**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC12-2349**

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**NORMAN BLAKE MCKENZIE**

**Petitioner,**

**v.**

**KENNETH S. TUCKER,[i] SECRETARY,**
**FLORIDA DEPARTMENT OF CORRECTIONS**
**&**
**PAMELA JO BONDI**
**ATTORNEY GENERAL,**
**STATE OF FLORIDA**

**Respondents.**

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# RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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## RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the State of Florida, by and through counsel, and responds as follows to Norman Blake McKenzie's petition for a writ of habeas corpus. For the reasons set out below, the State moves this Honorable Court to deny the petition.

## INTRODUCTION

The Petitioner in this case seeks a writ of habeas corpus. Contemporaneous with his petition, McKenzie appeals the denial of his motion for post-conviction relief under *Florida Rule of Criminal Procedure* 3.851 (hereinafter "Rule 3.851" or "3.851") from the Circuit Court in St. Johns County where he was convicted of first-degree murder and sentenced to death. This is McKenzie's first petition to this Court for a writ of habeas corpus. In his petition, McKenzie claims that his convictions and death sentences—and their affirmation by this Court—were obtained in violation of the Constitutions of the United States and the State of Florida.

## PROCEDURAL HISTORY

While essentially accurate, the "procedural history" set out on page two (2) of the petition is significantly abbreviated. On direct appeal, this Court summarized the facts of this case in the following way:

On October 17, 2006, a grand jury indicted the appellant, Norman Blake McKenzie, on two counts of first-degree murder for the homicides of Randy Wayne Peacock and Charles Frank Johnston. The charges against McKenzie resulted from the October 5, 2006, discovery of the bodies of Peacock and Johnston at a residence located in St. Johns County.

The evidence presented at trial established that on October 5, 2006, two Flagler Hospital employees became concerned when Randy Peacock, a respiratory therapist at the hospital, did not report to work. The two employees drove to the home that Peacock shared with Charles Johnston. Upon their arrival, they noticed that Peacock's vehicle, a green convertible, was not there. When the employees entered the residence, they found Peacock lying face down on the kitchen floor in a pool of blood. When deputies from the St. Johns County Sheriff's Office (SJSO) arrived, they secured the scene and subsequently located the body of Charles Johnston in a shed that was also located on the property. While processing the crime scene, law enforcement officers located a hatchet inside the shed that appeared to have blood on its blade and handle. A butcher knife was found in the kitchen sink. Deputies observed a gold sport utility vehicle (SUV) in the driveway and determined that it was registered to Norman Blake McKenzie.

The deputies subsequently spoke with a neighbor of the victims. The neighbor stated that on October 4, 2006, he went to the victims' home to assist Johnston with repairs on his vehicle. When the neighbor first arrived, Johnston was not there but Peacock was present and was speaking with a man whom the neighbor later identified in a photo lineup as McKenzie. The neighbor confirmed that he saw Peacock speaking with McKenzie between 4:30 and 7 p.m., and that he also observed a gold SUV in the driveway. The neighbor departed the victims' residence before dark.

McKenzie subsequently had an encounter with a Citrus County sheriff's deputy during which Randy Peacock's wallet was recovered from one of McKenzie's pockets. Further, Charles Johnston's wallet was located in a vehicle that McKenzie had recently operated. McKenzie agreed to speak with SJSO deputies on two separate occasions during which he confessed to the murders of Peacock and Johnston.

McKenzie explained that he went to the victims' residence on October 4, 2006, to borrow money from Johnston because of his drug addiction. When he first arrived, only Peacock and the neighbor were present; however, Johnston returned home around dusk. The neighbor left after briefly speaking with Johnston, and at some point, Peacock went inside the residence. McKenzie then asked Johnston for a hammer and a piece of wood so that he could knock some "dings" out of the door of his SUV. Johnston could not locate a hammer and gave McKenzie a hatchet. While walking into the shed to locate a piece of wood, McKenzie struck Johnston in the head with the blade side of the hatchet. Johnston fell to the floor and McKenzie struck him again. McKenzie then entered the home, approached Peacock, who was cooking in the kitchen, and struck him with the hammer side of the hatchet approximately two times.

McKenzie returned to the shed, and when he observed that Johnston was still alive, he struck Johnston one or more times with the hatchet. McKenzie removed Johnston's wallet from his pocket, placed the hatchet on top of a bucket inside the shed, and re-entered the residence. McKenzie observed that Peacock was struggling to stand up, so he grabbed a knife and stabbed Peacock multiple times. McKenzie then placed the knife in the sink, took Peacock's wallet and car keys, and departed in Peacock's vehicle.

