: "Grand Park Correctional" (XII 2247). The court asked McCray where that school was located and McCray responded: "on Division Street in Jacksonville." *Id.* The court asked McCray if he was currently under the influence of drugs or alcohol and McCray responded: "No, sir, I'm not." *Id.* The court asked McCray if he had

ever been diagnosed or treated for a mental illness and McCray responded: "No, sir." *Id.* The court asked McCray if he had any physical problem that would hinder his self-representation, such as hearing problems, a speech impediment of poor eyesight. *Id.* McCray did not responded to that question. Instead, McCray requested that Mr. Tassone remain his lawyer (XII 2247). McCray stated that he was looking for another attorney and was planning on finding another attorney in the next couple of weeks but he wanted to keep Tassone "for right now" (XII 2247-2248). The court then ordered Mr. Tassone to remain on the case (XII 2248). McCray requested four weeks to hire new counsel. *Id.*

On September 2, 2008, During the guilt phase, Judge Wilkes, who tried the case, also conducted a *Faretta* inquiry (XVII 660). The court asked the defendant about his age. *Id.* The court asked the defendant about his education (XVII 661). The court asked the defendant about his experience in the legal field. The court warned the defendant that if he represented himself he was bound by the same rules of evidence and procedure that the lawyers are. The court explained to McCray that he would get no help from anyone if he represented himself and that he, the judge, could not help him. *Id.* The court explained to McCray that if an objection should be made and McCray did not make the proper objection, due to his lack of legal training, that was his responsibility. The court also explained that the penalty was "very serious." The court noted to McCray that he was charged with four counts of first- degree murder and that the penalty was either life without parole or death. *Id.* On

September 26, 2008, at the penalty phase, prior to closing argument, defense counsel Tassone, told the court that he wanted to consult with McCray regarding who was going to present closing argument - counsel or McCray (XIV 2611). After consulting with McCray, defense counsel told the court that McCray wanted to address the jury (XIV 2612). Defense counsel Tassone explained to the court that he had given McCray a summary of his proposed closing argument and McCray did not want counsel "to say that." Counsel had explained to McCray that the only way he could present closing argument himself was to exercise his right of self-representation. McCray had indicted to counsel that he wished to represent himself for purposes of presenting closing argument. *Id.*

The court explained to McCray that it was either him or counsel - that both of them could not present closing (XIV 2612). McCray responded: "all right then I'll do it." *Id.* The court then instructed McCray that closing argument in penalty phase was "limited to whether or not it ought to be death or life" and that while the court had permitted the defendant to testify as to other matters "what you did up here previously was not proper but I allowed it anyway." *Id.* The court instructed McCray that his closing argument had to be limited "to whether the jury ought to recommend death or recommend life based on mitigation and aggravation." *Id.* The court then asked McCray whether he would rather Mr. Tassone do that," to which McCray responded: "I'll do it" (XIV 2613).

The court, after swearing the defendant, noted that he had been represented up to this point by Mr. Tassone and Mr. Eler but that he

wanted to present closing argument himself (XIV 2613). The court conducted a brief *Faretta* inquiry (XIV 2612-2615). The court asked McCray if he understood that he was not trained in the law, to which McCray responded: "yes" (XIV 2613). The court asked McCray what kind of education he had, to which McCray responded: "I have a 12th grade education," and that he graduated from high school" (XIV 2613-2614). The court asked McCray if he went to college, to which McCray responded: "No" (XIV 2614). The court asked McCray how old he was, to which McCray responded: "I'm 28." *Id.* The court asked McCray if he had ever worked in the court system, to which McCray responded: "No, I haven't." *Id.* The court asked McCray if he knew the dangers and disadvantages of representing himself, to which McCray responded: "Yes, sir, I do." *Id.* The court asked McCray if he understood that defense counsel Mr. Tassone was "trained in the law" and had "many years experience handling these type cases," to which McCray responded: "Yes, sir, I do." *Id.* The court asked McCray if he understood that defense counsel understood what to say to try to convince the jury to save his life, to which McCray responded: "Yes, I do." *Id.* The court asked McCray if he understood that he was at a disadvantage if he tried to do that, to which McCray responded: "not really at a disadvantage" (XIV 2614-2615). The court asked McCray if he understood what he was getting into, to which McCray responded: "Yes, I do" (XIV 2615).

The court then ruled that he would allow the defendant to represent himself during closing argument (XIV 2615). After the

prosecutor presented the State's closing argument, the defendant presented his own closing argument (XIV 2616-2639; 2639-2561).

Standard of review

The standard of review of a request for self-representation is abuse of discretion. *Aguirre-Jarquin v. State*, 9 So.3d 593, 602 (Fla. 2009)(concluding that the standard of review of a trial court's handling of a request for self-representation is abuse of discretion citing *Holland v. State*, 773 So.2d 1065, 1069 (2000)).

Merits

The Sixth Amendment guarantees both the right to be represented by counsel and the right to self-representation. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975).

First, a *Faretta* inquiry was not required. Defense counsel was not discharged. McCray was acting as co-counsel. *Faretta* inquires are required only when defense counsel is discharged. *United States v. Cromer*, 389 F.3d 662, 679-683 (6th Cir. 2004) (holding, in a case where the defendant was allowed to personally cross-examine a witness, that *Faretta* warnings are not required prior to hybrid representation); *United States v. Leggett*, 81 F.3d 220, 223-224 (D.C.Cir. 1996)(rejecting a claim that the district court was required to engage in "short discussion on the record" regarding the "dangers and disadvantages of self-representation" in a case where the defendant engaged in hybrid representation by personally cross-examined witnesses and presented closing argument to the jury because "*Faretta* applies only where a defendant chooses to proceed pro se and thereby forgoes the benefits associated with the right to

counsel."); but see *United States v. Davis*, 269 F.3d 514, 519-520 (5th Cir. 2001)(concluding that *Faretta* warnings should be given any time the defendant assumes any of the "core functions" of counsel).

Moreover, even if a *Faretta* inquiry was required before allowing McCray to act as co-counsel, a proper *Faretta* inquiry was conducted. Indeed, two different judges on two previous occasions had explained to McCray the dangers and disadvantages of not having an attorney. McCray openly admits that Judge Buttner conducted at proper *Faretta* inquiry during the arraignment (IB 61). Moreover, during the guilt phase, Judge Wilkes, who tried the case, also conducted a partial *Faretta* inquiry (XVII 660-661). At this earlier point in the trial, the court warned McCray that he was bound by the same rules of evidence and procedure that the lawyers are; that he, the judge, could not help him; that he needed to make proper objections but lack the training to know what objections to make; that he was charged with four counts of first degree murder and that the penalty was either life without parole or death. Once a full, proper *Faretta* inquiry is conducted, additional inquiries are not required. Multiple *Faretta* inquiries to inform the defendant yet again of the dangers and disadvantages of self-representation are not required. Once is enough. *United States v. Nunez*, 137 Fed.Appx. 214, 2005 WL 1389947 (11th Cir. June 13, 2005) (unpublished)(concluding there was no error in failing to conduct a second *Faretta* hearing after the defendant's competency was restored where a first *Faretta* hearing had been conducted less than four months earlier); *People v. McDowell*, 2006 WL 2664333, *3-*5 (Cal. App. September 18, 2006)(unpublished)(holding that failure to

conduct a second full *Faretta* inquiry was not error because "it is clear that defendant knowingly waived his rights at the arraignment, and that the court's limited readvisement post-trial, in conjunction with all prior proceedings, establishes that defendant knowingly and intelligently waived his rights" where defendant represented himself at arraignment after the first full *Faretta* inquiry, but was represented by counsel at trial and then wished to represent himself again at the trial on his prior convictions conducted for sentencing purposes and explaining that an appellate court examines the whole record, not just the second *Faretta* inquiry itself, to determine the validity of the defendant's waiver of the right to counsel, citing *People v. Crayton*, 48 P.3d 1136 (Cal. 2002)).

