IN THE SUPREME COURT OF FLORIDA

RENALDO DEVON MCGIRTH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC15-953

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Renaldo McGirth's motion for postconviction relief pursuant to *Fla. R. Crim. P*. 3.851. Citations to the direct appeal record will be DAR, V_, R_ or SR, DAR, V_, R_. Citations to the postconviction record will be V_, R_. This brief will refer to Appellee as such, State, or prosecution. This brief will refer to Appellant as such, Appellant, or by proper name, e.g., "McGirth."

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State defers to this Court's judgment as to whether or not oral argument is necessary in this case in which the evidentiary hearing was waived and no evidence presented.

STATEMENT OF THE CASE AND FACTS

As authorized by *Fla.R.App.P*. 9.210(c), the State submits its rendition of the case and facts. Petitioner's facts are incomplete and are denied.

In its direct appeal decision affirming McGirth's convictions and death sentence, this Court summarized the facts of the case in the following way:

FACTUAL AND PROCEDURAL HISTORY

Overview

Renaldo McGirth was convicted of the 2006 first-degree murder of Diana Miller. McGirth, who was eighteen years old at the time of the

murder, was also convicted of the contemporaneous attempted first-degree murder with a firearm of Diana's husband, James Miller, robbery with a firearm of James and Diana Miller, and fleeing to elude a law enforcement officer operating a marked patrol vehicle. After the penalty phase proceeding, the jury recommended that McGirth be sentenced to death for the murder of Diana by a vote of eleven to one. We first discuss the factual and procedural history of the case. We then address the guilt phase and penalty phase issues raised by McGirth.

The Guilt Phase

The evidence at trial established that James and Diana Miller ("the Millers"), both in their sixties and married for forty-two years, lived in The Villages, a gated retirement community situated in Marion County, Florida. Their daughter, Sheila Miller, who was in her late thirties at the time, was residing with them while she recovered from injuries sustained in an automobile accident that left her confined to a wheelchair. [FN1]

> [FN1] Sheila's dependence on her parents had often proven to be a source of contention between her parents as her father opposed supporting her. Sheila had battled drug and alcohol abuse since her teenage years and had been convicted of possession of cocaine and for uttering false or worthless checks. She had stolen from her parents and at one point stole her mother's identity to obtain a credit card. Sheila's relationship with her parents deteriorated to the point that her father obtained an injunction against her.

McGirth, a prior acquaintance of Sheila, Jarrord Roberts, and Theodore Houston, Jr., visited Sheila at the Miller home on the afternoon of July 21, 2006. [FN2] Sheila greeted McGirth with an embrace at the front door, after which the three men followed her inside the residence. James Miller saw the three men enter his home and observed Sheila embracing one of them. He excused himself as it was near noon and he had to shower for a haircut appointment scheduled for 1:00 p.m. that day. Thereafter, McGirth, who had entered the home with a black backpack, set the bag down on the floor

and the three men joined Sheila in the living room for some conversation. After some discussion, Sheila, McGirth, and Houston went into Sheila's bedroom, while Roberts remained in the living room with Diana. Once in the bedroom, McGirth pointed a small, silver gun in Sheila's direction and instructed Houston to tape Sheila's mouth and bind her wrists with duct tape that had been purchased at a Dollar General store on the way to the Miller residence. Diana was then called into Sheila's bedroom where McGirth pushed her onto the bed. Sheila told Diana to give McGirth all of her money. Diana responded that she only had seventy dollars and explained that she did not keep that kind of money at the house. McGirth, in turn, insisted she had money because she lived in The Villages. After agreeing to get the money, Diana raised her hands in the air and was making her way toward the bedroom door to retrieve money when McGirth stood in front of the bedroom door and shot her once in the chest, causing her to fall on Sheila's bed. McGirth then instructed Houston to pick up the shell casing from the floor and wipe down any objects the men had touched to remove fingerprints. As she bled on Sheila's bed, Diana whispered to McGirth, "Please call 911; you just shot me in the heart." However, her pleas for help were ignored.

> [FN2] Sheila testified that she and McGirth were former friends who had a falling out, and that the two had not spoken until that day.

At some point, Roberts collected wallets and car keys belonging to the Millers and handed them to McGirth. In the meantime, James had just finished his shower when he was grabbed by the arm and dragged to Sheila's bedroom where he was forced to lie on the floor while one of the men pinned his head with a foot. After the men obtained the couple's credit cards and a personal identification number, Diana, still conscious, was taken to the computer room in an unsuccessful attempt to purchase cell phones online. A few minutes later Diana was able to crawl back into Sheila's bedroom.

McGirth and Houston removed Sheila from the home and Roberts placed her in the Millers' van. As Roberts and Sheila remained in the van, McGirth and Houston returned to the home. Soon thereafter, as Houston was leaving the house with some items, McGirth shot James

and Diana in the backs of their heads as they lay on the bedroom floor. James survived the gunshot wound and was able to climb out of the bedroom window and summon the assistance of a neighbor.

