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 REPLY 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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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. The trial court's decision to allow McCray to represent himself in closing argument of his penalty phase was incomprehensible given its prior habit of denying McCray's requests for self- or hybrid-representation in the guilt phase. The illogical decision of the trial court in this regard was an abuse of discretion. Furthermore, even if this court finds that the court did not abuse its discretion in allowing McCray to present his own closing argument, a *Faretta* hearing was necessary under the controlling jurisdiction, and the court did not engage McCray in an adequate *Faretta* inquiry.

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). The trial court failed to submit a written order finding that McCray's competency had been restored at the second competency determination. This case must be remanded to the trial court for issuance of a *nun pro tunc* written order of competency to clarify the record in contemplation of later appeals.

ARGUMENT SIX: The state violated the Williams rule in making evidence of McCray's collateral crimes 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. While the State is permitted to use prior arrests to show motive, it presented information regarding a prior arrest of McCray which was totally irrelevant and unnecessary to establish McCray's alleged motive in the case. The irrelevant facts and circumstances of the arrest, and of McCray's lifestyle in general should not have been explored by the state in its case and chief as the information was far more prejudicial than probative. Even if the state did not err in presenting irrelevant collateral information of the facts and circumstances surrounding McCray's prior arrest and of his lifestyle, this information impermissibly became a feature of the trial.

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. The trial court's determination that McCray was competent to proceed at his third competency hearing was erroneous in the face of the evidence supporting incompetence and as such was an abuse of discretion.

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

In examining the facts and circumstances of this case as well as other similar cases, it is clear that the trial court abused its discretion in allowing McCray to represent himself after finding that he was "not capable" of representing himself on previous occasions. (17 R 609). Even if this court finds that there was not an abuse of discretion in this regard, the trial court did not conduct a sufficient *Faretta* inquiry, as required by Florida law.

In its Answer Brief, the State ignored the fickle nature of the court in allowing McCray's self-representation after having repeatedly denying him this opportunity on previous occasions. Rather, the State focused on its contention that a *Faretta* inquiry was not required for McCray to deliver his own penalty-phase closing argument because: (1) in a minority of jurisdictions, which have no precedent in Florida, a *Faretta* inquiry is not required in instances of hybrid-representation and/or (2) a complete *Faretta* inquiry may have been conducted on a previous occasion, in a separate stage of the trial proceedings, years before the present situation, by a different judge.

I. The court abused its discretion in allowing McCray to deliver his own guilt-phase closing argument after repeatedly denying him the opportunity to represent himself on previous occasions

First, appellate re-addresses the inexplicable decision of the trial court to allow McCray to represent himself in the closing argument of the penalty phase after repeatedly denying McCray the opportunity for self-representation in the guilt phase. As the court in *Brooks* warned: "The problems associated with hybrid representation are legion in the cases. For this reason, hybrid representation … is generally disfavored." *Brooks v. State*, 703 So. 2d 504, 505 (Fla. 1st DCA 1997). There is no constitutional right to hybrid-representation. *Sheppard v. State*, 17 So. 3d 275, 279 (Fla. 2009). Despite the problematic nature of hybrid-representation, the decision to allow a defendant to engage in hybrid representation is within the discretion and this decision should be upheld absent some abuse of discretion. *Aguirre-Jarquin v. State*, 9 So. 3d 593, 602 (Fla. 2009).

Here, as discussed in ISSUE I of the initial brief, the court repeatedly disallowed McCray from engaging in any type of self-representation. In the penalty phase of trial, the court declared, "[McCray] is not capable of representing himself in this type of case, anyway." (17 R 609). Therefore, even if a court may ordinarily have the discretion to allow for self-representation, its vacillation from one decision to the other without explanation for doing so was an abuse of this power.