While the rule of criminal procedure governing providing counsel to indigents, rule 3.111(d)(5), requires the trial court to renew the offer of counsel at every stage, the rule does not require additional *Faretta* inquiries at every stage. The rule reflects an understandable policy in favor of representation by counsel. In other words, this Court is hoping that a defendant, who is proceeding *pro se*, will change is mind and request counsel at the next stage. But neither the rule nor the policy behind the rule require that a trial court conduct multiple *Faretta* inquires. Once is enough.

Standard *Faretta* inquiry

In 1998, this Court attached a "model *Faretta* colloquy," developed by the Conference of Circuit Judges (CCJ), as an appendix to an order amending rule 3.111. *Amendment to Fla. Rules of Crim. Pro. 3.111(d)(2)-(3)*, 719 So.2d 873 (1998). "However, a trial judge is

not required to follow the colloquy word for word." *Aguirre-Jarquin v. State*, 9 So.3d 593, 602 (Fla. 2009). "Rather, the essence of the colloquy is to ensure the defendant makes a knowing and voluntary waiver of counsel." *Id.*, citing *Porter v. State*, 788 So.2d 917, 927 (Fla. 2001).

In *McKenzie v. State*, 29 So.3d 272 (Fla. 2010), this Court addressed a claim that the *Faretta* inquiry was inadequate because the trial court omitted any questioning regarding the defendant's prior experience with the criminal justice system. McKenzie was convicted of two counts of first-degree murder and sentenced to death for both murders. *McKenzie*, 29 So.3d at 277-278. During a pre-trial hearing, McKenzie, who was frustrated with his counsel's waiver of speedy trial and the delays caused by counsel's insistence on investigating mitigation, stated that he did not want counsel. *McKenzie*, 29 So.3d at 276. The court conducted a *Faretta* hearing and then allowed McKenzie to represent himself. *McKenzie*, 29 So.3d at 276-277. After the guilty verdict, McKenzie requested counsel be appointed for penalty phase and the court appointed counsel. *McKenzie*, 29 So.3d at 277. McKenzie changed his mind the next day and asserted his right to self-representation. *McKenzie*, 29 So.3d at 277. The court conducted a second *Faretta* hearing and allowed McKenzie to represent himself at the penalty phase.

On appeal, McKenzie asserted that the *Faretta* inquiry was detective because the court did not inquiry as to McKenzie's prior experience with the legal system. *McKenzie*, 29 So.3d at 280-283. This Court concluded that this single omission did not warrant a new

trial. This Court noted that the United States Supreme Court in *Faretta* did not require a particular colloquy be conducted. *McKenzie*, 29 So.3d at 280. Rather, the *Faretta* Court only required that a defendant should be made "aware of the hazards and disadvantages of self-representation" to the extent that the "defendant knew what he or she was doing and made the choice with eyes open." *McKenzie*, 29 So.3d at 280-281. This Court concluded that the *Faretta* inquiry which omitted certain questions, nonetheless, was adequate. *McKenzie*, 29 So.3d at 282.

The *Faretta* inquiry conducted by Judge Buttner during the arraignment was almost a verbatim recitation of the CCJ model *Faretta* inquiry. Judge Buttner covered the advantages section; the dangers and disadvantages section; the charges and consequences section and part of the competency to waive section before McCray reasserted his right to counsel. The critical part of *Faretta*, the part required by the Supreme Court decision's, regarding dangers and disadvantages of self-representation was completely covered. While this inquiry occurred a couple of years earlier than the penalty phase, McCray had been told the dangers and disadvantages as part of this particular case. Moreover, Judge Wilkes renewed some of the warnings about the dangers of self-representation just twenty-four days earlier.

Furthermore, the CCJ model *Faretta* inquiry is overkill. The federal model *Faretta* inquiry only asks fourteen questions rather than the twenty questions with numerous subparts in Florida's model. Bench Book for United States District Judges § 1.02 (3d ed. 1986);

United States v. McDowell, 814 F.2d 245, 251-252 (6th Cir. 1987).[7] While providing a model *Faretta* is certainly helpful to trial courts, this model is too involved.

[7] The fourteen questions are:

1. Have you ever studied law?
2. Have you ever represented yourself or any other defendant in a criminal action?
3. You realize that you are charged with (state the crimes defendant is charged with) crimes?
4. You realize that if you are found guilty of the crime charged in count I the court could sentence you to as much as (state the number of years in prison) and fine you as much as (state the amount of fine)?
5. You realize that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is one after another?
6. You realize that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
7. Are you familiar with the Federal Rules of Evidence?
8. You realize that the Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?
9. Are you familiar with the Rules of Criminal Procedure?
10. You realize that those rules govern the way in which a criminal action is tried in superior court?
11. You realize that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand tell your story. You must proceed question by question through your testimony.
12. I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.
13. Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?
14. Is your decision entirely voluntary on your part?

Moreover, regardless of any model, the Supreme Court only mandates that the inquiry explain the dangers and disadvantages, not the advantages, not the charges or the consequences, not access to the prosecutor, not any background information, only the dangers and disadvantages. Indeed, many of the questions in the competency to waive counsel section are irrelevant because how a defendant answers the question cannot be the basis of the denial of the right to self-representation. For example, the question about the defendant's age is meaningless. If a defendant answers the question with 18 years old or 81 years old is of no moment because both have the right to represent themselves. The same observation is equally true of the question of how many years of school the defendant completed. The only relevant question in this section is if the defendant has ever been diagnosed and treated for a mental illness and even that question should be amended to read a major mental illness. *Indiana v. Edwards*, 554 U.S. -, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008)(denying the right of self-representation to a defendant who suffered from schizophrenia and delusions); *United States v. Berry*, 565 F.3d 385, 391 (7th Cir. 2009)(opining that "severe" mental illness is a condition precedent to denying the right of self-representation).

This was a reasonable compromise between two mutually exclusive rights - the right to self-representation and the right to counsel. Thus, the court properly allowed McCray to presenting closing argument in penalty phase.