McGirth, Roberts, and Sheila left in the Millers' van, while Houston followed in the silver Ford in which the men arrived. Following McGirth's orders, Sheila withdrew $500 from an automated teller machine (ATM) nearby and gave the money to McGirth, who subsequently divided the money into thirds. The four then drove to a K–Mart store in Belleview where McGirth and Sheila attempted to locate a particular type of cell phone. A few minutes later the men left the silver Ford in the K–Mart parking lot and took Sheila in the van to a mall in Gainesville. At the mall, efforts to withdraw money from various ATMs and purchase items from stores failed.

At the Miller residence, law enforcement officers secured the scene and issued a BOLO ("be on the lookout") alert for a red van occupied by three black males and a possible kidnap victim. A police officer spotted the van at a convenience store in Ocala where McGirth was observed getting out and leaving the passengers in the vehicle. When McGirth returned and drove the vehicle out of the parking lot, the police officer activated his siren and lights which prompted McGirth to pull over. As the officer approached the vehicle, one of the men in the van told McGirth to "just shoot the cop." McGirth responded that he had it handled. When the officer ordered the driver to shut the van off, McGirth sped away. A high-speed chase in excess of 100 miles per hour ensued. As he drove the vehicle while being pursued by the police, McGirth handed the gun to Houston and ordered him to shoot Sheila because she could identify them. Houston, however, did not do so. The police ultimately used stop sticks to slow the van and then disabled it by employing the PIT maneuver, [FN3] which caused the van to roll several times. Sheila was found inside the van, and Houston was attempting to pull himself from underneath the van when police took him into custody. McGirth and Roberts were able to get out of the van and fled in opposite directions, but were apprehended and taken into custody shortly thereafter.

[FN3] Precision Immobilization Technique.

The police found bloody, folded money totaling $259 in McGirth's pocket, and his fingerprints were identified on two paper items from James's wallet.

Testimony was presented on the gunshot wounds inflicted on Diana. Dr. Julia Martin, the medical examiner, opined that the gunshot wound to the head would have rendered Diana immediately unconscious and dead soon thereafter, but that the wound to her chest would not. Dr. Martin concluded that Diana died as a result of the gunshot wound to her head.

The jury found McGirth guilty of first-degree murder of Diana Miller, attempted first-degree murder of James Miller, robbery with a firearm, and fleeing to elude law enforcement, [FN4] and the case proceeded to the penalty phase.

> [FN4] Both Sheila and Houston testified against McGirth and Roberts, who were tried jointly. McGirth and Roberts were both charged with, but acquitted of, the kidnapping with a firearm of Sheila. An undercurrent throughout the case was the extent, if any, of Sheila Miller's involvement in the criminal acts that transpired on July 21, 2006. Roberts, who was twenty years old at the time of the crimes, was convicted of robbery with a firearm and the lesser included offenses of manslaughter and attempted voluntary manslaughter.

The Penalty Phase

During the penalty phase, the State presented victim impact testimony from four witnesses who described Diana Miller as funny, playful, caring, a good friend, and an accommodating person who enjoyed traveling with her husband and friends and playing golf and softball. Their testimony revealed that Diana's softball team made tributes in her name and dedicated its fall season to her. A memorial service was held for Diana and, after a silent prayer, the team released balloons in the air in her honor. The softball team also placed Diana's retired team jersey along with her photograph and a medal she won in softball in a shadow box and brought it to softball games. A group of women in her community placed a quarter-page advertisement in a newspaper in

memory of Diana, which expressed how much she was missed.

The State also presented evidence from Dr. Martin, the medical examiner, who estimated that anywhere from fifteen to thirty minutes passed between Diana's chest wound and head wound. She also testified that there was nothing in her examination which would lead her to conclude that Diana lost consciousness as a result of the chest wound before the infliction of the head wound. The medical examiner explained that as a result of her chest wound, Diana would have experienced pain, difficulty in breathing, and anxiety.

The defense presented mitigation testimony from McGirth's family members and pastor. The evidence showed that McGirth had a difficult time growing up because he did not know his biological father and had poor male role models throughout his life.

At the conclusion of the penalty phase, the jury recommended by a vote of eleven to one that McGirth be sentenced to death for the murder of Diana Miller. After conducting a Spencer hearing, [FN5] the trial court entered its sentencing order in which it found five aggravators: (1) the murder was cold, calculated, and premeditated (CCP), to which it assigned great weight; (2) the murder was heinous, atrocious, or cruel (HAC), to which it assigned great weight; (3) McGirth had a prior violent felony, based on McGirth's contemporaneous conviction for the attempted first-degree murder of James Miller, to which it assigned great weight; (4) McGirth engaged in the commission of a robbery at the time of the murder, to which it assigned great weight; and (5) the murder was committed primarily to avoid arrest, to which it assigned moderate weight. As a statutory mitigating circumstance, the trial court found McGirth's age (eighteen), to which it assigned significant weight.

