IN THE SUPREME COURT
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

GARY BERNARD McCRAY, III

Appellant,

v.

Appeal No.: SC08-2434

STATE OF FLORIDA, L.T. Court No.: 04-1149CF

Appellee.

____________________________________/

APPELLANT'S AMENDED INITIAL BRIEF ON DIRECT APPEAL, PURSUANT TO FLA. R. APP. PRO. RULE 9.140(1)(a)

On Appeal from the Circuit Court, Fourth Judicial Circuit,
and For Clay County, Florida

Honorable William A. Wilkes
Judge of the Circuit Court, Division A

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS..ii-iv

TABLE OF CITATIONS..v-ix

PRELIMINARY STATEMENT..1

STATEMENTS OF THE CASE AND FACTS...2-17

STANDARD OF REVIEW..17-23

STATEMENT OF THE ISSUES INVOLVED.................................. 24-25

SUMMARY OF THE ARGUMENTS 25-27

GROUNDS FOR APPELLATE REVIEW.......................................28-119

1. THE COURT ERRED IN ASSIGNING GREAT WEIGHT TO THE JURY RECOMMENDATION FOR DEATH AFTER DEFENDANT LIMITED THE PRESENTATION OF EXPERT TESTIMONY BY COUNSEL AND CONDUCTED A PRO SE PENALTY PHASE CLOSING ARGUMENT AS THE JURY'S RECOMMENDATION WAS MADE WITHOUT THE BENEFIT OF HAVING HEARD ALL AVAILABLE MITIGATION IN VIOLATION OF DEFENDANT'S EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION

2. THE TRIAL COURT REVERSABLY ERRED LIMITING MCCRAY'S FUNDAMENTAL RIGHT TO TESTIFY ON HIS OWN BEHALF DURING THE GUILT PHASE

3. THE TRIAL COURT'S FAILURE TO CONDUCT ADEQUATE FARETTA INQUIRIES AND SUBSEQUENT APPOINTMENT OF COUNSEL OVER THE OBJECTION OF McCRAY CONSTITUTED PER SE REVERSIBLE ERROR

4. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING MCCRAY TO ENGAGE IN SELF- OR HYBRID-REPRESENTATION WHEN HE DELIVERED HIS OWN CLOSING ARGUMENT DURING THE PENALTY PHASE OF HIS TRIAL

5. THE COURT FAILED TO ISSUE A WRITTEN FINDING OF COMPETENCY UPON ADJUDICATING MCCRAY COMPETENT TO PROCEED AFTER A PERIOD OF INCOMPETENCE, PURSUANT TO FLA. R. CRIM. P. 3.212(C)

6. THE STATE VIOLATED THE WILLIAMS RULE IN MAKING EVIDENCE OF MCCRAY'S COLLATERAL CRIME A FEATURE OF ITS CASE AND BY PRESENTING EVIDENCE ABOVE AND BEYOND THE SCOPE OF THE STATE'S NOTICE OF OTHER CRIMES, WRONGS, OR ACTS IN THE OPENING STATEMENT, CASE IN CHIEF, CLOSING ARGUMENT, REBUTTAL, PENALTY PHASE & MEMORANDUM IN SUPPORT OF DEATH IN VIOLATION OF FLA. CONST. ART I, SEC 17, 9, AND U.S. CONST. AMEND. 6, 14.

7. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING MCCRAY COMPETENT TO PROCEED FOLLOWING THE THIRD COMPETENCY HEARING IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER FLA. CONST. ART I, SEC(S) 9 AND 17, AND THE U.S. CONST. AMEND 6 AND 14.

8. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE CLOSING ARGUMENT. THE STATEMENTS MADE BY THE PROSECUTION INDIVIDUALLY AND CUMULATIVELY DENIED MCCRAY HIS FUNDAMENTAL RIGHT TO A FAIR PURSUANT TO THE 6TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION, AND FLORIDA CONSTITUTION, ARTICLE 9 AND 17.

9. THE TRIAL COURT ERRED IN NOT GRANTING MCCRAY'S MOTION FOR MISTRIAL AND/OR SUBSQUENT MOTION FOR NEW TRIAL RESTATING SAME

10. THE TRIAL COURT ERRORED IN GIVING JURY INSTRUCTION "7.11 PENALTY PROCEEDINGS – CAPITAL CASES" WHERE THE ABA FLORIDA DEATH PENALTY ASSESSMENT REPORT DETERMINED THAT SIGNIFICANT CAPITAL CASE JUROR CONFUSION EXISTS AND RECOMMENDED THAT SAID INSTRUCTION BE CHANGED TO ENSURE RELIABILITY IN RECOMMENDATIONS FOR DEATH

11. MCCRAY'S ENTIRE TRIAL WAS FRAUGHT WITH ERROR; A NEW TRIAL MUST BE GRANTED AS ALLOWING THE JUDGEMENTS AND SENTENCE AGAINST MCCRAY TO STAND WOULD BE A MISCARRIAGE OF JUSTICE AND A VIOLATION FLA. CONST. ART. I SEC. 9, 17 AND THE 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION

CONCLUSION 120

CERTIFICATE OF SERVICE 120

CERTIFICATE OF COMPLIANCE AND AS TO FONT..............................121

TABLE OF CITATIONS

Cases **Pages**

Florida District Courts

Albright v. State, 378 So. 2d 1234 (Fla. 2d DCA 1979)…………..……………..119

Billie v. State, 863 So. 2d 323 (Fla. 3rd DCA 2003)…………………………...84

Brooks v. State, 703 So. 2d 504 (Fla. 1st DCA 1997)…...23, 38, 40, 70, 75, 76, 119

Bush v. State, 690 So. 2d 670 (Fla. 1st DCA 1997)……………………………84

Carter v. State, 332 So.2d 120 (Fla.2d DCA 1976)……………………………..119

Evans v. State, 693 So. 2d 1096 (Fla. 3rd DCA 1997)………………………...82, 83

First Republic Corp. of America v. Hayes, 431 So. 2d 624 (Fla. 3d DCA)……....53

Fleck v. State, 956 So. 2d 548 (Fla. 2ndDCA 2007)……………………………71

Gamez v. State, 643 So. 2d 1105 (Fla. 4th DCA 1994)…………………………54

Haram v. State, 625 So. 2d 875 (Fla. 5th DCA 1993)…………………………..70

Jones v. State, 658 So. 2d 122 (Fla. 2nd DCA 1995)…………………………...57

Goldsmith v. State, 937 So. 2d 1253 (Fla. 2nd DCA 2006)……………………..69

Keller Indus. v. Volk, 657 So. 2d 1200 (Fla. 4th DCA 1995)……………………...53

Lambert v. Florida, 864 So. 2d 17 (Fla. 2nd DCA 2003)……………………...75, 76

LoBue v. Travelers Ins. Co., 388 So. 2d 1349 (Fla. 4th DCA 1980)………………53

Martinez v. State, 851 So. 2d 832, 834 (Fla. 1st DCA 2003)……………………...81

Moore v. State, 800 So. 2d 747 (Fla. 5th DCA 2001)…………………………..22

Morgan v. State, 991 So. 2d 984 (Fla. 4th DCA 2008)………………………..20, 69

Neeld v. State, 729 So. 2d 961 (Fla 2nd DCA 1999)…………………………….....72

Payne v. State, 642 So. 2d 111 (Fla. 1st DCA 1994)………………………….78, 79

Perkins v. State, 349 So. 2d 776 (Fla. 2nd DCA 1977)…………………………..118

Perry v. State, 718 So. 2d 1258 (Fla. 1st DCA 1998)………………….…………84

Reddick v. State, 937 So. 2d 1279 (Fla. 4th DCA 2006)………………………62, 72

Rodriguez v. State, 982 So. 2d 1272 (Fla. 3rd DCA 2008)………………………..69

Sandoval v. State, 884 So. 2d 214 (Fla. 2nd DCA 2004)…………………………..69

Smith v. State, 956 So. 2d 1288 (Fla. 4th DCA 2007)……………………………..69

Wessling v. State, 877 So. 2d 877 (Fla. 4th DCA 2004)…………………………...54

White v. State, 548 So. 2d 765 (Fla. 1st DCA 1989)………………………………81

Wilson v. State, 724 So. 2d 144 (Fla. 1st DCA 1998)…………………………63, 70

Wilson v. State, 947 So. 2d 1225 (Fla. 1st DCA 2007)……………………………79

Florida Supreme Court

Allen v. State, 662 So. 2d 323 (Fla. 1995)……………………………………...35

Ashley v. State, 265 So.2d 685 (Fla. 1972)………………………………………..84

Amendment to Florida Rule of Criminal Procedure 3.111(d)(2)-(3), 719 So. 2d 873, 876-879 (Fla. 1998)…………………………………………………...78, 79

Barnes v. State, 58 So. 2d 157, 159 (Fla. 1951)…………………………106, 108

Bertolotti v. State, 476 So. 2d 130 (Fla. 1985)…………………………………..103

Bonifay v. State, 680 So. 2d 413 (Fla. 1996)……………………………………108

Burnes v. Stafford-Lobue, 397 So. 2d 777 (Fla. 1981)…………………………….53

Colina v. State 570 So. 2d 929 (Fla. 1990)……………………………………..54

England v. State, 940 So. 2d 389 (Fla. 2006)………………………………..18, 106

Farr v. State, 621 So. 2d 1368 (Fla. 1993)……………………………………35, 42

Finney v. Florida, 660 So. 2d 674 (Fla. 1995)…………………………………….83

Fowler v. State, 255 So. 2d 513 (Fla. 1971)……………………………………….80

Garron v. State, 528 So. 2d 353 (Fla. 1988)…………………………….…107, 108

Goodwin v. State, 751 So. 2d 537 (Fla. 1999)…………………………….…19, 106

Grim v. State, 841 So. 2d 455 (Fla. 2003)…………………………….25, 26, 40, 41

Hardwick v. State, 521 So. 2d 1071 (Fla. 1988)…………………………………..67

Hauser v. State, 701 So. 2d 329 (Fla. 1997)……………………………………….35

Heiney v. State, 447 So. 2d 210 (Fla. 1984)………………………………………82

Herring v. State, 446 So. 2d 1049 (Fla. 1984)…………………………………….35

Hill v. State, 688 So. 2d 901 (Fla. 1996)…………………………………………….72

Hutchinson v. State, 882 So. 2d 943 (Fla. 2004)………………………………...106

In re Std. Jury Instructions in Crim. Cases--Report No. 2005-2, 2009 Fla. LEXIS 1806 (Fla. Oct. 29, 2009)…………………………………………...…116, 117

Jackson v. State, 522 So. 2d 802 (Fla. 1988)……………………………………...82

Jackson v. State, 575 So. 2d 181 (Fla. 1991)………………………….................23

Jackson v. State, 18 So. 3d 1016 (Fla. 2009)…………………………...21, 28, 41

Jorgensen v. State, 714 So. 2d 423 (Fla. 1998)…………………………………...82

Koon v. State, 619 So. 2d 246 (Fla. 1993)……………………………………...28

Maharaj v. State, 597 So. 2d 786 (Fla. 1992)………………………………...82, 83

McDuffie v. State, 970 So. 2d 312 (Fla. 2007)………………………18, 22, 53, 119

Mora v. State, 814 So. 2d 322 (Fla. 2002)……………………………………77, 95

Muhammed v. State, 782 So. 2d 343 (Fla. 2001)…………………………34, 40, 41

Peed v. State, 955 So. 2d 480 (Fla. 2007)……………………………………...13

Penalver v. State, 926 So. 2d 1118 (Fla. 2006)………………………………...23

Perez v. State, 919 So. 2d 347 (Fla. 2005)…………………………………..19, 106

Porter v. State, 788 So. 2d 917 (Fla. 2001)………………………………………69

Robinson v. State, 684 So. 2d 175 (Fla. 1996)……………………………………35

Salazar v. State, 991 So. 2d 364 (Fla. 2008)……………………………18, 19, 106

Spencer v. State, 615 So. 2d 688 (Fla 1993)……………………………………....15

State v. Bowen, 698 So. 2d 248 (Fla. 1997) ……………………………………...71

State v. Lee, 531 So. 2d 133 (Fla. 1998)………………………………………….19

State v. Young, 626 So. 2d 655 (Fla. 1993)………………………………69, 70, 77

Tennis v. State, 997 So. 2d 375 (Fla. 2008)………………………………20, 55, 69

Urbin v. State, 714 So. 2d 411 (Fla. 1997)………………………………107, 108

United States Courts of Appeal

Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986)…………………………69

Hauser v. Moore, 223 F.3d 1316, 1323 (9th Cir. 2000)…………………………..96

Sanchez-Valesco v. Sec'y Dept. of Corr., 287 F.3d 1015 (11th Cir. 2002)……….96

U.S. v. Singleton, 107 F.3d 1091 (4th Cir. 1997)……………………………………75

U.S. v. Young, 287 F.3d 1352 (11th Cir. 2002)…………………………………...75

United States Supreme Court

Faretta v. California, 422 U.S. 806 (1975)……………………………………69-79

Godinez v. Moran, 509 U.S. 389 (1993)……………………………………….71

Illinois v. Allen, 397 U.S. 337 (1970)…………………………………………71, 73

Rompilla v. Beard, 545 U.S. 374 (2005)…………………………………...34, 43

Florida Rules of Criminal Procedure, Rules of Evidence, Constitutional Articles, Florida Statutes

Fla. Const. Art. I, § 9 (2009)……………………………………….46, 54, 118

Fla. R. Crim. P. 3.111(d)..67-71, 78, 79

Fla. R. Crim. P. 3.211(a)(1)..3, 95

Fla. R. Crim. P. 3.212(c)(7)…………………………………...5, 24, 26, 80, 81

Fla. R. Ev. 90.202(6) …………………………………………………..85

Fla. Stat. § 90.404(2)...83

Fla. Stat. § 916.12(1)……………………………………………………...95

Fla. Stat. § 921.141(6)(b),(f),(g)……………………………………28, 33, 34, 35

PRELIMINARY STATEMENT

Appellant, GARY BERNARD McCRAY, III, will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." Attorneys Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the "undersigned counsel." Counsel at the time of trial, attorneys Refik W. Eler (acting as 1st chair and guilt phase counsel), and Frank J. Tassone (acting as 2nd chair and penalty phase counsel), will be referred to as "Mr. Eler" and "Mr. Tassone".

References to the Record on Appeal will be designated "(volume number), R __" where the number of the appropriate volume number of the ROA will appear, followed by a page citation.

STATEMENTS OF THE CASE AND FACTS

Statement of Relevant Facts

The state's case at trial alleged that Gary McCray entered a dwelling in Orange Park Florida carrying two firearms and killed four victims while allowing other persons in the house to escape unharmed. The court heard William's Rule evidence which held that the defendant was concerned about the victims testifying against him in an case resulting from a prior arrest, and went there with the purpose of eliminating potential witnesses. McCray was subsequently found and

arrested in Tallahassee Florida days after he was alleged to have committed the murders.

McCray was unable to assist counsel with trial or penalty phase preparation since the onset of his case. (5 R 977). He was unresponsive to his defense team and behaved in an "unpredictable, strange, [and] paranoid…" manner. (5 R 951). Jail records report strange behavior including: provoking the use of tasers by prison guards on multiple occasions, refusing to bathe, kicking his cell door for three hours straight, and refusing food for several days in a row. (23 R. 72-78). He was also reported as behaving strangely as though reacting to internal stimuli. *Id*.

COMPETENCY DETERMINATION ONE:

Based on this strange behavior and defense counsel's attempted personal interactions, defense counsel filed a Suggestion of Mental Incompetence to Proceed, pursuant to Fla. R. Crim. P.R. 3.211. (5 R 950). The court appointed three mental health professionals to evaluate McCray: Dr. Harry Krop, Dr. Wade Myers, and Dr. William Meadows. *Id*. Each expert evaluated Mr. McCray, produced a written report, and testified as to thier conclusions at a January 4, 2006 Competency Hearing.

The court held that McCray was incompetent to proceed based on the following information: McCray had been on suicide watch and/or isolation for the duration of his then two-year period of incarceration; McCray engaged in

significant self-injurious behavior; there was a history of mental illness in McCray's family; McCray had been uncommunicative or combative, or his communications consisted of head nods and/or yes or no responses; McCray lost between 50 to 60 pounds during incarceration—1/4 to 1/3 of his body weight; McCray did not take care of his personal hygiene and was forcibly removed from his cell and forced to bathe; Drs. Krop and Myers both stated that although McCray might have been malingering, the greater weight of the evidence revealed that McCray was incompetent, in need of involuntary hospitalization, and continued to deteriorate; McCray had not communicated anything to counsel or to the investigator; McCray's communication with his girlfriend and family members has deteriorated or ceased; there was substantial, clear, and convincing information that McCray had a serious mental illness or defect that rendered him incompetent to proceed; and McCray was unable to comprehend the legal process or assist his attorney in a meaningful way in preparation of his defense. (5 R. 977-980).