ISSUE V

DID THE COURT ERR IN FAILING TO ISSUE A WRITTEN FINDING OF COMPETENCY? (Restated)

On November 11, 2006, Dr. Glen Watson and Tammy Lander of the Florida State Hospital submitted a report, forwarded to the trial court, concluding that McCray was now competent to stand trial (XVI 788-94). The parties discussed this report at a December 6, 2006 hearing (XII 2397-XIII 2401). Based upon the report, McCray's counsel and the prosecutor stipulated to the finding that McCray was then competent to stand trial (XII 2400). Based upon this stipulation, the court received the report and announced, "I'll find Mr. McCray competent under the meaning of the laws of the State of Florida" (XIII 2401). The record does not disclose that the court ever filed a written order finding McCray competent to proceed.

Twenty months later in August 2008, McCray still had not gone to trial, and underwent another competency evaluation, after which the court found him competent to proceed (X 1814-17).

Florida Rules of Criminal Procedure 3.212(c)(7), requires the court, upon finding that a committed defendant is competent to stand trial to "enter its order so finding and shall proceed." McCray complains that the court failed to file a written order adjudging him competent to proceed.

The State notes that the rule, which has existed in the rules of criminal procedure virtually unchanged since 1973,[8] does not require a "written" order. However, some district court of appeal opinions have suggested that the rule requires a written order. For instance, McCray cites *Martinez v. State*, 851 So.2d 832 (Fla. 1st DCA 2003), for this proposition. *Martinez* cites *Marshall v. State*, 351 So.2d 88 (Fla. 2d DCA 1977), for this rule, which in turn cites *Emerson v. State*, 294 So.2d 721 (Fla. 4th DCA 1974). *Emerson* appears to be the first opinion construing the new rule and finding a written-order requirement, as follows:

> Though not raised in the briefs, we note the only indication in the record of an adjudication of competency to stand trial is a docket entry that such a finding was made. It is our view that Rule 3.210, RCrP, 33 F.S.A., and *Rodriguez v. State*, Fla.App.1970, 241 So.2d 194, require a written order of the court determining the defendant to be competent to stand trial.

[8]Florida Rules of Criminal Procedure 3.210(a)(4) (1973), read as follows: "If at any time after such commitment the Court decides, after hearing, that the defendant is competent to stand trial, it shall enter its order so finding and declaring the defendant sane, after which the Court shall proceed with the trial." *In re Florida Rules of Criminal Procedure*, 272 So.2d 65 (Fla. 1972).

Emerson.[9] In short, the written-order requirement that the district courts have imposed stems from a 1974 decision where the only indication in the record of an adjudication of competency was a docket entry, and the court's "view" that the rule requires a written order.

The State contends that neither *Martinez* nor any other case has properly held that a court must file a written competency order to comply with what is now rule 3.212(c)(7), and that the failure to do so invariably requires remand for a *nunc pro nunc* order. This requirement was imposed in a case where the record reflected no basis for the finding of competency. The State submits that such a requirement, which again is not found in the text of the rule, is unnecessary where the basis for the finding of competency clearly appears in the record.

Generally, the requirement of a written order is imposed to facilitate appellate review. See e.g. *Campbell v. State*, 571 So.2d 415, 420 (Fla. 1990)(capital sentencing court must expressly consider in its written order each established aggravating and mitigating circumstance in order to facilitate appellate review); *Hernandez v. State*, 946 So.2d 1270 (Fla. 2d DCA 2007)(court determining admissibility under section 92.565 must "make specific findings of fact on the record or in writing to facilitate appellate review"); *Fetzer v. State*, 723 So.2d 907 (Fla. 1st DCA 1999)(Written reasons for contempt order are necessary to facilitate appellate review); *Schmidt v. State*, 468 So.2d 1112 (Fla. 1st DCA 1985)(written reasons

[9]*Rodriguez v. State* involved an earlier version of the insanity statute that did not contain the same language.

for departure sentence required to facilitate appellate review). It is noteworthy that the requirement for written reasons for departure to be in writing noted in *Schmidt*, now permits a "written transcription of reasons stated orally at sentencing" to suffice. § 921.00265, Fla. Stat. This change reflects the current easy availability of transcripts to facilitate appellate review.

In short, there is no reason for this Court to impose a written-order requirement for a competency finding when the record clearly reflects the reason for the finding, and is clearly sufficient to facilitate appellate review. This is especially true here, where the defendant stipulated to competency, and where the competency finding preceded a separate competency proceeding 20 months later when the defendant had still not gone to trial, rendering the 2006 competency finding essentially irrelevant. Under these circumstances, it would be a waste of time and judicial resources to remand this case for a competency order. The court below did not err.

ISSUE VI

DID THE COURT ABUSE ITS DISCRETION IN PERMITTING THE STATE TO INTRODUCE COLLATERAL-CRIME EVIDENCE RELEVANT TO APPELLANT'S MOTIVE FOR THE MURDERS? (Restated)

The admissibility of collateral crime evidence is within the discretion of the trial court, and the trial court's ruling shall not be disturbed upon review absent an abuse of that discretion. *Hodges v. State*, 885 So.2d 338, 357 (Fla. 2004).

The trial court's ruling and the testimony

Prior to trial the State filed a Notice of Other Crimes, Wrings or Act Evidence, seeking to introduce "any and all evidence related to Defendant's February 12, 2004 arrest as a result of the execution of a search warrant at 1018 - B Blanding Boulevard, Orange Park, Florida, including but not limited to any statements made by Defendant to anyone during or after the same arrest" (VIII 1579). McCray later filed a motion in limine to exclude the same evidence (VIII 1591). At the hearing on the motion, the State supported its argument with cases that held that the prosecution in a murder case could "point out a particular defendant is a drug dealer" (XIII 2582). The prosecutor continued: "in our case it's very clear from the multiple, multiple depositions that were taken that's exactly what this man had been doing for quite some time. **In fact, was a drug supplier of this house**." *Id.* The prosecutor explained that McCray had been arrested for possession of cocaine on February 12, and had told people that he wanted to find out who was responsible for "telling on him" and had made inquiries on the street regarding which people were giving information to authorities about his drug dealing (XIII 2583-85). The prosecutor explained that he sought to admit this evidence established McCray's motive to kill the victims: "our purpose in admitting this to the jury is to show a jury why he chose to kill the people that he chose in that house and it relates directly back to that drug raid some 90, 100 days prior to the murders (XIII 2585). After hearing, the court "granted" the State's Notice, permitting the State to introduce the evidence (X 1813).

Prior to any testimony about the McCray's drug arrest, the court told the jury that the collateral-crime evidence could be considered only for the limited purpose of proving motive directed them to consider it only as it relates to that issue, because McCray was not on trial for a crime (XVIII 813). Eric Goodman testified that McCray was arrested in a raid on February 12, and that afterward he asked whether he knew if anybody that was arrested with him at the time of that raid was "wearing a wire or was being an informant to the police ..." (XVIII 814-16). Travis Russell also testified that McCray asked him whether he believed anyone was wearing a wire during the raid (XX 1159-64). Amanda Long testified that McCray had said to her that he was going to find out who had told on him to police (XX 1145-48).