[FN5] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The trial court found fifteen of the eighteen nonstatutory mitigating factors proposed by McGirth: (1) McGirth had a close bond with his siblings, to which the court assigned very slight weight; (2) McGirth grew up in a financially poor family, to which the court assigned little weight; (3) McGirth grew up in an abusive home, to which the court

> assigned little weight; (4) McGirth was neglected by his custodial parents, to which the court assigned little weight; (5) McGirth's substance abuse, to which the court assigned very slight weight; (6) McGirth's intermittent exposure to positive role models, to which the court assigned some weight; (7) testimony which characterized McGirth as a follower and not a leader, to which the court assigned no weight; (8) McGirth's diagnosis of conduct disorder, to which the court assigned very little weight; (9) McGirth's diagnosis of antisocial personality disorder, to which the court assigned very little weight; (10) McGirth's exposure to people with criminal histories, to which the court assigned some weight; (11) McGirth's strong religious background, to which the court assigned little weight; (12) McGirth's good courtroom behavior, to which the court assigned slight weight; (13) McGirth suffered significant family losses, to which the court assigned little weight; (14) McGirth can benefit from a structured environment, to which the court assigned slight weight; and (15) McGirth was deprived of a relationship with his biological father, to which the court assigned some weight. [FN6] The trial court concluded that the aggravating circumstances in this case outweighed the mitigating circumstances and sentenced McGirth to death.
>
> > [FN6] The trial court found McGirth's IQ of 98 was "not a mitigating factor," and assigned it no weight. The trial court did not find that letters requesting that mercy be showed to McGirth were a nonstatutory mitigating factor. However, the court stated that even if a request for mercy were a nonstatutory mitigator, very slight weight would be given. The trial court rejected the proposed nonstatutory mitigator that McGirth acted under the influence and domination of another.

McGirth v. State, 48 So. 3d 777, 781-785 (Fla. 2010).

ISSUES RAISED ON DIRECT APPEAL

This Court described the issues raised on direct appeal in the following way:

ISSUES ON APPEAL

> On direct appeal, McGirth raises the following eight issues: (1) whether the trial court erred in admitting *Williams* rule evidence in the guilt phase that had more prejudicial effect than probative value; (2) whether the trial court erred in its response to a jury question concerning the law on principals; (3) whether the trial court erred in admitting excessive and inflammatory victim impact evidence during the penalty phase; (4) whether a prosecutorial remark during the penalty phase closing argument warrants a new penalty phase trial; (5) whether the trial court erred in finding the cold, calculated, and premeditated aggravator; (6) whether the trial court erred in finding the heinous, atrocious, or cruel aggravator; (7) whether the trial court erred in finding the avoid arrest aggravator; and (8) whether Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and related cases.
>
> [FN7] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

McGirth v. State, 48 So. 3d at 785.

This Court found each of these claims meritless. This Court also independently analyzed the sufficiency of the evidence and the proportionality of the death sentence, finding that there was sufficient evidence for a jury to find McGirth guilty and that his sentence of death was proportional, and upheld McGirth's convictions and sentence of death. *McGirth v. State*, 48 So. 3d at 796-797. McGirth's conviction was final on April 18, 2011, upon the United States Supreme Court's denial of McGirth's *petition for writ of certiorari*.

The Postconviction Proceedings and Relevant Procedural History

Pursuant to *Fla. R. Crim. P*. 3.851, McGirth's appointed counsel filed an initial motion for postconviction relief on April 10, 2012. (V2, R220-370). The State

responded on June 7, 2012. (V3, R408-29). After reviewing the pleadings, the trial court held a case management conference on September 11, 2012. (V3, R465-81). After hearing argument, the court ruled that McGirth would be granted an evidentiary hearing on four of the nine claims raised. A week-long evidentiary hearing was scheduled for February 4, 2013. (V3, R462-64). The hearing was rescheduled to April 22, 2013, (V3, R482-83), and again rescheduled for September 23, 2013. (V3, R500-01, 533-34).

On August 21, 2013, McGirth's counsel filed amendments to the postconviction motion. (V3, R579-89). On September 5, 2013, the State filed its response. (V5, R892-93). On September 10, 2013, the Petitioner moved to quash a subpoena of a witness and moved to continue the hearing. (V5, R916-20). The State responded. (V5, R921-22). On September 13, 2013, a hearing was held (V29, R1-18) and McGirth's motions were denied. (V5, R934-35).