COMPETENCY DETERMINATION TWO:

On December 6, 2006, a hearing to re-address McCray's competency occurred pursuant to Fla. R. Crim. P. 3.212(c). (13 R. 2398). At this hearing, the state and defense attorney, Eler, stipulated to McCray's returned competency based

upon a November 8, 2006 Letter and Competency Report from the Florida State Prison.[1] (13 R. 2397-2304) (26 R. 788-794).

The report disclosed that upon admission to the hospital following a court-finding of incompetence, McCray was diagnosed with Axis I Psychotic Disorder, NOS, Marijuana Abuse in Controlled Environment, and Malingering. McCray began taking Ariprazole (Ability) and Ziprasidone (Geodon), both psychotropic medications during his stay at the Florida State Hospital. (26 R. 792) (6 R. 1154). The report indicated that McCray exhibited a factual and rational understanding of the legal proceedings against him and that his psychiatric condition did not appear to be a factor in his capabilities to proceed to trial. (26 R 793). McCray was able to demonstrate appropriate understanding and capacity on all six realms of competency. *Id*.

Without the presentation of evidence, i.e. no expert testimony, no expert evaluations in preparation for the competency hearing, and no indication that McCray agreed to counsel's stipulation,[2] the court accepted both the state and counsel's stipulation to McCray's competence and found McCray competent to proceed without written order. (13 R 2397-2403).

[1] Defense attorney Tassone disagreed with this stipulation and filed a Motion to Set Aside Adjudication of Competency, which was denied. (96 R 1166-69).

[2] There is no indication on the record that McCray knew that his competency was going to be discussed at the hearing or that McCray authorized a stipulation to competency by his attorney without a full competency hearing.

JURY SELECTION:

Jury selection for Mr. McCray's began July 28, 2008. Throughout the jury selection process, McCray exhibited bizarre behavior, frequently interrupting the proceedings with outbursts, "objections," and ill-timed questions. McCray's outbursts began at the onset of the state's voir dire and continued through trial. (14 R 76-78, 16 R 363-69). McCray interrupted in the presence of the jury on numerous occasions, and his comments reflected his lack of understanding of the trial process. *Id*. Though McCray would occasionally sit quietly at the defense table, his outbursts would invariably begin again. (14 R 114). At one point during the Jury Selection process, McCray attempted to arrest the trial Judge:

> McCRAY: As I said, yes, you are under arrest for illegal procedures in the courtroom and that the defense I pressing charges at this time.
>
> COURT: Okay. Anything else?
>
> McCRAY: And you need to be arrested for illegal activities.
>
> COURT: Anything else? Anything else?
>
> McCRAY: No. That's it. You are under arrest.
>
> COURT: Do you want to participate with them before the selection is made?
>
> McCRAY: Counsel they under arrest.
>
> COURT: Do you understand the question?

McCRAY: Do you understand that they are committing illegal activities?

…

McCRAY: Y'all are going to be charged with conspiracy and attempted murder and not doing your job, and I report to my family I have military family. I have them come down here and talk to y'all.

McCray's concerns came to a head when he spoke for 23 transcribed pages. At this point, defense counsel Eler suggested that the trial be continued so that Mr. McCray could be re-examined for competency. (16 R 363). Counsel for McCray filed another Suggestion of Mental Incompetence to Proceed on July 29, 2008.

COMPETENCY DETERMINATION THREE:

The third competency hearing for Mr. McCray's occurred on August 22, 2008 after jury selection had occurred but before the commencement of the trial. (16 R 379). Three experts were appointed by the court for the purposes of evaluation McCray's competence: Dr. Harry Krop, Dr. Steven Miller (Dr. Myer's associate), and Dr. William Meadows. Each expert evaluated Mr. McCray submitted a written report, and testified at the competency hearing.

The State presented one witness, Dr. Meadows, and submitted ten exhibits. (16 R 379-381). The defense presented Drs. Krop and Miller, two exhibits, and statements from attorneys Tassone and Eler regarding McCray's inability to assist them with his defense. (10 R 1814).

McCray repeatedly interrupted the competency proceedings with various comments. (16 R 382-386). After ignoring warnings from the court, McCray was removed from the courtroom for the remaining portion of the hearing. (16 R 382).

Order Denying Defendant's "Redacted Suggestion of Mental Incompetence to Proceed:"

The court found McCray competent, citing in its order, *Peed v. State*, 955 So. 2d 480, 488-89 (Fla. 2007); Dr. Meadow's August 11, 2008 report; Dr. Krop's and Dr. Miller's August 15, 2008 and August 18, 2008 reports (respectively) finding McCray incompetent.

In less than four pages, the court dismissed the reports and testimony of the expert witnesses who found McCray incompetent, the experiences of two respected trial attorneys, and the court's first hand observation of McCray's erratic courtroom behavior, and found McCray competent to proceed. (10 R 1814-1817). No order to involuntarily medicate was entered despite expert opinions which stated that McCray needed medication to be competent.

Procedural History

Mr. McCray was indicted for the First Degree murders of John Ellis, Jr. (Count One), John Whitehead (Count Two), Phillip Perrotta (Count Three), and Robin Selkirk (Count Four) on November 18, 2004. (6 R. 1190-91).

McCray was tried before a jury on September 2, 2008 through September 5, 2008. (16 R-22 R). The jury found McCray guilty on all four counts on September 5, 2008 and recommended the death penalty at the close of the penalty phase on September 26, 2008. (10 R. 1885-92, 1921-1924). After hearing additional aggravating and mitigating evidence presented by the state and the defense at an October 22, 2008 Spencer[3] hearing, the Court set a final sentencing hearing for December 10, 2008 (11 R. 2063).

The court found the existence of two aggravating circumstances: (1) The defendant was previously convicted of a capital felony based upon the four contemporaneous convictions in the instant case; and (2) The crime for which Defendant was sentenced was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. (11 R 2063-72)

McCray argued the existence of four statutory mitigating factors: (1) extreme mental or emotional disturbance; (2) diminished capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law; (3) age of the Defendant at the time of the crime; and (4) catch all mitigator. The Court found that none of these statutory mitigating factors had been proven, and therefore did not give them any weight in determining the appropriate sentence to be imposed in the case.

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

McCray argued the existence of ten non-statutory mitigating circumstances: (1) The Defendant was raised without a mother for half of his adolescence (slight weight); (2) The Defendant was raised by an absentee father (slight weight); (3) The Defendant was raised in a negative and unstable family environment (slight weight); (4) The Defendant was raised in an environment that involved drugs (slight weight); (5) The Defendant lacked emotional maturity and desensitized himself with drugs and alcohol (not proven—no weight); (6) The Defendant received his General Equivalency Diploma (slight weight); (7) The defendant lacked parental guidance (slight weight); (8) The Defendant had a difficult childhood, and acted out in response to the instability in his life (not proven—no weight); (9) Throughout his youth, the Defendant suffered from mental illness issues (slight weight); (10) The Defendant was twenty-four when the instant crime was committed (not proven—no weight).

On December 10, 2008, the Court imposed four Death Sentences.

STANDARD OF REVIEW

Trial Court's decisions as to Motions for Mistrial. The Florida Supreme Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard. A motion for mistrial should be granted only when it is necessary to ensure that a defendant receives a fair trial. A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial. Under the abuse

of discretion standard, a trial court's ruling will be upheld unless the judicial action is arbitrary, fanciful, or unreasonable. *Salazar v. State*, 991 So. 2d 364 (Fla. 2008).

Trial Court's limiting of Defendant's presentation of testimony. Limiting a defendant's presentation of testimony or witnesses in his defense is reviewed under the abuse of discretion standard. The trial court's discretion is limited, however, by the rules of evidence. A trial court also abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *See* *McDuffie v. State*, 970 So. 2d 312 (Fla. 2007)

Prosecutorial Misconduct. Upon objection and request for mistrial as the result of improper argument, the Florida Supreme Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard. *See* *England v. State*, 940 So. 2d 389, 402 (Fla. 2006); *Perez v. State*, 919 So. 2d 347, 363 (Fla. 2005) ("[A] trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review.") (quoting *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999)), *Salazar v. State*, 991 So. 2d 364, 371-372 (Fla. 2008)

Williams Rule evidence. The erroneous admission of collateral crime evidence is subject to harmless error analysis. *State v. Lee*, 531 So. 2d 133 (Fla. 1998). The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to

the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Application of the test requires an examination of the entire record by the appellate court, including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. The focus of harmless error analysis must be the effect of the error on the trier of fact. Harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. *Id*.

Failure to conduct adequate Faretta inquires. The standard of review for trial court decisions involving withdrawal or discharge of counsel is abuse of discretion. *Morgan v. State*, 991 So. 2d 984 (Fla. 4th DCA 2008). Where a defendant demands self-representation, a trial court's ruling turns primarily on an assessment of demeanor and credibility, and consequently, its decision is entitled to great weight and will be affirmed on review if supported by competent substantial evidence.

With certain limitations, a defendant in a criminal trial has the right to choose self-representation. The critical limitation on the decision to waive counsel is that the decision must be "knowing and intelligent." Whether this standard is met in a given case is a fact-specific determination which must take into account all of the surrounding circumstances, including the background, experience and conduct of the accused. However, when an unequivocal request for counsel is made, it is per se reversible error for the trial court to either not conduct a Faretta inquiry or conduct an inadequate one. *See* *Tennis v. State*, 997 So. 2d 375, 378 (Fla. 2008).

Mohammad sentencing Order. The trial court is not required to present mitigation evidence to the jury. When a defendant waives mitigation evidence, case law requires the trial court to order the preparation of a presentence investigation report (PSI) and also permits the trial court to call witnesses to present mitigation evidence to the extent that the PSI alerts the court of the existence of significant mitigation *Jackson v. State*, 18 So. 3d 1016 (Fla. 2009)

Competency of a defendant. The Florida Supreme Court reviews a trial court's findings as to a defendant's competence to stand trial under an abuse of discretion standard. In situations where there is conflicting expert testimony regarding the defendant's competency, it is the trial court's responsibility to consider all the evidence relevant to competency and resolve the factual disputes. *Ferguson v. State*, 789 So. 2d 306 (Fla. 2001)

Decision to Allow McCray to Deliver Closing Argument. The United States Supreme Court has expressly recognized that "Faretta does not require a trial judge to permit 'hybrid' representation." *McKaskle v. Wiggins*, 465 U.S. 168, 183, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984). Nonetheless, it generally has been found to be within a trial judge's discretion to permit it. See, e.g., *United States v. Kimmel*, 672 F.2d 720 (1982).

Failure to grant a Motion for New Trial. The standard of review for a motion for new trial is abuse of discretion. In order to demonstrate abuse of discretion, the non prevailing party must establish that no reasonable person would take the view taken by the trial court. Thus, a trial court is generally accorded broad discretion in deciding whether to grant a motion for a new trial. *Moore v. State*, 800 So. 2d 747 (Fla. 5th DCA 2001)

Cumulative Error. Cumulative error is reviewed under the harmless error standard. *McDuffie v. State*, 970 So. 2d 312 (Fla. 2007) *DiGuilio,* 491 So. 2d at 1138. Harmless error analysis places the burden upon the State, as beneficiary of the errors, to prove there is "no reasonable possibility that the error contributed to" McDuffie's conviction. *DiGuilio,* 491 So. 2d at 1138. It is well-established that the harmless error test "is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and

convincing, or even an overwhelming evidence test" but the "focus is on the effect of the error on the trier-of-fact." Id. at 1139.

Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." *Brooks v. State,* 918 So. 2d 181, 202 (Fla. 2005) (quoting Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991)); *accord* Penalver v. State, 926 So. 2d 1118, 1137 (Fla. 2006).

STATEMENT OF THE ISSUES

1. Whether the trial court erred in assigning great weight to the jury's recommendation of death, and not ordering a pre sentence investigation report (PSI), when McCray conducted his own penalty phase closing argument, arguing no mitigation whatsoever, as acknowledged by the prosecution and the trial court.

2. Whether the trial court violated McCray's fundamental Constitutional rights to testify on his own behalf when it cut short and prohibited further testimony from McCray during the guilt phase of trial?

3. Whether the trial court committed per se reversible error by failing or conducting inadequate *Faretta* inquiries after McCray's unequivocal request for hybrid or self-representation, and subsequently forcing counsel to represent McCray over his objection?

4. Whether the trial court abused its discretion by allowing "hybrid representation" in McCray's penalty phase by allowing him to give his own closing argument that was completely irrelevant to the Penalty Phase of trial?

5. After McCray was previously adjudged incompetent to proceed with trial, did the trial court error in failing to issue written order finding McCray's competence had thereafter been restored, pursuant to Fla. Crim. Pro. R. 3.212(c)?

6. Did the trial court error in not granting defense counsel's motion concerning the prosecution going beyond the scope and making a Williams rule evidence a feature of the trial?

7. Did the trial court abuse its discretion in McCray's third competency proceeding by finding McCray competent, despite two out of the three doctors opining McCray was incompetent?

8. Did the trial court error in not granting defense counsel's motion concerning the jury instruction "7.11 Penalty Proceedings," which in granting McCray's jury instructions would have comported with the ABA and the Florida Supreme Court's revision of the Penalty Phase jury instructions?

9. Whether the court abused its discretion in not granting defense counsel's motion for mistrial in light of the prosecution's guilt phase closing arguments?

10. Did the trial court error in not granting defense counsel's motion for mistrial and/or new trial, supported by the cumulative errors surrounding the guilt phase of the proceedings?

11. Whether McCray was denied his right to a fair trial based on the cumulative error in both the guilt and penalty phases of trial.

SUMMARY OF THE ARGUMENTS

1. The trial court erred by giving great weight to the jury's recommendation of death and in not ordering a pre-sentence investigation report. McCray refused defense counsel's requests to put on expert testimony of mental illness and statutory mitigation. McCray conducted his own penalty phase closing argument, which did not discuss any mitigation, as acknowledged by both the prosecution and the trial court. The trial court's failure to consider all mitigating evidence in the record, including a prior court order from a different Circuit Court Judge adjudicating McCray incompetent and finding him suffering from a severe mental illness or defect, requires reversal for a new penalty phase in light of *Muhammad v. State*, *Grim v. State*, and *Jackson v. State*, see citations below.

2. The trial court violated McCray's fundamental and constitutional right to testify on his behalf. The court abruptly ended McCray's narrative testimony in the guilt phase after McCray testified approximately fifty minutes. McCray objected to this, saying his testimony was not finished. This violated McCray's essential elements of Due Process of law, as provided in Fla. Const. Art. I, § 9 (2009), U.S. Const. amend. V and U.S. Const. amend. XIV.

3. The trial court abused its discretion in allowing "hybrid representation" in the Penalty phase of trial when it honored McCray's request to conduct his own closing argument. The closing argument was conceded to be "irrelevant" as to mitigation. Given the trial court's previous refusal to allow McCray to represent himself in the guilt phase and McCray's previous mental history, the trial court's decision rendered McCray's penalty phase unreliable, as the jury was subjected to guilt phase argument, and not what mitigation exists to recommend a sentence of life.

4. The trial court committed per se reversible error on four occasions in McCray's guilt phase by failing to give, or giving inadequate Faretta inquiries when prohibiting McCray to represent himself. When eventually allowing McCray to represent himself, the trial court's justification for reappointing counsel was improper and insufficient to force representation on McCray.

5. The prosecution's Williams Rule testimony exceeded its scope and became a feature of trial when preceding the trial the prosecution stated they would only use it in closing argument. The pervasiveness of the Williams Rule testimony in all phases of both the guilt and penalty phases of trial demonstrated the prosecution's intention to make it a feature of trial. The trial court should have sustained defense counsel's objection as to this issue, or granted a new trial.

6. Despite a prior finding of incompetency, the trial court found McCray competent, but did not make a written finding supporting his ruling pursuant to Fla. R. Crim. Pro. R. 3.212(c). This Court should order the trial court to correct this error by issuing a written "nunc pro tunc" order reflecting his oral findings.

7. Two out of the three experts, during McCray's third competency proceeding, found McCray incompetent to proceed. The trial court abused its

discretion in finding McCray competent when there was substantial and compelling evidence to the contrary.

8. McCray's motion to amend the penalty phase jury instructions in accordance with the ABA's findings and the Florida Supreme Court's recent recommendations in response to same injected McCray to an arbitrary and capricious punishment. The penalty phase instructions used in McCray's case subjected the jury to confusion.

9. The trial court erred in not granting defense counsel's motion for mistrial after the state made improper closing arguments during the guilt phase of trial.

10. The trial court should have granted defense counsel's motion for mistrial, and/or motion for new trial, as the cumulative effect of the error in the proceedings in front of the jury violated McCray's right to a fundamentally fair trial.

11. The Court should reverse McCray's case for a new trial, as the cumulative effect of the errors existing throughout McCray's guilt and penalty phases of trial cannot be considered harmless.