Kevin Cunningham testified that he was familiar with the house that was raided, and that McCray "supplied the crack" in the house (XVIII 841). McCray objected, arguing that the testimony regarding the supply of cocaine was unrelated to the motive ground for admission of the testimony previously admitted (XVIII 842). The prosecutor replied that "the whole purpose of the motive is to show that this defendant had an interest in that house," and that his arrest in February of 2004 curtailed or hindered that delivery of drugs to that house." *Id.* The prosecutor argued that this testimony was exactly the purpose of the collateral-crime evidence for which the State received pretrial approval. The prosecutor also noted that State's memorandum of law in support of the evidence included Cunningham's entire deposition (XVII 845-46). The court allowed the prosecutor to move on (XVII 846).

Detective Hall testified regarding the February 12 raid, noting that the police had information that McCray was supplying drugs to the house (XX 1123-24).

In closing, the State did in fact argue that McCray's motive for killing was retribution for the February 12 arrest (XXI 1446-1452).

Merits

Section 90.404(2), Florida Statutes, permits the trial court to admit evidence of similar crimes if that evidence is relevant to prove a material fact in issue and does not derive its relevancy solely from its tendency to prove defendant's bad character or propensity to engage in criminal behavior. See *Bryan v. State*, 533 So.2d 744, 746 (Fla. 1988). On its face, section 90.404(2) only addresses "similar fact evidence." However, "the admissibility of other crimes evidence is not limited to crimes with similar facts." *Zack v. State*, 753 So.2d 9, 16 (Fla. 2000). See also *Pittman v. State*, 646 So. 2d 167, 170 (Fla. 1994)("[E]vidence of bad acts or crimes is admissible without regard to whether it is similar fact evidence if it is relevant to establish a material issue."). Applying the general rule of relevance (section 90.402), the trial court may admit evidence of crimes factually dissimilar to the charged crime, as long as it is relevant. *Bryan* at 746; Charles W. Ehrhardt, *Florida Evidence,* § 404.17 (2009 ed.):

> Evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not *Williams* rule evidence. It is admissible under section 90.402 because it is a relevant and inseparable part of the act which is in issue. It is necessary to admit the evidence to adequately describe the deed.

Thus, section 90.404 governs the admissibility of similar fact evidence, whereas section 90.402 controls the admissibility of dissimilar fact collateral-crime evidence. See *Jorgenson v. State*, 714 So.2d 423, 427 (Fla. 1998)("[I]f evidence of a defendant's collateral bad acts bears no logical resemblance to the crime for which the defendant is being tried, then section 90.404(2)(a) does not apply and the general rule in section 90.402 controls.").

Regardless of whether collateral-crime evidence is similar to the charged crime, relevancy is the key to admissibility. When properly admitted as relevant information, collateral crime evidence enables the jury to view the entire context out of which the charged criminal conduct arose. See *Jackson v. State*, 522 So. 2d 802, 805 (Fla. 1988)("Among the other purposes for which a collateral crime may be admitted under *Williams* is establishment of the entire context out of which the criminal conduct arose"); *Wright v. State*, 19 So.3d 277 (Fla. 2009)(permitting evidence that is "a relevant and interwoven part of the conduct that is at issue. Where it is impossible to give a complete or intelligent account of the criminal episode without reference to other uncharged crimes or bad conduct, such evidence may be used to cast light on the primary crime or elements of the crime at issue").

Collateral-crime evidence establishing motive is admissible. See *Jorgenson*, 714 So.2d at 427-28 (Fla. 1998)(evidence that the defendant was a drug dealer was admissible to his motive for murder because it established that the victim was part of the defendant's

drug business, that the victim had stolen from the defendant, that the victim had threatened to turn the defendant in if he were to cut off her drug supply, and that the defendant threatened to get rid of anyone who interfered with his drug business); *Craig v. State*, 510 So.2d 857, 863 (Fla. 1987)(finding that evidence of the defendant's thefts was relevant to show his motive for killing Eubanks and Farmer and "an integral part of the entire factual context in which the charged crimes took place"); *Tumulty v. State*, 489 So.2d 150, 153 (Fla. 4th DCA 1986)(finding that evidence of the defendant's prior drug smuggling in a murder prosecution was "inextricably intertwined" with the crime because it demonstrated that the killing resulted from the defendant's need to get an drug-smuggling airplane back from the victim).

Applying these principles, it is clear that the court did not err in admitting the disputed evidence here. The State's theory of the case was that McCray killed the victims in retribution for their role in earlier his arrest. McCray does not appear to dispute this conclusion, but complains that the evidence became an impressible "feature of the trial" so that a new trial is required, and that the evidence exceeded the court's pretrial order permitting the use of collateral-crime evidence.

Collateral-crime evidence that is otherwise admissible can nonetheless result in reversal if it is "disproportionate" to the evidence relating to the charged crime. Williams v. State, 117 So.2d 473, 476 (Fla. 1960). For instance in Turtle v. State, 600 So.2d 1214 (Fla. 1st DCA 1992), the court held that the collateral crimes had

become an impermissible feature of the trial "in respect to both the quantum of evidence and the arguments of counsel." Turtle at 1218. The collateral crime evidence in Turtle "consumed more than half of the trial proceedings, and the prosecutor "repeatedly referred" to the collateral crime during closing arguments. Id.

The State here did not make the collateral-crime evidence an impermissible feature of the trial. A proper "feature of the trial" analysis examines whether collateral-crime evidence "was given undue emphasis by the state and was made a focal point of the trial." State v. Lee, 531 So.2d 133 (Fla. 1988). McCray lists every mention of the collateral-crime evidence at trial, but cannot demonstrate that the evidence was given undue emphasis. The evidence here was not evidence of a similar collateral crime offered to show that McCray perpetrated the charged crime; it was the very basis for McCray's motive to kill the victims. Nonetheless, the State's use of this evidence did not in any way seek to malign McCray's character merely because he was a drug dealer who had been arrested for drug dealing. The evidence was presented solely and explicitly to allow the jury to understand why McCray killed the victims. While McCray's drug dealing and the February 12 arrest were explored through five different witnesses (all of whom, the State contends, testified to different aspects of the drug-related matters and were therefore not improperly cumulative), in no way was the trial an unfair exploration of McCray's drug crimes that outweighed evidence of the murders for which he was on trial.

Moreover, while McCray correctly notes that volume of collateral-crime evidence alone cannot determine whether it became an impermissible feature of the trial, it is still relevant. See *Turtle*. In this case, only a very small portion of the evidence related to the collateral crimes, in spite of the fact that these crimes were such a large part of the State's theory of the case. Any "emphasis" given to the collateral-crime crime evidence was in no way "undue."