At the scheduled evidentiary hearing on September 23, 2013, the Petitioner moved to discharged his appointed counsel from Capital Collateral Regional Counsel ("CCRC") and represent himself. (V30, R8-10). Petitioner disagreed with appointed counsel about the claims that should be pursued in his postconviction motion. (V30, R10-13). McGirth specifically did not want to pursue any of the mental health claims CCRC was proposing for the evidentiary hearing. (V30, R93-

4). The court conducted a *Nelson*[1] hearing, heard testimony and argument, and found counsel was rendering effective assistance. (V30, R23-61). McGirth made an unequivocal request to represent himself and after the trial court conducted a lengthy *Faretta*[2] hearing, it determined McGirth was competent to make the choice to represent himself. (V30, R61-75). The court took a brief recess to determine the legality of McGirth representing himself in a postconviction proceeding. (V30, R80). When the proceeding resumed, McGirth and his counsel represented to the court that McGirth had changed his mind and wanted to proceed with the evidentiary hearing with CCRC-Middle as counsel. (V30, R81-2).

McGirth's counsel called Dr. Robert Berland, psychologist, as a witness. (R30, R85). Berland evaluated McGirth, administered testing, and spoke with lay witnesses. (V30, R88). In Berland's opinion, McGirth suffers from a psychological disturbance. (V30, R89). At this point, McGirth requested an opportunity to address the court outside the presence of Berland. (V30, R93). After Berland was excused, McGirth voiced his objections to Berland's assessment. McGirth stated, "I'm not crazy or psychotic but they [are] calling witnesses up here to talk about I'm crazy and psychotic." …" (V30, R93-4). McGirth renewed his request to proceed *pro se* with the assistance of standby counsel, requested time to amend his

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[1] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

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

postconviction motion, and also requested a continuance. (V30, R94, 95, 96). The court informed McGirth of standby counsel's role to answer "any questions" and further informed McGirth, "You have that entire responsibility of your own defense." (V30, R110, 115). CCRC-Middle was not named as standby counsel. (V30, R103).

On September 26, 2013, the State filed a motion to clarify appointment and the role of standby counsel. (V5, R965-66). On September 27, 2013, the trial court issued an order discharging counsel, appointed standby counsel (CCRC-South) and clarified standby counsel's role. The order also allowed McGirth to amend his postconviction motion, and rescheduled the evidentiary hearing for December 2, 2013. (V5, R967-71). On October 4, 2013, CCRC-South Director William Hennis filed a motion for rehearing/reconsideration of the order appointing CCRC-South as standby counsel, arguing that the trial court found "no reasonable cause to believe that counsel [CCRC-Middle] was rendering ineffective representation." (V5, R975-79). On October 29, 2013, CCRC-Middle filed a motion and memorandum of law regarding appointment of standby counsel and represented that McGirth agreed with said motion and that McGirth would file a motion requesting appointment of CCRC-Middle as standby counsel. On October 31, 2013, the trial court granted CCRC-South's motion for rehearing, appointed CCRC-Middle as standby counsel, and scheduled the evidentiary hearing for January 21, 2014. (V5, R988-89).

On December 10, 2013, McGirth filed a *pro se* motion for extension of time to file an amended postconviction motion and informed the court he had not received all materials from standby counsel. He requested an extension of time to continue the evidentiary hearing and an extension to file his amended motion by January 24, 2014. He again objected to CCRC-Middle's appointment as standby counsel and requested the court grant his motion to appoint substitute counsel, or conduct a hearing addressing the standard of ineffective counsel and allow McGirth to be present or appear by phone. (V5, R990-1000; V10, R1001-04). On December 20, 2013, the court denied McGirth's motion to continue the hearing but granted his motion for extension of time to file his amended motion up until January 2, 2014. (V6, R1006-07). On December, 23, 2013, the court further denied McGirth's request for hearing on the standard of ineffective counsel and also denied McGirth's request to dismiss CCRC-Middle appearing as standby counsel, stating "Defendant remains entirely responsible for his representation in these proceedings." (V6, R1008-10).

On January 2, 2014, McGirth filed *pro se* motions for extension of time and for an appointment of an investigator, claiming he still had not received all materials needed to file an amended postconviction motion. (V6, R1032-37; 1038-39). On January 7, 2014, the State filed a response and informed the court that not granting McGirth's motion for extension of time and not continuing the hearing would cause an undue burden on the State in light of the late submissions of materials to McGirth, and McGirth's failure to timely file an amended

postconviction motion. Pursuant to McGirth's filings and the State's request, the trial court converted the January 21, 2014, evidentiary hearing to a status conference. (V6, R1043-44).

