ORIGINAL

IN THE SUPREME COURT OF FLORIDA

NORMAN B. McKENZIE,

Appellant,

v.

CASE NO. SC12-986

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant in this case sought 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. The court below summarily denied the Appellant's motion and this appeal follows.

STATEMENT OF THE CASE

On August 21, 2007, a jury in St. Johns County found the Appellant guilty of two counts of first degree murder for killing Randy Wayne Peacock and Charles Frank Johnson. (DAR, V1, R83-84, V6, R375-376). At the conclusion of the penalty phase on August 23, 2007, the jury recommended the death sentence by a vote of 10-2. (DAR, V1, R94-95). A *Spencer*[1] hearing was held on October 12, 2007, and the following week on October 19th, Judge Wendy Williams Burger sentenced the Appellant to death for each of the first-degree murders. (DAR, V3, R462-486, V1, R183-196). On January 7, 2010, this Court affirmed McKenzie's first degree murder convictions and death sentences. *McKenzie v. State*, 29 So. 3d 272 (Fla. 2010). The United States Supreme Court denied McKenzie's Petition for Writ of Certiorari on October 4, 2010. *McKenzie v. Florida*, 131 S. Ct. 116 (2010).

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

McKenzie filed a Rule 3.851 motion on September 15, 2011. (V1, R109-199).[2] The State answered McKenzie's motion on October 11, 2011. (V2, R200-251). The post-conviction trial court conducted a Case Management Conference (*Huff*[3] hearing) on January 13, 2012, and heard argument from counsel on the motion and response. After reviewing the Defendant's motion, the State's response, the record, and argument from counsel, the trial court summarily denied McKenzie's claims on March 8, 2012 without an evidentiary hearing. (V2, R322-521).

McKenzie filed a motion for rehearing on March 20, 2012, and a supplemental motion for rehearing on March 29, 2012. The State responded to the motion for rehearing on April 2, 2012, and filed a motion to strike the Defendant's supplemental motion for rehearing on April 4, 2012. A motion to strike the State's motion to strike was filed on April 9, 2012. The trial court issued an order denying the motion for rehearing on April 16, 2012. McKenzie filed the notice for this appeal on May 9, 2012. (V4, R614-616). McKenzie filed the initial brief in this appeal and a contemporaneous petition for a writ of habeas corpus on November 7, 2012. This answer follows.

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[2] 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_.

[3] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

PROCEDURAL AND FACTUAL HISTORY

STATEMENT OF THE FACTS

This Court summarized the factual and procedural history for this case in its opinion following the direct appeal:

> 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 this 3.851 appeal, McKenzie's first claim raises seven sub-claims under a single heading alleging that "state action" denied him a fair sentencing and violated his constitutional rights. In his second "claim,"[4] McKenzie presents a list of mitigation without presenting any additional legal authority or argument relevant to the issue before this Court. In his contemporaneous petition

[4] While the second "claim" is styled and formatted as a claim or issue raised in this appeal, the claim is nothing more than a list of possible mitigation that McKenzie would have presented at an evidentiary hearing.

for a writ of habeas corpus, Case No. SC12-2349, McKenzie raises the single claim that the execution of "mentally ill" individuals violates the Eighth and Fourteenth Amendments of the United States Constitution.

INEFFECTIVE ASSISTANCE OF COUNSEL—STANDARD OF REVIEW

To establish a claim for ineffective assistance of trial counsel, a defendant must meet both of the requirements set forth in *Strickland v. Washington*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687 (1984). The prejudice prong is met only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694*; see also Porter v. McCollum*, 558 U.S. 30 (2009) (explaining that the Court does not require proof "'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'") (*quoting Strickland*, 466 U.S. at 693-94).

In evaluating counsel's representation under *Strickland*, there is a strong presumption that counsel's performance was constitutionally effective. 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential."). The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (*quoting Michel v. Louisiana*, 350 U.S. 91 (1955)). Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

SUMMARY DENIAL OF POST-CONVICTION CLAIMS

A post-conviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on the written materials before the court. A court may summarily deny a post-conviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. *See Franqui v. State,* 59 So. 3d 82, 95-96 (Fla. 2011); *Troy v. State,* 57 So. 3d 828 (Fla. 2011) (*citing Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008)). A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. *Doorbal v. State*, 983 So. 2d 464 (Fla. 2008) (*citing Downs v. State*, 453 So. 2d 1102 (Fla. 1984)); *See also Moore v. State*, 820 So. 2d 199, 203 (Fla. 2002).

A. LEGAL SUFFICIENCY

Rule 3.851(e)(1)(D) requires a defendant to include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought. The burden is on the defendant to establish a legally sufficient claim. *See Franqui,* 59 So. 3d 82 (Fla. 2011) (*citing Freeman v. State/Singletary*, 761 So. 2d 1055, 1061 (Fla. 2000)); *Nixon v. State/McDonough*, 932 So. 2d 1009, 1018 (Fla. 2006). Conclusory allegations are not legally sufficient. *Franqui*, 59 So. 3d at 96.

The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. *See Knight v. State,* 923 So. 2d 387 (Fla. 2005); *Thompson v. State*, 796 So. 2d 511, 515 n.5 (Fla. 2001). The facial sufficiency of an ineffective assistance of counsel claim is determined by applying the two-pronged test of deficiency and prejudice set forth in *Strickland. Troy*, 57 So. 3d at 834, (*citing Duest v. State*, 12 So. 3d 734, 747 (Fla. 2009)). Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief. *Dennis v. State*, --- So. 3d ---, 2012 WL 6619282, 6, 38 Fla. L. Weekly S1 (Fla. Dec 20, 2012) (holding counsel cannot be deemed ineffective for failing to make a meritless argument); *See also Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008).

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, the defendant is "required to allege what testimony defense

counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), *cited in Bryant v. State/Crosby*, 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify). Stating that a witness could testify about a subject, without more, is insufficient to require an evidentiary hearing. *Franqui*, 59 So. 3d at 101.

A defendant's claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy*, 57 So. 3d at 835 (*citing Van Poyck v. State*, 694 So.2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might be considered sound trial strategy" the claim may be summarily denied. *Franqui*, 59 So. 3d at 99 (*citing Michel*, 350 U.S. at 101). As the Florida Supreme Court explained in *Winkles v. State*, "an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."

21 So. 3d 19, 26 (Fla. 2009). S*ee also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to summary denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *See Franqui*, 59 So. 3d 82; *Troy*, 57 So. 3d 828; *Freeman,* 761 So. 2d at 1063; *Duest,* 12 So. 3d at 747. *See also Walls v. State,* 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial appropriate on ineffective assistance of counsel claim where evidence was cumulative); *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001) (Because the *Strickland* standard requires establishment of both the deficient performance and prejudice prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong).

If a claim is deemed *facially* insufficient because of a technical omission, the court should afford the defendant a reasonable opportunity to amend. *See Davis v. State,* 26 So. 3d 519, 527 (Fla. 2009). In this case, the omissions are not merely technical—the claims are legally insufficient and the trial court's summary denial should be affirmed.

B. PROCEDURAL BAR

In addition to legal insufficiency and refutation by the record as bases for summary denial, the trial court must also summarily deny claims that are procedurally barred. This Court has consistently held that a claim that could and should have been raised on direct appeal is procedurally barred in post-conviction proceedings. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State*, 928 So. 2d 1089, 1116-1136 (Fla. 2005); *Duckett v. State*, 918 So. 2d 224, 231 (Fla. 2005); *Robinson v. State*, 913 So. 2d 514 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. *Willacy v. State*, 967 So. 2d 131 (Fla. 2007). A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. *Freeman,* 761 So. 2d at 1067 (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). *See also Rodriguez v. State/Crosby*, 919 So. 2d 1252, 1262 (Fla. 2005).

RIGHT TO SELF-REPRESENTATION

The overarching constitutional principle that is inextricability intertwined with every issue in this case—and eclipses them all—is Norman McKenzie's constitutional right to represent himself at his trial. A criminal defendant has a constitutional right to self-representation at trial provided that the decision to do so is knowing, intelligent, and voluntary. *Faretta*, 422 U.S. at 835, *quoted in Indiana*

v. Edwards, 554 U.S. 164 (2008). In *Faretta*, the United States Supreme Court stated that a defendant should be made aware of the hazards and disadvantages of self-representation to the extent that the record would demonstrate that the defendant knew what he or she was doing and made the choice with "eyes open." *Id.* The Supreme Court further indicated that neither legal knowledge nor legal skills are required as conditions precedent for a defendant to exercise the right to self-representation:

> Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the "ground rules" of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Id. (footnotes omitted). In past decisions from this Court, there was some indication that trial judges should inquire into the defendant's experience in criminal proceedings. *See Hardwick v. State*, 521 So. 2d 1071, 1074 (Fla. 1988); *Johnston v. State*, 497 So. 2d 863, 868 (Fla. 1986); *see also* Fla. R. Crim. P. 3.111(d)(3) (1992).[5] Indeed, a defendant's experience in the criminal justice

[5] Rule 3.111 previously provided: "No waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of

system—for example, having been arrested and read *Miranda*[6] rights, having previously waived one's rights and spoken to law enforcement without counsel, or pleaded guilty to a criminal charge—could be one factor in the totality of circumstances that a trial court uses in determining whether the defendant understands the challenge he is facing by proceeding without counsel. But it has never been a prerequisite that defendants have any such experience in the criminal justice system or any legal training or education. Notwithstanding the *Hardwick* and *Johnston* decisions, and the previous version of rule 3.111, this Court later clarified that a defendant's legal skill or experience, or whether he can prepare an effective legal defense, is not part of the *Faretta* inquiry.