Because the trial court granted McCray the right to self- or hybrid-representation in penalty phase closing, the very last comments that the jury heard in regard to McCray's case were disastrous ramblings. *See* IB 56-57. Shockingly, the court, in its sentencing order, went so far as to use a statement made by McCray in his closing remarks against McCray to negate a statutory mitigator: "The capacity of the Defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired." In its sentencing order, the court stated:

> The Defendant [in his closing argument] made comments implying that when he entered the house, the people inside quickly learned it was not a game, demonstrating that [he] was quite aware of his actions.

(11 R 2067). The decision of the court to allow McCray to deliver his own closing remarks, only to use portions of those remarks against McCray in sentencing demonstrates the dangerous, quixotic nature of self- or hybrid- representation. Because of the problems arising from this type of representation, courts should employ extreme caution in allowing defendant's to carry out functions of representation best left to counsel.

Not only was the jury left with a poor final impression of McCray and not instructed with regard to how the minimal mitigation presented in the penalty phase was tied to the facts of the case, but with Court approval, McCray was

allowed to actually negate the mitigation offered by the defense team, resulting in an unsurprising 12- 0 vote for the death penalty.

The court in this case abused its discretion by deviating from its previous pattern and suddenly allowing McCray to represent himself instead of insisting on representation by counsel. As pointed out by the Florida Supreme Court in *Muehleman*, a court should insist upon representation by counsel when a defendant is competent enough to stand trial, "but who still suffers from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Muehleman v. State*, 3 So. 3d 1149, 1159 (Fla. 2009), *citing* *Indiana v. Edwards*, 128 S. Ct. 2379, 2388 (2008). In fact, the Florida Supreme Court has amended Florida Rule of Criminal Procedure 3.111, following the United States Supreme Court decision in *Indiana v. Edwards*, to implement a narrow limitation upon the right to self-representation of those who are competent enough to stand trial, but who suffer from "severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *In Re: Amendments to Florida Rule of Criminal Procedure 3.111*, 17 So.3d 272, 274 (Fla. 2009), *citing* *Edwards*, 128 S. Ct. at 2387-88.

The court in *Visage* applied a similar, more expanded principle, stating, "a defendant may be deemed mentally competent to stand trial yet still be prohibited from waiving the assistance of counsel where, due to a mental condition, the lack

of education or experience, or *some other factor*, he appears to be unable to make an intelligent and understanding choice to proceed without counsel." *Visage v. State*, 664 So. 2d 1101, 1102 (Fla. 1st DCA 1995)(emphasis added).

In this case, significant evidence exists which supports a serious mental health issue in McCray: a previous finding of incompetence to proceed with trial (5 R 977-980), findings of at least two experts that McCray suffers from a non-specified psychotic disorder and possible early stages of schizophrenia (26 R 765, 768), and the diagnosis from a Florida State mental institution of a non-specified psychotic disorder (6 R 1154). However, even if it cannot be said with certainty that McCray suffers from "a serious mental illness," as in *Edwards*, under the principle described in *Visage*, a court may nonetheless find that a defendant is unable to make an intelligent and voluntary waiver of counsel due to "some other factor." *Visage*, 664 So. 2d at 1102. The rationale used by a court in denying self-representation does not have to be as serious as a "severe mental illness" as implied by the State in its answer brief. AB 58. Rather, the court must find that for some reason, the defendant has demonstrated an inability to intelligently and voluntarily waive one's right to counsel. *Visage*, 664 So. 2d at 1102. The trial court in this case, following *Visage*-like logic, had previously denied McCray the right to represent himself on four prior occasions and it should have done so when

McCray requested to represent himself in the penalty phase. (16 R 384)(17 R 605-09)(17 R 609)(17 R 662-64).

It is apparent that the court abused its discretion in allowing McCray to proceed on his own given the prior decisions of the court in disallowing self- or hybrid- representation; appellant's previous court-mandated institutionalization in a mental health facility for a year; appellant's inability to conduct himself appropriately during the guilt phase of his trial; and the current trend of court to disallow hybrid representation; and disallow self-representation where mental illness or other reason disallows a defendant from making a intelligent and voluntary waiver of counsel. As such, the court's decision to allow for self- or hybrid- representation at this critical stage of appellant's trial was an abuse of discretion.