McCray's argument that the evidence exceeded the scope of that permitted in the court's pretrial order fails as well. First, the prosecution was not even required to seek pretrial approval of this evidence pursuant to section 90.404(2)(b), Florida Statutes. Ehrhardt, § 404.17 at 262 ("Because [inextricably intertwined collateral-crime] evidence is admissible under section 90.402, rather than 90.404(2), the ten day notice provision in section 90.404(2) is not applicable," citing *Griffin v. State*, 639 So.2d 966, 969 (Fla. 1994) and *Smith v. State*, 866 So. 2d 51, 60–62 (Fla. 2004)). Because the State was not required to give pretrial notice of this evidence, McCray cannot complain that it exceeded the scope of the notice.

Even if the State were required to give notice, the court did not abuse its discretion in finding that the evidence did not exceed what the court had authorized. Given the amount of material the State included in its notice, as well as the argument on the notice where the prosecutor specifically indicated that McCray's status as a supplier of the drug house was part of its theory of McCray's

motivation, McCray cannot contend that he was not aware that such testimony was part of the evidence sought in the notice or that he was surprised at trial by this evidence. As the court did not abuse its discretion in its ruling on this issue, McCray has failed to demonstrate error, much less reversible error.

ISSUE VII

DID THE TRIAL COURT ERR IN DETERMINING THAT COMPETENT SUBSTANTIAL EVIDENCE SUPPORTED A FINDING OF COMPETENCY? (Restated)

Trial court ruling

During jury selection on July 28, 2008, McCray was persistently disruptive, constantly interrupting proceedings and defying the trial court's orders (XIV-XV 1-362). The following day defense counsel filed a Suggestion of Incompetence (IX 1770-772). The court ordered Drs. Meadows, Krop, and Miller to evaluate McCray (X 1801-04). Dr. Krop and Dr. Miller concluded that McCray was not competent to proceed (XXVI 765-66, 767-780), but Dr. Meadows concluded that he was competent (XXVI 781-87). The court conducted a hearing at which all the doctors testified (XVI 379-526), followed by an order finding McCray competent to proceed (X 1814-17).

Standard of review

"[W]hen analyzing a competency determination on appeal, this Court applies the competent, substantial evidence standard of review to the trial court's findings. In other words, a trial court's determination of competency supported by competent, substantial evidence will not be disturbed on appeal." *Gore v. State*, 24 So.3d

1, 10 (Fla. 2009). See also *Hernandez-Alberto v. State*, 889 So.2d 721 (Fla. 2004)("Even though there is conflicting evidence on the issue, the trial court's determination is supported by competent, substantial evidence and will not be disturbed on this appeal").[10]

Merits

"In determining whether a defendant is competent to stand trial, the trial court must decide whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the proceedings against him." *Boyd v. State*, 910 So.2d 167, 186 (Fla. 2005). "The trial court's function in making this determination is to resolve factual disputes arising from different expert opinions. *Id.* at 187. The court here met this requirement, resolving the conflicting testimony in favor of McCray's competency. Because competent substantial evidence supported this finding, it should be be disturbed.

The court's order shows that it considered all relevant evidence. The order addresses the reports and the testimony of all

[10]McCray erroneously cites *Sanchez-Velasco v. Sec'y of Dept. of Corr.*, 287 F.3d 1015 (11th Cir. 2002), for the proposition that a trial court's competency determination can be reversed "if the party challenging the inmate's mental competency comes forward with evidence that clearly and convincingly establishes incompetency." This standard governs a federal court's consideration of a state inmate's federal habeas corpus petition pursuant to 28 U.S.C. s. 2254, generally when the inmate has provided evidence at a federal hearing to challenge the state-court finding. This standard is wholly irrelevant to this Court's consideration of a trial court's competency order on direct appeal.

three experts, the representations of McCray's counsel, and the court's own observations of Mc. The court described Dr. Meadows' observations and conclusions as follows:

> Dr. Meadows submitted a report dated August 11, 2008 and testified that he attempted to interview the Defendant, but the Defendant did not want to participate in the evaluation. Dr. Meadows noted that in explaining his unwillingness to be interviewed, the Defendant was "relevant" and "lucid." In forming his opinion about the Defendant, Dr. Meadows listened to recorded phone calls of the Defendant and his mother, television news coverage of the Defendant's appearance in court, 2005 and 2006 psychological evaluations as to the Defendant's competency, the Clay County jail logs of the Defendant's daily activities, as well as other records. While Dr. Meadows characterized the Defendant as having an antisocial personality, he found that the Defendant was competent and malingering likely because the Defendant is facing court counts of murder and a potential death sentence.

(X 1816).

The court's finding that McCray was competent to proceed is amply supported by the evidence, in particular the report and testimony of

Dr. Meadows. Dr. Meadows' report concluding that McCray was malingering and exhibiting antisocial personality disorder was based on McCray's refusal to be interviewed for the examination, his "vague and inconsistent" reports of auditory hallucinations, his uncooperative and hostile behavior at Florida State Hospital (FSH), and the FSH staff reports that the uncooperative behavior was volitional and similar in nature to his outbursts at jury selection (XXVI 786). Meadows noted that McCray exhibited no overt signs of mental illness in the detention facility, where he was subject to fifteen-minute checks, and that McCray was showed lucid, coherent, organized speech in his phone calls to his mother on the day of jury selection. *Id.* Meadows also reviewed a video recording of his outburst during jury selection, which "did not impress this examiner as being related to mental illness." *Id.*

Meadows also noted McCray's "manipulative behavior" in past examinations. For example, when Meadows attempted to interview McCray for an earlier competency proceeding in 2005, McCray "presented in a dramatic fashion and was portraying himself as mute," even though he immediately began speaking to others after he was found incompetent to proceed (XXVI 786-87). Meadows also noted that detention facility records indicated that the McCray "spoke in a deliberately conscious way outside of meetings with forensic examiners" (XXVI 787). Referring to his diagnosis of antisocial personality disorder, Meadows observed that it was not uncommon for features of that disorder, such as "hostility, manipulativeness, a strong sense of entitlement, impulsivity, and oppositional behavior,

to intensify when an individual is under a great deal of stress." *Id.* While Meadows opined that McCray's disruptions in court were likely to continue, he concluded that the disturbances were not a product of mental illness and that he was, therefore, competent to proceed. *Id.*

McCray devotes a great deal of his argument on this issue to the contrary conclusions of Dr. Krop and Dr. Miller. To the extent that these witnesses drew different conclusions about McCray's competency than Dr. Meadows, the court resolved this conflict in favor of Meadows' conclusions. Moreover, the weight the court gave to Miller's conclusions may have been influenced by the fact that Miller had never met or known about McCray until after the court ordered a competency evaluation some three and one-half weeks earlier, whereas Dr. Meadows had direct involvement in this case since 2005 (XVII 497). Moreover, Miller had not watched any video recording of jury selection that led to the competency evaluation in the first place, did not listen to the recording of McCray's telephone call to his mother the same day, and had never been qualified as an expert or given a competency opinion before (XVI 479 512, 515).