> [W]e hold that once a court determines that a competent defendant of his or her own free will has "knowingly and intelligently" waived the right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented. The court may not inquire further into whether the defendant "could provide himself with a substantively qualitative defense," for it is within the defendant's rights, if he or she so chooses, to sit mute and mount no defense at all.

State v. Bowen, 698 So. 2d 248, 251 (Fla. 1997) (internal citations and footnotes omitted); *see also Hill v. State*, 688 So. 2d 901, 905 (Fla. 1996) ("[A] defendant

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a mental condition, age, education, experience, the nature or complexity of the case, or other factors." Fla. R. Crim. P. 3.111(d)(3) (1992).

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

does not need to possess the technical legal knowledge of an attorney before being permitted to proceed pro se").

Subsequent to the decision in *Bowen*, this Court adopted the current version rule 3.111(d)(3), which provides: "Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel." Fla. R. Crim. P. 3.111(d)(3); *see also Amendment to Florida Rule of Criminal Procedure* 3.111(d)(2)-(3), 719 So. 2d 873, 875 (Fla. 1998). "A defendant's choice to invoke [the right to represent himself]'must be honored out of that respect for the individual which is the lifeblood of the law.'" *Tennis v. State,* 997 So. 2d 375, 377-78 (Fla. 2008) (quoting *Faretta,* 422 U.S. at 834); *see also Pasha v. State,* 39 So. 3d 1259, 1261 (Fla. 2010). It is reversible error for a trial court to deny a defendant's unequivocal pro se request and such a denial is not subject to a harmless error analysis. *Pasha*, 39 So. 3d at 1261-1262.

SUMMARY OF THE ARGUMENT

Norman McKenzie made an informed decision to exercise his unalienable constitutional right to represent himself in his capital murder trial. Prior to discharging his appointed counsel, Mr. McKenzie was neither misguided nor ineffectively represented by his attorneys. No one persuaded or coerced him to

forgo the assistance of any attorney. No one assuaged or discounted the consequences of a conviction and the potential sentence he faced. It was abundantly clear that the reason Mr. McKenzie wanted to represent himself was because he and his attorneys had irreconcilable disagreements about trial strategy. Mr. McKenzie was literate and competent and he understood the gravity of his decision. That Mr. McKenzie understood the severity of his circumstances was made unmistakably transparent to the trial judge when McKenzie explicitly described his situation,

> "[my attorneys] are not the ones who are going to get [to prison] and get a needle put in their arm and be killed. **I am** . . . . They are not the ones that [are] going to have to sit in prison for life . . . . **I am**. I've [been in prison] for 21 years. **I know what I'm facing**."

(DAR, V3, R407) (emphasis added).

Mr. McKenzie recognized that he did not possess any legal skills or have any formal legal training. He was aware that if he were convicted he would be allowed to present mitigation about the crime—or any circumstance of his life—to his sentencer and no one denied him that opportunity. In fact, Mr. McKenzie was determined to affect just the opposite: he did not want to present any mitigation. He was also certain, in his own mind, that there was not much to be disputed in his case, and no one lured him into that belief. Norman McKenzie knew his technical limitations in trial practice, he knew the consequences of being found guilty, he knew what the jury and the court would not know about him when they decided his

sentence, and even so, with eyes wide open he made the unequivocal decision to represent himself.

ARGUMENT

CLAIM I

WHETHER STATE ACTION DENIED McKENZIE A FAIR SENTENCING

In his first claim that "state action" denied him a fair sentencing procedure, McKenzie raises seven sub-claims each of which will be discussed seriatim. The Circuit Court summarily denied relief as to each sub-claim. In its order, the trial court addressed each of the sub-claims and made the following findings:

(1) Whether counsel was ineffective during the period in which they represented McKenzie.

The court below found McKenzie's claim of ineffective assistance of counsel for waiving his right to a speedy trial was discussed on direct appeal "wherein the Supreme Court recognized the trial court's statement to the defendant that such action was not incompetent." (V3, R326-327). Defendant's claim that he was prejudiced by counsel's alleged deficient performance is refuted by the record—"McKenzie's wavier of his right to counsel was clearly based on his desire to proceed in an expeditious manner, without a continuance." (V3, R327).

(2) Whether McKenzie was denied the assistance of an expert and to compel witnesses in his favor.

The trial court found that this sub-claim should have been raised on direct appeal and is procedurally barred. (V3, R328).

(3) Whether McKenzie was denied access to the law library.

The trial court found that this claim was refuted by the record. McKenzie was provided with meaningful access to the court through the assistance of competent counsel. After being informed of the limited access he would have to legal materials in jail should he represent himself, he chose to waive his right to counsel nonetheless. (V3, R329).

(4) Whether State misconduct prevented McKenzie from presenting mitigation.

The trial court found that, to the extent McKenzie is claiming prosecutorial misconduct, such a claim should have been raised on direct appeal and is procedurally barred. Additionally, the court found that McKenzie voluntarily chose to represent himself and assumed the consequences of such representation. He cannot complain now that he received ineffective assistance of counsel. (V3, R330).

(5) Whether the State failed to present mitigation.

The trial court found that the claim is refuted by the record. The defendant indicated that he and the prosecutor discussed the videotaped confession. He voluntarily chose to represent himself and assumed the consequences of doing so. Furthermore, the prosecutor had no duty to present mitigation. (V3, R331).

(6) Whether the pre-sentence investigation was deficient.

The trial court found that the defendant did not challenge the pre-sentencing investigation at trial and the prosecutor did not have a duty to present mitigation. Additionally, the court found that this claim should have been raised on direct appeal and is procedurally barred. (V3, R332).

(7) Whether the death penalty cannot be imposed without a full presentation of mitigation.

The trial court found that the defendant made a competent waiver of mitigation and that the court considered the defendant's drug abuse as mitigation in determining a sentence. (V3, R332). The trial court's summary denial is supported by the law and competent, substantial evidence, *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998), and should be affirmed.

1. Whether McKenzie's Attorneys Were Ineffective During the Period in which They Represented Him

McKenzie alleges that his appointed public defenders, James R. Valerino, Esquire, Valli Quetti, Esquire, and Renee Peshek, Esquire, were ineffective during their period of representation for: (i) failing to visit him immediately "at the location he was held in custody;" and (ii) waiving speedy trial without his approval.

This issue is procedurally barred because it was preserved by McKenzie's objection in a pre-trial hearing and could have been raised on direct appeal. *Miller*,

926 So. 2d at 1260; *Davis*, 928 So. 2d at 1116-1136; *Duckett*, 918 So. 2d at 231; *Robinson*, 913 So. 2d at 523. Even if the claim were not procedurally barred, it is meritless. While some rights require the defendant's consent to waive, the right to a speedy trial does not. *New York v. Hill*, 528 U.S. 110, 114-115 (2000). The United States Supreme Court held in *Hill* that an attorney, acting without consent from his client, could waive his client's statutory right to a speedy trial because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." *Id. Cf. Gonzalez v. United States,* 553 U.S. 242, 250 (2008) (comparing waiver of speedy trial to counsel accepting a magistrate judge for jury selection and holding that both are within the purview of the attorney to decide).

The courts in Florida have also held that an attorney can waive speedy trial over the defendant's objection. *Boyd v. State,* 45 So. 3d 557, 559 (Fla. 4th DCA 2010), *citing Williams v. State*, 383 So. 2d 722, 726 (Fla. 1st DCA 1980) (explaining that it is not error for counsel to waive speedy trial without the client's approval if the waiver was made in good faith and the attorney believed the delay would benefit the client). *Florida Rule of Criminal Procedure* 3.191(i) even contemplates that the speedy trial time periods may be extended by counsel. It is reasonable for counsel to seek a continuance, especially in capital cases, in order to adequately prepare a defense and counsel's failure to do so could result in a finding of deficient performance. *Ford v. State*, 955 So. 2d 550, 555 (Fla. 2007) (counsel

could not have rendered effective assistance if Ford's right to an immediate and speedy trial had been exercised). Moreover, McKenzie has not even alleged prejudice, a necessary component of any ineffectiveness claim. McKenzie confessed to murdering Peacock and Johnson and was found in possession of their belongings. He brutally murdered the two victims in a cold, calculated, and premeditated manner. He had six prior violent felonies that included armed robberies and armed carjacking. McKenzie fails to explain how the waiver of speedy trial would undermine confidence in the outcome of the guilt or penalty phases of his murder trial.

In this case, McKenzie killed Randy Peacock and Charles Johnston on October 4, 2006. He was indicted by the grand jury on October 17, 2006. After an encounter with deputies in Citrus County, McKenzie was arrested and agreed to speak with detectives from St. John's County and the Georgia Bureau of Investigations. He subsequently confessed to the murders and was found in possession of the victims' personal effects. (DAR, V5, 194-195, 207, 209). After he was arrested, McKenzie was transported back and forth between Marion and Alachua Counties on outstanding warrants for unrelated armed robberies and armed carjacking. It was not until February 6, 2007, that McKenzie was transported from Marion County to St. Johns County and served with the felony warrant for the first degree murders in this case. (DAR, V1, R5-6). At his first

appearance the next day, McKenzie said he was going to attempt to hire a private attorney, so counsel was not appointed. (DAR, V1, R7). McKenzie later applied for indigent status and the public defender was appointed on February 15, 2007. (DAR, V1, R10). By that time, McKenzie was back in Marion County awaiting sentencing on the armed carjacking charges. (DAR, V1, R7, 11). A pre-trial conference was scheduled for March 15, 2007, and, despite the St. Johns County circuit judge's transport order, McKenzie was not brought to the hearing. (DAR, V1, R15).