II. A *Faretta* inquiry is required upon defendants' requests of hybrid and self-representation

If this court finds that the trial court did not abuse its discretion in allowing McCray to conduct his own penalty-phase closing argument, it must then find that a *Faretta* inquiry was necessary regardless of whether or not it was self- or hybrid-representation, and in this case an adequate *Faretta* inquiry did not occur.

It is well-known that a *Faretta* inquiry is required before self-representation. *State v. Young*, 626 So 2d. 655, 675 (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.] The state in its answer, repeatedly declared that a *Faretta* warning is not required in instances of hybrid-representation. AB 43, 52. This assertion is based on a D.C. Circuit case and a US Sixth Circuit case. *U.S. v. Leggett*, 81 F. 3d 220, 223-24 (D.C. Cir. 1996), *U.S. v. Cromer*, 389 F.3d 662, 679-83 (6th Cir. 2004), respectively. The state conceded that the US Fifth Circuit has found, "that *Faretta* warnings should be given any time the defendant assumes any of the 'core functions' of counsel."

However, the state failed to mention that in a majority of jurisdictions in the United States and in the Florida First District Court of Appeal, where this trial took place, a *Faretta* inquiry must be given before a defendant may engage in any "core function" of counsel. *See e.g*. *Madison v. State*, 948 So. 2d 975, 976 (Fla. 1st DCA 2007)("After designating Appellant co-counsel, the trial court allowed him to argue a pretrial motion and present lengthy arguments at his sentencing…While we understand the trial court's attempt to accommodate Appellant's request and promote judicial economy, we established a bright-line rule in *Brooks* that a trial court cannot designate a criminal defendant as co-counsel and permit the defendant to perform any of the "core functions" of an attorney unless the trial court first conducts a Faretta inquiry…"); *Brooks*, 703 So. 2d 504, 505-6 (where defendant moved to serve as co-counsel, the motion was granted, defendant conducted his own opening statement, and counsel handled the remainder of the proceedings,

appellant conducted a "core function" of counsel and a Faretta inquiry was required); *Payne v. State*, 642 So. 2d 111, 112 (Fla. 1st DCA 1994); *Taylor v. State*, 610 So. 2d 576 (Fla. 1st DCA 1992)(where the public defender sat at the counsel table with defendant and provided any assistance that defendant needed, yet defendant conducted his own defense at trial, the case was reversed and remanded where there was no indication on the record that defendant comprehended the significance of his decision); *U.S. v. Taylor*, 113 F.3d 1136 (10th Cir. 1997); *U.S. v. Kimmel*, 672 F.2d 720, 721 (1982).

The delivery of an opening or closing argument in either the guilt or penalty phase of a trial is undeniably a "core function" of counsel. *Madison*, 948 So. 2d at 976 (arguing a pre-trial motion is a "core function" of counsel); *Brooks*, 703 So. 2d 504, 505-6 (delivering opening statement is a "core-function" of counsel). As such, the trial court erred in not engaging McCray in a *Faretta* inquiry prior to allowing him to deliver his closing argument.

III. The previous *Faretta* inquiries conducted in earlier stages of McCray's trial were not sufficient to eliminate the necessity of a complete *Faretta* during the penalty phase