An autopsy conducted on Randy Peacock revealed that the cause of his death was six stab wounds which caused extensive bleeding, with a contributory cause of blunt-force trauma to the head. The stab

wounds suffered by Peacock were consistent with the knife found in the kitchen sink and the blunt-force trauma was consistent with the hammer side of the hatchet that was recovered from the shed. An autopsy conducted on Charles Johnston revealed that the cause of his death was extensive head trauma due to the infliction of four "chop" wounds. The trauma to Johnston's skull was consistent with the blade side of the hatchet that was recovered from the shed.

During a pretrial hearing, McKenzie expressed frustration with his court-appointed counsel because his right to a speedy trial had been waived without first consulting with him. When defense counsel sought a continuance on the basis that more time was needed to prepare for trial, McKenzie objected. McKenzie insisted that he was ready and wanted to proceed as expeditiously as possible. As a result, defense counsel moved to withdraw. The trial court, based upon McKenzie's assertion that he was ready to proceed, denied the motion and scheduled a trial date.

During a second pretrial hearing, defense counsel again moved for a continuance, asserting that additional time was necessary to prepare for trial and to investigate mitigation. McKenzie again expressed frustration with his court-appointed counsel, stating that they had requested his medical records even though he had specifically advised them that he did not want this action taken. When the trial court recommended that McKenzie listen to his attorneys' assertion that more time was required to properly prepare for trial, McKenzie responded that he did not need the assistance of counsel. Based upon this statement, the trial court scheduled a *Faretta*[1] inquiry.

FN1. *Faretta v. California*, 422 U.S. 806 (1975).

During the *Faretta* hearing, when asked by the trial court why he wanted to represent himself, McKenzie replied that he was ready for trial and did not need attorneys to prepare any sort of mitigation on his behalf. McKenzie also expressed the belief that he possessed

sufficient intelligence to represent himself. With regard to his desire to proceed to trial as quickly as possible, McKenzie stated that he did not wish to subject his mother, his fiancée, or the victims' families to an extended trial, and that he thought a protracted trial would be a waste of taxpayer funds.

When the trial court asked McKenzie why he wanted to discharge his court-appointed counsel, McKenzie replied that they insisted upon taking actions with which he disagreed. Defense counsel agreed that McKenzie's displeasure with them arose from a difference of opinion with regard to trial strategy. After conducting a *Faretta* inquiry, the trial court concluded that McKenzie was competent to waive counsel and that his waiver was knowing, intelligent, and voluntary. The trial court allowed McKenzie to represent himself but appointed standby counsel with McKenzie's approval.

During the guilt phase of the trial, McKenzie admitted that he went to the victims' home on October 4 with the intention of taking their money. McKenzie also admitted that he hit both Johnston and Peacock with the hatchet and stabbed Peacock with a knife. After the State rested its case, McKenzie stated that he would not offer any witness testimony and further declined to testify on his own behalf. On August 21, 2007, the jury found McKenzie guilty of two counts of first-degree murder.

After the verdict was announced, McKenzie advised that he would like to be represented during the penalty phase and the trial court appointed counsel. However, the next day McKenzie recanted his request and stated that the impact of the verdict caused him to be temporarily distracted from his intended course of action which was to expedite the trial proceedings. The trial court conducted a second *Faretta* inquiry and again concluded that McKenzie was competent to waive counsel. The trial court allowed McKenzie to represent himself but reappointed standby counsel.

During the penalty phase, an SJSO deputy testified that when McKenzie spoke to law enforcement he stated that he went to the victims' residence with the intent to kill Peacock and Johnston for their money. The State introduced eight prior convictions for the following crimes: burglary while armed with a firearm and with an assault or battery; kidnapping with a firearm; strong-arm robbery; attempted robbery with a firearm; robbery with a firearm (three separate convictions); and carjacking. Finally, victim impact statements written by Charles Johnston's daughter and Randy Peacock's sister were read to the jury. After the State rested its case, McKenzie advised that he would not offer any mitigation evidence to the jury. However, following the prosecutor's closing statement, McKenzie was allowed to place bank records into evidence for the purpose of demonstrating his financial behavior in the months before these crimes. By a vote of ten to two, the jury recommended that a sentence of death be imposed for each murder.