ARGUMENT ONE

THE COURT ERRED IN ASSIGNING GREAT WEIGHT TO THE JURY RECOMMENDATION FOR DEATH AFTER DEFENDANT LIMITED THE PRESENTATION OF EXPERT TESTIMONY BY COUNSEL AND CONDUCTED A PRO SE PENALTY PHASE CLOSING ARGUMENT AS THE JURY'S RECOMMENDATION WAS MADE WITHOUT THE BENEFIT OF HAVING HEARD ALL AVAILABLE MITIGATION IN VIOLATION OF DEFENDANT'S EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION

I. The Defendant prevented defense counsel from presenting non-familial mitigating testimony during the penalty phase of McCray's trial:

During the Penalty Phase of trial, McCray specifically disallowed trial counsel from presenting evidence of mitigation through expert testimony or any

non-family/friend related sources. Prior to the start of the penalty phase, counsel informed the court of its desire to present the testimony of two experts for the purpose of establishing three statutory mitigators[4] as well as a number of non-statutory mitigators. (22 R 1559-60). Counsel informed the court of McCray's desire that said experts not be called. (22 R 1560). The court then conducted a colloquy with the defendant, pursuant to the procedure delineated in Koon v. State, 619 So. 2d 246 (Fla. 1993), which occurred as follows:

> Court: All right. Mr. McCray, let me just inquire from you here a couple of things. You've heard what your attorney, Mr. Tassone, has related to the Court. Do you agree with what he says, that he talked to you about that?
>
> McCray: Uh-huh (affirmative).
>
> Court: Do you understand that they are here to benefit you?
>
> McCray: They're here to benefit me?
>
> Court: Yes sir. In other words, they want to present some mitigation as to why this jury ought not to recommend a death penalty for you, and so Mr. Tassone represents to us here today that you are not agreeable to that, is that correct?
>
> McCray: That's correct.
>
> Court: Could you tell me why, why you don't want to hear from them, I mean, or let the jury hear from them?
>
> McCray: Because I think it's unnecessary.
>
> Court: All right. It's your choice.

(22 R 1560-61). Counsel then informed the court that McCray had authorized him to call a number of family members to testify on his behalf, but:

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[4] Specifically, the statutory mitigators of extreme mental or emotional disturbance at the time of the criminal act, the impaired capacity to appreciate the criminality of his act, and the age of the defendant at the time of the crime, pursuant to Fla. Stat. § 921.141(6)(b), (f), and (g) respectively.

> [McCray] doesn't want me to go into his – the witnesses' relationship and background and rather wants their testimony – or wanted me to elicit testimony essentially about this case or the handling of the this case, and I respectfully indicated that I didn't think that was relevant or proper, but that is where I am at with these witnesses, your honor.

(22 R 1562). Counsel continued upon being asked to clarify by the court:

> Mr. McCray does not want me to ask questions that I would normally ask witnesses in this situation and that is relationships, people who love him, people who he loved, some of the good acts, deeds, whatever, that he did in his past, the impact that he had on his family and friends and on his community.
>
> It is my understanding that Mr. McCray does not want me to ask questions of that nature and would rather – and has instructed me to ask questions only with regard to what these witnesses think or feel about the handling of this case, not as attorneys but perhaps as the process went…

(22 R 1563). The Court then asked the defendant to verify his desire to limit counsel's mitigation presentation, which McCray did throughout a rambling dissertation insisting that the mitigating evidence was not "hard core" enough to sway the opinions of a jury who had already convicted him of first degree murder. (22 R 1565). After McCray affirmed his decision to present no mitigation in the penalty phase, defense counsel offered to proffer the testimony of non-expert witnesses. (22 R 1566).

Prior to beginning the proffer, McCray interjected and stated that the non-expert testimony could be presented to the jury. (22 R 1567). Counsel then

proceeded to call and question a number of family and friends of the defendant.[5] After the testimony of the fourth penalty phase witness was completed, the court again inquired as to McCray's decision not to call experts to testify:

> Mr. Tassone, let me ask him one more thing. Mr. McCray, I'm sure you remember this but maybe you don't. Dr. Krop and Dr. Miller never testified before this jury, okay? They testified before me at a hearing that you attended, I think, maybe the week before, so I'm recommending that you let them testify because they don't know anything about you. You understand? You and Mr. Tassone and Mr. Eler talk about that because I think it can't do anything but help you, all right? Tell me when you are ready.

(22 R 1585-86). The court then called a recess, allowing counsel to confer with McCray, after which the court was informed by defense counsel that McCray again refused to present the testimony of the two psychologists on his behalf. (22 R 1586). Through the course of the five witnesses that McCray allowed to testify, no statutory mitigators were addressed, argued for, or established. Additionally, very limited non-statutory mitigation was presented to the jury.

The limited non-statutory mitigation presented was as follows: McCray acted as a role model to his younger cousins (22 R 1570, 1573); his family loved and supported him (22 R 1574); he was affected by the death of his Grandmother (22 R 1577); that he had a "promising future" as a child (22 R 1576); he suffered mental "diminishment" (a non-expert opinion) (22 R 1578, 84, 89); that at some

[5] Namely, the defendant's cousin John Manning (22 R 1568), cousin Christopher Lewis (22 R 1572), aunt Veronica Lewis (22 R 1575), father Gary McCray Sr. (22 R 1581), and girlfriend Terry Carter (22 R 1587)

unknown time he had been in a mental institution (22 R 1589); and he was a good father to his children (22 R 1580, 88).

McCray then demanded to give his own closing argument in the penalty phase, which the court allowed. (14 R 2615). Prior to this catastrophic "closing argument" by the defendant, the state acknowledged that minimal mitigation was presented to the jury. The state argued that what "mitigation" was presented actually made McCray's crime worse because he "had a great childhood," "[he] wasn't abused", and he "had the support of his friends and family who cared for him." (14 R 2638).

McCray's rambling close to the penalty phase addressed nothing in the way of mitigation, nor did it in any way tie in or even summarize the limited mitigation that McCray allowed his counsel to present. McCray's improper penalty phase closing argument addressed only issues pertaining to his guilt or innocence, and addressed nothing in the way of mitigating factors. (14 R 2639-2651).

Counsel presented additional mitigation for the court's consideration in at the October 22, 2008 (14 R 2667) Spencer hearing. Here, the defendant presented the reports of Mitigation coordinator Shreya Mandel[6] (10 R 1964); the August 15,

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[6] Ms. Mandel's report was created after a lengthy analysis and assessment of all information included in a PSI report including: psychological evaluations by Dr.'s Meyers and Krop, Clay County A&B reports, 911 call transcripts, Clay Cty. Correctional medical records, Educational and School reports, School physical

2008 report on an evaluation conducted by Dr. Harry Krop; and the August 18, 2008 and reports of doctor's Wade Meyers and Steve Miller. The October 16, 2008 report *specifically addresses* the existence of statutory mitigation under Fla. Stat. 921.141, including the likelihood of the extreme emotional distress, and inability to appreciate the criminality of his conduct. (10 R 1989). A Memorandum of Law in Support of a Life Sentence was filed by trial counsel on November 14, 2008. (10 R 1942). This memorandum specifically lists support and argument for the existence of three statutory mitigators pursuant to Fla. Stat. § 921.141(6)(b),(f),(g). Additionally, the memorandum discussed 10 potential non-statutory mitigators. A motion to preclude imposition of the death penalty was filed by trial counsel on November 14, 2008 in accompaniment to the Memorandum of Law (10 R 1990). This motion summarized the Memorandum and also argued at length for the existence of the age of the defendant mitigator pursuant to Fla. Stat. § 921.141(6)(g) largely due to the expert finding of diminished capacity and low emotional age as applied in the context of *Rompilla v. Beard*, 545 U.S. 374 (2005). (10 R 1994). It bears mention again that none of these reports, experts, or arguments were heard or considered by the jury during trial.

II. Florida law dictates that a trial court must not give great weight to a jury's recommendation of guilt where the jury has not heard mitigating evidence:

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examination forms, multiple interviews with friends and family, a variety of scholarly research on mental health.

In Muhammed v. State, 782 So. 2d 343 (Fla. 2001) this court held that reversible error occurs when a trial court affords a jury recommendation "great weight" when a defendant either waives the jury's advisory recommendation, or limits the presentation of mitigation in the penalty phase of trial. The court explained that where a defendant fails to present any mitigation, a jury is stripped of the ability to make a sound recommendation based on the character and background of the defendant. Id. at 361. See also Herring v. State, 446 So. 2d 1049, 1056 (Fla. 1984). The court further stated that when a jury does not hear mitigating evidence, even as a result of the defendant's refusal, the trial court has a duty to consider all mitigating evidence, "contained anywhere in the record, to the extent it is believable and uncontroverted." This requirement applies when a defendant argues in favor of the death penalty, even if the defendant asks the court not to consider mitigating evidence." Id. at 363, citing Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993) ("Farr I") (internal citation omitted). This court specifically held that a comprehensive PSI report should be ordered and considered by the trial court when faced with an unreliable jury recommendation due to a waiver of the jury recommendation, or a penalty phase in which no mitigation was presented by the defendant. Id.[7]

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[7]In the past, we have encouraged trial courts to order the preparation of a PSI to determine the existence of mitigating circumstances "in at least those cases in

The ruling of _*Muhammed*_ was further defined in _*Grim v. State*_, 841 So. 2d 455 (Fla. 2003). In _*Grim*_, the trial court was again faced with a defendant who did not present mitigating evidence and did not waive the jury recommendation. This court upheld the death sentence imposed by the trial court, explaining that it could be distinguished from _*Muhammed*_ on the following grounds:

> In its sentencing order the trial court recognized, unlike the trial court in *Muhammad*, that the penalty phase jury did not have the benefit of hearing mitigation…
>
> Moreover, the trial judge considered two separate paths in sentencing Grim. In considering the jury's recommendation, the judge recognized and considered the fact that in making its recommendation the jury did not have the benefit of hearing mitigating evidence. The judge therefore independently weighed the aggravating and mitigating circumstances as noted in his sentencing order…
>
> We find this case distinguishable from *Muhammad* and conclude that the trial court properly sentenced Grim despite the lack of mitigation presented for the jury's consideration in the penalty phase.

_*Id*_. at 461. This court, in _*Grim*_, determined that a trial court must meet two

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which the defendant essentially is not challenging the imposition of the death penalty." Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that 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*. To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. _*Muhammed v. State*_, 782 So. 2d 343 (Fla. 2001).

requirements in sentencing a defendant who has either waived the jury recommendation, or failed to present mitigation in the penalty phase: 1) the trial court must specifically acknowledge in its sentencing order that the jury recommendation was made bereft of hearing the available mitigation; and 2) an independent analysis of all available mitigation must be conducted and delineated in its sentencing order before a court may arrive at the same decision made by the uninformed jury. *Id*. Notably, the requirement that a defendant waive a jury recommendation (as occurred in the *Muhammed* case) was removed in the *Grim* opinion. The *Muhammed* analysis was said to apply even where a defendant did not specifically waive jury recommendation in the penalty phase, but no mitigation was presented. *Id*. The court held that a separate analysis of the mitigation must be conducted by the court in the event that no mitigation was presented to the jury, regardless of whether the defendant waived jury recommendation. *Id*.

In *Jackson v. State*, 18 So. 3d 1016 (Fla. 2009) this court again interpreted *Muhammed*. In *Jackson*, the defendant validly waived his right to present mitigation evidence in the penalty phase, but then argued on direct appeal that the trial court erred in not: 1) providing the jury with an alternative means to hear mitigating evidence, and 2) informing the jury that their recommendation would be afforded “great weight”. In denying this claim, this court stated:

> When a defendant waives mitigation evidence, *Muhammad* simply requires the trial court to order the preparation of a PSI and also

> permits the trial court to call witnesses to present mitigation evidence to the extent that the PSI alerts the court of the existence of significant mitigation. Here, the trial court fully complied with these requirements by ordering the preparation of a PSI. In addition, the sentencing order reflects that the trial court utilized the PSI when it considered the appropriate sentences to be imposed for the murders.

Id. at 1033 (internal citations omitted). Here, this court again affirmed the holding in *Muhammed* that a PSI report must be ordered and considered by the court as part of an independent analysis. The FSC in Jackson stated the following:

> [A]lthough the trial court orally informed the jury [in Jackson's case] that its recommendation would be given great weight, there is no indication here that the trial court afforded great weight to the jury's advisory recommendation…the trial court expressly conducted a separate analysis and did not consider the jury's recommendation as dispositive of the ultimate sentence.
>
> Accordingly, we deny relief on this issue because the trial court here complied with the dictates of *Muhammad* when a PSI was ordered and properly conducted an independent analysis of the aggravating and mitigating circumstances found in the record to determine the appropriate sentences without affording dispositive weight to the jury's advisory recommendation.

Id. at 1033 citing *Muhammed*, 782 So. 2d at 362. The court in Jackson held that even where a defendant did not waive a penalty-phase jury, but very little mitigation was presented, and where a court orders a PSI and conducts an independent analysis, it has covered its bases. *Id*.

It is apparent that since *Muhammed*, this court has delineated a specific set of guidelines to follow in order to avoid reversal when a court affords great weight to a jury recommendation after a defendant waives the jury recommendation or

presents no mitigation in the penalty phase. These steps include: 1) An independent assessment of the aggravators and all available mitigation, all of which must be discussed and considered in the sentencing order. *See* *Muhammed,*782 So. 2d at 363, *Grim* So. 2d at 841, *Jackson* 18 So. 3d at 1033; 2) The ordering of a PSI report to assist in determining what mitigation exists. *See* *Muhammed* 782 So. 2d at 363, *Jackson*, 18 So. 3d at 1034; and 3) Explicit acknowledgment in the sentencing order that the Jury's recommendation was made without considering mitigating evidence. *See* *Grim* So. 2d at 461.

III. The trial court violated *Muhammed* and *Jackson* in failing to order a PSI and in giving the jury's recommendation of guilt great weight when the jury had heard only limited mitigating evidence:

The trial court failed to order or consider a PSI report in violation of *Muhammed* and *Jackson*. This action by the trial court is demanded by Florida Law in the event that a waiver of jury recommendation or failure to present mitigation occurs. *Muhammed,* 782 So. 2d at 343, *Jackson* 18 So. 3d at 1034. The failure to order and consider the PSI alone meets the criteria of a *Muhammed* violation which explained the necessity for the trial court to consider all mitigation "contained anywhere in the record, to the extent it is believable and uncontroverted." *Muhammed*, 782 So. 2d at 343.

Secondly, the court assigned great weight to the jury's recommendation for death, but failed to stipulate in its order that the jury's recommendation was made

without the benefit of hearing the entirety of the available mitigation. *Grim* So. 2d at 461. The jury's recommendation was therefore disproportionate, and as determined in *Muhammed*, should not have been assigned great weight by the court in determining the sentence.

Finally, this court failed to conduct an independent and thorough analysis of all mitigating evidence available as required under *Muhammed* and *Grim*. In the instant case, even where McCray refused to present mitigation in the penalty phase defense counsel provided the trial court with other sources of mitigation to consider. While some sources were considered by the court, the court failed to consider and note its examination of "all mitigation evidence contained in the record."

Notably, the October 18, 2008 report of doctor's Miller and Meyers was not discussed or even acknowledged by the court in the portion of the sentencing order discussing the statutory mitigator of extreme mental or emotional disturbance. The order, instead of addressing the sources of mitigation pursuant to *Mohammed* and *Grim*, attempts to circumvent McCray's disastrous penalty phase by saying "no testimony explicitly established that the defendant was under the influence of any mental or emotional disturbance at the time of the murders. (11 R 2066). However the court is not allowed to circumvent mitigation evidence simply because a

defendant refused to present it. *Muhammed*, supra. This evidence was presented during the Spender hearing. (14 R 2667)

In discussing the existence of the statutory mitigator of defendant's age at the time of the offense, the court did not consider or address the expert's opinions as to McCray's diagnosed schizophrenia, nor the implications of same pursuant to *Rompilla*, as addressed in Defendant's motion to preclude imposition of the death penalty. (10 R 1990). In addressing the non-statutory mitigation, the court did not consider or address the report of the mitigation coordinator. (11 R 2068). One could expect that should the court fail to order and consult a PSI, that the report of the mitigation coordinator, addressing the same evidence and documentation encompassed in a PSI, would have been consulted.

The sentencing order does not reflect that the prior order of the court determining McCray incompetent was considered.[8] (5 R 977-82) Nor does it appear that the November 8, 2008 Department of Children and Families (DCF) letter to the court following a competency determination was considered. This

[8] This Order contained the following evidence previously found by the court in determining McCray incompetent to proceed with trial: 1) that while awaiting trial McCray had been in isolation or suicide watch while incarcerated and awaiting trial, 2) that McCray engaged in self injurious behavior (such as kicking doors, not eating, inviting pepper sprays and or tasing by jail officials), 3) that there is a history of mental illness in defendant's family, 4) that McCray's communication was at times incomprehensible, 5) that McCray does not voluntarily perform self hygiene and must be forcibly removed and compelled to do so, 6) that two doctors concluded that McCray is in need of involuntary hospitalization and is deteriorating. (5 R 977-982)

letter notes that DCF doctors found an Axis I diagnoses of Psychotic Disorder, with an Axis II diagnosis of Anti-social personality disorder. The letter also notes that McCray was being medicated with two potent psychotropic medications. (6 R 1153-54).