Appellee next argues that even if a *Faretta* inquiry is required for hybrid-representation, it is unnecessary to deliver subsequent *Faretta* warnings after an initial *Faretta* inquiry has been conducted. AB 52. This is an erroneous conclusion. Where a defendant chooses to represent himself and the trial court

engaged in a *Faretta* inquiry before allowing a defendant to proceed *pro se*, it has been held that a *Faretta* warning must be renewed at every critical stage of the trial process to ensure that the defendant is aware of the dangers and disadvantages of self-representation and to ensure the Sixth Amendment right to counsel. *Ingraham v. State*, 35 Fla. L. Weekly D948a (Fla. 2d DCA April 28, 2010). The court in *Travis* stated, "Sentencing is a crucial stage of a criminal proceeding, so that the offer of assistance of counsel must be renewed then, even if the defendant has previously waived counsel at other stages." 969 So. 2d 532, 533 (Fla. 1st DCA 2007). The court in *Parker v. State*, 539 So. 2d 1168, 1169 (Fla. 1st DCA 1989), held that the failure to do so compelled vacating the sentence and remanding for re-sentencing. *See also Kepner v. State*, 911 So. 2d 1256, 1258 (Fla. 4th DCA 2005); *Beard v. State*, 751 So. 2d 61, 62 (Fla. 2d DCA 1999); *Hardy v. State*, 655 So. 2d 1245, 1247-48 (Fla. 5th DCA 1995). This principle should apply to instances where the defendant proceeded with counsel after having been previously denied the right to self-representation after *Faretta* during the guilt-phase and renews his request for self-representation during the penalty phase of trial.

While Appellee states that Florida Rule of Criminal Procedure 3.11(d)(5) indicates that the trial court must only renew the offer of counsel at every critical stage, this court has stated the following:

> Once the defendant is charged … the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the

> assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver. Any waiver of this right must be knowing, intelligent, and voluntary, and courts generally will indulge every reasonable presumption against waiver of this fundamental right. Where the right to counsel has been properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.

Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992)(emphasis added). The language in *Traylor* requires a full *Faretta* inquiry, ensuring that a defendant understands the consequences of a waiver and that any waiver of the right to counsel is knowingly, intelligently, and voluntarily made. *Travis*, 969 So. 2d at 533 *["Because the failure to renew the offer of counsel at the commencement of the sentencing hearing constitutes reversible error, Appellant is entitled to be re-sentenced after a proper Faretta inquiry" (emphasis added)]*.

The State spent five pages of its answer brief explaining every detail of a *Faretta* inquiry conducted by Judge Buttner on December 1, 2004, after McCray had requested self-representation at arraignment. [1] AB 44-48. Whether or not Judge Buttner conducted a proper *Faretta* inquiry four years prior to the penalty phase is completely irrelevant. It becomes even less important after considering that Judge Buttner's *Faretta* inquiry was given to McCray two years prior to

[1] It should be noted, however, that after Judge Buttner conducted a proper *Faretta* inquiry which almost exactly followed the model *Faretta*, McCray elected not to represent himself. (12 R 2247).

McCray's one-year institutionalization in a mental health facility which began on January 27, 2006 (12 R 2226-2240)(5 R 991). McCray cannot possibly be expected to have knowingly and intelligently waived his right to counsel at his September 26, 2008 penalty phase based on a *Faretta* inquiry that was delivered by a different judge, four years earlier, prior to a year-long institutionalization where McCray was subjected to heavy doses of psychotropic medications. This is a preposterous argument.[2]

Appellee next infers that even if the complete *Faretta* inquiry conducted by Judge Buttner was too far removed from the penalty phase to cover the *Faretta* requirement, the partial *Faretta* inquiry delivered by Judge Wilkes in the guilt phase was good enough. AB 49. However, even the State concedes that the line of questioning conducted by Judge Wilkes during the guilt-phase of the trial was only a "partial *Faretta* inquiry." AB 52. In the guilt-phase questioning of McCray, the court discussed some of the dangers and disadvantages of self-representation, but McCray clearly did not understand the implications of self-representation because he responded to Judge Wilkes questions by stating, "The case is very simple, You Honor. I can handle it. I can represent myself easily…[it's a] very simple case."

[2] The unpublished Eleventh circuit decision, *US v. Nunez*, 137 Fed. Appx. 214 (11th Cir. June 13, 2005), cited by the State in holding that where a *Faretta* inquiry had been delivered less than four months before a competency hearing, there was no need to conduct a second *Faretta* inquiry after competency had been restored, cannot be said to extend to this factual situation where the original *Faretta* inquiry was conducted four years before.