McKenzie advised the trial court that he wished to represent himself during the *Spencer*[2] hearing and that he did not intend to present any witnesses. In light of the minimal mitigation offered by McKenzie, the trial court ordered the Florida Department of Corrections (DOC) to prepare a presentence investigation report (PSI). During the *Spencer* hearing, the State did not present any additional evidence but discussed the aggravating circumstances that purportedly had been established and also reviewed potential mitigation factors, such as cooperation with law enforcement, cryptic references to child abuse,[3] and drug addiction. After stating that he would not expound upon any purported reference to child abuse, McKenzie read a statement that he prepared in which he expressed regret for the murders and apologized to the families of the victims.

FN2. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

FN3. The PSI report prepared by the DOC noted that McKenzie's fiancée "would not discuss [McKenzie's]

family.... She did state that his parents should be the ones incarcerated and not him. She would not go into any detail."

The trial court subsequently sentenced McKenzie to death for the murders of Randy Peacock and Charles Johnston. In pronouncing McKenzie's sentences, the trial court determined that the State had proven beyond a reasonable doubt the existence of four statutory aggravating circumstances: (1) McKenzie had previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person, see § 921.141(5)(b), Fla. Stat. (2006) (eight prior convictions and the contemporaneous murder of the other victim) (great weight); (2) the murders were committed while McKenzie was engaged in the commission of a robbery, see § 921.141(5)(d) (significant weight); (3) the murders were committed for pecuniary gain, see § 921.141(5)(f) (merged with robbery aggravator-no additional weight given); and (4) the murders were cold, calculated, and premeditated (CCP), see § 921.141(5)(i) (great weight).

The trial court concluded that McKenzie had failed to prove the existence of the statutory mitigating circumstance that he was under the influence of an extreme emotional or mental disturbance at the time of the murders. Although McKenzie contended that he acted under the influence of cocaine, the trial court found that the admission of McKenzie's bank statements alone was insufficient to establish this mitigating circumstance. Further, the trial court concluded that the evidence presented during trial overwhelmingly established that McKenzie was in complete control of his faculties at the time he committed the murders.

The trial court found a total of seven nonstatutory mitigating factors: (1) McKenzie suffered from a cocaine addiction (little weight); (2) McKenzie was the victim of child abuse (little weight); (3) McKenzie exhibited good behavior during court proceedings (some weight) (4) McKenzie expressed remorse (some weight); (5) McKenzie

cooperated with police (some weight); (6) McKenzie possesses a GED and certificates in architectural design (very little weight); and (7) McKenzie is currently serving a life sentence for armed carjacking, and the minimum mandatory sentence for the murders is life without the possible of parole (little weight).

The trial court concluded pursuant to *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), that it could not afford the jury's advisory recommendation great weight in light of McKenzie's minimal presentation of mitigation during the penalty phase. Accordingly, the trial court conducted an independent evaluation and concluded that the aggravating circumstances established far outweighed the mitigating circumstances.[4] Based on this conclusion, the trial court imposed a sentence of death for each murder.

> FN4. The trial court further concluded that "[e]ven in the absence of [CCP] ... the remaining aggravating circumstances would far outweigh the mitigating circumstances."

*McKenzie v. State*, 29 So. 3d 272, 275-278 (Fla. 2010).

## ISSUES RAISED ON APPEAL

McKenzie raised the following issues on direct appeal:

(1) The trial court *sua sponte* struck a juror for cause and, in doing so, impermissibly departed from judicial neutrality;

(2) The *Faretta* and *Nelson* inquiries conducted by the trial court were defective and, for this reason, the trial court impermissibly permitted McKenzie to represent himself in violation of the Sixth Amendment; and the trial court restricted his access to standby counsel in violation of the Sixth, Eighth, and Fourteenth Amendments;

(3) The trial court erred when it drafted one sentencing order to address both murders;

(4) The death sentences imposed by the trial court are disproportionate; and

(5) Florida's capital sentencing scheme violates *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court denied each of McKenzie's claims on direct appeal and affirmed the convictions and death sentences. *McKenzie*, 29 So. 3d at 272, *cert. denied*, 131 S. Ct. 116 (2012). In his contemporaneous 3.851 appeal (Case No. SC12-986), McKenzie alleges that "state action" denied him a fair sentencing and violated his constitutional rights and proffers a list of mitigation. In this petition, McKenzie raises the single claim that the execution of "mentally ill" individuals violates the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

## RESPONSE TO "INTRODUCTION"

In the section titled "Introduction" on page one (1) of the petition, McKenzie makes reference to claims of ineffective assistance of appellate counsel and questions raised on direct appeal that should be reheard under subsequent case law or legal argument. Apart from the three sentences that speak in conclusory terms of ineffective assistance of appellate counsel, McKenzie presents no additional facts, legal authority, or analysis. To the extent that McKenzie is attempting to fashion a

claim of ineffective assistance of appellate counsel, such claims area insufficiently pled, insufficiently briefed, and should not be considered by this Court.