In the meantime, the State filed a notice of intent to seek the death penalty. (DAR, V1, R12). Capital-qualified public defenders filed a notice of appearance on March 15, 2007. (DAR, V1, R16). That same day, the public defender filed a motion to continue the pretrial hearing because McKenzie had not been transported and when the attorneys went to the jail to visit their client, McKenzie was still in Marion County. (DAR, V1, R20-21). The motion to continue included a waiver of speedy trial. (DAR, V1, R20). The court below entered a transport order for McKenzie to be transported to a pre-trial hearing on May 15, 2006. (DAR, V1, R27). Once again, the Defendant was not transported, and the hearing was rescheduled for July 11, 2007 and a third transport order was issued. (DAR, V1, R30-31). By this time, McKenzie had pled to the armed carjacking charges in Marion County and armed robbery charges in Alachua County and was

incarcerated with Department of Corrections. (DAR, V1, R32).[7] McKenzie was not returned to St. Johns County until the July 11, 2007, pre-trial hearing.

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

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[7] The exhibits from the penalty phase show that McKenzie had pending charges in both Alachua County and Marion County as follows:
Case No. 42-2006-CF-004213, Marion County, Carjacking while Armed; plea entered March 6, 2007 (DAR, V1, R129);
Case No. 2007-CF-000585-A, Alachua County, Robbery with a Firearm; plea entered May 10, 2007. (DAR, V1, R128);
Case No. 01-2007-CF-000532-A, Alachua County, Robbery with a Firearm; plea entered May 10, 2007 (DAR, V1, 131);
Case No. 01-2007-CF-00586-A, Alachua County, Robbery with a firearm; plea entered May 10, 2007 (DAR,V1, R133);
Case No. 2006-CF-005259-A, Alachua County, Attempted Robbery with a Firearm, plea entered May 10, 2007 (DAR,V1, R135);
Case No. 01-2006-CF-005261-A, Alachua County, Burglary while Armed, Kidnapping with a firearm, plea entered May 10, 2007 (DAR, V1, R139).

McKenzie that the defense attorneys needed to prepare a defense and mitigation, McKenzie stated:

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

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

Defense counsel said that he could not file a demand for speedy trial in good faith because he was not ready for trial. Because of the numerous charges McKenzie had in other jurisdictions, he was transported from St. Johns County before his attorneys could meet with him. Further, McKenzie indicated he was going to obtain private counsel when he was arraigned. (DAR, V2, R363). The public defender was not appointed until February 15, 2007 and capital qualified public defenders did not appear for McKenzie until March 15, 2007, just after the State filed its notice of intent to seek the death penalty. (DAR, V2, R363). The trial

judge asked McKenzie if he wanted to go to trial in August, and McKenzie said: "Absolutely." (DAR, V2, R364). Besides, he said: "There's nothing to discuss in this case." (DAR, V2, R364). McKenzie said there were "no discoveries to be made" and "no depositions to be made" because:

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

(DAR, V2, R365) (emphasis added).

McKenzie's attorneys filed a motion to continue the trial scheduled for August 20, 2007. (DAR, V1, R39). At the August 7, 2007, pretrial conference defense counsel acknowledged the motion to continue and advised this Court that after the July 16th pretrial conference, depositions were set but very few witnesses appeared. Defense counsel Peshek advised the Court that the case agent, Detective Burres, did not appear for depositions. (DAR, V2, 372). Neither did the two detectives who took McKenzie's statement. (DAR, V2, R373). Defense counsel needed more time to prepare for trial. (DAR, V2, R369).

McKenzie then told the trial judge he "absolutely" wanted to represent himself. (DAR, V2, R375). He was ready to go to trial on August 20th. (DAR, V2, R375). A *Faretta*[8] hearing was set for the following Friday. Defense counsel stated

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

that a psychiatrist had conducted two evaluations if that would assist with competency. (DAR, V2, R376). McKenzie repeated that he just wanted to "get this over with this month" . . . "whatever it takes." (DAR, V2, R380). McKenzie wanted a motion for "a fast and speedy trial." (DAR, V2, R383). McKenzie expressed concern that he was being held in county jail rather than in prison. The trial judge asked if he would continue with trial counsel if she let him go back to state prison. McKenzie said he wanted the trial that month. (DAR, V3, R389). The trial judge explained the importance of the penalty phase. (DAR, V3, R391). McKenzie stated that:

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

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

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

(DAR, V3, R393) (emphasis added).

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

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

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

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

THE COURT: And so – but, I mean, is it that you believe that they're incompetent and that's why you don't want to represent – them to represent you?

THE DEFENDANT: I personally feel that it's not in my best interest for the path they they're taking to try to represent me. I just – I feel it's not in my, my best interest.

(DAR, V3, R402).

THE COURT: And you want to represent yourself.

THE DEFENDANT: Yes, I do.

THE COURT: And you want to represent yourself not because you believe your attorneys are incompetent.

THE DEFENDANT: I don't feel that my – I mean, I don't think that they're incompetent. I mean, they passed the Bar exam, okay? That in itself is an accomplishment. I don't think I could pass the Bar exam, okay? So you know, I mean, no. Do I think they're incompetent? No, I don't. But do I think that they have my best interests in their – in – at hand? No, I don't. I think they have their own best interest at hand.

Mr. Valerino likes to walk around and say I've represented 35 different death cases, and I've never had one to go to death row. That's his greatest saying, okay? And, and

THE COURT: Well—

THE DEFENDANT: I personally don't feel like that's an accomplishment on his behalf. I feel like that that's an accomplishment on the lack of the State's behalf, okay?

(DAR, V3, R405). McKenzie then told the trial judge he had checked his attorneys' status with the Florida Bar and was aware of any complaints filed

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

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

(DAR, V3, R407) (emphasis added).

McKenzie then discussed whether his attorneys should have driven to Alachua County to visit him before speedy trial was waived in March of 2007.

(DAR, V3, R408). The trial judge asked whether McKenzie had any further complaint besides the speedy trial issue. (DAR, V3, R409). McKenzie repeated generalizations about what the judge said about the attorneys doing what they needed to do, not what McKenzie wanted them to do. (DAR, V3, 410). Further, **McKenzie felt there was no "reason to mitigate this case."** He said he could: "get up on the stand during mitigation and alleviate the need of anyone else to be put on the stand on my behalf." (DAR, V3, R410).

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

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

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

> THE COURT: So you do not believe that your attorneys are incompetent or offering ineffective assistance of counsel. You just want to try this case yourself in a week.

> THE DEFENDANT: I believe that my best interest is not in my attorneys. What they want is not what I want, okay? That's what I believe. Now, if that makes them ineffective assistance, then yes. All right?

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

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

an excuse." (DAR, V3, R430). The trial court also conducted a *Nelson*[9] inquiry prior to the discharge of the public defenders.

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

The case was tried by jury on August 20-21, 2007. The jury found McKenzie guilty as charged of two counts of first-degree murder. (DAR, V1, R83, 84; DAR, V6, 375-76).

On direct appeal, McKenzie challenged the adequacy of the *Faretta* hearing. McKenzie's attack on the lower court's inquiry relied primarily on the *Hardwick*

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[9] *Nelson v. State*, 274 So. 2d 258-259 (Fla. 4th DCA 1973).

and *Johnson* opinions discussed at pages 19 and 20 of this response, which this Court clarified in its decision in *Bowen* and the opinion from McKenzie's direct appeal. *Bowen* 698 So. 2d at 251; *McKenzie*, 29 So. 3d at 282-283. After a thorough discussion of the law under *Faretta*, this Court held that the inquiry conducted by the trial court was sufficient. *McKenzie*, 29 So. 3d at 282.

McKenzie also attacked the lower court's *Nelson* inquiry on direct appeal and this Court held as follows:

> The *Nelson* inquiry conducted by the trial court was also sufficient. In *Nelson*, the Fourth District articulated a procedure to be followed when a defendant contends that his or her court-appointed attorneys are incompetent:
>
> > If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether . . . there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.
>
> *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973). This Court subsequently approved the procedure articulated in *Nelson. See Hardwick,* 521 So. 2d at 1074.
>
> **McKenzie contends that the trial court never adequately addressed his main complaint concerning his counsel which was centered on the waiver of his right to a speedy trial prematurely**

and without his consent. However, the trial court advised McKenzie that although the waiver without his consent may have angered him, the conduct, in itself, was not incompetent. McKenzie acknowledged to the trial court that he understood this legal principle. *See generally State v. Kruger*, 615 So. 2d 757, 759 (Fla. 4th DCA) ("The principle is well established that the right to a speedy trial is waived when the defendant or his attorney request a continuance. The acts of an attorney on behalf of a client will be binding on the client even though done without consulting him and even against the client's wishes."), *review denied*, 624 So. 2d 266 (Fla. 1993).

Aside from this primary complaint, it does not appear that McKenzie believed that he was receiving incompetent representation from his court-appointed counsel. When asked about the competency of his counsel, McKenzie replied:

> **I don't think they're incompetent**. I mean, they passed the Bar exam, okay? That in itself is an accomplishment. I don't think I could pass the Bar exam.... **Do I think they're incompetent? No, I don't**. But do I think that they have my best interest ... at hand? No, I don't. I think they have their own best interest at hand.