(17 R 662). At the conclusion of this partial *Faretta*, the court allowed McCray to represent himself, only to re-appoint counsel minutes later when McCray made it clear with his statements and general behavior that the court could not allow self-representation if it were to maintain order in the courtroom. (17 R 669). Based on McCray's answers to the court's questions and his behavior after self-representation was briefly granted it is clear that McCray did not understand the implications of self-representation -- whatever questioning the court had undertaken was not enough to cover the requirement on that occasion, let alone a later request for self-representation in a separate phase of the trial.

IV. The line of questioning of Judge Wilkes during the penalty phase was insufficient under Faretta to determine if McCray intelligently and voluntarily waived his right to counsel

The State argues that even if a new *Faretta* inquiry was necessary at the penalty phase of trial, the questioning of Judge Wilkes at this stage was sufficient to address the requirement. However, as acknowledged by the state ("the court conducted a brief *Faretta*") and the court itself ("I guess I need to do a little *Faretta* here") the colloquy of the court was incomplete. (14 R 1619- 21). The court did not question McCray specifically with regard to the dangers and disadvantages of conducting his own closing argument (e.g. inability to tie mitigation to the facts of the case, likelihood of self-incrimination). Given McCray's prior mental health concerns and his behavior in court, the court had a

duty under *Faretta* to conduct a thorough inquiry to determine if McCray truly understood the significance of his foray into self- or hybrid-representation.

The state argues that the short question/answer session conducted by the court prior to allowing McCray to conduct his own penalty phase closing argument was sufficient because:

> [M]any of the questions in the competency to waive counsel section [of Florida's model Faretta inquiry] are irrelevant because how a defendant answers the question cannot be the basis of the denial of the right to self-representation … For example, the question about the defendant's age is meaningless. If a defendant answers the question with 18 years old or 81 years old is of no moment (sic) because both have the right to represent themselves. The same observation is equally true of the question of how many years of school the defendant completed.

AB 58. Under this very reasoning, six of the fourteen questions asked by the court in its insufficient *Faretta* inquiry were irrelevant to the determination of whether McCray could exercise the right to represent himself as they involved McCray's age and educational experience. (14 R 1619-20).

The state relies on the ruling in *McKenzie v. State*, 29 So. 3d 272 (Fla. 2010) to argue that an incomplete Faretta inquiry does not warrant reversal. AB 54-55. However, *McKenzie* is inapplicable to the current situation. In *McKenzie*, a defendant elected to represent himself pro se, after *Faretta* inquiry, during the guilt-phase of his trial. *McKenzie*, 29 So. 3d at 276-77. He chose to proceed with counsel at his penalty phase, only to change his mind the next day. *Id.* at 277. The

court conducted another *Faretta* inquiry and thereafter allowed McKenzie to represent himself in the penalty phase. On appeal, McKenzie argued that the second *Faretta* inquiry was defective because the court did not inquire as to his prior experience with the legal system. *Id.* at 280-283. This court found that a single omission did not warrant new trial, holding "a defendant should be made aware of the hazards and disadvantage of self-representation," so that he makes the decision "with eyes wide open." *Id.*

This case is dissimilar to the case at hand for a number of reasons. First, although McCray requested self-representation on a number of occasions during the guilt-phase, he was not granted this opportunity because the court did not believe it was appropriate given the circumstances. Unlike McKenzie, who had successfully carried out his own representation for the duration of his guilt-phase, McCray had a track-record of odd and inappropriate behavior in the courtroom. Second, *McKenzie* points to a specific topic that was omitted by the court in its *Faretta* inquiry, where McCray states that the questioning was wholly deficient.