At the hearing, the court ordered CCRC-Middle to submit any remaining materials to McGirth (CDs and media files), (V32, R23), ordered McGirth to file his amended postconviction motion by March 21, 2014, along with a list of witnesses and exhibits, (V32, R18), appointed an investigator to assist McGirth, (V32, R17), and scheduled a four-day evidentiary hearing to commence on May 27, 2014. (V32, R20). Stand-by counsel filed a notice of compliance that McGirth's appointed investigator delivered all materials to UCI on January 31, 2014. (V6, R1052-58).

On March 11, 2014, McGirth filed a *pro se* Petition for Writ of Mandamus in the circuit court requesting the court issues an order compelling the Warden of Union Correctional Institution "UCI" to allow him time to view the CDs and media files. (V6, R1064-70). On March 17, 2014, the court dismissed the petition without prejudice on venue grounds[3] in order for McGirth to file in Leon County where UCI is located. (V6, R1062-63). McGirth also requested another extension of time to file his *pro se* amended postconviction motion and list of witnesses and exhibits,

[3] The trial court noted that the Department of Corrections/Union Correctional Institution is headquartered in Leon County and McGirth had filed the writ in Marion County.

based on his struggles to view the remaining materials related to his case. (V6, R1104-06). On March 19, 2014, the court issued an order granting McGirth's motion for extension of time with a deadline of April 7, 2014, to file said amended motion, witness list, and exhibit list. (V6, R1107-08). McGirth's April 2, 2014, *pro se* motion for reconsideration for addition time (V6, R1110-1117) was denied on April 8, 2014. (V6, R1109).

On April 23, 2014, McGirth filed a Petition for Writ of Prohibition in this Court, Case No. SC14-786. Pursuant to this Court's April 24, 2014, order, the State filed its response on April 28, 2014. On May 23, 2014, this Court issued its order denying the writ stating:

> The petition for writ of prohibition is hereby denied because petitioner has failed to demonstrate that a lower court is attempting to act in excess of its jurisdiction.

(Order at 1).

On April 21, 2014, the State filed a motion to strike subclaims (b), (c)(ii), (c)(iii), (c)(iv), of claim four of McGirth's original motion for postconviction relief filed on April 12, 2012, as well as a Notice of Non-Filing of any Responsive Pleading or Witness List. (V6, R1141-43). On April 23, 2014, the court ordered McGirth to file a response, (V6, R1144-45), which McGirth filed on May 25, 2014. (V6, R1182-85).

On April 28, 2014, McGirth filed a *pro se* motion to amend his postconviction motion, (V6 , R1155-56), a motion to appoint defense expert, (V6, R1157-59), a supplemental witness list and exhibit list, (V6, R1160-63), his *pro se* second

amended postconviction motion, (V6, R1166-79), and a demand for additional public records. (V6, R1186-1200). The State filed its response on May 15, 2014. (V7, R1252-69).

On May 7, 2014, the court issued an order denying McGirth's motion for a continuance, granted his motion to amend, denied the State's motion to strike subclaims (b), (c)(ii), (c)(iii), (c)(iv), of claim four of McGirth's original motion for postconviction relief, and ordered the State to respond to McGirth's additional demand for public records. (V6, R1164-65). The court did not rule on McGirth's motion to appoint a defense expert but instructed McGirth to ensure the expert, Dr. Joy Degruy, was available for the scheduled hearing and to clarify the purpose of her anticipated testimony. (V6, R1165). On May 12, 2014, the State responded to McGirth's demand for public records. (V7, R1223-24).

On May 8, 2014, CCRC-Middle filed an amended motion to clarify its role as standby counsel, and asserted that McGirth wanted CCRC-Middle to be reappointed. (R7, R1225-26). On May 9, 2014, the court issued an order that CCRC-Middle was not re-appointed and further stated that "CCRC-Middle region is not entitled to make opening or closing statements, arguments to the court, direct examination of witnesses, cross examination of witnesses or filing of motions on behalf of defendant." Standby counsel was available to "consult" with McGirth. (V7, R1242-44).

On May 27, 2014, the day the evidentiary hearing was to begin, McGirth's standby counsel filed a motion with the trial court to determine McGirth's

competency. (V7, R1322-25). Counsel alleged that McGirth was not competent to proceed with his post-conviction proceedings, "as a *pro se* litigant or represented by counsel." The Court heard argument on this issue and subsequently issued an order on June 6, 2014, appointing experts Dr. Gregory Prichard and Dr. Robert Berland to determine Defendant's competency, and directing them to file their reports with the clerk no later than 75 days. (V7, RV7, R1326-28). On August 3, 2014, Dr. Berland submitted his report memorializing his findings that McGirth was incompetent to proceed. (V12, R1360-65). On August 12, 2014, the State requested an extension of time to submit Dr. Prichard's report, (V7, R1330-33), which was granted on August 25, 2014. (V7, R1334-36). On September 5, 2014, Dr. Prichard submitted his report, memorializing his findings that McGirth was competent to proceed. (V8, 1337-46). On September 26, 2014, the State filed a motion to set a competency hearing. (V9, R1347-50). On October 9, 2014, the court issued an order setting a competency hearing for November 24, 2014. (V11, R1357). At this hearing, testimony was taken from both experts, trial counsel, and from McGirth. Nothing was mentioned during this competency hearing about filing another amended 3.851 motion. The court found McGirth competent to proceed and able to represent himself at the evidentiary hearing, *pro se*. (V34, R1-34). The court's order was issued on December 5, 2014. (V18, 1396-99). The court also issued an order rescheduling the postconviction hearing for February 16, 2015, lasting for five days. (V18, R1393-95).