As to the questions that McKenzie claims should be reheard under subsequent legal authority or argument, the issues are procedurally barred and should not be considered by this Court. The legal authority McKenzie cites in the body of the petition's argument existed at the time of McKenzie's direct appeal and—as set out in the argument of this response—they are distinguishable from McKenzie's case.

## RESPONSE TO JURISDICTIONAL STATEMENT

In this original action, the Petitioner raises claims challenging the constitutionality of his convictions and sentences and the judgment of this Court. Under Article V, Section 3(b)(9) of the Florida Constitution, this Court has jurisdiction. *See also Reynolds v. State*, 99 So. 3d 459, 465 (Fla. 2012), *reh'g denied* (Fla. 2012); Fla. R. App. P. 9.030(a)(3), Fla. R. App. P. 9.100(a). However, McKenzie's petition does not set out appropriate grounds for relief.

## ARGUMENT

### THE "MENTAL ILLNESS" CLAIM

In his petition for a writ of habeas corpus, McKenzie claims that he suffers from "profound" or "major mental illness." (Petition at 4-5). Aside from making obtuse references to "major mental disorders" or "mental illness," McKenzie does

not identify a specific mental illness in the petition and this "ground for relief" is insufficiently pled. McKenzie's conclusory statements about mental illness say nothing at all.[1]

Assuming arguendo that the claim is properly and sufficiently presented, McKenzie's basis for relief fails on the merits. Using the "evolving standards of decency" analysis in the United States Supreme Court decisions in *Akins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005), McKenzie advances a freestanding claim that his self-described "mental illness" is a bar to execution on equal constitutional footing with mental retardation or juvenile age. McKenzie misapprehends the breadth of *Atkins* and *Roper* and attempts to fashion whole-cloth a constitutional ruling that is inconsistent with the decisions of this Court and the United States Supreme Court.

This Court has repeatedly held that there is no per se bar to imposing the death penalty on individuals with mental illness. *Johnston v. State/Tucker,* 70 So. 3d 472, 484-485 (Fla. 2011) (*citing Nixon v. State,* 2 So. 3d 137, 146 (Fla. 2009); *Lawrence v. State,* 969 So. d 294, 300 n. 9 (Fla. 2007)).

> Specifically, **this Court has recently considered and rejected the precise arguments that Johnston raises here regarding the**

[1] McKenzie tries to rely on his proffer of Dr. Cunningham's report in his 3.851 proceeding. Such reliance is improper, but even if it is allowed, no mental illness has ever been identified.

> **evolving standards of decency in death penalty jurisprudence**. *See Johnston v. State,* 27 So. 3d 11, 26–27 (Fla. 2010) (denying David Eugene Johnston's claim, based on the reasoning in *Atkins* and *Roper,* that mental illness is a bar to execution), *cert. denied,* ---U.S. ---, 131 S.Ct. 459, 178 L.Ed.2d 292 (2010). And this Court has made clear that we "find no reason to depart from these precedents." *Id.* at 27.

*Johnston,* 70 So. 3d at 484-485 (emphasis added). In *Power v. State*, this Court ruled that "the existence of mental illness alone does not automatically exempt [a defendant] from execution." 992 So. 2d 218, 222 (Fla. 2008). In the *Power* decision, this Court discussed *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006) and held:

> In *Diaz*, the defendant cited ABA Resolution 122A, arguing that his personality disorders were sufficiently akin to being mentally retarded so as to exempt him from execution. 945 So. 2d at 1151. We held:
>
> > **Neither this Court nor the Supreme Court has recognized mental illness as a per se bar to execution.** Instead, mental illness can be considered as either a statutory mental mitigating circumstance if it meets that definition (i.e., the crime was committed while the defendant "was under the influence of extreme mental or emotional disturbance") or a nonstatutory mitigating circumstance. *See* § 921.141(6), Fla. Stat. (2006). Such mental mitigation is one of the factors to be considered and weighed by the court in imposing a sentence.
>
> *Id.* Although Diaz was not able to show that he suffered from mental illness, we held that "**even if he could, this would not automatically exempt him from execution as there is currently no per se 'mental illness' bar to execution.**" *Id.* at 1152; *see also Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007) ("To the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position." (*citing Diaz*, 945 So. 2d at 1151)). We reaffirm our previous declaration in *Diaz* and hold that **the existence of mental**

**illness standing alone does not automatically exempt Power from execution.**

*Power*, 992 So. 2d at 222 (emphasis added).