The trial court ultimately determined that a difference of trial strategy, not incompetence, was the reason discharge was sought. Accordingly, we conclude that any further *Nelson* inquiry, which is necessary only when the asserted reason for the discharge of appointed counsel is incompetence, was not required. *See Nelson*, 274 So. 2d at 258-59. Moreover, McKenzie fails to clearly explain what the trial court should have done—but failed to do—to adequately explore and address his complaints about his court-appointed counsel. Accordingly, we conclude that this challenge is without merit.

McKenzie, 29 So. 3d at 282 -283 (emphasis added). This Court's discussion demonstrates the lack of merit for this sub-claim and the lower court's denial should be affirmed.

2. Whether McKenzie was Denied the Assistance of an Expert or the Opportunity to Compel Witness in his Favor

McKenzie argues he was denied due process under *Ake v. Oklahoma* because he was not "offered the assistance of a mental health expert." 470 U.S. 68 (1985). He also argues that he was denied the ability to compel witnesses in his defense. These issues are procedurally barred. *Miller*, 926 So. 2d at 1260; *Davis*, 928 So. 2d at 1116-1136; *Duckett*, 918 So. 2d at 231; *Robinson*, 913 So. 2d at 523. Both McKenzie's *Ake* claim and his compulsion of witnesses claim should have been raised on direct appeal. *Owen v. State*, 986 So. 2d 534, 551 (Fla. 2008); *Whitfield v. State*, 923 So. 2d 375 (Fla. 2005). Furthermore, the lack of merit in these claims is self-evident.

In *Ake*, the defendant was denied due process because he requested but was denied the assistance of a mental health expert. The United State Supreme Court framed the issue as:

> . . . whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, **when his sanity at the time of the offense is seriously in question**.

470 U.S. at 71 (emphasis supplied). The holding in the case was:

> . . . that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

470 U.S. at 74.

There is no indication in the record that McKenzie was insane or that he was denied access to a mental health expert. To the contrary, the lower court conducted multiple *Faretta* hearings, and McKenzie himself acknowledged that he had been evaluated by a mental health professional:

> THE DEFENDANT: Ms. Berger, I'm sorry, Your Honor, but **he has two evaluations by a psychiatrist already. He can turn those over to you right now to show you that I'm competent.**

(DAR, V2, R376) (emphasis added). Assistant Public Defender Valerino never indicated that he was concerned about McKenzie competency. The lower court found McKenzie competent to waive his right to counsel under *Faretta*. Ostensibly, the only conclusion that can be drawn from those circumstances is that the mental health evaluations found the Defendant competent and did not provide anything helpful for mitigation. Nonetheless, if those mental health evaluations have any bearing on the truth seeking function of the Court or the integrity of McKenzie's judgments and death sentences then they should be produced in the record. McKenzie's claim that "[h]ad [he] been evaluated by a competent mentally health expert . . ." (Initial Brief at 97) ignores his own words and is directly refuted by the record.

McKenzie cites to a section of *Ake* which involves access to a psychiatric exam to assist in the sentencing phase of a capital case. McKenzie misapprehends

the section of *Ake* that he cited. This quoted section does not eliminate the requirement for a defendant to make a preliminary showing of insanity or for sanity to be at issue in the case. McKenzie's sanity at the time of trial was never an issue before the court below or this Court on direct appeal and it certainly has not materialized into an issue in the current iteration of this case. The Court explained aggravation and mitigation, and at McKenzie's request, read the statutory mitigators. (V3, R409-414). The court explained all of the ways in which an attorney could assist in the sentencing portion of the trial—to include presenting mitigation about extreme mental or emotional distress. (V3, R412). After the trial court explained all of the ways in which a lawyer could assist in the penalty phase, before the court could even ask if he understood the colloquy, McKenzie stated, "**nothing of which that I couldn't do myself.**" (DAR, V3, R414) (emphasis added).

Additionally, McKenzie cites to this Court nothing in the record to support his argument that he was denied the ability to compel witness in his favor. The argument is based on the fact McKenzie did not present witnesses, not that he was denied the right to compel witnesses. As outlined in the previous sub-section (1) of this brief, the trial judge conducted several *Faretta* hearings. (DAR, V3, R417-437; DAR, V7, R432-42). The following is an excerpt from the August 10, 2007, *Faretta* hearing:

THE COURT: . . . A lawyer can call witnesses for you, question witnesses against you, and present evidence on your behalf.

. . .

Do you understand how a lawyer can help at trial?

. . .

THE DEFENDANT: Yes, I do . . . I understand that . . .

(DAR, V3, R406-409).

Not only is there nothing in the record to support his claim, the record indicates the exact opposite. Prior to discharging his attorneys, McKenzie had the assistance of a mental health expert and obviously knew about the evaluations because he was the one to inform the court of their existence. McKenzie voluntarily waived his right to counsel and was advised of the inherent difficulties of self-representation. McKenzie was advised of his right to compel witnesses in his favor and elected not to do so. He knew of the competency evaluations and elected not to present them. But even if he did not call witness or use the evaluations because he was inept at trial practice, then he simply experienced the difficulties of self-representation that he was warned about numerous times. The lower court's denial of this sub-claim should be affirmed.

3. McKenzie was Denied Access to the Law Library

McKenzie claims that he was denied the "constitutional right to a law library." First, this issue is procedurally barred. *Miller*, 926 So. 2d at 1260; *Davis*, 928 So. 2d at 1116-1136; *Duckett*, 918 So. 2d at 231; *Robinson*, 913 So. 2d at 523. If McKenzie was denied access to a law library, the issue should have been raised

on direct appeal. Secondly, this claim is legally insufficient because McKenzie has failed to allege that he was denied access to the law library—he only alleges that "there is no indication that [he] was given access to the law library in the county jail."(Initial Brief at 26). This allegation fails to meet McKenzie's burden of pleading. At the August 10, 2007 *Faretta* inquiry, the following colloquy between the trial court and McKenzie took place:

> . . .
>
> THE COURT: You will be limited to the legal resources that are available to you while you're in custody. Do you understand that?
>
> THE DEFENDANT: Yes, I am.
>
> THE COURT: **You will not be entitled to any additional library privileges just because you're representing yourself. Do you understand that**?
>
> THE DEFENDANT: **I have no library privileges**.
>
> THE COURT: A lawyer would have fewer restrictions in researching your defense or investigating your cases. Do you understand that?
>
> THE DEFENDANT: I'm sorry?
>
> THE COURT: **That because you're in custody, a lawyer would have fewer restrictions in researching your defense or investigating your case. Do you understand that**?
>
> THE DEFENDANT: **Yes, ma'am**.
>
> . . .

(DAR, V3, R414-415) (emphasis added). The record shows that McKenzie was informed that he would have no **additional** library privileges if he discharged his

appointed attorneys. McKenzie stated, "I have no library privileges." The latter statement may have been true at the time (especially for a pre-trial confinee who was, at that exact moment, still represented by counsel). But McKenzie has failed to allege that he asked for access to or materials from a law library and was then denied such a request by his custodian. The court explained that a lawyer would have fewer restrictions in researching a defense or investigating the case. McKenzie indicated that he understood what his lawyers could do for him and he discharged them anyway. Nonetheless, at the direction of the court and McKenzie's acquiescence, stand-by counsel remained an available resource. And there is also no indication or allegation that McKenzie was impeded in seeking the assistance of his stand-by counsel.

On several occasions in pre-trial hearings, the trial judge explained to McKenzie the need for his attorneys to prepare for trial and a possible penalty phase—to conduct discovery, take depositions, prepare mitigation. McKenzie consistently responded to the judge by saying that "there's nothing to discuss in this case . . . there are no discoveries to be made and no depositions to be made." (DAR, V2, R364-365). McKenzie stated,

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

(DAR, V2, R365). As the trial judge continued to press the importance of preparing for trial and the penalty phase, McKenzie responded,

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

(DAR, V3, R391). McKenzie further stated,

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

(DAR, V3, R393). McKenzie continued to belabor that there was no reason to "drag this out" and "there's not a lot to [sic] in this case;" saying that there was nothing that "could possibly take place to alter the outcome of this matter at all." (DAR, V3, R395). In fact, McKenzie said that he was willing to be the first witness in the State's case: "I will get up on the stand and I will end this trial within five minutes of it taking place, that fast." (DAR, V3, R391). If McKenzie's dialogue with the court in pre-trial conferences was any indication of his willingness to speak his mind and exercise his rights, then he certainly would have asked for library privileges if he felt he needed them and was being denied access. The record indicates that McKenzie was not concerned with his lack of access to a law library to research what he described as a "cut-and-dry case." McKenzie wanted to

proceed to trial the moment counsel was discharged and believed that he could adequately represent himself on the merits and at sentencing.

Thirdly, there is no merit to this claim because McKenzie's reliance on *Bounds v. Smith*, 430 U.S. 817 (1977) is misplaced. In support of his claim, McKenzie cites the United States Supreme Court decision in *Bounds*, but overlooks the fact that the Court's focus in *Bounds* was post-conviction inmates no longer represented by counsel having access to the courts to attack their judgment and sentences. 430 U.S. at 817. The Supreme Court's decision in *Bounds* "did not create an abstract or free-standing constitutional right to a law library or legal assistance," it acknowledged an already well-established constitutional "right of **access to the courts**." *Lewis v. Casey*, 518 U.S. 343, 350-351 (1996), *discussed in Bass v. Singletary*, 143 F.3d 1442 (11th Cir. 1998) (noting the holding in *Lewis* that "*Bounds* focused on access to the court."), *Mitchell v. Moore,* 786 So. 2d 521, 525 (Fla. 2001) (discussing that law libraries are one acceptable means to provide access to the courts). "Prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Id.* (quoting *Bounds*, at 825). Indeed, law library facilities are "merely one constitutionally acceptable method to assure meaningful access to the courts" .