McGirth filed his *pro se* third amendment on January 16, 2015, and his fourth and final *pro se* amendment was filed on January 29, 2015. (V18, R1414-24). On February 5, 2015, the State filed its response to the *pro se* January 16, 2015, amendment, (V18, R1448-61) and on February 6, 2015, the State filed its final response to McGirth's *pro se* January 29, 2015, amendment. (V18, R1462-74).

On February 5, 2015, McGirth filed a *pro se* motion for continuance and informed the court that CCRC-Middle had informed him that his experts had refused to testify and McGirth needed time to consult with them or find replacements. (RV18, R1497-99). On February 9, 2015, McGirth filed a *pro se* "Composite – One - Motion to Appoint Conflict-Free Counsel, Or in the Alternative - Two- Motion to Appoint Conflict-Free Counsel."(V18, R1501-04). On February 11, 2015, the State filed its response and objection to a continuance. (V18, R1508-16). A motions hearing was held on February 13, 2015. McGirth appear *pro se* and CCRC-Middle appeared telephonically. (V35, R1-44). After hearing argument and discussion from all the parties, the court denied McGirth's motion for continuance and the appointment of conflict-free counsel. (V35, R28). McGirth's February 13, 2015, *pro se* motion to disqualify the trial judge was denied. (V18, R1535-49; V35, R33-35).

The court granted an evidentiary hearing on the following claims (as numbered in McGirth's postconviction motion):

Claim I

Ineffective Assistance of Counsel for failing to raise reasonable doubt that it might not have been Renaldo McGirth that committed the crimes by negating Sheila Miller's[4] credibility. The State violated *Brady v. Maryland*[5] when it failed to disclose material witness Roxanna Baker, and violated *Giglio v. United States*[6] when it allowed Sheila Miller to testify that she did not know Jerrod Roberts before July 21, 2006;

Claim II

(a) Defendant alleged counsel was ineffective for failing to sever Jarrod Roberts' trail because had the trials been severed, Robert could have been called to testify about Sheila Miller's substantial involvement in the case without admitting any further culpability of his own;
(b) Defendant alleges counsel was ineffective for failing to call Tamara Woods and Kenike Calvin as witnesses to testify that during a period of time in which Sheila miller has been incarcerated, she made admissions to these two individuals that she had killed her mother;
(c) Defendant alleges counsel was ineffective for failing to call a witness, Robin Smart, to testify that Sheila Miller had expressed a desire to kill her mother;
(d) In a *pro se* amendment to the motion, Defendant alleged that he had newly discovered evidence regarding Sheila miller, Jarrod Roberts, and Robin Smart and that counsel was ineffective for failing to discover this evidence;

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[4] Sheila Miller is the adult daughter of the victim.

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

[6] *Giglio v. United States*, 405 U.S. 150 (1972).

Claim III

(a) Defendant alleged that his counsel was ineffective for (1) failing to locate a witness, Roxanne Baker, (2) not deposing the separate witness, robin Smart, and (3) failing to sufficiently impeach Sheila' Miller's testimony;

(b) Defendant alleged his counsel was ineffective for failing to present additional testimony from co-defendant Theodore Houston to the effect that Sheila Miller, after the murder, suggested they use her parents van to get away and to direct them to withdraw money from the specific ATM machine because it allegedly did not have a camera. Houston also would have testified that Miller wanted them to provide her with crack cocaine. Defendant also alleged his counsel was ineffective for failing to detect Sheila Miller's alleged admission to killing her mother and for failing to effectively impeach Sheila Miller;

(c) Defendant alleged that his counsel was ineffective for not adequately moving for a mistrial when one of the jurors was dismissed, failing to object to alleged prejudicial photographs, failing to force the court to confiscate the jurors cell phones and failing to object to the court having asked counsel is she was satisfied with the jury instructions;

(d) In his *pro se* amendments, Defendant claimed counsel was ineffective for failing to adequately question Detective Stoup from the Marion County Sheriff's Office, either prior to or during the trial, regarding her conversations with Sheila miller during an emergency room visit and in not having these investigative reports transcribed;

Claim IV

(a) Defendant alleged counsel was ineffective for failing to call the co-defendant, Houston, during the penalty phase because Houston would have allegedly testified that Defendant had a startled or surprised look on his face when Diana Miller was shot the first time;