Third, and most importantly, this court concluded that despite being questioned with regard to his previous legal training, McKenzie made the decision to represent himself with "eyes wide open." The generalized and hurried line of questioning delivered by the trial court cannot possibly have satisfied the dictate that a defendant make a decision with "eyes wide open" because he inarguably did

not understand the implications of his decision: McCray unequivocally stated, that he was, "Not really at a disadvantage," when asked if he understood that he might be "at a disadvantage if he [got] up there and [tried] to do [his own closing argument]," (14 R 1619-21) (emphasis added). This response clearly indicates that McCray did not understand the dangers and disadvantages of delivering his own closing argument – and at the very least, this response should have been followed up with additional, precise questioning by the trial court.

Given the seriousness of the charges against McCray, and the seriousness of the penalty, the brevity of the court's *Faretta* inquiry is startling, especially considering McCray's nonchalant responses which indicated a complete lack of understanding of the seriousness of his undertaking. Under the concurring remarks of Justice Cantero in *Amendments to Fla. Rules of Crim. Proc. & Fla. Rules of App. Pro.*, 875 So. 2d 563 (2004):

> As we have repeatedly recognized, "death is different." The dynamics of a capital case and those of a noncapital case are different not just in degree, but in kind. A death penalty case, involving the ultimate penalty, invokes a host of pre- and post-trial procedures, as well as requirements for court and counsel, that do not exist in any other context.

Citing, *Walker v. State*, 707 So. 2d 300, 319 (Fla. 1997); *Crump v. State*, 654 So. 2d 545, 547 (Fla. 1995)(internal citations omitted). Due to the seriousness of McCray's case and possible penalty, the court had a duty to take the utmost care in

its decision making and not flippantly allow McCray to deliver his own closing argument in penalty phase.

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 addressed the issue of McCray's regained competency.[3] (13 R 2398). Although there was a stipulation by all parties as to regained competency on the record, no written order was ever entered. The court in *Martinez*, on nearly identical facts, held that where parties stipulate to regained competency and the court orally pronounced that competency had been restored, a *nun pro tunc* written order of competence was necessary. 851 So. 2d 832 (Fla. 1st DCA 2003).

The state in its answer claims that no written order is necessary in this case because "the record clearly reflects the reason for the finding, and is clearly sufficient to facilitate appellate review." AB 61-62. However, this rationale is flawed. The verbal order was insufficient in this case because there was controversy surrounding the competency hearing and determination by the court.

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

In fact, co-counsel for McCray filed a Motion to Set Aside Adjudication of Competency and a subsequent Motion for Rehearing on the oral pronouncement of restored competency. (6 R 1166-67, 1170-71). The Motion to Set Aside Adjudication of Competency was based upon the fact that counsel for defense failed to consult with co-counsel before stipulating to McCray's regained competency on the record. (6 R 1166-67). A *nun pro tunc* written order is necessary to perfect the record so that the issue regarding the conflicting opinions of trial counsel and other matters regarding McCray's competency may be addressed in later appeals.

ARGUMENT SIX

THE STATE VIOLATED THE WILLIAMS RULE IN MAKING EVIDENCE OF MCCRAY'S COLLATERAL CRIMES 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 N SUPPORT OF DEATH IN VIOLATION OF FLA. CONST. ART. 1, SECTION 17, 9 AND U.S. CONST. AMEND. 6, 14.

The State used evidence of a collateral crimes of McCray to show that a motive existed for McCray to kill his alleged victims. This is a permissible trial tactic. *Jorgenson v. State*, 714 So. 2d 423, 427-28 (Fla. 1998). However, while the fact that McCray had previously been arrested with his alleged victims may be relevant to show motive, the facts and circumstances surrounding the arrest and

McCray's role in the arrest are not relevant to show motive, and if vaguely relevant were raised to an impermissible level by the state.

I. Evidence of McCray's lifestyle as a drug dealer was irrelevant to the case and was thus more prejudicial than probative

Understandably, the State in this case wished to offer evidence of an arrest that occurred prior the murders where McCray and his victims were all arrested together. McCray was purportedly motivated to kill these individuals because he suspected that they had "ratted him out" to the police. Under *Jorgenson*, above, as well as *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), this is clearly a permissible tactic.