. . and *Bounds* "does not foreclose alternative means to achieve that goal." *Id.* (quoting *Bounds* at 830).

The Supreme Court's reasoning in *Bounds* and *Lewis* alleviates any concerns this Court may have over the Scylla and Charybdis that McKenzie attempts to extract from *Simmons v. United States*, 390 U.S. 377 (1968) and apply to his case. The defendant in *Simmons* was woefully placed in the peculiar position of giving up his Fifth Amendment rights in order to exercise his Fourth Amendment rights. *Id.* at 389. The Supreme Court found it "intolerable" that defendants would be locked in the horns of such a dilemma—"surrendering one constitutional right in order to assert another." *Id.* at 394. But in this case, McKenzie faced no such "Hobson's Choice." *Id.* As the Supreme Court articulated in *Bounds*, the law library is not a constitutional right in and of itself, but a means of exercising the constitutional right of access to the courts. Ostensibly, McKenzie had access to the court because he was standing in it exchanging dialogue with the judge when he was warned of the limitations of self-representation and elected to do it anyway. McKenzie had in-person access to the court and a court-appointed lawyer and he voluntarily chose to give up the lawyer—it is a cardinal understanding that having a lawyer to plead one's case is an exceedingly sufficient means of access to the courts under *Bounds* and *Lewis*. After the *Faretta* inquiry, the trial judge was even gracious enough to lend McKenzie her rule book. (DAR, V7, R444). Neither his

custodian in the county jail or any agent of the State impeded McKenzie's access to the courts or forced him to forgo the assistance of counsel.

4. State misconduct prevented McKenzie from presenting mitigation

McKenzie argues that he "innocently tried to model his court performance" after that of the prosecutor and as a result the state engaged in misconduct by arguing in closing to the jury McKenzie's comments from opening statement as substantive evidence. (Initial Brief at 27). In this claim McKenzie presents additional arguments that the prosecutor's conduct violated the Confrontation Clause, Due Process, and the Rule of Completeness regarding admitted evidence. To the extent McKenzie is arguing prosecutorial misconduct in any of the iterations of this claim, the issues are procedurally barred because they should have been raised on direct appeal. *Spencer v. State*, 842 So. 2d 52, 60 (Fla. 2003). Furthermore, this claim and its subparts are legally insufficient and refuted by the record.

Like all criminal defendants, counseled and *pro se*, McKenzie had the opportunity to present an opening statement after the State and to present evidence at the close of the State's case in chief. During his opening statement, McKenzie commented on the evidence that would be presented to the jury:

> MR. McKENZIE: My name is Norman Blake McKenzie. I'm here before you being tried for two crimes which occurred on October 4th at about dusk. My intention, in this opening statement, is twofold: To take up the least amount of your time as possible, and give you a clear

understanding of the crime that took place. Only I can do this. Though the prosecution can, and will, no doubt, put before you an excellent case, only I can truly bring you into the horror of the evening of October 4th, 2006. I don't want to overstep my boundaries here, and so I'll ask you, Your Honor, to stop me at any point if I do so. The hesitancy I have and the reason the crime occurred I believe is not important. Perhaps at a later time the reason may be important, but in the guilt phase, I don't believe it is important. At approximately 3:00 p.m. on October 4th, 2006, needing some money, I contemplated on how I could get some. I was working for Randy Peacock and Charles Johnston, remodeling a home for them in Green Cove Springs, on 209 -- I believe it's County Road 209 on -- off of County Road 209 on Mitchell Road. I knew that they had some money; I wasn't sure how much. I had drove to their house with the intention of physically depriving them of their money. Driving this vehicle right here, State's Exhibit 8, this gold-colored Kia Sorrento, which was my vehicle that I had recently purchased from Parker Nissan's used car dealership. Upon arriving at their home, I saw Charles Johnston's car on jacks, with the wheels off. Randy Peacock's car, a green Chrysler Sebring, was not there. As I pulled into the yard, Randy Peacock came outside because their pet dogs began barking. Once again, State's Exhibit 8 is where I parked at. We met and spoke of the brake job that was taking place on Charles Johnston's car. A young man, a neighbor, was doing a brake job for Charles Johnston, and had started the job on the 3rd of October, but due to the lack of a specific tool, could not finish the job. Charles Johnston was, at that moment, in town buying a tool, and the young man and Charles would eventually, at about 5:30 p.m., complete the job on the brakes of Charles Johnston's car on October 4th. So I sat down to wait for Charles to come home. Randy Peacock was cooking dinner, a chicken soup. He had stayed home sick that day from work; he had the flu or something. Charles Johnston arrived, and the young man and he completed the brake job, as I said. Charles Johnston paid the guy a 12-pack of Bud Light, a $20 bill. The young man then left. It was nearly dark. At that time, I asked -- standing in the carport, State's Exhibit 8, again, that's the carport, standing there in the carport, I asked Randy John -- or Charles Johnston if he had a hammer. You can't see the damage to my truck, or the SUV, I'm sorry, but there is damage on the other side, and it caused a problem each time I opened up the driver's side door. It was my intention to utilize the hammer and a piece of wood to bang

out the dent as much as possible to be able to open up the driver's side door as much as possible without doing further damage to the vehicle, as well as get a weapon in my hand. State's Exhibit 8, once again, you can barely see it, but there's -- there's a table there behind these two trash cans. Upon this table are numerous tools, drop cords, Skil saws, various things that Charles Johnston did as far as work around the home, and I was utilizing some of these tools as well in the remodeling of the home in Green Cove Springs. On this table is where the hatchet was given to me at that time. He gave me the hatchet because it has a flat side to it. State's Exhibit 6 has a flat side to it. I asked for a hammer. I was given a hatchet. I needed a piece of wood. He searched upon the carport and couldn't find one. I knew that there was wood laying in the back of the home, from previous work that I had done around the home, and I said come on, we can find a piece of wood back there easily. He still searched around the front. I don't know if he felt something wrong or what, but I kind of sensed that he did, and I finally talked him into getting -- I know there's one, you know, right around the corner, and we walked back there and went into the shed. And I, once again holding State's Exhibit 6 in my hand, as he walked into the shed, State's Exhibit 16, that's the shed, you can see that it's still daylight, but it's -- well, no, this is another day. I'm sorry. It's dusk. It's almost night. And he walked in and I walked in behind him. State's Exhibit 17, there's numerous shelves around, and I struck Charles Johnston one time in the back of the head with the State's Exhibit 6, flat part of the hatchet, not the blade side, probably about right there. He fell down, knocking down a lot of the shelves that's -- I know it looks pretty cluttered in there, but a lot of stuff fell around, him and there was a great deal of noise. And I immediately left the shed, State's Exhibit 16, pushing the door closed a bit, and proceeded to walk back around the house, State's Exhibit 8, back around, through here, up the front porch. I walked into the front door. Randy Peacock was standing in the kitchen, cooking a pot of chicken soup. And I walked up behind him and I struck him one time in the top, the back of his head, once again, State's Exhibit 6, with the flat part of the hatchet. Basically about the same spot that I hit Charles Johnston at. State's Exhibit 12 shows you the pot of chicken soup that Randy Johnston -- or Randy Peacock was cooking at the time. He fell forward, on both elbows, about like that, directly into the pot of chicken soup, with the soup still maintaining where it was being cooked at on the stove. He didn't fall over, but he

was knocked out. And he didn't cry out in pain. He was knocked out. And I didn't really -- I was wondering -- I was puzzled why he wouldn't fall, and then I realized that he was balanced perfectly there, knocked out, leaning with his arms in the pot.

THE COURT: Mr. McKenzie, you need to tell them what you expect the evidence will show, as opposed to giving a statement.

MR. McKENZIE: And the evidence will show that he has burns on his arms from leaning in the pot. Then the evidence will show that Randy Johnston's wallet was missing, was found in my possession. The evidence will show that he was struck several more times. It will also show that Randy Peacock's wallet was missing, and both of their identifications were found in my possession, excluding one of the wallets. The evidence will also show that Randy Peacock was again assaulted with a deadly weapon that ultimately took his life, and the life -- State's Evidence 9 -- and the life of Randy – Charles Johnston. The State will also produce evidence showing State's Evidence Number 13, the knife that was used in the crime. Thank you.

(DAR, V5, R129-35).

In the State's closing argument, the prosecutor said,

All of those injuries and all of that blood and all of that viciousness because Norman Blake McKenzie, as he told you in his own words in his opening statement, wanted these items and wanted a car to get away for his own purpose.

. . .

Ladies and gentlemen, the evidence has clearly shown you, beyond any doubt, that this defendant is guilty of both counts of murder in the first degree. It's a rare case, it's a unique case where you hear from the defendant, right off the beginning of the case, that's represented himself here, **but still, the State has to prove every element of each of those counts beyond and to the exclusion of every reasonable doubt.**

. . .

> **Norman McKenzie stood up, and in his own words in his opening statement, told you what the evidence would show**, but the most compelling thing he told you was that not one single witness that would take the stand could know the horror of that day, that he was the only one that knew the horror of that day, and the truth of his own words to you have been the truth of this entire case throughout yesterday and today.
>
> . . .
>
> **And Mr. McKenzie told you himself in his opening statement that the evidence would show** that he was there for just a little while, he was sort of balanced there in that position. So forethought about why – why was he still there, and then more injuries to that man with a different instrument. And those are the circumstances, ladies and gentlemen, you must consider based on Florida's law.