The sentencing order does not reflect that the judge gave any consideration to the Clay County Jail records which indicate an extensive medication regimen and a number of bizarre acts committed by McCray during incarceration. (9 R 1784). Nor does it appear that the court considered defendant's sentencing memorandum in favor of life which clearly discusses the *Muhammed* implication of an unreliable jury recommendation. (10 R 1942). The court seems to have completely ignored this forewarning by giving full weight to the juror recommendation, yet no attempt at distinguishing McCray from *Muhammed* is made in the sentencing order.

The court gave no consideration given to the listing of mitigation in the November 14, 2009, Motion to Preclude the Death Penalty (10 R 1990). The entirety of this motion functions essentially as a summary of all previous mitigation sources and evidence of same. This document would have functioned as a starting point for the trial court given the failure to order a PSI.

While it is clear that some sources of mitigation were considered by court during sentencing, it is also quite apparent that the court failed to consult all

available mitigation contained in the record as demanded by this court in cases such as _Muhammed_.

Furthermore, this court in _Jackson_ noted that as the sentencing judge did not consider the recommendation of the jury as dispositive, there was no error. _Jackson_, 18 So. 3d at 1034. The court in McCray *did* consider the jury's recommendation as dispositive of the ultimate sentence. (11 R 2071). Moreover, this court held in _Jackson_ that because counsel was afforded the opportunity to conduct a closing argument in the penalty phase in order to tie in what little mitigation the jury heard, and was able to present a limited argument. This did not occur in the instant case with McCray's incoherent pro-se argument. (14 R 2615). The jury was clearly left without any evidence of mitigation and the court in sentencing should have recognized the jury's unreliable recommendation based on insufficient evidence. The state acknowledges that no cognizable mitigation was put forth in the penalty phase due to McCray's closing argument, when it stated in the Spencer hearing:

> Judge, the only issue the state would have is, Mr. McCray, himself, argued his own penalty phase argument and he never articulated a mitigating factor or any other mitigating circumstance. I would ask, at least, for the state to have a chance to review what the defense provides so we can answer their mitigation.

(14 R 2696). The standard afforded in *Jackson*, in that the defendant's penalty phase was not wholly without mitigation, is not present in the instant case, per both the record and the admission of the state.

The lack of a required PSI, the lack of attention to the sources of mitigation present in the record, and the great weight afforded to the jury recommendation despite the fact that it was unreliable, all reflect a trial court that was fed up with the defendant and wanted to be finished with the case as quickly as possible. For the aforementioned reasons, McCray's sentence should be overturned and a new penalty phase granted.

ARGUMENT TWO

THE TRIAL COURT REVERSABLY ERRED IN LIMITING MCCRAY'S FUNDAMENTAL RIGHT TO TESTIFY ON HIS OWN BEHALF DURING THE GUILT PHASE

The essential elements required under Due Process of the law, as provided in Fla. Const. Art. I, § 9 (2009), U.S. Const. amend. V, and U.S. Const. amend. XIV, are notice, an opportunity to be heard, and an opportunity to defend in an orderly proceeding before a tribunal having jurisdiction of the cause. Also guaranteed is the right to present witnesses and testify in one's own defense. The court denied McCray his constitutional right to testify as the court cut short his testimony during the guilt phase of his trial. (21 R 1438). This constitutes reversible error.

I. McCray's guilt phase testimony

When the state rested its case-in-chief, defense counsel informed the court that McCray was going to testify in his own defense; that McCray did not inform his counsel what he intended to testify about; and that McCray intended to deliver his testimony in a narrative fashion. (21 R 1397-1398). Just before the court allowed the jury into the courtroom, McCray stated that he was not ready to testify as he needed twelve copies of depositions to show the jury that the witness statements differed from the prosecution's testimony. (21 R 1411). The court told McCray the depositions were irrelevant to his testimony, and proceeded to place McCray under oath. (21 R 1412).

During his testimony, McCray spoke about several relevant issues surrounding his defense. McCray testified about his alibi, stating he was at the residence of an acquaintance during the time of the murders. (21 R 1414). McCray attempted to rebut the prosecution's accusations that McCray cut his hair in an effort to avoid arrest and change his appearance. (21 R 1414). McCray defended his reasoning for leaving Jacksonville for Tallahassee shortly after the murders. (7 R 1415). McCray talked about the DNA evidence in the case, arguing the DNA was not a good match. (21 R 1415-1416).

Admittedly, McCray also discussed issues that were irrelevant to his guilt, including legal files stolen from his cell and the police, prosecution, and Judge being at fault for their disappearance. (21 R 1417-1420). The state objected to this

testimony, opining it was "totally irrelevant" and "a waste of the Court's time and the jury's time." (21 R 1420). After the prosecution's objection, McCray relevantly testified about stolen DNA, and why the state needed DNA to prove its case. (21 R 1420). He also discussed the getaway vehicle and how it should not be considered as evidence. (21 R 1421). He discussed how the DNA evidence did not match the scarf bandana found in the getaway vehicle. (21 R 1422).

McCray then discussed "illegal acts" and procedures by the court (21 R 1422-1423), revisited the stolen legal notes from his cell, claimed that the state should not be allowed to "force" witnesses to testify after upon receiving a subpoena, and the "right to remain silent." (21 R 1423-1427). McCray next discussed the "illegal" and "intentional" denial of his Motion to Suppress DNA (21 R 1427-1428).

McCray moved back to relevant material again, testifying as to items in evidence, including a swab from his mouth, the scarf bandanna found in the getaway vehicle, a cigarette found at the scene, and how his DNA did not match them. (21 R 1428-1430). Finally, McCray discussed how the state's eyewitnesses "were under the influence and intoxicated with illegal drugs" for the majority of the day in question, and that they all described the assailant differently. (21 R 1432, 1435-37).

At this point in McCray's testimony, the court interrupted and broke for lunch. After the break, the following discussion between McCray and the court ensued:

Court:	So how much longer you have?
McCray:	There's a whole lot of testimony about the three - - the three witnesses in the house, three surviving eyewitnesses, five surviving eyewitnesses in the house. I don't know. It may take an hour or so.
Court:	No, it's not. That's what I'm telling you. When you come back up here on the bench – on the witness stand he's going to ask you questions. You're not going to sit up here and just make an argument for your case. You're here to testify. You're not defending –
McCray:	I'm not making an argument, Your Honor. I'm giving testimony to the Court.
Court:	You're making an argument and that's what I expect and if you don't follow through with that I'm going to have them remove you from the bench - -from the witness stand. You understand?
McCray:	Your Honor, it's my right to testify in front of the court.
Court:	We'll see, okay? All right. Bring the jury back.
McCray:	Your Honor, my testimony is not through yet before the Court.
Court:	You're going to testify based on questions asked of you. You're not going to give me an argument as to why the case ought to be dismissed or why you ought to be acquitted. You're going to answer questions concerning your testimony. What you're doing right now is just making argument.

(21 R 1438-1441).

During the debate between McCray and the court, the prosecution made a standing objection to McCray's testimony as to relevance (21 R 1441) but

acknowledged that McCray's testimony as to his alibi *was relevant*. (21 R 1441).

The court then terminated McCray's testimony:

Court:	Do you have any further questions?
Mr. Tassone:	No, Sir
McCray:	-- was a dark skinned person.
Court:	*All right. That's the end of his testimony*
State:	We have some cross, Your Honor.
Court:	All right. I think they want to ask you a question when the jury comes back.
McCray:	*Your Honor, I'm - - excuse me, Your Honor. My testimony is not over with.*
Court:	*Your testimony has ended. We're going to have cross examination*.
McCray:	Excuse me, Your Honor, objection. You cannot end my testimony until I end my testimony myself. It is my job to end my testimony because the Court has to hear the whole testimony of the defendant. *You are limiting my testimony to the Court and to the jury.* This is necessary testimony to the jury, Your Honor. If you would please allow me to continue on I would appreciate it. Thank you, Your Honor.
Mr. Tassone:	Mr. McCray, I think at this point it's time for the state to be able to ask you - -
Court:	They're going to ask you some questions.
McCray:	Not yet. No. It's not time for the state.
Court.	Yeah, they are.
McCray:	Not yet, Your Honor. It's still the defendant's – it's still the defendant – the defendant's witness right now. The defendant's testimony has not been finished yet at this time. Now would you please have a seat, Mr. Skinner, so the jury can come in?
Prosecution:	Your Honor, the state is ready to proceed.
McCray:	Objection. If you can please have a seat, Mr. Skinner, so the jury can come in I would like to –
Court:	Take him back there.
McCray:	I would like to finish giving my testimony.
Court:	Take him back there to the holding cell.

(Defendant exits courtroom)

(21 R 1443-1445).

McCray was thus removed from the courtroom before the state even had the opportunity to cross examine him. Defense counsel moved for a mistrial, which was denied. (21 R 1445).

II. The trial court denied McCray's fundamental right to testify and introduce evidence on his own behalf

Without exploring other alternatives, the trial court had no authority to terminate McCray's testimony or allow McCray to testify upon direct examination of his counsel where defense counsel had no idea how McCray might respond. (21 R 1397-1398). Nor did the Court have the justification to terminate McCray's fundamental right to testify on his own behalf, as much of McCray's testimony was relevant in some way to his guilt. (21 R 1397-1492). The extreme sanction employed by the trial court in limiting McCray's testimony (thereby limiting evidence of the defendant) should have been used only as a last resort. See McDuffie v. State, 970 So. 2d 312 (Fla. 2007) *["Where an issue involves possible exclusion of defense evidence, the extreme sanction of excluding defense evidence should be used only as a last resort and it is incumbent upon the trial court to determine whether any other reasonable alternatives can be employed to overcome possible prejudice, including declaration of a mistrial"]*. One of a defendant's most important due process rights is the right to call witnesses. LoBue v. Travelers

Ins. Co., 388 So. 2d 1349, 1351 (Fla. 4th DCA 1980). A trial court should only exclude witnesses under the most compelling of circumstances. *Id*. This is particularly so when the exclusion would be of a party's most important witness. *LoBue*, 388 So. 2d at 1351; *Keller Indus. v. Volk*, 657 So. 2d 1200 (Fla. 4th DCA 1995).

McCray, facing a first degree murder conviction and the death penalty, had the right to present evidence to his defense. The presentation of evidence is fundamental and essential to every person's constitutional right to Due Process under the Sixth and Fourteenth Amendments to the United States Constitution. *See Gamez v. State*, 643 So. 2d 1105 (Fla. 4th DCA 1994); *Colina v. State* 570 So. 2d 929 (Fla. 1990). Because McCray's testimony (the coherent and relevant portion) was relevant to the furtherance of his defense, it was not merely argument, but relevant first-hand accounts of McCray's defense to the jury. The state acknowledged that portions of McCray's testimony were relevant. (21 R 1441).

This bar upon McCray's testimony denied him the fundamental right to defend himself in violation of the Sixth and Fourteenth Amendments, and his Due Process rights under Fla. Const. Art. I, § 9 (2009); *Wessling v. State*, 877 So. 2d 877, 879 (Fla. 4th DCA 2004) *["Exclusion of exculpatory evidence denies a defendant his fundamental right to defend himself in violation of the Sixth Amendment]*.

Accordingly, McCray's case should be reversed for a new trial.

ARGUMENT THREE

THE TRIAL COURT'S FAILURE TO CONDUCT ADEQUATE FARETTA INQUIRIES AND SUBSEQUENT APPOINTMENT OF COUNSEL OVER THE OBJECTION OF MCCRAY CONSTITUTED PER SE REVERSIBLE ERROR

McCray unequivocally requested the right to self representation four times throughout the guilt phase of his trial. On the first occasion, the trial court gave no *Faretta*[9] inquiry. On the second occasion it gave an inadequate *Faretta* inquiry. On the third request, the court again gave an inadequate *Faretta* inquiry then temporarily allowed McCray to represent himself, only to reappoint counsel almost immediately thereafter. McCray's fourth request for self-representation was ignored, after the court forced representation upon McCray. Per se reversible error occurred as a result of the court ignoring McCray's requests for self-representation, failing to give proper *Faretta* inquiries, and/or re-appointing counsel after granting McCray the right to represent himself. Thus, McCray's convictions and sentences should be reversed and remanded for a new trial. *Tennis v. State, 997 So. 2d 375, at 379-80* (Fla. 2008) *[holding that the failure to hold a Faretta hearing is per se reversible error and reversing the defendant's conviction, vacating his death sentence, and remanding for a new trial].*

I. Four requests by McCray for self-representation

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

A. **First request for self-representation**

McCray's first request for self-representation during trial occurred during McCray's third competency hearing on August 22, 2008, after commencement of jury selection.[10] The dialogue between McCray and the Court went as follows:

McCray:	I'm allowed to object in the courtroom. It's legal procedure.
Court:	No, you don't. You don't represent yourself.
McCray:	Well, I need to represent myself because my lawyer is not representing me right now.
Court:	You want to represent yourself rather than them represent you, is that what you're saying?
McCray:	I'm going to represent myself as well as they are, too.
Court:	No, they're not. Either they represent you or you represent yourself.
McCray:	You can't tell me that I can't represent myself with them.
Court:	I can tell you that.
McCray:	I can represent myself with them, too. As long as I can represent myself by myself then I am allowed to represent myself with my lawyer says the law and the Court.
Court:	I'm telling you that you're not.
McCray:	Your Honor, *how can I not represent myself by myself*?
Court:	You do not represent yourself.
McCray:	You are talking at the same time.
Court:	Take him back there in the cell.

[10] On December 1, 2004, a different Circuit Court Judge conducted a *Faretta* inquiry after McCray requested self-representation. (12 R 2226). Ironically, this Judge followed the proper *Faretta* colloquy ordered by the Florida Supreme Court. (12 R 2240).

(16 R 383-84). The record shows that McCray made an unequivocal for self-or hybrid representation was made, yet no _Faretta_ inquiry was given. Instead, McCray was banished from the courtroom.

B. Second request for self-representation

On September 2, 2008, during the prosecution's opening statement of trial, McCray again requested to represent himself. (16 R 599). The Court expressed concern that McCray wanted to engage in hybrid representation at this time, and an inadequate _Faretta_ inquiry was attempted by the court. Later in this proceeding, McCray made an unequivocal request for full-self representation, no _Faretta_ inquiry was conducted, and McCray was banished from the courtroom. The following questions employed by the court did not adequately "explore with the appellant the complexities of a jury trial, [and] the dangers and disadvantages of self-representation," a necessity spelled out in _Jones v. State_, 658 So. 2d 122, 125 (Fla. 2d DCA 1995):

McCray: *Your Honor, I'm going to represent myself*. I said if I want to address the Court I need to represent myself. I'm going to represent myself at this time, Your Honor…

Court: The question is: Are you going to represent yourself and discharge your attorney? Is that what you want to do?

McCray: Your Honor, you told me if I would like to represent myself to address the Court that I could. You told me - -

Court: No, no. I said you were either going to represent yourself or you're going to be represented by counsel. You're not going to do both.

McCray: Okay.

Court: Now my question is: Do you want to be represented by Mr. Eler and Mr. Tassone.
McCray: *I'm going to represent myself right now at this time*.
Court: No, you're not. You're going to do one or the other.

McCray: You told me - - *I'm going to represent myself now at this time,* Your Honor. You told me if I would like to speak before the Court - -
Court: Take him back there and cut the T.V. on for him where he can hear.
McCray: *You said I can't represent myself right now, Your Honor?*
Court: You want to represent yourself and discharge your attorneys?
McCray: Yes, I would like to.
Court: All right. Raise your right hand. Hold on. I want to deal with him right now.

(Defendant sworn.)

Court: Now what you're saying here you want to discharge your attorneys, correct?
McCray: You told me if I would like to address the Court - -
Court: I want you to answer my question and then you can talk. Is it your desire to discharge you two attorneys here today?
McCray: Yes, Sir. I can speak in Court, yes, Sir.
Court: And represent yourself throughout the trial and they will go back to their office, is that what you're going to do?
McCray: Go back to their office?
Court: Do you want them to represent you at all during this trial?
McCray: I would like to represent myself right now at this time, Your Honor.
Court: Listen to me. Are you - - do you not understand what I'm asking do you want to represent yourself throughout the trial or not?
McCray: Yes, Sir. I do.
Court: You want to discharge your two attorneys then, right?
McCray: Yes.

(17 R 598-600). Just minutes later, the conversation between McCray and the court began again:

McCray:	Your Honor, you told me if I would like to speak before the Court I would have to fire my attorney from the case and represent myself. My lawyers are ineffective assistance at this time. …
McCray:	I am the head of the defense says the court of law. With that said, Your Honor, I also – well, I'm not going to continue on right there but I'll stop right there. The defendant will defend hisself (sic) with the assistance of counsel. I am the head of the defense says the Court to flaw right here in criminal law key 641.5.5 in parenthesis. …
Court:	You ever represented yourself before?
McCray:	No. No, I haven't represented myself.
Court:	Tell me something about your background. What kind of education do you have?
McCray:	I have a 12th grade education.
Court:	12th grade?
McCray:	High school graduate.
Court:	All right. Have you got – had any type training in the law itself?
McCray:	No. But really, Your Honor, with this kind of - -
Court:	What kind of jobs have you had over the years? Tell me something about your employment background?.
McCray:	I worked at a couple jobs, Your Honor, a couple of fast food, Winn-Dixie.
Court:	Okay. But you've never worked in anything that dealt with the law itself, have you? Never worked for law enforcement, never worked s a bailiff, never worked in a courtroom as a clerk or any of that kind of stuff, have you?
McCray:	No, Your Honor, but with the law - - what the law saying that they are to assist me I can still keep my counsel right now at this time and defend myself before the court at the same time because it is my job as the defendant.