The defendant in *Power* alleged in general terms that he suffered from "severe mental illness." In this case, McKenzie avers in similarly opaque terms that he suffers from "profound" or "major" mental illness. Aside from vague references in the proffered mitigation in the initial brief of his 3.851 appeal, McKenzie does not allege that he suffers from a particular mental illness—neither mental retardation, nor incompetence to be executed, nor any specific mental illness at all. Even if McKenzie could establish a diagnosed mental illness, unless the diagnosis was mental retardation or incompetency to be executed,[2] under this Court's rulings in *Johnston* and *Power*, his petition should be denied. 70 So. 3d at 484-485; 992 So. 2d at 222. Furthermore, the Respondents do not concede that it is permissible to use the 3.851 evidence to support the petition. McKenzie is attempting to re-argue his 3.851 claims for relief in this proceeding, which is improper.

It would appear that McKenzie relies on the proffer of mitigation from his post-conviction expert and his self-described mental illness from his recorded

[2] Of course, incompetency to be executed would not be ripe until McKenzie was under a death warrant, and he is under no such warrant.

confessions as support for this claim. Without conceding the propriety of that strategy or the reliability of Dr. Cunningham's report, McKenzie's post-conviction psychologist hypothesizes that McKenzie's maternal great-aunt suffered from Schizophrenia, but does not confirm it. (Initial Brief at 62). The psychologist also references that McKenzie's sister has been hospitalized for psychiatric disorders, including Bi-Polar Disorder. (Initial Brief at 62). But while the psychologist indicates that McKenzie exhibited symptoms of Bi-Polar Disorder, he does not diagnose him with the condition. (Initial Brief at 62-64). Even so, Bi-Polar Disorder alone would not be an absolute bar to execution like mental retardation, juvenile age, or incompetency. McKenzie's initial brief and petition are fraught with hollow references to "mental illness," but not even his mental health expert's distended catalogue of mitigation offers a specific diagnosis. The psychologist offers no opinion about McKenzie's mental state during the recorded interrogations.

The record in this case indicates the opposite of what McKenzie now claims—he is not mentally ill. Prior to their discharge, one of McKenzie's lawyers mentioned to the trial court that there were two pre-trial psychological evaluations of McKenzie. (DAR, V2, R376).[3] These reports ostensibly found McKenzie to be

[3] Cites to the 3.851 appeal record will be V_, R _ for volume number followed by page number. Cites to the direct appeal record will be DAR, V_, R_.

competent because his attorneys did not offer them to the court to establish his incompetence to proceed or to waive his right to counsel. The trial court engaged in continuous dialogue with McKenzie during preliminary hearings and throughout the trial and was never concerned about his competency to proceed. (V3, R375-430, R435-474). The trial court found him competent to exercise his right to self-representation and that his doing so was knowing, intelligent, and voluntary. (V3, R425, R472). This Court affirmed the lower court's competency findings. *McKenzie v. State*, 29 So. 3d 272, 280-283 (Fla. 2010).

McKenzie's petition for writ of habeas corpus presents no basis for this Court to grant relief and should be denied.

## CONCLUSION

Based on the foregoing authority and arguments, the Respondents respectfully request that this Honorable Court deny McKenzie's petition for a writ of habeas corpus.

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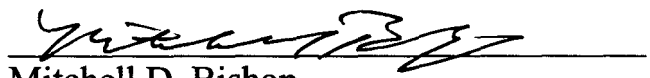
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **James L. Driscoll**, Driscoll@ccmr.state.fl.us, **David D. Hendry**, Hendry@ccmr.state.fl.us, and support@ccmr.state.fl.us, this 22nd day of January, 2013.



Mitchell D. Bishop
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point font.

Mitchell D. Bishop
Assistant Attorney General

[i] The State acknowledges that Michael D. Crews has assumed the duties of Secretary of the Florida Department of Corrections. However, at the filing of this response, there has been no order changing the style of this case replacing Secretary Tucker as a respondent.