(DAR, V6, R316-17, 322-23) (emphasis added).

First, the prosecutor did not refer to McKenzie's opening statement as substantive evidence, she simply employed a routinely practiced tenant of closing argument: holding the defendants' (or defense counsels') feet to the fire by reminding the jury of their opening statement comments and then firing back with his argument about the evidence that was presented in a light most favorable to the State. The prosecutor specifically characterized McKenzie's comments in opening as McKenzie telling the jury **what the evidence would show**; not that McKenzie's comments in opening statement could be considered as substantive evidence. The prosecutor did not speak of McKenzie's opening statement as if it were testimony. The prosecutor even reiterated that, although it is rare for a jury to hear directly from a defendant in opening statement, the State still has the burden to prove the

case beyond a reasonable doubt. The prosecutor in this case may have delivered a hard blow as her duty required, but there was nothing foul about it. *See Berger v. United States*, 295 U.S. 78, 88 (1935). Furthermore, the court below properly instructed the jury that what is said in opening statements and closing arguments is not evidence and that the State has the burden of proving the elements of each offense "beyond and to the exclusion of every reasonable doubt." (DAR, V5, R122-23, DAR, V6, 354-55).

In this claim, McKenzie further argues that "the State's use of Mr. McKenzie's opening statement against him as substantive evidence was objectionable and a violation of the Confrontation Clause of the United States Constitution." (Initial Brief at 28-29). McKenzie's argument that the Confrontation Clause grants him the right to cross-examine himself—whether from opening statement or the witness stand—establishes nothing more than the fact that "at the frontier of the absurd there are no border guards." *Zack v. Tucker*, --- Fed.3 ---, 2013 WL 105166, 10 (11th Cir. Jan. 9, 2013) (Carnes, J. concurring). Even if McKenzie had taken the witness stand and provided substantive testimony, his reliance on *Pointer v. Texas* and *Turner v. Louisiana* is erroneous. In *Pointer*, the Court ruled generally that the Sixth Amendment applies to the states through the Fourteenth Amendment, and specifically that using a transcript of a witness's testimony from a prior hearing as substantive evidence against the defendant

violated the Confrontation Clause. 380 U.S. 400 (1965). In *Turner*, the Court held that it violated the defendant's right to due process and a fair jury trial when the two deputies who testified against the defendant at trial were also the bailiffs for the jury. 379 U.S. 466 (1965). Those circumstances are not at issue here.

Rooted in ancient canon and aimed at preventing the use of ex parte examination of witnesses on the merits, the Confrontation Clause indisputably guarantees criminal defendants the right to confront and cross-examine the witnesses who testify against them. *Crawford v. Washington*, 541 U.S. 36 (2003) (*citing inter alia*, 3 W. Blackstone, Commentaries on the Laws of England 373-374 (1768), 3 J. Wigmore, Evidence § 1397, p. 104 (2d ed.1923), and J. Langbein, Prosecuting Crime in the Renaissance 21-34 (1974); *see also* J. Langbein, The History of the Common Law: The Development of Anglo-American Legal Institutions 297-298, 788-789 (2009). It is axiomatic, however, that a criminal defendant need not confront himself. The Confrontation Clause is simply not at play in this case because there is no concern that McKenzie was convicted on ex parte testimony taken in private examination.

As this claim continues, McKenzie submits that his *Faretta* inquiry should have "warned him that without counsel the State can violate the Constitution with impunity and if you do not come to that realization and innocently try to model your performance after the State, you will be stopped from making any defense."

(Initial Brief at 31). McKenzie cites no legal authority for the argument that a trial court should include such an illogical and distorted statement in the *Faretta* inquiry. McKenzie's argument draws near to senseless. Seemingly, there is nothing to say against the claim except that there is nothing to be said for it. *McKoy v. North Carolina*, 494 U.S. 433, 466-467 (1990) (Scalia, J. dissenting, "If petitioner should seek reversal of his sentence because two jurors were wearing green shirts, it would be impossible to say anything against the claim except that there is nothing to be said *for* it—neither in text, tradition, nor jurisprudence). McKenzie was informed and understood that an attorney could present evidence and argument for him at trial. McKenzie knew that he was not trained in the art of trial practice and he understood the challenges of representing himself. Whether or not he modeled his courtroom presentation after the prosecutor's is of no consequence for he was not manipulated into doing so.

As this claim wanders further, McKenzie argues that the prosecution violated his due process rights by speaking to him at the jail without a court-reporter present and because the State's attorney misinformed him that his first interrogation—during which McKenzie was intoxicated—could not be presented to the jury. First, McKenzie was representing himself and therefore had no lawyer for the prosecutor to meet with. If the prosecutor needed to discuss the case, he had no choice but to speak directly to McKenzie. And McKenzie cites no authority for

the position that the prosecutor is required to have a court-reporter present every time the need arises to discuss a case with defense counsel or a pro se litigant. Secondly, there is absolutely no indication from the record that the prosecutor misled McKenzie about the admissibility of his confession. While not an absolute bar to the admissibility of a confession, intoxication is a factor in challenging a confession's voluntariness and if the prosecutors said as much to McKenzie it would not be misleading. *Burns v. State*, 584 So. 2d 1073, 1076 (Fla. 4th DCA 1991), *see also Thomas v. State*, 456 So. 2d 454 (Fla. 1984). And that issue is secondary to the fact that the encounter with the prosecutor as McKenzie described it appears to be pure speculation because there is nothing in the record to support the claim.

Furthermore, it was not a violation of the rule of completeness for the State to present McKenzie confession through the testimony of the interrogating officer rather than by playing the recorded confession. *Christopher v. State*, 583 So. 2d 642 (Fla. 1991) (discussing that the rule traditionally applies to writings and recordings and not conversations), *See also Jordan v. State*, 694 So. 2d 708, 712 (Fla. 1997); *Hoffman v. State*, 708 So. 2d 962, 966 (Fla. 5th DCA 1998). The rule of completeness does not allow a defendant to elicit hearsay on cross-examination of the State's witnesses. *Evans v. State*, 808 So. 2d 92, 104 (Fla. 2001). A criminal defendant's exculpatory statements, elicited through another witness, are hearsay

and do not invoke the rule of completeness. *Christopher*, 583 So. 2d at 645; *Jordan*, 694 So. 2d at 712. McKenzie's claim may have some merit if the state had played a redacted portion of the video-recorded confession, but the video-recorded confession and the interrogator's testimony about the confession are mutually exclusive of one another for the purposes of the rule of completeness. As this Court discussed in *Christopher*, if McKenzie believed the State had introduced part but not all of his confession, he could have cross examined his interrogator on confession in its entirety. 583 So. 2d at 646. Also, McKenzie could have played the video-recorded confession in his case-in-defense. *Id.*

At trial, Detective Burres gave the following account, in relevant part, of McKenzie's confession from February 6, 2007:

> DETECTIVE BURRES: He stated that he went there to -- with the intent of borrowing money from Charles Johnston.
>
> MR. FRANCE: And, again, which of the two gentlemen -- where was Mr. Johnston found again?
>
> DETECTIVE BURRES: He was located in the shed behind the residence.
>
> . . .
>
> MR. FRANCE: Did the defendant indicate that he saw Patrick Anderson there, the gentleman who just testified?
>
> DETECTIVE BURRES: Yes, sir, he did.
>
> MR. FRANCE: Did he remember what time Mr. Anderson left the residence?

DETECTIVE BURRES: He believed it was sometime before dusk, dark.

MR. FRANCE: What did the defendant tell you he did next, after Mr. Anderson exited the house?

DETECTIVE BURRES: He advised that he had asked Mr. Johnston for a hammer and a block of wood to knock a dent out on the driver's side door of his vehicle.

MR. FRANCE: And then what did he tell you?

DETECTIVE BURRES: He stated that Mr. Johnston provided him with a hatchet, he couldn't locate a hammer, and that he inquired about the block of wood that he needed.

MR. FRANCE: Okay. Where did they go, according to the defendant, to get that block of wood?

DETECTIVE BURRES: They went to the shed where Mr. Johnston was located.

MR. FRANCE: What did he tell you he did to Mr. Johnston?

DETECTIVE BURRES: He stated after entering into the shed, he took the hatchet that Mr. Johnston provided him with and struck him in the head.

MR. FRANCE: And then what?

DETECTIVE BURRES: He stated that Mr. Johnston fell into some shelving inside his shed and then fell down. He stated he struck Mr. Johnston possibly one or two more times and then exited the shed.

MR. FRANCE: And then what?

DETECTIVE BURRES: He stated he then went into the residence where Mr. Peacock was cooking and struck Mr. Peacock in the back of the head with the same hatchet he had used on Mr. Johnston.

. . .

MR. FRANCE: What did he tell you he did next?

DETECTIVE BURRES: He then exited the residence and went back into the shed where Mr. Johnston was.

MR. FRANCE: What did he do?

DETECTIVE BURRES: He stated Mr. Johnston was still alive at that point and moving, and he struck Mr. Johnston a couple more times with the hatchet. He then removed Mr. Johnston's wallet from his pockets, placed the hatchet on top of a bucket inside the shed, and entered back into the residence.

MR. FRANCE: Now, that's what the defendant's telling you he did, correct?

DETECTIVE BURRES: Yes, sir.

MR. FRANCE: Okay. Was the hatchet, in fact, in that bucket right where he said it was?

DETECTIVE BURRES: Yes, sir.