Court:	So you want to keep you lawyer then, is that wah5 you are saying? You want to keep your lawyers plus you want to talk on your own, right?
McCray:	That's right.
Court:	You understand that you're charged with four counts of first degree murder, don't you?
McCray:	Yes, Sir.
Court:	You understand the penalty is either life in prison without parole or death?
McCray:	Yes, I do.
Court:	You understand how serious that is, right?
McCray:	Yes, I do.
Court:	So far you haven't told me anything that would indicate that you have a right to speak when you're represented by counsel. Now, what I - - based on—based on your conduct that you – that you had at the jury selection time interrupting like you're doing here today I provided you a T.V. back there in the holding cell along with sound and each time we go through witness then your lawyer will come back and ask if you got any kind of questions, but at this time I'm removing you from the courtroom, okay?

(17 R 605-9). McCray then made another *unequivocal* request to for self-representation:

McCray:	I don't want my counsel.
Court:	Move him back to the Court – back to the cell
McCray:	I don't want them to help me right now, then, Your Honor.
Court:	Anyway, *you're not capable of representing yourself in this type of case anyway.* Bring the jury back.
McCray:	I don't prefer them to help me at all right now. I'd like to dismiss them all the way because I'm the head of the defense. I'll assist myself without - -

(Defendant excused from the courtroom)

(17 R 609). Again no proper *Faretta* was given. The trial court denied McCray's request for self-representation based on the court's opinion that McCray was *incapable of representing himself*, not based whether McCray was capable of making a knowingly and voluntarily waiver of counsel. Such a determination based upon ability to represent oneself rather that capability to waive counsel is improper. *See* *Reddick v. State*, 937 So. 2d 1279 (Fla. 4th DCA 2006) *[Case reversed as the trial court failed to make the necessary finding that defendant knowingly and intelligently sought to waive his right to counsel. Instead, the trial court considered defendant's competence to represent himself, although not a required subject of inquiry, perhaps in a noble attempt to interpose itself between defendant and any upcoming danger].*

The preceding dialogue between the trial court and McCray does not constitute a valid *Faretta* inquiry. The dangers and disadvantages of self representation were never discussed; McCray was not asked whether he was under the influence of drugs or alcohol; whether he had ever been diagnosed or treated for mental illness; or whether he had any physical problems which would hinder self-representation. *See* *Wilson v. State*, 724 So. 2d 144 (Fla. 1st DCA 1998). If the state argues the first portion of this self-representation request was not unequivocal, when McCray finally did unequivocally request his right to self

representation, the trial court banished McCray without any _Faretta_ inquiry whatsoever.

C. McCray's third request for self representation

After the state called its first witness during its case-in-chief, McCray requested to represent himself for the third time. The trial court actually allowed McCray to represent himself this time after another brief, inadequate _Faretta_ inquiry. (17 R 661):

Court:	All right. Mr. McCray, one of your counsel has come back to the Court and says you want to represent yourself now?
McCray:	Yes, sir.
Court:	And only you will represent yourself without counsel, correct?
McCray:	Yes.
…	
Court:	How old are you?
McCray:	28.
Court:	28. And your – you education I think you told me earlier that you finished high school, correct?
McCray:	Yes.
Court:	And you have no experience in the legal field, correct?
McCray:	Not really. Only what I've learned in jail.
Court:	While you've been in jail?
McCray:	Yes.
Court:	Now you understand that if you represent yourself that you are bound by the same rules of evidence and trial procedure that the lawyers are that is you'll get no help from anyone in that you're representing yourself? If there's – an objection should be made and because of your lack of legal training or you're not a lawyer then you're on your own. Then- - body is to help you. I can't help you as a Judge. You have to do it own your own. Do you understand that?

McCray:	Yes, Sir.
Court:	And do you understand—I think we discussed earlier that the penalty for what you're charged with is very serious. You've got four counts of first degree murder and the penalty of either life without parole or death. That' the only penalty that can be imposed for those crimes. Now knowing all of that, do you still think you ought to be representing yourself and not have your attorneys representing you?
McCray:	The case is very simple, Your Honor. I can handle it. I can represent myself easily.
Court:	You think you can do that?
McCray:	Yes, I can.
Court:	Is that what you're telling me?
McCray:	Yes. Very simple case.
Court:	Okay. Thank you. You're discharged.

(17 R 660-62).

As soon as the trial court allowed McCray to represent himself, the court reconsidered upon McCray statement that he needed defense counsel's files for his defense, and that he had, "new evidence" to present to the court regarding law notes stolen from his cell. (17 R 662-64):

McCray:	Objection, Your Honor. This is evidence that law - - that law materials were stolen out of the defendant's room.
Court:	All right. Okay. I think that settles it. You two are back representing him. He goes back to the back. They'll come back there and talk with you about questioning.
McCray:	I don't want them representing me, Your Honor.
Court:	You're out, okay?

(17 R 668-69). The court then explained its rationale for banishing McCray from the Courtroom:

Court: All right. Obviously the record should reflect that I have no choice. He keeps interrupting the court. He can't see to stay on task as to what we're dealing with. What he's talking about has absolutely nothing to do with this witness, so that's the basis for going back to the way were doing. (17 R 669). [11]

D. McCray's fourth request for self-representation

After McCray's request for self-representation was denied, he later asked the trial court to reconsider. This request fell on deaf ears:

Court: Ask Mr. Tassone to step back here. Mr. Tassone, you wanted to put something on the record here, I believe, did you not?

Counsel: Your Honor, yes, Sir. As the Court's aware I was back with Mr. McCray. He wanted me to advise the Court again that he wanted – this was during the testimony of Mr. Logan, that he wanted to represent himself and asked me to tell you that as soon as I could.

….

He said he would not interrupt and I am passing that along to the Court.

(18 R 687).

II. Florida case law requires reversal

A. Unequivocal request for self-representation

McCray's requests to engage in self-representation were unequivocal. McCray asked on numerous occasions to be allowed to exercise his right to self-

[11] The Court contrastingly finds McCray able to represent himself in the penalty phase of his trial, contradicting this earlier finding. (14 R 1618-21).

representation, stating, "I want to dismiss them all the way, "I would like to represent myself." (17 R 609).

In the light spun most favorable to the state, McCray requested hybrid representation in the first two requests, and full self-representation in his third and fourth requests. These unequivocal requests for self representation required the trial court to conduct adequate *Faretta* inquiries. See State v. Craft, 685 So. 2d 1292, 1295 (Fla. 1996) *["[O]nly an unequivocal assertion of the right to self-representation will trigger the need for a Faretta inquiry"]*; See Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988).

B. Inadequate *Faretta*

Although the Florida Supreme Court's Model *Faretta* inquiry and Fla. R. Crim. P. 3.111(d), was available for the use of the trial court, it chose not to utilize this guide, and conducted its *Faretta* inquiries inadequately.

McCray's first and fourth requests for self-representation were not met with any *Faretta* inquiry whatsoever. After McCray's second request, the court did not inquire as to: "dangers and disadvantages" of self representation; whether any mental or physical limitations would constrict McCray's self-representation; whether McCray understood access to the State Attorney will be severely reduced as compared to a lawyer who could easily contact the State Attorney. After McCray's third request and brief questioning by the court, the court took no time to

discuss what benefits his attorneys would offer; whether McCray understood his access to the prosecution or legal library would be fettered; or whether McCray had any mental or physical limitations that would constrict his representation (17 R 660-64) despite McCray saying his case was "very simple" and he "can handle it." The lack of such questioning by the court resulted in the court's determination as to whether McCray "knowingly" and "voluntarily" waived his right to counsel being based on insufficient information. Importantly, nowhere in the inadequate colloquies does the trial court ever find McCray "knowingly and voluntarily" waived his right to counsel. Instead, it provides as a reason for such a denial that McCray is "incapable" of representing himself (17 R 609), a reason courts have specifically rejected as support for a denial of a request for self-representation. <u>Reddick</u>, 937 So. 2d 1279. This was per se reversible error. [12]

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[12] The Florida Supreme Court has summarized the model colloquy as follows:

> The judge is to (1) inquire concerning the defendant's age, education, his ability to read and write, any mental or physical conditions, and whether anyone has threatened him concerning the decision to proceed without counsel; (2) advise the defendant that a lawyer can assist him in calling witnesses and presenting evidence, advise him regarding whether he should testify, is familiar with the rules of evidence, can ensure accurate jury instructions are given, and preserve errors for appeal; and (3) warn the defendant he will not receive special treatment and will be limited by the resources available to him while in custody. See *Amendments to Fla. Rules of Crim. Pro. 3.111(d)(2)-(3)*, 719 So. 2d 873 (1998).

The abundance of case law existing on this topic demonstrates that the trial court's inadequate _Faretta_ inquiries and improper justification for denying McCray's self-representation was per se reversible error[13] _See_ _Tennis v. State_, 997 So. 2d 375 (Fla. 2008*) [Under our clear precedent, and that of the district courts of appeal, the trial court's failure to hold a Faretta hearing in this case to determine whether Tennis could represent himself is per se reversible error]*; _State v. Young_, 626 So. 2d 655, 657 (Fla. 1993) *["[T]he United States Supreme Court decision in Faretta and our rule 3.111(d) require a reversal when there is not a proper Faretta inquiry"*]; _Rodriguez v. State_, 982 So. 2d 1272, 1274 (Fla. 3d DCA 2008) *[holding that court's failure to conduct Faretta hearing was reversible error]*; _Goldsmith v. State_, 937 So. 2d 1253, 1256-57 (Fla. 2d DCA 2006) *[holding that the denial of the right of self-representation is not amenable to harmless error analysis]*. _Dorman v. Wainwright_, 798 F.2d 1358, 1370 (11th Cir. 1986); *Sandoval v. State*, 884 So. 2d 214, 216 (Fla. 2d DCA 2004) *[vacating Sandoval's sentence and remanding for resentencing due to a* _Faretta_ *violation despite the fact that Sandoval "will almost certainly receive the same sentence on remand"]*; _Morgan v. State_, 991 So. 2d 984 *[The biggest problem here is that the trial court failed to*

[13] Although a trial judge is not required to follow this colloquy word for word, the judge needs to assure the inquiry is sufficient to ensure a knowingly and voluntary waiver of counsel. *See* _Smith v. State_, 956 So. 2d 1288, 1290 (Fla. 4th DCA 2007); _Porter v. State_, 788 So. 2d 917, 927 (Fla. 2001)

warn the defendant of the dangers and disadvantages of self-representation]; Wilson v. State, 724 So. 2d 144 (Fla. 1st DCA 1998).

If this Court finds that McCray was not requesting complete self-representation during either of the two aforementioned first and second requests, but rather requesting hybrid representation, a complete and adequate *Faretta* inquiry is still required to save reversal on appeal. *See* Brooks v. State, 703 So. 2d 504 (Fla. 1st DCA 1997) (Where a trial court permitted hybrid representation at defendant's trial, the judge was required to administer *Faretta* warnings on the consequences of waiving trial counsel, even though court-appointed stand-by counsel assisted in the defense).

McCray's fourth request (after the trial court required McCray to be represented by counsel) made through his counsel was not even acknowledged by the trial court. Instead, the trial court broke for lunch, and never revisited the issue. This issue went completely unsolved, and was the last time McCray requested self-representation in the guilt phase. The failure to conduct a *Faretta* inquiry here was per se reversible error. *See* *Haram v. State*, 625 So. 2d 875, 875 (Fla. 5th DCA 1993) (affirming trial court's denial of defendant's request to represent himself because the request was "not in good faith, but . . . designed solely for the purpose of further delay"). ("Our cases make clear that a trial judge is not compelled to allow a defendant to delay and continually frustrate his trial." *Young*, 626 So. 2d at

657; Fleck v. State, 956 So. 2d 548, 550 (Fla. 2d DCA 2007) (rejecting State's argument that the court was justified in denying the defendant's request because of an attempt to delay proceedings where court made no findings that motions were improper attempts to delay).

C. Forced reappointment of counsel

The trial court's justifications for disallowing McCray to represent himself were based on McCray's "inability to represent himself," "disruption," and "inability to keep focused on what we were talking about." (18 R 689)(18 R 609). These findings were insufficient for denying McCray's right to his Sixth Amendment right to self-representation, a right considered as the "lifeblood of the law." *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring) *[a knowing and intelligent waiver of counsel "must be honored out of 'that respect for the individual which is the lifeblood of the law'"]*; *See* State v. Bowen, 698 So. 2d 248, 251 (Fla. 1997) *[The focus of a Faretta hearing under rule 3.111 is whether a defendant is competent to waive the right to counsel, not whether he is competent to provide an adequate defense]*.

As stated above, a denial of self-representation premised on a defendant's competence for self-representation, and not under the premise of whether the defendant "knowingly and voluntarily" sought to waive his right to counsel under *Faretta*, is reversible error. Godinez v. Moran, 509 U.S. 389, 399 (1993), *["[T]he*

competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself"]; see also Neeld v. State, 729 So. 2d 961 (Fla 2nd DCA 1999); Reddick v. State, 937 So. 2d 1279 (Fla. 4th DCA 2006). A court need not believe that a defendant "possess the technical legal knowledge of an attorney" before permitting that defendant to proceed pro se." *Hill v. State*, 688 So. 2d 901, 905 (Fla. 1996).

The trial court forced McCray to accept his appointed lawyer in an effort to secure a more orderly trial. This is an inadequate reason for the denial of a defendant's Sixth Amendment right to self-representation. The trial court did not based its decision on the type of rationale necessary for the deprivation of the right to self-representation such as doubts as to McCray's mental competency or a finding that McCray sought self-representation only to delay the trial.

The United States Supreme Court has repeatedly upheld the, "nearly universal conviction," (made manifest in state law) that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so," *Faretta v. California*, 422 U.S. 806, 817-18 (1975). In the present case, the court's frustration with McCray's questions concerning his retrieval of defense counsel's files and concern over stolen legal materials did not warrant such a drastic remedy of forced representation. This is not a case where forced representation was the only solution available to remedy the problem at hand. A

viable solution would have been to take a temporarily break in order for McCray to obtain copies of defense counsel's records or explain why the issue of McCray's legal materials would be dealt with at a later time. As demonstrated after the conclusion of the four requests for self-representation, McCray could and did demonstrated proper courtroom behavior for the majority of the remaining guilt phase.

III. Conclusion

During the four separate requests for self-representation by McCray, the Court only attempted *Faretta* inquires in two of the requests. In those two *Faretta* inquires, the trial court inadequately conducted the inquires, leaving out numerous questions concerning the "dangers and disadvantages" of self-representation; McCray's mental and/or physical ability to represent himself; the benefits of having representation; and the fact McCray would be limited in his discussions with the prosecution or access to legal materials. The need for a thorough *Faretta* inquiry became even more obvious when McCray told the court his case was "simple," and he could represent himself "easy." (17 R 660-662).

When the trial court finally allowed McCray to represent himself, McCray's choice should have been honored as his actions did not warrant forced representation—a defendant's choice to represent himself is the lifeblood of the law. *See* *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337(1970)

(Brennan, J., concurring)). The trial court's denial of McCray's choice violated McCray's constitutional rights under the Sixth and Fourteenth Amendment, as well as the Fla. Const. Art. 1, Sec. 17 to proceed without counsel. *See Edwards*, 128 S. Ct. at 2383 (quoting *Faretta*, 422 U.S. at 807).

ARGUMENT FOUR

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING MCCRAY TO ENGAGE IN SELF- OR HYBRID-REPRESENTATION WHEN HE DELIVERED HIS OWN CLOSING ARGUMENT DURING THE PENALTY PHASE OF HIS TRIAL

If this court finds that the trial court did not abuse its discretion in failing to grant McCray the right to self-representation, as submitted by appellant in the previous argument, this court must alternatively find that the trial court abused its discretion in allowing McCray to represent himself during the penalty phase of his trial.

McCray was allowed by the court to deliver his own closing argument during the penalty phase of his trial. (14 R 1618-21). This pro se closing argument was a procedural and substantive disaster: McCray repeatedly presented guilt-phase arguments and requested that the jury retract its guilty verdict (14 R 2646) ("the jury has the power to overturn the verdict because it was their verdict and if they was confused they can fix that because the defendant should be found not guilty and the state did not prove their case"); he personally addressed the jurors (14 R 2646) ("why do you think the defendant was found guilty? I could

start with you"); even worse, at one point during his rambling narrative, McCray began describing the events on the night of the crime in the first person, essentially admitting guilt:

> Kevin Cunningham was standing behind the counter like in the dining room area from where the sworn depositions said he was at…He said the gunman did not hesitate…this is a masked man coming through the door…[Kevin Cunningham] said he wasn't even scared. Said [he] wasn't nervous or anything because he thought *maybe I came to play. He didn't think that I came to kill someone in that house*.