(b) Defendant alleged counsel failed to investigate substantial evidence of mitigation, for relying on one single expert that was presented in mitigation who was not adequately prepared, failing to present all available mitigation evidence and in failing to refute the State's case in favor of the imposition of the death penalty;

(c)Defendant alleged counsel was ineffective for failing to object to the State's penalty phase opening argument, for moving to strike juror Lee during the penalty phase and advising Defendant to agree to striking juror Lee from the panel; for failing to object and seek a curative instruction or mistrial on the state's closing argument in the penalty phase on the HAC aggravator, failing to present the new facts from Jarrod Roberts, Sheila Miller's post-trial admission of guilt, and additional testimony of Houston, al which would have established that Defendant (1) was under the substantial domination of another, (2) was suffering from extreme mental or emotional disturbance at the time of the murders, (3) had a substantial impairment in his ability to conform his conduct to the requirements of the law, and, (4) had a decreased ability to appreciate the criminality of his conduct;

Claim X

(a)In his *pro se* amendment, Defendant alleges counsel was ineffective for failing to object to the State's discriminatory prosecution against him based upon his race.

McGirth appeared *pro se* at the February 16, 2015, evidentiary hearing scheduled for 5 days. CCRC-Middle appeared as standby counsel. (V36, R1-29). McGirth declined to have CCRC-Middle represent him for the postconviction proceedings. **Ultimately, McGirth moved to "waive the evidentiary hearing and preserve the right to appeal all rulings up to this point." (V36, R5).** Standby counsel advised the court that McGirth was "incompetent to go forward and/or represent himself because of what we consider to be bizarre behavior." (V36, R6). **The court conducted a *Faretta*-type hearing and found McGirth "freely and voluntarily waived his right to an evidentiary hearing." (V36, R8-26).**

On March 2, 2015, McGirth filed a *pro se* motion for rehearing and/or reconsideration of the orders denying his composite motion to appoint conflict-free counsel or to appoint conflict-free counsel and motion for continuance. (V20, R1846-63). On March 3, 2015, he filed a *pro se* motion for rehearing and/or reconsideration of Defendant's waiver of 3.851 postconviction hearing. (V19, R1778-1817). On April 15, 2015, the trial court denied all of McGirth's pending *pro se* motions and issued its final order denying McGirth's 3.851 postconviction motion. (V21, R2040-68; 2069-72; 2073-75).

On May 11, 2015, McGirth timely filed his *pro se* notice of appeal. (V21, R2076-78). On May 27, 2015, this Court ordered that jurisdiction be temporarily relinquished to the circuit court for thirty (30) days for appointment of counsel. (V21, R2084-85). On June 10, 2015, the circuit court appointed CCRC-Middle to represent McGirth in his appeal. (V21, R2086-88). On June 19, 2015, CCRC-Middle filed a motion to reconsider and motion to withdraw, claiming a conflict with representation. (V21, R2089-2090). On June 22, 2015, McGirth filed a *pro se* motion in this Court objecting to the circuit court's order appointing CCRC-Middle and requested a rehearing or reconsideration. (V21, R2095-98). On June 23, 2015, this Court granted McGirth's request to remand his case back to the circuit court for a hearing on the conflict with CCRCF-Middle and request for conflict-free counsel. (V21, R2099-2100). On June 29, 2015, the State filed its response to McGirth's motion for conflict-free counsel and CCRC's motion for appointment of counsel and for rehearing. (V21, R2101). On July 15, 2015, the circuit court held a

hearing and addressed both McGirth's motion and CCRC's motion. (V38, R1-24). After hearing arguments and discussion, the circuit court granted McGirth's motion for conflict-free counsel and CCRC-Middle's motion for appointment of counsel and appointed CCRC-North to represent McGirth for this appeal. (V21, R2109-10; V38, R22-23).

McGirth's *Initial Brief* was filed, along with a Petition for a Writ of Habeas Corpus in accompanying case number, SC16-341, on February 24, 2016. This *Answer* follows.

SUMMARY OF ARGUMENT

The postconviction court was correct in denying McGirth's motion for post-conviction relief because McGirth voluntarily, and with full knowledge of the consequences, waived his right to an evidentiary hearing and therefore failed to carry his burden of proof.

Argument I: The postconviction court was correct in denying new counsel after the *Nelson* hearing because postconviction counsel was not ineffective.

Argument II: The postconviction court was correct in allowing McGirth to represent himself after the proper inquiry at the *Faretta* hearing. There was no credible evidence consistent with the allegation that McGirth was incompetent.

Argument III: The postconviction court was correct to appoint CCRC as standby counsel because the appointment of standby counsel to assist the court is within the discretion of the trial court.