MR. FRANCE: Specific to his description about how the victim fell, I'm showing you State's 18. If you can show the jury what observations you find in that picture that corroborates his account of the crime.

. . .

DETECTIVE BURRES: Okay. As you can see here in this photograph, inside the shed Mr. Johnston is laying there. He's laying positioned on his back side. As you can see, the shelving underneath here is broke. You see a large area of blood stains in the area of where the altercation took place, and the actual shed itself is kind of cluttered in appearance and it's hard, from this photo, to really give you a true overall of the area there.

MR. FRANCE: Now, leading back to the kitchen, what did he indicate he did next?

DETECTIVE BURRES: He entered back into the residence through the rear doors. He said at that time he noticed that Mr. Peacock was struggling to stand up. He said it kind of caught him by surprise, and he was alarmed that he was attempting to stand up, and he grabbed a knife from the kitchen strainer on the counter and began stabbing Mr. Peacock.

MR. FRANCE: Now, to back you up a little bit, how many times did the defendant indicate he struck Mr. Peacock?

DETECTIVE BURRES: He believed it was twice, possibly three times.

MR. FRANCE: Did he indicate then he left the kitchen area?

DETECTIVE BURRES: Yes, sir.

MR. FRANCE: Okay. Where did he go?

DETECTIVE BURRES: He went out to the shed.

MR. FRANCE: And upon his return, where -- what position does he place Mr. Peacock?

DETECTIVE BURRES: In a standing position, he stated, struggling to get to his feet.

MR. FRANCE: What did he say he did then?

DETECTIVE BURRES: That's when he armed himself with the butcher knife inside the kitchen and began stabbing Mr. Peacock.

MR. FRANCE: And we're going to call medical testimony that's going to go into more detail about the wounds, but can you tell us the locations of the wounds found on Mr. Peacock?

DETECTIVE BURRES: Yes, sir. There was two wounds to the back of Mr. Peacock's head, consistent with the blunt side of the hatchet. There were also what appeared to be two stab wounds in the back side

of Mr. Peacock's head as well. There was a stab wound in Mr. Peacock's neck, and multiple stab wounds in his abdomen area and side.

MR. FRANCE: Okay. Now let's go back to what the defendant was telling you about this. Do those locations match up with the defendant's account of this second attack?

DETECTIVE BURRES: Yes, sir.

MR. FRANCE: Okay. What did he tell you about that second attack?

DETECTIVE BURRES: He stated that when he began stabbing Mr. Peacock, he attempted to stab him in the neck. He stated that he didn't see a lot of blood coming out. He said he was actually going for the jugular vein in his neck, and due to the lack of blood, he presumed he missed, and began attempting to stab Mr. Peacock in the heart. He said he also stabbed Mr. Peacock in the stomach, in an upward motion, attempting to strike his heart as well.

MR. FRANCE: What did he indicate he did next?

DETECTIVE BURRES: After stabbing Mr. Peacock, he began searching for his wallet.

MR. FRANCE: Where did he find that wallet?

DETECTIVE BURRES: He found it inside of a collapsible lunchbox in the dining room area.

MR. FRANCE: What did the defendant say he did next?

DETECTIVE BURRES: He took Mr. Peacock's wallets, the keys that were hanging on a column inside the kitchen, and left the residence.

MR. FRANCE: How did he leave?

DETECTIVE BURRES: He left by taking Mr. Peacock's vehicle.

MR. FRANCE: Was that car later recovered?

DETECTIVE BURRES: Yes, sir, it was.

MR. FRANCE: Where was it recovered?

DETECTIVE BURRES: It was recovered in Alachua County.

MR. FRANCE: How did the defendant indicate that he arrived at this residence?

DETECTIVE BURRES: By driving his own personal vehicle there.

MR. FRANCE: Okay. And did he tell you the make and model of that car?

DETECTIVE BURRES: It was a gold Kia Sorrento.

MR. FRANCE: Okay. And, again, you verified that part of what he was telling you?

DETECTIVE BURRES: Yes, sir.

MR. FRANCE: Where did the defendant indicate he left the knife in the kitchen?

DETECTIVE BURRES: He stated that he washed the knife and placed it inside the kitchen sink.

MR. FRANCE: And, again, is that exactly where you found it?

DETECTIVE BURRES: Yes, sir.

. . .

MR. FRANCE: As to the other wounds on Mr. Peacock, what did Mr. McKenzie say about what he was doing when he attacked him?

DETECTIVE BURRES: He stated that he was cooking at that time.

MR. FRANCE: And where did Mr. Peacock end up upon the initial attack?

DETECTIVE BURRES: On top of the stove, inside the pot. Mr. McKenzie described him going down with his elbows inside the pot.

MR. FRANCE: And did you, in fact, observe burns on Mr. Peacock?

DETECTIVE BURRES: Yes, sir, on his arms.

MR. FRANCE: And, again, did the defendant comment about this?

DETECTIVE BURRES: Yes, sir.

MR. FRANCE: Okay. Did he also indicate that you probably would find burns on Mr. Peacock?

DETECTIVE BURRES: Yes, sir, he did.

(DAR, V5, R195-203).

Juxtaposing the officer's testimony with McKenzie's comments in opening statement about what the evidence would show, the two are similar. The interrogating officer did not present a distorted or grandiose version of McKenzie's confession. He repeated McKenzie's statements similar to the way McKenzie characterized them in opening statement.

McKenzie was advised of the potential consequences of self-representation and he voluntarily waived his right to counsel. He knowingly and voluntarily assumed those consequences and cannot complain about them now. This claim does not state a viable claim, is insufficiently pled, has no merit, is based on speculation and the lower court's summary denial should be affirmed.

5. The state failed to present mitigation

McKenzie argues the State should have presented the entire videotape of the confessions because it showed drug use and mental illness. First, this claim is procedurally barred. *Miller*, 926 So. 2d at 1260; *Davis*, 928 So. 2d at 1116-1136; *Duckett*, 918 So. 2d at 231; *Robinson*, 913 So. 2d at 523. Additionally, McKenzie cites no authority to support his argument that the State "has a duty" to present evidence for a defendant who voluntarily chooses to represent himself. In fact, McKenzie seems to contradict himself later in the initial brief and acknowledges that the State has no duty to present mitigation evidence when he argues, "The State did not have a duty to present mitigating evidence for Mr. McKenzie." (Initial Brief at 38). There are circumstances in which the trial court could **order** 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." *Muhammad v. State*, 782 So. 2d 343, 363-364 (Fla. 2001). The trial courts, however, have other means at their disposal for a pro se defendant who has implicitly or affirmatively waived mitigation; such as appointing special mitigation counsel, ordering a comprehensive PSI into the defendant's background, or tasking stand-by counsel for this limited purpose. *Barnes v. State*, 29 So. 3d 1010, 1022-1023 (Fla. 2010) (citing *Muhammad*, 782 So. 2d at 363-364).

In this case, the court below ordered a comprehensive PSI which produced mitigation that the court considered in sentencing. (V4, R539, 555-556, 558, 560). For McKenzie to claim that he was unaware of the status of his mental health at the time of the confession and was not aware his confessions were videotaped defies logic. And any allusion to a *Brady*[10] violation is directly refuted by the record. There were two confessions, both of which took place in interview rooms, both of which took place after McKenzie signed a written waiver. (DAR, V1, R98, 102). The State's discovery exhibit list clearly indicates that the statements were electronically recorded. (V1, R22). If McKenzie failed to view the videotapes, it is because he either did not want to or his oversight was a hazard of his self-representation on which he so vehemently insisted. He was advised repeatedly of the pitfalls of self-representation, but insisted on controlling his destiny. He had the evidence in his hands and if he did not know what to do with it because he refused the assistance of his attorney—or did not ask his stand-by counsel—he assumed the risk of his circumstances when he discharged his lawyers.

Most importantly, the purpose for which McKenzie claims he would have admitted the videotaped confession was to present mitigation evidence of his "drug abuse and mental illness." It escapes reason that the court would have been able to discern mental illness from a videotaped dialogue with law enforcement—

[10] *Brady v. Maryland*, 373 U.S. 83 (1963).

especially when there were two pre-trial mental health evaluations of McKenzie which found him competent and McKenzie spoke early and often with the court during his trial and gave no indication that he was mentally infirm. During the videotaped interrogations McKenzie was lucid, articulate, at times whimsical, and recalled facts about the murders and other crimes in specific detail. As to McKenzie's drug use, the court below considered McKenzie's drug abuse as non-statutory mitigation.

It would have been more harmful than helpful if McKenzie had played the videotaped interrogations to the jury. In addition to the details of the murders in this case, the jury would have watched and listened to McKenzie discuss his voluntary drug abuse, numerous robberies—some committed with a firearm—and details about another homicide in Georgia. While additional evidence about his cocaine binges would support McKenzie's theory in mitigation, juries are not usually sympathetic to cavalier discussion about drug use. *Hannon v. State*, 941 So. 2d 1109, 1130 (Fla. 2006) (*quoting Cummings-El v. State*, 863 So. 2d 246, 267 (Fla. 2003) ("Counsel acknowledged that drug abuse can have a double-edged sword effect on the jury, as juries are not sympathetic to junkies generally.") (quoted from trial court's denial order attached to opinion). The contents of the videotaped interrogations presented a double-edged sword that was blunt in mitigation and razor sharp in aggravation. *Evans v. Sec'y, Dept. of Corr.*, 10-

14920, 2013 WL 50208 (11th Cir. Jan. 4, 2013); *see also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004). Additionally, because McKenzie waived mitigation, the trial court followed this Court's ruling in *Muhammad* and did not give any weight to the 10-2 jury recommendation. 782 So. 2d at 361-362. Therefore, McKenzie was in no way prejudiced by the absence of his videotaped confession at trial. This claim is based on pure speculation, is insufficiently pled, is refuted by the record, fails to state a viable post-conviction claim, and is procedurally barred. The lower court's denial should be affirmed.