(14 R 2642-43) (emphasis added).

I. **Based on current Florida case law, McCray's history, as well as the court's previous actions, the trial court had a duty to disallow McCray from representing himself during the penalty phase:**

Appellant first emphasizes that although there is a constitutionally protected right to represent oneself, the trial court was not compelled by precedent to permit McCray's self-representation after the start of the trial while represented by counsel. *Brooks v. State*, 703 So. 2d 504, 505 (Fla. 1st DCA 1997). Furthermore, the United States Supreme Court has made clear that hybrid representation is not constitutionally mandated. *Id*. In fact, given the untimely nature of McCray's request to represent himself, the court should not have entertained the idea at all. *Lambert v. Florida*, 864 So. 2d 17, 17-18 (Fla. 2d DCA 2003), *U.S. v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997). As explained in *Lambert*, "The Eleventh Circuit has held that a defendant's request for self-representation is untimely *per se* if it is made after a jury is impaneled." *Id*. relying on *U.S. v. Young*, 287 F.3d 1352

(11th Cir. 2002). *Lambert* goes on to acknowledge that while Eleventh Circuit case law is not binding precedent in state court, it is persuasive. *Id*. at 18 (emphasis added). The trial court should have weighed any request by McCray to represent himself against: (1) our Federal courts' practice of disallowing one from deciding to represent oneself after a jury has been selected; (2) McCray's mental health history and previous behavior at trial; and (3) the enormous potential for hybrid-representation creating an unfair trial situation; and upon this information denied McCray's request to represent himself mid-trial.

Although McCray had previously been denied the opportunity to represent himself on numerous occasions (Refer to Argument Three above), the court allowed him to deliver his own closing argument knowing full-well that the content and delivery would be inappropriate. Why the court determined, that it was necessary to allow McCray to deliver closing argument in the penalty phase, after repeatedly disallowing McCray to represent himself, is unexplainable.

Under Florida law, the lower court had the discretion to refuse McCray's request to represent himself. *Brooks*, supra, *Lambert*, supra. Based on McCray's history and the previous rulings of the court (disallowing McCray from representing himself on numerous previous occasions) this court should not have allowed McCray to embark in self-representation at this critical stage of his trial. Under Eleventh Circuit precedent, the lower court had a *duty* to disallow McCray

to represent himself after trial was already in progress. Young, 287 F.3d 1352. Regardless of the case law in place to guide a court in this situation, the lower court granted McCray's request after a limited *Faretta* inquiry and allowed McCray to continue unfettered without any direction or control.

Even if this reviewing court finds that the trial court did not abuse its discretion in allowing McCray (an individual who had previously been adjudicated incompetent, was disruptive and repeatedly demonstrated his lack of understanding of the legal system) to represent himself at the end of his trial, it must find that the lower court had an obligation to curtail McCray's self-representation to maintain control of the courtroom. In *Mora*, a judge allowed a defendant to assist with his closing argument, but limited the scope of the defendant's argument to issues not raised by his counsel, after his counsel had delivered formal closing remarks. *Mora v. State*, 814 So. 2d 322, 328 (Fla. 2002). This judge enforced such limitations on Mora even though he had passed a full *Faretta* inquiry and there was no indication whatsoever that Mora was incompetent, had ever been incompetent, or that he had been difficult to control in the courtroom.

II. The questions asked of McCray by the trial court prior to the allowance of self-representation were insufficient under the dictates of *Faretta*:

The *Faretta* inquiry conducted by the court in McCray's case prior to allowing his to engage in self-representation in the penalty phase was insufficient. The court in the instant case described his questioning of McCray as a "little

Faretta." While the court engaged in a brief question-answer session with McCray, the inquiry did not meet the requirements of the *Faretta* inquiry and was incomplete under current Florida standards. (14 R. 1618-1621).

In a concurring opinion of *Payne*, the Justice Kahn of the United States Supreme Court stated, "To avoid reversal in self-representation cases, trial judges will have to mechanistically apply *Faretta's* requirement that the defendant be made fully aware of the dangers and disadvantages of self-representation…" *Payne v. State*, 642 So. 2d 111 (Fla. 1st DCA 1994), referencing *Faretta v. California*, 95 SCt. 2525, 2541 (1975).

As discussed in the previous argument, the FSC has created a model colloquy to guide judges in properly assessing whether or not a defendant is competent to represent himself. *Amendment to Florida Rule of Criminal Procedure 3.111(d)(2)-(3)*, 719 So. 2d 873, 876-879 (Fla. 1998). While a court is not required to mirror the model, the basic requirements of *Faretta* must be followed, such as explaining to the defendant the overwhelming disadvantages of self-representation, the seriousness of the charges against him, and the potential sentence he might face if found guilty. *Payne*, 642 So. 2d at 113.

In the instant case, while the court informed McCray generally that there were disadvantages to self-representation it did not inform McCray as to what those disadvantages were. The FSC in creating its model colloquy urged courts to

inform a defendant that he will not get any special treatment from the court due to self-representation; that he will not be entitled to a continuance, and that if the defendant is disruptive, self-representation can be ended and the trial can go on without him. _Amendment to Florida Rule of Criminal Procedure 3.111(d)(2)-(3_, 719 So. 2d at 878. It is apparent that McCray did not understand his legal handicap when he informed the court that he was "not really" at a disadvantage in representing himself.[14]

Based on the trial court allowing McCray to conduct what would be a disastrous penalty phase, this portion of the proceeding should be reversed.

ARGUMENT FIVE

THE COURT FAILED TO ISSUE A WRITTEN FINDING OF COMPETENCY UPON ADJUDICATING MCCRAY COMPETENT TO PROCEED AFTER A PERIOD OF INCOMPETENCE, PURSUANT TO FLA. R. CRIM. P. 3.212(C)

At the beginning of a December 6, 2006, pre-trial hearing, the Court briefly

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[14] While one could argue that the trial court had been through the _Faretta_ procedure on numerous occasions prior to the penalty phase, a court has a responsibility to conduct a thorough _Faretta_ inquiry every time a defendant unequivocally states that he wishes to represent himself. _Wilson v. State_, 947 So. 2d 1225, 1226 (Fla. 1st DCA 2007*)["when a defendant makes clear his desire to represent himself at a critical stage, the trial court is obligated to conduct a* _Faretta_ *inquiry to determine if the defendant is knowingly and voluntarily waiving his right and is aware of the dangers and disadvantages of self-representation"].* (quoting _Faretta v. California_, 422 U.S. 806, 835 (1975).

addressed the issue of McCray's regained competency.[15] (13 R 2398). The state and one of McCray's defense attorneys stipulated to McCray's returned competency based upon a November 8, 2006 Letter and Competency Report from the Florida State Prison, which stated that McCray had regained his competency to proceed to trial. (13 R 2397-404) (26 R 788-94). Although there was a stipulation by all parties as to McCray's regained competency on the record, no written order was ever entered.

Fla. R. Crim. Pro. 3.212(c)(7) dictates the proper procedure for reinstating the competence of an incompetence defendant: "If, at any time after such commitment, the court decides, after hearing, that the defendant is competent to proceed, it shall enter its order so defined and shall proceed." The FSC in *Fowler* has permitted a determination of regained competency to be made via stipulation of all parties, but the court in *Martinez* required that an order must be issued by the court to formalize this legal return to competency. *Fowler v. State*, 255 So. 2d 513 (Fla. 1971); *Martinez v. State*, 851 So. 2d 832, 834 (Fla. 1st DCA 2003).

Martinez v. State, involves nearly identical facts to the instant case: an appellant who had been adjudicated incompetent, and placed in a mental institution, was subsequently released from the mental institution based on the institution's professional opinion that he no longer met the criteria for involuntary

[15] After he had been adjudicated incompetent on January 4, 2006 and had been in involuntarily mental health commitment for nearly one year.

hospitalization. *Id*. at 833. During a hearing where defendant's regained competency was briefly discussed and defense counsel stated that appellant was competent to proceed, the judge responded, "All right, sir." *Id*. Where the judge verbally affirmed regained competence, but failed to issue a written order, the reviewing court remanded the case for "entry of a *nunc pro tunc* order finding appellant competent to stand trial." *Id*., at 834, citing *White v. State*, 548 So. 2d 765, 768 (Fla. 1st DCA 1989) (internal citations omitted).

Based on Fla. R. Crim. Pro. 3.212(c)(7) and the decision in *Martinez*, this court must remand this case back to the trial court for entry of a *nunc pro tunc* order finding McCray competent to stand trial.

ARGUMENT SIX

THE STATE VIOLATED THE WILLIAMS RULE IN MAKING EVIDENCE OF MCCRAY'S COLLATERAL CRIME A FEATURE OF ITS CASE AND BY PRESENTING EVIDENCE ABOVE AND BEYOND THE SCOPE OF THE STATE'S NOTICE OF OTHER CRIMES, WRONGS, OR ACTS IN THE OPENING STATEMENT, CASE IN CHIEF, CLOSING ARGUMENT, REBUTTAL, PENALTY PHASE & MEMORANDUM IN SUPPORT OF DEATH IN VIOLATION OF FLA. CONST. ART I, SEC 17, 9, AND U.S. CONST. AMEND. 6, 14.

Prior to McCray's trial, the state sought the use of collateral crime evidence of a previous arrest of McCray to reveal its proposed "motive' for the instant crime, a tactic allowable under *Maharaj v. State*, 597 So. 2d 786 (Fla. 1992), *Jackson v. State*, 522 So. 2d 802 (Fla. 1988), and *Heiney v. State*, 447 So. 2d 210 (Fla. 1984). At the pre-trial hearing on the collateral crime issue, the state vowed

not to focus on the previous arrest, stating: "*I will never make this a feature of the trial. We will reference it in closing argument only for the very limited purpose of telling the jury this is why [McCray] did it*." (13 R 2585)(emphasis added). The court, over objections by the defense, submitted an Order Granting the State's Notice of Other Crimes, Wrongs, or Act Evidence. (10 R 1813).

Despite the promise of the state to limit its focus on the collateral arrest, the Williams Rule material became a feature of the trial. During McCray's trial, the state brought up evidence of the collateral crime on at least eleven separate occasions: the state called six witnesses to discuss the collateral arrest; and brought the collateral material up during its opening statement (17 R 634-37); case-in-chief (18 R 813-1164); closing argument (21 R 1446); rebuttal (22 R 1494-95), penalty phase closing argument (14 R 1632-35); and Memo in Support of Death Penalty (11 R 2054, 2056-57).

I. <u>Florida law disallows the use of collateral crime evidence where it becomes a feature of the trial is more prejudicial than probative</u>:

Under <u>Fla. Stat. Ann. § 90.404(2)</u>, and as stated in such cases as <u>*Finney v. Florida*</u>, 660 So. 2d 674, 682 (Fla. 1995), and those listed in the State's Memorandum (see <u>*Maharaj*</u>, <u>*Jackson*</u>, <u>*Heiney*</u>, <u>*Jorgenson*</u>, <u>*Evans*</u> above) evidence of other crimes, wrongs, or acts is admissible if relevant for the limited purposes of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. However, as stated in <u>*Travers v. State*</u>, 578 So. 2d

793, 797 (Fla. 1st DCA 1991), "such evidence *is inadmissible to prove bad character* or the propensity of the accused to commit the crime**,** and…is inadmissible under [Fla. Stat. Ann.] section 90.403 if its probative value is substantially outweighed by undue prejudice." (emphasis added). In other words, "evidence of collateral crimes may not make such crimes a feature of the trial instead of an incident…" *Id*., at 798, citing *Ashley v. State,* 265 So.2d 685, 693 (Fla. 1972) (internal citations omitted); *see also Bush v. State*, 690 So. 2d 670 (Fla. 1st DCA 1997), and *Billie v. State*, 863 So. 2d 323 (Fla. 3rd DCA 2003).

Although there is no bright-line rule in place to assist a court's determination of whether a collateral matter became a feature in a trial, there is case law on point to serve as a guide. The First District in *Perry* has held that while a court cannot consider volume alone in a determination of whether collateral evidence became a feature of a trial. *Perry v. State*, 718 So. 2d 1258, 1259-60 (Fla. 1st DCA 1998). However, if, upon measuring the quantum of evidence presented by the state and the arguments of state in closing, it is determined that the collateral material became a feature of the trial, this constitutes reversible error. *Bush*, supra at 673. The court in *Billie* held, "[A]dmission of excessive evidence of other crimes is fundamental error to the extent that it becomes a feature of the trial, and where the State emphasized a collateral crime during the trial, and compounded this error by

making the prior bad act a feature of closing arguments, it became a feature of the case." Billie, 863 So. 2d at 331-32.

II. State exceeded the limit of permissible collateral crime evidence where it made McCray's previous drug arrest and his lifestyle as a drug dealer the feature of his murder trial:

On July 2, 2008, the state submitted a Notice of Other Crimes, Wrongs, or Acts Evidence and supporting Memorandum with the court. The memorandum requested that the court take judicial notice of the clerks file of a collateral crime for which Mr. McCray had been arrested, to wit: 2004-CF-213, and all related materials, documents, discovery, contained in the clerk's file, pursuant to Fla. R. Ev. 90.202(6). (8 R. 1595). The state also listed as possible evidentiary fodder: the depositions and/or sworn statements of individuals specifically, but not limited to Detective Tony Hall, Amanda Long, Eric Goodman, Kevin Cunningham, newspaper articles and/or a February 13, 2004 Clay County Sheriff's Office media release. *Id*.

While the court approved this notice by the state for the limited purpose of proving motive, McCray's prior drug arrest became a feature of his trial. The theme of the state's case (i.e. "who's the snitch, and who's the rat" [21 R. 1446]) was based upon the admission and discussion of improper collateral crime evidence. The state made repeated references to collateral evidence to show the jury that McCray was a drug dealer and that he was responsible for supplying

illegal narcotics to the "crack house," where his alleged victims died. The references by the state to McCray's February 12, 2004 collateral arrest and/or references to McCray's life as a drug-dealer occurred as follows:

A. OPENING STATEMENT:

The state discussed the prior arrest of McCray during its opening statement. (17 R 634-37). In addition to explaining why the prior arrest was important to prove motive for the murder, the state inserted improper character evidence into its remarks:

> This house, 1018-B Blanding Boulevard, that the defendant [McCray] frequents is a drug house. You're going to hear testimony that the defendant is the supplier of that drug house…These people are going to come in here and testify that he was simply trying to find out who was hurting his drug business at that house…

(17 R 634-37).

B. CASE-IN-CHIEF:

i. Eric Goodman: The state discussed the February 12, 2004 arrest of McCray during the direct examination of Eric Goodman. (18 R 813-16).

ii. Travis Russell: The state called Travis Russell to discuss the previous arrest of McCray. (20 R 1159-64).

iii. Kevin Cunningham: The state discussed the previous arrest of McCray during the direct examination of Kevin Cunningham. Here too,

prosecutors went beyond the scope of the Notice of Other Crimes and turned its focus to a discussion of McCray's lifestyle:

> State: Can you tell this jury what the defendant's role in that house was – in that house with respect to the drugs coming in and out of that house?
>
> Kevin Cunningham: *He supplied – he supplied the crack.*
>
> State: Okay. And did he supply that to Robin Selkirk?
>
> Cunningham: Yes.

(18 R.842) (emphasis added). Defense counsel properly objected to this line of questioning, emphasizing that the defendant had not been put on notice that the state intended to comment on McCray's life as a drug dealer:

> [T]he notice of other crimes, wrongs or acts that I got on July 2nd puts us on notice of any and all evidence related to the defendant's February 12th 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 the defendant to anyone during or after the same arrest. *That's different than what just came out at trial. What has come out at trial is that Mr. McCray was supplying the house with drugs*…we weren't put on notice of that.

(18 R 842-45)(emphasis added).

iv. Detective Vincent Hall: McCray's collateral drug arrest was brought up by the state again with the testimony of Detective Vincent Hall. Prior to this testimony, Defense counsel objected again to the state's excessive use of Williams Rule evidence: "I renew my objection as to making the Williams Rule a feature of

the trial." (20 R 1117). The court allowed the state to present the evidence and the following testimony ensued before the jury:

State:	[Y]ou were working a case involving a residence at 1018-B Blanding Boulevard?
…	
State:	All right. And what was the general purpose for your team executing the search warrant on that day?
Det. Hall:	The purpose was we had information that there were drugs being sold at the residence. We had some complaints and our intent was to shut down the house. Our understanding was it was a crack house.
State:	And was the defendant present that day…?
Det.	Hall: Yes, sir, he was.
…	
State:	And who – based on the information that you had, who if you know, was the person supplying that house with the drugs at that time?
Det. Hall:	It was Gary McCray.

(20 R 1123-24). Again, not only did the state continue to focus on the collateral crime, by eliciting testimony to prove that McCray was previously arrested with his victims at the house where they were killed, but here again, the state went into specific details of the arrest including facts which paint McCray in the light of a drug dealer.

v. Amanda Long: Amanda Long was also called by the state to discuss facts relating to the February 12, 2004 prior arrest of McCray. Defense counsel objected prior to Long taking the stand: "Just so the record is clear, I have a

standing objection to [Williams Rule evidence]. I think it's cumulative. All this evidence already came out through other witnesses that we objected to…" (20 R 1135). Again, the court overruled the objection, allowing more testimony of the collateral crime to come before the jury. (20 R 1142-1148).