McCray's competency claims are similar to those raised by the defendant in *Gore v. State*. This Court resolved that claim as follows:

> Although the court heard testimony from Dr. McInnes that Gore was incompetent, the court also heard conflicting evidence from Dr. Ruiz and Dr. Suarez that Gore was competent. The trial court also observed Gore's behavior first-hand and had the benefit of the record from the prior competency proceedings at trial in this case, as well as the Columbia County case. Because the

> court's competency determination is supported by the testimony from Dr. Ruiz and Dr. Suarez, the court's own observations of Gore's behavior, and the prior proceedings in the Columbia County case, the court did not err in finding Gore competent to proceed in his postconviction proceedings.

Gore, 24 So.3d at 10.

The same applies here. The court was justified in resolving the dispute regarding McCray's competency in favor of a finding of competency based on competent substantial evidence in the record and its own observations of McCray. As such, McCray has failed to demonstrate reversible error.

ISSUE VIII

> DID APPELLANT PRESERVE THIS ISSUE FOR APPELLATE REVIEW, AND IF SO, DID THE COURT ABUSE ITS DISCRETION IN DENYING A MOTION FOR MISTRIAL BASED UPON ALLEGED PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT? (Restated)

During the State's guilt-phase closing argument, McCray's counsel made no objections (XXI 1446-1458). After the conclusion of the State's argument, McCray moved for mistrial, arguing that the prosecutor engaged in "improper name calling," meant to "incite the passions of the jury (XXI 1458-59). In particular, McCray noted that the prosecutor used the phrase "brutally murdered" approximately three times; the word "eliminated" approximately three times; the word "savage" once; the phrase "selected prey" once; the word "hunted" once and the word "executed" once (XXI 1459). Defense counsel claimed that such "name calling" rose to the level that required a mistrial. *Id.* The prosecutor responded that he did not refer to

McCray by any derogatory term and that the comments were fair argument (XXI 1559-1460). The court denied the motion (XXI 1460).

Preservation

In spite of McCray's motion for mistrial, he has not preserved this issue for appellate review for two reasons. First, a mistrial cannot be predicated on alleged errors to which the defendant did not contemporaneously object. See *Norton v. State*, 709 So.2d 87 (Fla. 1997). In *Norton*, the defendant complained that a witness made an improper comment during testimony. *Norton* at 94. Rather than object when the witness made the improper comment, the defendant waited until the close of the witness' testimony at which time he moved for a mistrial. This Court held that the defendant did not preserve the objection for review:

> [D]efense counsel's failure to raise a contemporaneous objection to the comment at the time it was made waived his right to argue this issue on appeal. The purpose of the contemporaneous objection rule is to place the trial judge on notice that an error may have occurred and provide him or her with the opportunity to correct the error at an early stage of the proceedings. A timely objection must be made in order to allow curative instructions or admonishment to counsel. **Thus, despite appellant's motion for mistrial at the close of the witness's testimony, his failure to raise an appropriate objection at the time of the impermissible comment failed to adequately preserve the issue for appellate review**. (Citations and quotations omitted).

Id. See also *Deliford v. State*, 505 So.2d 523, 524 (Fla. 3d DCA 1987)(rejecting claim that the trial court erred in denying a defense motion for a mistrial based on the prosecuting attorney's closing argument to the jury because "the defendant did not object to the complained-of argument until after the prosecuting attorney had

completed his argument, and, accordingly, the point has not been properly preserved for appellate review"); *DuBoise v. State*, 520 So.2d 260, 264 (Fla. 1988)(argument that the trial court erred in denying a motion for mistrial based upon the prosecutor's improper remarks during closing argument was not preserved since the motion was made after the jury had been given its instructions and had retired for deliberations).

The same is true here. Rather than objecting to the prosecutor's comments when they were made, which if improper could have resulted in "curative instructions or admonishment to counsel," *Norton*, McCray did nothing except tally the comments and then announce his objection to them after the prosecutor concluded his closing. It could even be suggested that counsel chose not to take action that might actually allay any prejudice from these prosecutorial remarks for the very reason that he would rather move for mistrial instead. The issue is not preserved.

In addition, some of the claims McCray raises on appeal were not presented below. McCray specifically argued below that the prosecutor engaged in "name calling" when referring to McCray's actions, specifically indicating the objectionable words, and that such name-calling was improperly intended to "incite the passions of the jury." While McCray generally repeats this argument on appeal, he adds other arguments that were not presented below. McCray never argued below that the State made an improper "Golden Rule" argument or that it employed an improper "imaginary script" to describe the murders. As such, even if McCray had properly objected below, the

portions of his argument that were not presented below still would not be preserved for review. See *Johnson v. State*, 969 So.2d 938, 954 (Fla. 2007)(an issue is not preserved when grounds for reversal argued on appeal are not the same as those raised in the objection below).

Because McCray did not preserve this issue for review, he must demonstrate that the comments amount to fundamental error. § 924.051(3), Fla. Stat. ("An appeal may not be taken unless the issue is properly preserved or, if not properly preserved, would constitute fundamental error"). Fundamental error is error that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, 484 (Fla. 1960). "For an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process." Castor v. State, 365 So.2d 701, 704 n. 7 (Fla. 1978). "Specifically, prosecutorial misconduct constitutes fundamental error when, but for the misconduct, the jury could not have reached the verdict it did." Farina v. State, 937 So.2d 612, 629 (Fla. 2006), citing Miller v. State, 782 So.2d 426, 432 (Fla. 2d DCA 2001). "[R]arely will an error be deemed fundamental." F.B. v. State, 852 So.2d 226 (Fla. 2003). Under these standards, Appellant is not entitled to relief.

McCray claims that the prosecutor's argument where he describes the murders constitutes a "Golden Rule violation" because it invited the jury to place themselves in the shoes of the victims (IB 86). This

claim takes the disputed argument out of context, which in context was as follows:

> [The victims were] lives of value to the defendant, Gary McCray, too, but for a very different reason and a very different way. Who's the snitch? Who is the rat? To Gary McCray these lives had to be eliminated, not for who they were but for what they knew, and eliminated they were.
>
> Eliminated by being chased, by being shot three times, then once in the back of the head at close range for good measure, eliminated while running away, being shot twice in the back, the last bullet ripping through a spinal cord, eliminated while standing barefoot and shirtless in a drug trap kitchen watching the defendant raise a gun inches from his face, looking into the face of his killer as Gary McCray pulls the trigger, eliminated after hiding in a back bedroom, hearing the sound of death and destruction around you, knowing it's coming, then seeing it face-to-face before the bullet literally rips through an eye lodging itself in a brain.

When the first paragraph is not omitted, it becomes clear that the prosecutor was merely describing what McCray did, deciding that the victims needed to be eliminated, and then eliminating them, rather than urging the jury to place themselves in the victims' position. This argument bears little resemblance to an actual "Golden Rule" violation. See e.g. *Barnes v. State*, 58 So.2d 157, 158 (Fla. 1952)("What if it was your wife or your sister or your daughter that this beast was after?"). The comment was not a Golden Rule violation, even if McCray had objected to it.