6. The pre-sentence investigation was deficient

Any issue regarding the sufficiency of the PSI is procedurally barred because it should have been raised on direct appeal. *Miller*, 926 So. 2d at 1260; *Davis*, 928 So. 2d at 1116-1136; *Duckett*, 918 So. 2d at 231; *Robinson*, 913 So. 2d at 523. Moreover, the issue has no merit. The court below precisely followed the rules and procedures outlined by this Court for a defendant who waives mitigation. *Muhammad*, 782 So. 2d at 343. If the lower court had failed to properly follow procedure, it should have been raised on direct appeal. *Cf. Robinson v. State/Crosby*, 913 So. 2d 514 (Fla. 2005) (Capital murder defendant's claim in post-conviction proceeding that trial court had violated the Eighth and Fourteenth Amendments in its consideration of mitigation and failure to find mitigating

circumstances was procedurally barred, as defendant was arguing trial court error that should have been raised on direct appeal).

Further, this claim is insufficiently pled. McKenzie makes conclusory allegations that the PSI is insufficient, but points to no specific instance of insufficiency other than to retreat to his argument in sub-section five above. The only specific piece of information cited is that the confession videos show McKenzie in the "throes of delusion and mental illness." McKenzie fails to explain how or why the PSI should have included these videos. McKenzie again states the trial judge should have appointed a mental health expert, but fails to explain why, considering McKenzie represented himself and voluntarily waived (whether tacitly or affirmatively) mitigation. McKenzie knew that a lawyer could hire a mental health expert for him, in fact his court-appointed lawyers had done so and he fired them anyway. McKenzie was competent to waive his right to counsel and the trial court took into account McKenzie's waiver of mitigation under *Muhammad*.

7. The death penalty cannot be imposed without a full presentation of mitigation

McKenzie argues that the death penalty cannot be imposed without consideration of mitigation. McKenzie ignores this Court's ruling in *Muhammad* and its progeny. 782 So. 2d 343. McKenzie waived the assistance of counsel and waived mitigation. There is no claim that either of these waivers was involuntary. The court below followed the procedures outlined by this Court for both the

Faretta waiver and mitigation waiver. Any complaint about the procedure should have been raised on direct appeal and this issue is procedurally barred. *Miller*, 926 So. 2d at 1260; *Davis*, 928 So. 2d at 1116-1136; *Duckett*, 918 So. 2d at 231; *Robinson*, 913 So. 2d at 523.

A competent defendant may waive presentation of mitigation evidence. *Hojan v. State*, 3 So. 3d 1204, 1211 (Fla. 2009) (*citing Muhammad*, 782 So. 2d 343); *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988). McKenzie makes no claim of incompetency. Neither does he allege he would allow mitigation to be presented. He merely argues that he has a mental illness and abuses drugs. He does not allege the specific mental illness or the witnesses who would establish the alleged facts. As to drug abuse, this Court found as mitigation that, "the Defendant suffers from an addiction to cocaine," and the sentencing order specifically notes the defendant's drug addiction and drug use as mitigation at the time of the murders. (V1, R192-193). This issue is conclusory, insufficiently pled, and has no merit. *See Doorbal v. State/McNeil,* 983 So. 2d 464 (Fla. 2008); *Nelson v. State*, 875 So. 2d 579 (Fla. 2004).

CLAIM II

MITIGATION THAT MCKENZIE CLAIMS HE SHOULD BE PERMITTED TO PRESENT AT AN EVIDENTIARY HEARING

In the portion of the initial brief titled "Claim II," McKenzie present no claim at all: he simply proffers the mitigation evidence he would like to present at an evidentiary hearing. A significant portion of the proffered mitigation falls under drug abuse and child abuse, both of which were found and considered as mitigation by the court below. (V4, R556-559). McKenzie acknowledges that this "claim" is nothing more than a summary of mitigation when he writes "Claim II of Mr. McKenzie's post-conviction motion presented a summary of the mitigating evidence that should have been presented during [sic] penalty phase. This evidence was. . . ." (Initial Brief at 51). He then proceeds with an aggrandizing description of 26 mitigating factors he would present through his post-conviction mental health expert. McKenzie is trying to frame a claim cognizable in a motion for post-conviction relief, however, the facts are clear: he voluntarily chose to exercise his constitutional right to represent himself and he voluntarily waived mitigation. The lower court thoroughly advised McKenzie of the consequences of waiving counsel and of waiving mitigation.

McKenzie waived the presentation of mitigation, and the newly-proffered evidence is procedurally barred. McKenzie does not claim he was incompetent to

waive mitigation or that he was involuntarily seduced into the waiver. The trial judge followed this Court's procedures when a defendant waives mitigation. Any issue those procedures were not properly followed should have been raised on direct appeal and is procedurally barred. *Miller*, 926 So. 2d at 1260; *Davis*, 928 So. 2d at 1116-1136; *Duckett*, 918 So. 2d at 231; *Robinson*, 913 So. 2d at 523. McKenzie even acknowledges in his 3.851 motion to the trial court that he "waived the available mitigation in this case through his self-representation." (V1, R134). Nonetheless, he asked for an evidentiary hearing to proffer mitigation. Aside from being procedurally barred, this claim does not require an evidentiary hearing because it does not state a claim cognizable in post-conviction proceedings, has no merit, and the record establishes McKenzie's waivers were voluntary and competent.

In *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), the Florida Supreme Court ruled a defendant has the right to represent himself and control his own destiny. *Hamblen* and its progeny operate under the premise that a competent defendant may direct his own defense at trial. *See Farr v. State*, 656 So. 2d 448, 449 (Fla. 1995). A defendant possesses great control over the objectives and content of his mitigation. *Id.* (no error when defendant takes stand to refute and disclaim any possible mitigation because defendant is entitled to control overall objectives of counsel's argument). Whether a defendant is represented by counsel or is *pro se*,

the defendant has the right to choose what evidence, if any, will be presented during the penalty phase. *See Boyd v. State*, 910 So. 2d 167, 189-190 (Fla. 2005); *Grim v. State*, 841 So. 2d 455, 461 (Fla. 2003), *cert. denied*, 540 U.S. 892 (2003). McKenzie chose to present only his bank records. He was acting as his own counsel, chose to take control of his destiny, and made his own decision. He had the absolute right to control his circumstances at trial and represent himself, and cannot now complain that **he** was ineffective. *Jones v. State*, 449 So. 2d 253, 258-259 (Fla. 1984) (*quoting Faretta*, 422 U.S. at 835, "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"); *see also Behr v. Bell*, 665 So. 2d 1055, 1056-57 (Fla. 1996) (citing to *Faretta*).

Insofar as any claim this Court failed to follow the procedure outlined in *Muhammad,* 782 So. 2d at 363, the issue is procedurally barred and has no merit. *Miller*, 926 So. 2d at 1260; *Davis*, 928 So. 2d at 1116-1136; *Duckett*, 918 So. 2d at 231; *Robinson*, 913 So. 2d at 523. The lower court strictly complied with *Muhammad.*

The record provides extensive support to substantiate that McKenzie understood his rights and understood the consequences of his choice regarding mitigation. Prior to the *Faretta* inquiry, the trial judge advised McKenzie that the defense attorneys needed to prepare mitigation, McKenzie stated:

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

(DAR, V2, R360) (emphasis added). In a later colloquy with the defendant, the trial judge explained the importance of the penalty phase. (DAR, V3, R391). McKenzie stated that:

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

(DAR, V3, R391) (emphasis added). Further, **McKenzie felt there was no "reason to mitigate this case."** He said he could, "**get up on the stand during mitigation and alleviate the need of anyone else to be put on the stand on my behalf.**" (DAR, V3, R410) (emphasis added). The judge explained the ramifications of presenting aggravating **and mitigating circumstances, to which McKenzie said he could "do myself."** (DAR, V3, 426) (emphasis added).

McKenzie's chimerical claim that his case could be "one of the most mitigated," (Initial Brief at 97) can be true only in a world of fantasy. At best, it strains credulity to think that any of McKenzie's proffered mitigation could

overcome the weight of his **eight** prior violent felonies, to include armed robberies, armed carjacking, and the contemporaneous murders of each victim that he committed during the course of a robbery for pecuniary gain in a cold, calculated and premeditated manner. Most importantly, McKenzie was unequivocally exercising his right to represent himself and determine what would be presented during the penalty phase. The lower court's summary denial should be affirmed.

CLAIM III

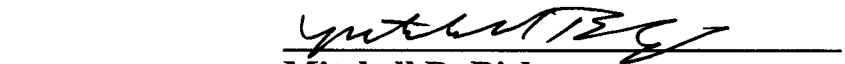
CUMULATIVE ERROR

In the final lines of the initial brief, McKenzie submits with no legal authority or argument that "cumulative error" in the lower court requires reversal and remand. This sentence fails to state claim, is insufficiently pled, and, as discussed in the previous sections of this response, there is no error to cumulate.

CONCLUSION

Based on the foregoing authorities and argument, the State of Florida respectfully requests this Honorable Court to affirm the trial court's summary denial of post-conviction relief.

PAMELA JO BONDI
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-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 16th day of January, 2013.

Mitchell D. Bishop
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CERTIFICATE OF COMPLIANCE

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

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