C. CLOSING ARGUMENT:

The state mentioned the collateral crime of McCray on various occasions during its closing argument. Immediately upon the start of the closing argument, the state impermissibly focused on the lifestyles of the victims and the defendant, and the respective roles that each played:

> John Ellis, Robin Selkirk, Phillip Perrotta, and John Whitehead, addicts living a life not far from this courthouse…lives ensnared by the poison of crack cocaine but lives nonetheless, lives with hopes and dreams and failures and fears, lives of value. Lives of value to the defendant, Gary McCray, but for very different reason and a very different way. *Who's the snitch? Who is the rat?*

(21 R 1446)(emphasis added). The prosecutor then went on to discuss McCray's "motive" for killing the four victims: "What is the motive? Mary McCray and a number of people in that home were arrested months before…[McCray] talked about wanting to find out who was responsible, who rolled over on him, *who's the rat*…? (21 R 1452) (emphasis added).

D. REBUTTAL:

The state used its last opportunity to address the jury before deliberations to reemphasize the collateral crime, and the theme of its case, i.e., who's the snitch,

who's the rat? The state recapped the testimony of Amanda Long: "Remember Amanda Long who said, yeah, I saw him in between the drug raid and I saw him – in between the drug raid and the shooting and he said things to me like, yeah, I want to find out who's *ratting me out in that house…*" (22 R 1491)(emphasis added).

Minutes later in this closing argument, the state reemphasized the earlier testimony regarding the collateral arrest:

> [T]he only person in this case whose liberty was at stake was Gary McCray's. He had that pending charge. He was arrested along with three of these four people in that house.
> …
> Why did we call Amanda Long? Why did we call Travis Russell?...Why did we – Eric Goodman, Kevin Cunningham, all these four people said he made statements *like I'm going to find out who the rat is. I want to find out who the snitch is*. Who do you think was wearing a wire? *Why? Hurt his business. He was the supplier of that house.*

(22 R 1494-95)(emphasis added). In its closing remarks, the state undeniably heightened the importance of the collateral crime to an impermissible level and wrongly commented on McCray's role as a drug dealer.

E. PENALTY PHASE CLOSING ARGUMENT:

During the penalty phase of McCray's trial, the state brought up the collateral crime of McCray to assist the state in proving the aggravating circumstance of cold, calculated, and pre-meditated (CCP) murder:

> *Number one*, remember the statements made by Gary McCray days and weeks prior to the murders, and *if you remember all the way back to even opining statement we talked about that prior drug case in February…*
>
> …
>
> Amanda Long…She talked to him. She says she brought up the word on the street that those who were arrested with him might have told on him…
>
> …
>
> Travis Russell, he testified after the drug raid the defendant told him that he thought the people in the house were telling on him…Eric Goodman testified that the defendant asked him if one of the four people were rolling over on him or whether one wore a wire…
>
> …
>
> Kevin Cunningham testified *the defendant was the primary supplier of the house.* He was arrested in the raid. He said the defendant asked him what happened to Kevin Cunningham's case…

(14 R 1632-35) (emphasis added). Once again, the previous crime became a feature of McCray's trial when the state used it to prove the aggravating circumstance of CCP, one of only two aggravators argued by the state., even though its Notice of Prior Crimes had only put the defense on notice that the state intended to use the information for the purpose of showing motive. (14 R 2622).

F. MEMO IN SUPPORT OF THE DEATH PENALTY:

The state used the February 12, 2004 collateral arrest as support for the aggravating circumstance of CCP in its Memorandum in Support of the Imposition of the Death Penalty. (11 R 2054, 2056-57). In this document, the state reiterated what it had argued during the penalty phase.

II. <u>Prejudice</u>:

McCray was greatly prejudiced by the image that was created in the minds of the jurors with the state's excessive introduction of collateral crime evidence and the repeated references to McCray as a drug dealer at the "crack house" in which the victims were killed. As discussed above, under Florida law, it was permissible to allow the state to use limited evidence of McCray's prior crime to show that he had a motive to kill his victims. In the present situation, the state went well beyond what is allowable. In fact, "who's the snitch, who's the rat," a central there of the State's case was based on the collateral arrest.

Even more egregious, the state elicited testimony on numerous occasions regarding McCray's role as a drug dealer who supplied the 1018-B Blanding Boulevard house. Testimony regarding McCray's role as a drug dealer was undeniably more prejudicial than probative; the fact that McCray was a dealer, while vaguely relevant, was totally unnecessary to show motive because it makes absolutely no difference who was selling drugs to whom. The relevant fact is that McCray was arrested along with several of his victims and that he believed that someone had "snitched" on him. The jury did not need to know that McCray was a drug dealer to understand the implications of the prior arrest on the instant case. The only purpose that the presentation of this information served was to prejudice McCray in front of the jury, and ensure verdicts of first degree murder on all counts.

In painting McCray as a drug dealing career criminal who was earned a living by supplying helpless drug addicts with crack-cocaine, the state effectively increased the odds of conviction. Jurors are more likely to convict someone whom they believed should be in jail regardless of his guilt or innocence in the case at hand.

III. Conclusion:

Defense counsel for McCray preserved the legal issues created when the state made a collateral crime the feature of the trial and impermissibly ventured beyond the scope of its notice of other crimes by commenting on McCray's lifestyle as a drug dealer. The court denied McCray's right to a fair trial in overruling these objections thereby committing reversible error. It cannot be said that the erroneous rulings by the trial court were harmless as the jury may not have convicted McCray of first degree murder on the four counts of murder, and sentenced him to death on each but for the redundant references to a collateral crime and the bad character of the defendant.

ARGUMENT SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING MCCRAY COMPETENT TO PROCEED FOLLOWING THE THIRD COMPETENCY HEARING IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER FLA. CONST. ART I, SEC(S) 9 AND 17, AND THE U.S. CONST. AMEND 6 AND 14.

As described in the factual history above, McCray began behaving strangely toward his defense attorneys shortly after the onset of his case. (5 R. 951). Due to his "unpredictable, strange, and paranoid," behavior, McCray's competency to proceed with trial was called into question and he was subsequently evaluated by three court-appointed experts to assist the court with a competency determination: Drs. Krop, Myers, and Meadows. Based on the opinions and testimony of these experts, the court issued a January 27, 2006 order declaring McCray incompetent to proceed with trial and ordering his involuntary commitment in the Department of Children and Families (DCF) Mental Health Program. (5. R. 991). On December 6, 2006 McCray's competency was reinstated by the court. (13 R. 2398). His competency was again called into question by defense counsel following jury selection but prior to the onset of trial.

I. Florida law holds that abuse of discretion in the trial court's finding of competency may be found where there is clear & convincing evidence of incompetence in the defendant:

In determining whether a defendant is competent to stand trial, the trial court must ascertain whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. Fla. Stat. § 916.12(1), Fla. R. Crim. P. 3.211(a)(1). Where there is conflicting testimony as to the defendant's competency, it is the trial court's responsibility to consider all

the evidence relevant to competency and resolve the factual dispute. *See generally Mora v. State*, 814 So. 2d 322 (Fla. 2002). This decision of the trial court must be upheld absent an abuse of discretion. *Id*. However, the abuse of discretion is not insurmountable. The 11th Circuit in *Sanchez-Valesco* held that the "presumed correctness" of a state court finding can be overcome, "if the party challenging the inmate's mental competency comes forward with evidence that clearly and convincingly establishes incompetency." *Sanchez-Valesco v. Sec'y Dept. of Corr*., 287 F.3d 1015, 1030 (11th Cir. 2002) *citing Hauser v. Moore*, 223 F.3d 1316, 1323 (9th Cir. 2000). McCray has sufficient evidence to overcome this presumption.

II. The trial court's ruling:

On July 29, 2008, defense counsel filed a second Suggestion of Mental Incompetence. Again, three experts were appointed for the purpose of evaluating McCray's competency: Drs. Harry Krop, Steven Miller, and William Meadows. None of these experts were able to fully evaluate McCray based on his refusal to participate in mental health evaluations. Based on collateral information and interviews, Drs. Krop and Miller found that McCray was incompetent to proceed and Dr. Meadows again found McCray competent.

The court, in an August 11, 2008 order (after a full hearing on the matter) found that McCray was competent to proceed with trial. This determination was made despite the fact that the previous judge had found McCray incompetent upon

nearly identical information presented in a previous competency hearing (5 R 977-82); despite that fact that two out of three experts found McCray incompetent to proceed (26 R 765)(26 R 767)(26 R 786); and despite the fact that McCray's defense attorneys attested to his inability to assist them with his defense. (17 R 524). The Order Denying Defendant's "Redacted Suggestion of Mental Incompetence to Proceed," produced by this court was a mere three and a half pages in length. (10 R. 1814-17). The court spent most of the Order discussing McCray's terrible behavior during the competency hearing.[16] (10 R 1815). The court briefly stated the applicable law for competency determinations, and then summarized the reports of each expert. *Id*.

Dr. Meadows, the court stated, was unable to interview McCray due to McCray's own unwillingness, but "found that the Defendant was competent and likely malingering because the Defendant is facing four counts of murder and a potential death sentence." (10 R. 1816). The court summarized Dr. Krop's reports into a finding that malingering could not be ruled out and that the Doctor may have come to a different determination of competency had the charges been petty theft rather than murder. *Id*. The court reduced Dr. Miller's lengthy report to three

[16] The Court described the events at the competency hearing, e.g.: McCray was removed from the courtroom on two occasions and "was not present in the courtroom for the remainder of the hearing due to the Defendant's inability to remain quiet in the courtroom, and the Defendant's insistence on addressing the Court and witness directly." (10 R1815).

sentences stating: "[Dr. Miller] could not eliminate the possibility that the Defendant was malingering. He also stated that medication could take a Defendant from an incompetent to a competent state."[17] *Id.*

The court noted defense counsel testimony that McCray provided little to no assistance with the preparation of the defense and did not understand the trial process. (10 R 1817). Offering nothing but sympathy to defense counsel, the court ruled that McCray's strange and disruptive behaviors were "decisions" by McCray rather than indications of a lack of competency. *Id*.

III. Evidence of McCray's incompetence to proceed with trial at the time of jury selection was overwhelming:

In its Order finding competency in McCray, the trial court sidestepped the true nature of the three expert reports, and the circumstances of the case, thereby abusing his discretion as to his competency determination. The following discussion provides a summary of the critical information provided in the expert reports that was ignored by the court in its Order finding competency:

A. REPORT OF DR. HARRY KROP

Dr. Krop evaluated Mr. McCray on August 9, 2008. (26 R 765). He noted that McCray was previously adjudicated incompetent to proceed and admitted to

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[17] While the judge referenced Dr. Miller's opinion that medication would likely be helpful for one like McCray, the court did not follow up on this recommendation and force-medicate McCray so that he could be returned to state more appropriate for the courtroom.

the forensic service of Florida State Hospital on June 1, 2006 and competency was judicially restored by the court on December 6, 2006.

When Dr. Krop attempted to personally interview McCray to for the purpose of determining competency in this instance the following situation occurred:

> I asked if I could go to Mr. McCray's cell as I was informed that he was taking a shower. When this examiner went to Mr. McCray's cell, he refused to come out of the shower and demanded privacy. He was talking coherently on the phone…[o]n the other hand, he was overheard telling whoever he was talking to that one of the officers may be impersonating the doctor [although McCray should have been familiar with Dr. Krop as they had met on numerous prior occasions (26 R. 765)]…When [McCray] saw this examiner, he asked if I had mental problems and accused me of harassing him.

(26 R 765-66).

In addition to attempting an interview McCray, Krop interviewed Sgt. Baker, consulted with defense counsel, Frank Tassone, and reviewed voluminous records in the case including prior and current psychological evaluations of Drs. Myers and Meadows and a report of the Competency Evaluation from the Florida State Hospital. *Id*. He also reviewed a transcript of the July 28, 2008 jury selection proceedings. *Id*.

From his review of the jury selection proceedings, Dr. Krop observed that McCray behaved inappropriately in court, argued with the judge, and was "clearly in conflict with his defense attorneys." (26 R 765). Dr. Krop noted that at one point, McCray accused the judge of "engaging in unlawful behavior and told the

judge that the judge was under arrest." *Id*. Dr. Krop also noted, based upon the jury selection transcripts that McCray appeared to become increasingly paranoid and suspicious and it was necessary for the judge to remove McCray from the courtroom. *Id*.

Based on Dr. Krop's evaluation, he determined that while he could not rule out malingering, he concurred with the diagnosis of the Florida State Hospital staff of Psychotic Disorder NOS. (26 R 766). He further stated that McCray's ability to conduct himself appropriately in the courtroom and assist his attorneys was compromised. *Id*. Although Dr. Krop believed that McCray understood the nature and seriousness of his charges, Dr. Krop questioned McCray's ability to testify relevantly and disclose pertinent facts to his attorneys. *Id*. Due in part to the seriousness of the charges against McCray, Dr. Krop opined that he was incompetent to proceed. *Id*.

B. REPORT OF DR. STEVE MILLER[18]

Dr. Miller attempted to interview McCray on August 12, 2008. (26 R 768). When McCray saw Dr. Miller coming, he immediately stated, "I'm not talking to no doctor," and refused to enter the interview room. *Id*. When Dr. Miller introduced himself and tried to initiate an interview, McCray made a number of telling statements to Dr. Miller, including:

[18] Reviewed and approved by Dr. Myers

> I was evaluated by a doctor, I was sent there by court order, and he discharged me as '*competent"*… Why are you talking to me about my case, my lawyer? That's none of your business.

(26 R 768) (emphasis original). According to Dr. Miller, based on his interactions with McCray on this date, it seemed that McCray believed, "if he simply refused to participate in the competence evaluations, *his trial would proceed, and that was his desire*." *Id*. (emphasis added). After personally visiting McCray, Dr. Miller noted, "there was at least one statement that revealed paranoid thinking that would be considered delusional." *Id*.

After Dr. Miller's largely unsuccessful interview with McCray, Dr. Miller spoke to the correctional officers on duty who stated that McCray did not understand the nature of the jail facilities as demonstrated by McCray's instruction to the guards that they were not allowed to go into his cell when he was away. (26 R 769). The officers provided Dr. Miller with 15-minute observation logs, which contained reports that McCray was: "laying (sic) down, sitting, standing up, or eating." *Id*.

In addition to the attempted interview with McCray and the conversation with the correctional officers, Dr. Miller spoke with McCray's mother, Marion Jones on the phone on August 18, 2008. *Id*. Dr. Miller also spoke with Terri Carter, McCray's girlfriend. She told Dr. Miller that she visited McCray with some frequency until May or June of 2008. McCray's behavior was odd during

these visits—he would mouth words, "without speaking out loud." Id. She stated that he has not been himself since his incarceration. She also mentioned that following the jury selection, he called her mother several times, but never attempted to contact Terri. Id. Terri's mother, acknowledged speaking with McCray, but refused to comment on the content of their conversations. (26 R 770).

In addition to conducting personal interviews, Dr. Miller assessed the reports of other mental health professionals, and looked at the complete medical record from the Department of Children and Families hospitalization. From these records, Dr. Miller ascertained that after the court ordered intramuscular doses of medication, McCray's behavior began to improve. (26 R 771). When evaluated by Drs. Kline and Patel at the State Hospital, McCray expressed his belief that the medications helped. Id. In the recommendations at the conclusion of their report, which contained the opinion of re-gained competency, Kline and Patel stated that "continuation of medication is crucial for his continued progress…" Id.

Based on the jury selection transcripts and all of the other information that Dr. Miller reviewed, he opined that the *likelihood of malingering in McCray was small in light of the "robust response to anti-psychotic medication*." (emphasis added). Dr. Miller also observed that McCray refused the medications over the six months leading up to his evaluation. Dr. Miller stated that McCray asserted his belief that he was competent to stand trial and competent to represent himself. Id.

While Dr. Miller conceded that McCray may have exaggerated his symptoms in the past, it was unlikely that McCray malingered at the time of his evaluation. (26 R 777). Dr. Miller stated that McCray's history suggested a possible diagnosis of schizophrenia. *Id.* It was Dr. Miller's opinion (as well as that of his associate, Dr. Myers, who reviewed Dr. Miller's report) that McCray was incompetent to stand trial due to mental illness, that he lacked the ability to communicate with his attorneys, lacked the capacity to disclose to his attorneys pertinent facts surrounding the alleged offenses, and lacked the ability to manifest appropriate courtroom behavior. *Id*. Dr. Miller also opined that McCray would likely benefit from a court-ordered administration of antipsychotic medication. *Id*.