However, the nature of the prior arrest nor McCray's role and lifestyle as a drug dealer was only tangentially relevant to show motive. McCray and his alleged victims could have been arrested for anything and the state's proposed motive would still be in place. McCray could have served any role in the lives of his alleged victims and still had a motive to kill them based on a suspicion that they implicated him to the police. The bottom line is that the only reason why the state emphasized McCray's role as a drug is because they knew the jury would be more likely to convict a crack-dealer than a law-abiding citizen. The state used the

information solely for the purpose of prejudicing McCray in the eyes of the jury. Had the state truly been interested in avoiding unwarranted prejudice, while still presenting McCray's alleged motive, it would have informed the jury that McCray was arrested prior to the murders with several of his victims and that McCray believed that these individuals had "rolled on him" in exchange for lighter sentences. If the state presented its argument in this manner, it still would have presented a viable motive to the jury without purposefully attacking McCray's character based on his lifestyle as a drug dealer.

II. The state placed impermissible emphasis on collateral crime evidence during McCray's trial proceedings

Even if this court finds that the testimony and references to the particulars of McCray's arrest or his lifestyle as a drug dealer were somehow necessary to prove motive in this case, the State placed such emphasis on this information until it became a feature of the trial and unduly prejudiced McCray in the eyes of the jury. The evidence regarding McCray's collateral crimes and bad acts was overused and overemphasized by the State in violation of clear precedent and its own Notice of Other Crimes, Wrongs, or Acts Evidence. *Ashley v. State*, 265 So. 2d 685, 693 (Fla. 1972); *Bush v. State*, 690 So. 2d 670 (Fla. 1st DCA 1997), *Billie v. State*, 863 So. 2d 323 (Fla. 3d DCA 2003); *Perry v. State*, 718 So. 2d 1258, 1259-60 (Fla. 1st DCA 1998). As noted by the State in its answer brief, collateral crime evidence that may otherwise be admissible can result in a reversal if its overuse makes it

disproportionate to the evidence relating to the charged crime. AB 67, *citing* *Williams v. State*, 117 So. 2d 473, 476 (Fla. 1960). In this case the state repeatedly attacked McCray's character as that of a drug dealer under the guise of "proving motive." As discussed in the initial brief, the emphasis placed on collateral bad acts and the collateral arrest placed impermissible weight on matters which were collateral to the issue to be decided by the jury.

III. The state venture well beyond the scope of its Notice of Other Crimes in using collateral crime evidence in trial proceedings

In addition to placing undue emphasis on collateral matters in McCray's trial proceedings, the state went beyond the terms of its Notice to the defense and court of its reliance on collateral bad act and crime information. The state in its answer declares that the state did not need to notify the court of its reliance on the information because it could have presented information regarding an "inextricably intertwined collateral crime" without first notifying the court under Florida Statute 90.402. AB 69. However, the state in answer did not engage in analysis to ascertain whether the collateral information presented by the state at trial qualified as such under the four-part test for "inextricably intertwined" collateral-crime evidence. AB 69. *See e.g. Dorsett v. State*, 944 So. 2d 1207, 1213 (Fla. 3d DCA 2006)(for discussion of test for inextricably intertwined collateral crime evidence). The collateral crime evidence presented by the state in trial proceedings was not inextricably intertwined with the case, and the state has not established nor can it

establish this point. Further, it was the state in trial proceedings which sought to present the information as evidence admissible under Florida Statute 90.404(2).