McCray also claims that the comments were improperly inflammatory and constituted an "imaginary script," citing *Urbin v. State*, 714 So.2d 411 (Fla. 1998) and *Garron v. State*, 528 So.2d 353 (Fla. 1988). The prosecutor's argument here bears little resemblance to that made in those cases. In *Urbin*, this Court

condemned the prosecutor's use of an imaginary script when he literally put[] his own imaginary words in the victim's mouth, i.e., 'Don't hurt me. Take my money, take my jewelry. Don't hurt me.'" *Urbin* at 421. Moreover, this court noted numerous other improperly inflammatory comments throughout the closing argument, not just the imaginary script. In *Garron*, the prosecutor made "several remarks which, notwithstanding curative instructions, were so egregious, inflammatory and unfairly prejudicial that a mistrial was the only proper remedy." *Garron* at 358. Among the prosecutor's numerous improper arguments were "you can just imagine the pain this young girl was going through as she was laying there on the ground dying.... Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug herself from the bathroom into the bedroom where she expired;" that if the victim were there, she would probably argue the defendant should be punished for what he did, and that the jury should "listen to the screams and to her desires for punishment" in decided a penalty. *Id.* at 358-59.

In contrast, the prosecutor here did not put imagined words into the mouths of the victims, did not instruct the jury to imagine the victim's pain, and did not imbue the closing argument with numerous improper comments. While the comment may have had an emotional impact, a prosecutor's duty to refrain from inflammatory comments "does not limit prosecutors' closing arguments to flat, robotic recitations of 'just the facts.'" *Diaz v. State*, 797 So.2d 1286, 1287 (Fla. 4th DCA 2001). The *Diaz* court also expressed "great confidence in the common sense of jurors to decide cases on the law and facts

without being unduly swayed by the lawyers' oratory." *Id.* Moreover, "[a] prosecutor does not violate her obligation to seek justice by arguing the state's case with passion and conviction." *Id.*[11]

Any possible impropriety in the comment was isolated and could have been cured by objection and admonishment. This comment would not have constituted reversible error even if McCray had objected. Any impropriety certainly did not "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error," and as such, McCray has failed to demonstrate fundamental error.

[11]Moreover, the State disagrees that "eliminate" is synonymous with "execute" in this context. "Eliminate" suggests getting rid of something undesirable, which is exactly what the State contended McCray did. In any event, this Court does not hold that use of the word "execute" is invariably reversible error. See *Burr v. State*, 466 So.2d 1051, 1054 (Fla. 1985); c.f., *Jones v. State*, 652 So.2d 346, 352 (Fla. 1995)("asssassinate" was a reasonable characterization of the murder).

ISSUE IX

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING McCRAY'S MOTION FOR MISTRIAL AND MOTION FOR NEW TRIAL BASED UPON "THE OVERALL PREJUDICIAL NATURE OF THE TRIAL?" (Restated)

Standard of review

A decision on a motion for a mistrial is within the discretion of the trial judge and such a motion should be granted only in the case of absolute necessity. *Snipes v. State*, 733 So.2d 1000, 1005 (Fla. 1999). "The standard of review for the denial of a motion for new trial is abuse of discretion." *Smith v. State*, 7 So.3d 473, 507 (Fla. 2009).

Trial court's ruling

During the charge conference of the guilt phase, McCray moved for a mistrial based upon "the cumulative effect of I guess the removals and or his testimony," which the court denied (XXI 1518).

After guilt phase, McCray moved for new trial, listing numerous grounds, including the "cumulative effect of the errors in this trial" (X 1893-94). The court denied the motion (XI 2083).

On appeal, McCray specifies several incidents, some of which were included in the motion for new trial, some not, which cumulatively demonstrate that he did not receive a fair trial: the incident during jury selection; the finding that McCray was competent to stand trial; the denied requests for self-representation at trial; the collateral-crime evidence; the termination of McCray's guilt-phase testimony; inflammatory closing arguments; McCray's decision not to permit mental-health witnesses in the penalty phase;

the decision to allow McCray to give his own closing argument in the penalty phase; and the court's assignment of "great weight to the jury recommendation."

The State has two specific responses to this claim, and one overriding general response. First, it is noteworthy how many of these complaints directly involve McCray's own actions at trial. McCray is essentially complaining that his own conduct rendered his trial unfair and necessitates a new trial. Second, the motion for new trial was filed prior to the penalty phase, so any complaints about the penalty phase and sentencing were not part of the motion.

More importantly, all of these matters have been addressed by specific issues in this brief. The State has argued that none of the claims demonstrate error; if none of the claims individually constitute error, than cumulatively they cannot constitute error either. It is particularly noteworthy that the State has not argued that any of McCray's claims constituted error that was harmless. If the State were arguing that several issues correctly identified trial error but were individually harmless, a cumulative error analysis might make sense. Without any such claims, cumulative error analysis is meaningless. See e.g., *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992)(en banc)(noting "[t]hat the constitutionality of a state criminal trial can be compromised by a series of events none of which individually violated a defendant's constitutional rights seems a difficult theoretical proposition"). The court did not err in denying the motion for mistrial or motion for new trial.

ISSUE X

DID THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE PENALTY PHASE JURY USING THE THEN STANDARD JURY INSTRUCTIONS? (Restated)

McCray asserts that the trial court fundamentally erred by instructing the jury using the then standard penalty phase jury instructions. McCray premises his argument on the ABA report finding that Florida juries were confused about their role in capital sentencing (IB 95) citing American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* (2006). First, this issue is not preserved. Defense counsel specifically stated that he had no objections to the penalty-phase jury instructions. Furthermore, defense counsel certainly did not propose his own alternative penalty phase jury instructions. Moreover, while this Court later issued new standard instructions to clarify areas of jury confusion identified in the ABA report, there is no evidence that McCray's particular jury was confused. Thus, the trial court properly instructed the jury.

The trial court's ruling

At the close of penalty phase, the trial court instructed the jury (XXVIII 2652-2658). The alternate jurors were excused and the jury began deliberations on their sentencing recommendation at 1:30 (XXVIII 2659-2660). Prosecutor Skinner noted that he had no objections to the jury instructions (XXVIII 2660). Defense counsel Tassone stated: "We have no objections, Your, Honor" (XXVIII 2660).

Preservation/fundamental error

This issue is not preserved and is not fundamental error. Defense counsel explicitly stated he had no objections to the penalty phase jury instruction after they were read to the jury (XXVIII 2660). Claims that the jury instructions are erroneous must be preserved by contemporaneous objection. *Insko v. State*, 969 So.2d 992, 1002 (Fla. 2007)(finding a claim that the jury instruction omitted the correct age was not preserved because the defendant was "required to object to preserve the error and, having failed to do so, waived it").