C. REPORT OF DR. WILLIAM MEADOWS:

McCray refused to participate in an interview with Dr. Meadows. (26 R 783). Despite the inability to interact with McCray, Meadows opined that McCray, "exhibited a selective unresponsiveness across situations." *Id*. He concluded that McCray was malingering mental illness and competent to proceed. (26 R 786). He came to this conclusion based upon several points: Throughout McCray's stay at the State Hospital, McCray exhibited major behavioral problems – both before and after forced medication; the hospital staff described McCray's behavior as "volitional" (26 R 784); after reading the jury selection transcripts, Meadows

characterized McCray as "coherent and organized." (26 R 785).[19] Dr. Meadows brought up McCray's past "manipulative" behavior, e.g. portraying himself as mute, while later speaking openly in the Florida State Hospital. *Id*. Dr. Meadows opined that McCray's behavioral problems were manifestations of Antisocial Personality Disorder and stated that although McCray would be a difficult client for defense counsel to handle, he was competent to proceed. (26 R 787).

IV. Conclusion:

Based on the information presented in the reports of the three experts above as well as the testimony of McCray's defense attorneys at the competency hearing, McCray's general courtroom behavior, and McCray's history of mental illness and court adjudicated incompetence, it cannot be said that McCray was competent to proceed at the third competency hearing. The trial court's finding on this issue was an abuse of discretion and McCray's case must be reversed on this point.

ARGUMENT EIGHT

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE CLOSING ARGUMENT. THE STATEMENTS MADE BY THE PROSECUTION INDIVIDUALLY AND CUMULATIVELY DENIED MCCRAY HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL PURSUANT TO THE 6TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION, AND FLORIDA CONSTITUTION, ARTICLE 9 AND 17.

[19] Oddly, these exact same jury selection transcripts had caused Dr. Miller to opine that McCray was *incompetent*. (26 R 772-74).

I. **The trial court committed reversible error in failing to grant defendant's motion for mistrial made after guilt phase closing argument by the state**:

The guilt phase closing argument was fraught with improper comments and language offered by the prosecution in the attempt to inflame the passions of the jurors. At the close of guilt phase, counsel for the defendant moved for a mistrial based on the language and argument put forth by the state. (21 R 1458). The court subsequently denied the motion, stating that it "didn't see anything improper about that." (14 R 1460).

The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985).

This Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard. *See* *England v. State*, 940 So. 2d 389, 402 (Fla. 2006). *["A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review."]*; *Perez v. State*, 919 So. 2d 347, 363 (Fla. 2005) *["[A] trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard*

of review."] (quoting Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999)), Salazar v. State, 991 So. 2d 364, 371-372 (Fla. 2008).

A. Golden Rule Violation:

The state made a number of impermissible statements during the guilt phase closing argument when describing the murders of the victim. This emotion-fueled and terrifying description represents the state's personal interpretation of what it believed to have occurred, and goes far beyond what was stated at trial in the attempt to elicit emotion and fear in the minds of the jurors:

> 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.

(21 R 1447). This statement constitutes a Golden Rule violation. *See* *Barnes v. State*, 58 So. 2d 157, 159 (Fla. 1951); *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004); *Urbin v. State*, 714 So. 2d 411 (Fla. 1997); *Garron v. State*, 528 So. 2d 353, 358 (Fla. 1988).

The prosecution clearly invites the jury to place themselves in the shoes of the victims when deciding his guilt by creating a lengthy scenario in which the prosecution describes an imaginary situation from the perspective of the victims.

Merely changing the phrasing, such as stating "a brain" as opposed to "your brain" does not change the impression made upon the jury. There is no other reason to make a comment other than to ask the jurors to envision themselves standing in the moment being described. At the end of this narrative, the prosecution actually slips and refers to the hypothetical victims as "you" while speaking to the jury. This violation cannot be construed as fair and impartial comments on the evidence, and represents reversible error warranting the granting of a new trial.

B. Inflammatory Statements and Emotional Script:

In the preceding segment (21 R 1447), the State attempted to inflame the minds and passions of the jury by referring to the murders as "eliminations," by using inflammatory language in describing the murders, and by describing McCray as a vicious animal: "Gary McCray selected his prey, he hunted them down…and viciously murdered them" (21 R 1448).

For over sixty years, Florida case law has held this type of imaginary script argument to be improper. In *Urbin v. State,* 714 So 2d 411 (Fla. 1998), the Florida Supreme Court condemned the prosecution's conduct when it stated that the State "*went far beyond the evidence in emotionally creating an imaginary script demonstrating the victim was shot while pleading for his life*." *Id*.. In creating this "imaginary script" the state was attempting to create, arouse, and inflame the sympathy, prejudice, and passions of the jury to the detriment of the accused. *Id*.,

Barnes v. State, 58 So.2d 157 (Fla. 1951), Garron v. State, 528 So. 2d 359 (1988). Florida law has long held that the word "execute" is an improper and inflammatory descriptor in the context of a closing argument. *See* Urbin, at 420, *citing* Bonifay v. State, 680 So. 2d 413, 418 n.10 (Fla. 1996). It is undeniable that the word "eliminate" used by the state in this case is synonymous with "execute," and therefore should be treated in the same regard.

The impermissible comments of the state were made in the attempt to influence the jurors and do not constitute legitimate and non-prejudicial comments on the evidence. A new trial should be granted because a verdict of guilty would not have been obtained without the assistance of the alleged error. *See* Bonifay v. State, 680 So. 2d 413 (Fla. 1996) The trial court erred in not granting a new trial after defense counsel's motion for same, and said failure represents an abuse of discretion. Defendant's conviction should be overturned and a new trial granted.

ARGUMENT NINE

THE TRIAL COURT ERRED IN NOT GRANTING MCCRAY'S MOTION FOR MISTRIAL AND/OR SUBSEQUENT MOTION FOR NEW TRIAL RESTATING SAME

During the charge conference, McCray's counsel moved again for a mistrial, citing the overall prejudicial nature of the trial, and stating, "I don't see how Mr. McCray could have gotten a fair trial – I mean the – the cumulative effect of I guess the removals and or his testimony..." (21 R 1518). McCray's Motion for

New Trial covered issues concerning: the court's decision of allowing McCray to represent himself then reappointing counsel; McCray did not receive a new trial; the cumulative effects of the errors in the trial prejudiced McCray and precluded him from a fair trial; the court erred in refusing to grant the defense's motion for mistrial after the state's improper closing arguments; Court error in refusing to allow McCray to continue his own testimony during the defense's case. (10 R 1893-94).

I. The effect of all the errors warrants a mistrial

The errors and negative incidents which occurred in McCray's trial are insurmountable. A close look at each of the following proceedings demonstrates that, as a whole, McCray could not have gotten a fair and impartial trial.[20]

A. Jury selection

McCray was previously found incompetent and to have a "serious mental illness." (10 R 977-82). During jury selection, the court warned McCray he was "hurting himself" by talking in front of the jury (15 R 207), and cautioned McCray about saying things in the jury's presence because they would remember McCray's behavior. (15 R 213). Shortly after the court's statement, McCray, in front of the

[20] It appears from the record McCray had a speedy trial issue. (XII 2266). The prosecution acknowledged McCray's speedy trial rights already expired, and there was no written waiver in the court file to rebut this fact. (XII 2266). However, defense counsel did not object, making the claim, in the undersigned's opinion, more cognizable in a motion for post conviction relief.

jury, told the judge he was "lying to his face." (15 R 218). McCray repeatedly objected in jury selection based on the lack of racial diversity of the jury pool. (14 R 76-78)(15 R 247). McCray was later removed from jury selection. (16 R 335).

When the trial commenced, McCray's requests for self representation were denied after inadequate *Faretta* inquires, and he was banished on numerous occasions. Eventually, McCray was allowed to represent himself, only to have the court, moments later, reappoint counsel and again remove him from the courtroom. (21 R 1438-41).

B. Third competency proceeding

During the interim of selecting a jury and holding trial, and third competency hearing was held on August 22, 2008. McCray again requested to represent himself, but this request was not honored, and no *Faretta* inquiry was held. (16 R 383-384) McCray was ultimately barred from the courtroom. Two of the three experts opined McCray had a severe mental illness, had an Axis I Psychotic disorder, had possible schizophrenia, and that schizophrenia runs in his family. (10 R 1987). McCray was also given a host of medication, including but not limited to Abilify, Geodon, Aripiprazde, and Ziprasidone (IX 1782, 1796). Despite two out of the three experts finding McCray incompetent to proceed, the trial court found McCray competent.

C. Opening statements

During the prosecution's opening statements, McCray requested to represent himself again. (16 R 599)(17 R 606-609). This request was not honored, and McCray was again banished from the courtroom, as the court found McCray "not capable of representing" himself "in this type of case anyway." (17 R 609).

McCray was denied presence from the courtroom for the majority of both the prosecution's and defense's opening statements. (17 R 609).

D. <u>State's case-in-chief</u>

After yet another request by McCray to represent himself, the court found him capable, and allowed him to represent himself. (17 R 661). Moments, later the trial court changes its mind and reappoints defense counsel, stating McCray cannot "stay on task." (17 R 668-69)

McCray tried one more time to represent himself and while in the holding cell during trial, asked defense counsel to relate his intent to the trial court. This request fell on deaf ears, and the request was not honored, or even discussed further. (18 R 687)

<u>Williams Rule</u>

The state introduced Williams Rule testimony that not only exceeded the scope of the original Williams Rule order but became a feature in trial, despite the prosecution clearly stating the information would only be referenced in the state's closing argument and "never make this a feature of trial." (13 2585). Defense

counsel objected to this issue repeatedly. (XVIII 845, 888)(XIII 2587). Defense counsel also filed a Motion in Limine pertaining to this Williams Rule. (XIII 1591). Williams Rule was argued in every facet of trial, including opening statement, through the presentation of numerous witnesses, closing and rebuttal arguments (and was a feature of the prosecution's guilt phase)(XXI 1447-1451), and in the penalty phase (XIV 2618) and memorandum of law in support of death to establish the existence of the CCP aggravating factor. (CITE)

E. Defense case

McCray was ultimately banished from the courtroom and disallowed his constitutional right to testify when the trial court cut short his testimony. After McCray testified for fifty minutes, the court asked him an estimate of how much testimony he had left. After McCray discussed that he needed to talk about the eyewitnesses at the scene and said "an hour or so," the court cut off his testimony. (XXI 1438). Even the state conceded portions of McCray's testimony were relevant to his defense. (XXI 1441). McCray was then banished from the courtroom without the prosecution doing cross-examination.

F. Charge conference

The Motion for Mistrial was made during the charge conference, where defense counsel opined given the cumulative effect of the incidents arising at trial, McCray could not have received a fair trial. (21 R 1518).

G. **Closing arguments**

The state repeatedly used the overreaching Williams Rule evidence to portray a theme that McCray committed the murders to find out who the "rat" was, engaged in a lengthy and insidious golden rule violation in the guilt phase closing argument, and continually referred to the murders as "eliminations".

H. **Penalty phase**

McCray would not allow defense counsel to call expert testimony in order to establish the existence of statutory mitigation, or to establish the existence of McCray's severe mental illness. (21 R 1559-60)

Despite the trial court previously finding McCray "incapable" of representing himself in the guilt phase, the court somehow found McCray capable to conduct his own penalty phase closing argument. (14 R 1618-21).

McCray's testimony was chaotic. During this "hybrid representation" he essentially and mistakenly admitted to the murders. He argued nothing relevant to mitigation, and instead continued to discuss why he was not guilty. McCray *even attempted to individually ask the jury members themselves as to "why they think defendant was found guilty."* (14 R 2646). The state repeatedly objected to McCray's closing argument, stating the testimony was irrelevant to the proceedings. (14 R 2646). The trial court even acknowledged McCray's penalty phase closing argument was not appropriate, but let him continue anyway, while he

was still represented by counsel. (14 R 2650). The state attorney told the court that because McCray did his own closing, he did not articulate any mitigating factors (14 R 2674).

I. Sentencing

Despite McCray delivering his own closing argument to the penalty phase jury and articulating no mitigation whatsoever, the trial court gave the jury's decision "great weight." The trial court did not order a PSI, although it acknowledged in it's sentencing order "defendant did not request that the jury be instructed on any statutory mitigating factor." (11 R 2064) . The trial court did not give any weight to the three proposed statutory mitigators (11 R 2066) Nor did the court acknowledge a previous judicial finding McCray had a serious mental illness or defect, and was prescribed numerous anti-psychotic medications.[21] (9 R 1782, 1796).

These above errors cannot be considered harmless in light of the totality of the circumstances that existed throughout McCray's trial. McCray's trial was a disaster. McCray deserves a fair trial, and his case should be reversed in order for him to receive one.

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[21] A previous court order ruling McCray incompetent to proceed held McCray his a history of mental illness in his family, has lost fully ¼ to 1/3 of his body mass (V 978) and has a serious mental illness or defect. (5 R 979). None of the contents of this Order was discussed in the trial court's sentencing order. (XI 2066)

ARGUMENT TEN

THE TRIAL COURT ERRORED IN GIVING JURY INSTRUCTION "7.11 PENALTY PROCEEDINGS – CAPITAL CASES" WHERE THE ABA FLORIDA DEATH PENALTY ASSESSMENT REPORT DETERMINED THAT SIGNIFICANT CAPITAL CASE JUROR CONFUSION EXISTS AND RECOMMENDED THAT SAID INSTRUCTION BE CHANGED TO ENSURE RELIABILITY IN RECOMMENDATIONS FOR DEATH

In 2004, the FSC court instructed the Jury Instructions and Steering committees to suggest changes to the capital case jury instructions in order to ensure developments in capital case law was sufficiently reflected. *See In re Std. Jury Instructions in Crim. Cases--Report No. 2005-2*, 2009 Fla. LEXIS 1806 (Fla. Oct. 29, 2009). Both committees prepared reports and published suggestions in 2005. Any amendments were put on hold by this court until a decision was reached in *State v. Steele*, 921 So. 2d 538 (Fla. 2005). See *In re Std. Jury Instructions in Crim. Cases--Report No. 2005-2*, 2009 Fla. LEXIS 1806 (Fla. Oct. 29, 2009). While the *Steele* case remained pending, the American Bar Association (ABA) issued the Florida Death Penalty Assessment Report which concluded that Florida Jurors are confused concerning their role in the sentencing process:

> Significant Capital Juror Confusion…Death sentences resulting from juror confusion or mistake are not tolerable…[yet] many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence. In one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were

> *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.

Id. Following the Steele decision, the proposals of the committees were withdrawn and subsequently altered to reflect the findings of the ABA report. Following a consolidated Oral Argument in case numbers SC05-960 and SC05-1890, and a series of amended reports and revised proposals, this court amended Jury Instruction 7.11.

In adopting the committee recommended changes, which in turn adopted the findings of the American Bar Association's assessment of Florida's Death Penalty, this court has essentially called into question any prior recommendation of death given the previous instructions. There is no indication that the statistical findings of the ABA report did exist in McCray's jury, and by adopting the findings of the study and recommended changes of the committee findings based on same, this court has tacitly acknowledged that the prior capital cases in which these instructions were given were flawed.

The record in the instant case reflects that instruction 7.11 was given verbatim in the previous embodiment that was deemed by this court, along with the ABA, to be confusing and ineffective in determining a reliable penalty phase

outcome. (14 R 2652-2658). As trial proceedings are not finalized in this case, the defendant's penalty phase should be reversed, and a new penalty phase ordered in which the revised instruction is utilized.

ARGUMENT ELEVEN

MCCRAY'S ENTIRE TRIAL WAS FRAUGHT WITH ERROR; A NEW TRIAL MUST BE GRANTED AS ALLOWING THE JUDGEMENTS AND SENTENCE AGAINST MCCRAY TO STAND WOULD BE A MISCARRIAGE OF JUSTICE AND A VIOLATION OF FLA. CONST. ART. I SEC. 9, 17 AND THE 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION

I. **Current Florida Law dictates reversal in cases where cumulative error is found**:

While a number of errors made during pre-trial and trial proceedings, standing alone, may not be cause for reversal, their cumulative effect may substantially prejudice a defendant. *Perkins v. State*, 349 So. 2d 776, 778 (Fla. 2d DCA 1977). *Perkins* held, "while a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error." *Id.*, *Carter v. State*, 332 So.2d 120 (Fla.2d DCA 1976), *Albright v. State*, 378 So. 2d 1234, 1236 (Fla. 2d DCA 1979). When error is compounded on error, courts have held that a defendant has been denied his constitutional right to a fair trial. *Id*. The FSC in *McDuffie* held:

> Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because *even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be*

> *considered harmless*, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

McDuffie, 970 So. 2d at 328, citing *Brooks v. State,* 918 So. 2d 181, 202 (Fla. 2005)(emphasis added). The court in *McDuffie*, after surveying the history of the case and determining that the accumulation of error in the case was substantial, ordered a new trial: "We conclude that the errors that occurred in this case, when viewed cumulatively, cannot be considered harmless beyond a reasonable doubt." *Id*, at 329.

Applying these rules to the instant case, this court after reviewing the preceding claims, the argument alleged therein, and the history of this case, must find that the errors which occurred, when considered together cannot be considered as harmless error, and therefore this case must be remanded for a new trial.

CONCLUSION:

Based on the above arguments, Appellant respectfully asks this Court to reverse and remand McCray's convictions and sentences for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to the Office of the Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050 on this 27th day of January, 2010.

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

s/Frank Tassone Jr. Esq.
A T T O R N E Y