ARGUMENT SEVEN

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

I. The trial court abused its discretion in finding that McCray was competent to proceed at his third competency hearing

The trial court found that McCray was competent to proceed with trial despite McCray's prior determination of incompetence and subsequent involuntary institutionalization in a mental health facility because, among other reasons, McCray had lost a full one-third of his body weight after his arrest while in jail; despite McCray's erratic behavior since the onset of his case; despite the findings of two of three experts (in the competency hearing at issue) who determined that McCray was incompetent to proceed; despite the interviews conducted by these experts with McCray's family members who stated that McCray had changed, had become withdrawn, and no longer kept in touch with his child, who had once been his life; despite the fact that a Florida State mental health facility had diagnosed McCray with a non-specified psychotic disorder; despite the fact that McCray had

improved remarkably when force-medicated with psychotropic medications; and that his behavior worsened again when he stopped taking the medication.

Despite all of these facts, the court found McCray competent to proceed because its own opinion matched that of a lone expert, Dr. Meadows.

II. The opinions of Dr. Krop and Dr. Miller of McCray's incompetence

The State remarked in its answer to this claim, "McCray devotes a great deal of his argument on this issue [on Initial Brief] to the contrary conclusion of Dr. Krop and Dr. Miller." AB 73. The State's observation is exactly right; the opinions Dr. Krop and Dr. Miller who both found McCray incompetent at the third competency hearing were the focus of this claim because these opinions were largely ignored and/or paraphrased by the trial court in its order finding McCray competent.

III. The experience and expertise of Dr. Miller

The state also commented on Dr. Miller's "inexperience" both with McCray's case and in testifying as an expert. AB 73. This is faulty conclusion. Dr. Miller was the associate of Dr. Myers, who had been working on McCray's case along with Drs. Krop and Meadows since the onset. He co-signed the written report drafted in preparation for the third competency hearing. Dr. Miller did not simply step into the case, conduct an unsuccessful interview where McCray refused to speak with him, and make a determination of incompetence. Dr. Miller

was keenly aware of McCray's history as he worked with a prior expert in McCray's case. Furthermore, simply because Dr. Miller had never testified as an expert in court on a previous occasion does not make him unqualified—an expert who has never testified in court may have more experience than an expert who has testified one hundred times.

IV. The faulty decision of the court concerning McCray's competency cannot be excused under current Florida law

The State repeatedly argues that the court did not abuse its discretion but simply performed the judicial function of resolving the conflict among the expert opinions, as allowed under *Gore v. State*, 24 So. 3d 1, 10 (Fla. 2009). AB 71, 73, 74. The state citing *Gore*, claims that the court properly resolved a dispute among the facts in reaching a finding of competency in McCray's third competency hearing. However, the conclusion in *Gore* actually supports McCray's position. There, the court concluded that Gore was competent based on the opinions of two of three experts who found Gore competent; the courts own observations; and prior proceedings where Gore had been found competent to proceed by 4 of 7 different experts who evaluated him over the course of three competency hearings and his competency was upheld on each occasion. *Id.* at 10.

In the present situation, the court reached the exact opposite logical conclusion of the court in *Gore*. In *Gore*, the court's determination was supported by the quantum of the evidence at hand. *Id.* Here, the court ruled against a

preponderance of the evidence supporting incompetence: despite the testimony of two of three experts in the current proceeding who found McCray incompetent; despite that Dr. Meadows was the only expert out of the four who evaluated McCray in the course of his proceedings; despite a judicial finding of incompetence earlier in the case, leading to a one-year period of institutionalization of McCray in a mental health facility; despite a prior diagnosis of Axis I psychotic disorder NOS; despite McCray's documented vast improvement while medicated; and despite McCray's bizarre, uncontrollable behavior in trial proceedings, the court found that McCray was competent. The decision of the trial court with regard to McCray's competency was an abuse of discretion which cannot be rationalized by a court's duty to resolve disputes. This was not a case involving a conflict or a "close call" warranting a referee decision by the court. As described above, the bulk of evidence presented in this case weighed against McCray's competence.

CONCLUSION

Based on the arguments presented in Appellant's initial brief as well as those presented above, Appellant respectfully asks this Court to reverse and remand McCray's convictions and sentences for a new trial.

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/Rick Sichta
A T T O R N E Y

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 ____ day of June, 2010.

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