As the United States Supreme Court recently observed, "a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett v. United States*, - U.S. -, -, 129 S.Ct. 1423, 1428 (2009). Florida's concept of fundamental error is akin to the federal concept of structural error. Only one type of jury instruction error has been identified by the United States Supreme Court as structural error - an error in the reasonable doubt instruction. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078 (1993). Only jury instruction errors that vitiated all the jury's findings are structural error, all other jury instruction errors are subject to harmless error analysis. *Hedgpeth v. Pulido*, - U.S. -, 129 S.Ct. 530 (2008). This was not an error in the reasonable doubt instruction and therefore, not structural error.

Standard of review

The standard of review for a claim of fundamental error is necessarily *de novo* because, by definition, there is no ruling from the trial court to which to pay deference. Most jury instruction issues are reviewed for abuse of discretion, not *de novo*. *Hoskins v.*

State, 965 So.2d 1, 14 (Fla. 2007)(noting: "[w]e review the denial of a requested instruction for an abuse of discretion."). McCray has obtained a more favorable standard of review on appeal by failing to object. This is one of the myriad of reasons that fundamental error is, and should be, very sparily applied.

Merits

The trial court instructed the jury using the then standard penalty phase jury instructions. This Court's new penalty phase instructions, which clarified certain matters based on the ABA report, were issued in October of 2009 but the penalty phase in this case occurred over a year earlier, in September of 2008. See *In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2*, 22 So.3d 17 (Fla. 2009).

This Court has repeatedly rejected claims of error premised on general studies and reports do not apply to the particular cases. Most recently, in *Johnston v. State*, 27 So.3d 11, 20 (Fla. 2010), this Court rejected a claim of newly discovered evidence based on a report by the National Academy of Sciences titled Strengthening Forensic Science in the United States: A Path Forward (2009), in part because the report did not establish that any particular test, test result, or testimony at Johnston's trial was faulty. The Court concluded that even if the report were newly discovered evidence, "the report lacks the specificity that would justify a conclusion that it provides a basis to find the forensic evidence admitted at trial to be infirm or faulty." This Court observed that nothing in the report rendered the forensic techniques used in this case unreliable. *Johnston*, 27

So.3d at 21. This Court also noted that Johnston had not identified how the article would demonstrate, in any specific way, that the testing methods or opinions in his case were deficient. *Johnston*, 27 So.3d at 21-22.

This Court has also repeatedly rejected constitutional attacks on Florida's death penalty statute based on this same ABA report. *Tompkins v. State*, 994 So.2d 1072, 1082-1083 (Fla. 2008)(quoting *Power v. State*, 992 So.2d 218, 222-223 (Fla. 2008)(rejecting the claim ion part because Power did not allege "how any of the conclusions in the report would render his individual death sentence unconstitutional."); *Rutherford v. State*, 940 So.2d 1112, 1118 (Fla. 2006)(reject a constitutional attack based on the ABA report in part because "Rutherford does not allege how any of the conclusions reached in the ABA Report would render his individual death sentence unconstitutional."). While this Court issued new standard instructions to clarify areas of jury confusion identified in the ABA report, after this trial was complete, there is no evidence that McCray's particular jury was confused. McCray points to no jury questions showing jury confusion in the areas identified by the ABA report. Indeed, he does not even a suggest that his particular penalty phase jury was actually confused about their role. The trial court properly instructed the jury.

ISSUE XI

SHOULD THIS COURT HAVE THE CUMULATIVE ERROR DOCTRINE AND IF SO, DID CUMULATIVE ERROR OCCURRED IN THIS CASE? (Restated)?

McCray asserts that he was denied a fair trial due to cumulative errors. IB at 97. This Court should not entertain cumulative error claims. Cumulative error claims improperly employ partial legal analysis rather than properly employing the whole legal analysis. Even if this Court entertains cumulative error claims, this Court has repeatedly stated that where the error individually are "either procedurally barred or without merit, the claim of cumulative error also necessarily fails." McCray's individual claims of error are without merit. So, McCray's cumulative error claim necessarily fails.

Standard of review

Whether a trial violated due process is reviewed *de novo*. *United States v. Mitchell*, 2010 WL 489443, 6 (11th Cir. February 11, 2010)(reviewing de novo the cumulative impact of alleged errors, citing *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1340 (11th Cir. 2009).

Merits

This Court should not entertain cumulative error claims. There is no United States Supreme Court case conducting a cumulative error analysis. The Eleventh Circuit recently noted that noted "the absence of Supreme Court precedent applying cumulative error doctrine to claims of ineffective assistance of counsel." *Forrest v. Fla. Dept. of Corr.*, 2009 WL 2568185 at 4 (11th Cir. Aug. 21, 2009); see also

Derden v. McNeel, 978 F.2d 1453, 1456 (5th Cir. 1992)(en banc)(noting the Supreme Court has not directly spoken regarding cumulative error).

The problem with cumulative error analysis is that it is mix and match law. A defendant raising a cumulative error claim cannot, by definition, meet the existing legal test for individual reversible error. Cumulative error is premised on the notion that while the errors individually do not warrant reversal, when considered together, the errors do warrant reversal. The problem with cumulative error analysis is that it is an open admission that none of the individual errors warrants reversal but somehow together the errors do warrant reversal. So, for example, a defendant who cannot meet the three prongs of *Brady* or the two prongs of *Strickland*, claims that he met two prongs of *Brady* and one prong of *Strickland*, cannot claim that he is entitled to reversal. Such an argument undermines the actual legal tests of both *Brady* and *Strickland*. *See e.g., Suggs v. State*, 923 So.2d 419, 441 (Fla. 2005)(stating that the Court "considers the cumulative effect of evidentiary errors and ineffective assistance claims together"). A defendant should be required to meet the entire legal test, not merely parts of that test.

The doctrine of cumulative error suggest that the whole is greater than the sum of the parts. Cumulative error is a "difficult theoretical proposition." *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992)(en banc)(noting "[t]hat the constitutionality of a state criminal trial can be compromised by a series of events none of which individually violated a defendant's constitutional rights seems a

difficult theoretical proposition."). "Cumulative error" claims should not be entertained. *But see Brooks v. State*, 918 So.2d 181, 202 (Fla. 2005)(stating that where multiple errors are found, even if deemed harmless individually, "the cumulative effect of such errors" may "deny to defendant the fair and impartial trial" quoting *Jackson v. State*, 575 So.2d 181, 189 (Fla. 1991)); see also *McDuffie v. State*, 970 So.2d 312, 329 (Fla. 2007) (concluding that the errors, when viewed cumulatively, cannot be considered harmless).

Moreover, even if this Court entertains the cumulative error claim, this Court has repeatedly stated that where the error individually are "either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009)(quoting *Israel v. State*, 985 So.2d 510, 520 (Fla. 2008)(quoting *Parker v. State*, 904 So.2d 370, 380 (Fla. 2005)). The individual claims are without merit. Accordingly, McCray's cumulative error claim necessarily fails.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence entered in this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Frank J. Tassone, Esq., and Rick A. Sichta, Esq., 1833 Atlantic Boulevard, Jacksonville, Florida 32207, by MAIL on May 3, 2010.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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