Argument IV: The postconviction court was correct that McGirth had a

right to represent himself at his competency hearing because both a proper *Nelson* and *Faretta* inquiry was made and McGirth was competent and proceeded with "eyes open."

Argument V: The postconviction court was correct in denying the motion to recuse itself because the motion was facially insufficient.

Argument VI: The postconviction court was correct to find that McGirth knowingly, intelligently, and voluntarily waived his right to an evidentiary hearing. McGirth was accorded every opportunity to present his evidence and he chose not to do so.

Argument VII: Florida Statutes § 775.082(2) does not entitle McGirth to a life sentence as a result of *Hurst*.

ARGUMENT

Standards on Claims of Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are governed by the well-settled *Strickland v. Washington*, 466 U.S. 668 (1984), standard. This Court has described that standard in the following way:

> Claims of ineffective assistance of counsel are reviewed under the two-pronged standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the burden falls on the defendant to identify specific acts or omissions that demonstrate counsel's performance was unreasonable under prevailing professional norms. *Duest v. State*, 12 So. 3d 734, 742 (Fla. 2009). Counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the Appellant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Second, the defendant

> must prove that the deficient performance resulted in prejudice. *Id*. Thus, the defendant must demonstrate that "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, 104 S.Ct. 2052. "Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions *de novo*." *Anderson v. State*, 18 So. 3d 501, 509 (Fla. 2009). In reviewing a claim that counsel's representation was ineffective based on a failure to investigate or present mitigating evidence, the Court requires the defendant to demonstrate that the deficient performance deprived the Appellant of a reliable penalty phase proceeding. *Henry v. State*, 937 So. 2d 563, 569 (Fla. 2006); *see Gaskin v. State*, 737 So. 2d 509, 516 n. 14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings."), *receded from in part on other grounds by Nelson v. State*, 875 So. 2d 579, 582–83 (Fla. 2004).

Hoskins v. State, 75 So. 3d 250 (Fla. 2011).

The *Strickland* Court acknowledged that it is appropriate for a court considering an ineffectiveness claim to dispose of that claim on the prong that is the easiest to decide, and commented that the Court expected that the prejudice inquiry would frequently fall into that category. *Strickland v. Washington*, 466 U.S. at 696.

Appellant bears the burden of establishing both prongs of the *Strickland* test before a criminal conviction will be vacated. *Schofield v. State*, 681 So. 2d 736, 737 (Fla. 1996). First, there is a strong presumption that counsel's performance was

not ineffective. *Strickland*, 104 S.Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential."). Second, "[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*. Third, the Appellant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (quoting *Michel v. Louisiana*, 76 S.Ct. 158 (1955)). Specifically, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

When the trial court denies postconviction relief without conducting an evidentiary hearing, this Court accepts the Appellant's allegations as true to the extent that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009) (citing *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)). To uphold the trial court's summary denial of claims raised in a post conviction motion, the claims must be either facially invalid or the record must conclusively refute them. *Gordon v. State*, 863 So. 2d 1215, 1218 (Fla. 2003). Appellate courts do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (quoting *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)). "[W]e review the trial court's application of the law to the facts *de novo*." *Green*, 975 So. 2d at

1100. *Lambrix v. State*, 39 So. 3d 260, 268-269 (Fla. 2010). A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court, and its ruling is subject to *de novo* review. *See Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT I: THE POSTCONVICTION COURT WAS CORRECT TO DENY MCGIRTH'S REQUEST TO DISCHARGE COUNSEL AFTER CONDUCTING A SUFFICIENT *NELSON* INQUIRY. (*IB* 30-39, RESTATED).

In his first claim, McGirth argues that the postconviction court abused its discretion in denying McGirth's request to appoint substitute counsel after conducting a *Nelson* inquiry on September 23, 2013.[7] The court properly conducted a *Nelson* inquiry, and correctly cited the standard in *Nelson* for defendant to be entitled to new counsel:

> Well, under Nelson then, I mean the issue is whether if there's reasonable cause to believe that the court-appointed counsel's not

---

[7] To the extent McGirth makes reference to any other requests for discharge of counsel occurring throughout McGirth's litigation, those arguments are insufficiently briefed and should be denied. (*See IB* at 37). The State rejects the argument that the trial court has a "duty to monitor the performance of counsel." The duty in a *Nelson* hearing is unequivocally the defendant's to bring a sufficient request to the court. *Davis v. State*, 136 So. 3d 1169, 1209 (Fla. 2014), *reh'g denied* (Aug. 28, 2014). Further, McGirth's argument that he "continued to raise his dissatisfaction with Gemmer with the court"—that is exactly the kind of request that is insufficient to trigger a *Nelson* inquiry. *Id*. (V34, R11-12; V35, R28; V38, R9).

> rendering effective assistance to the Defendant. I mean, I've read the motion, I, you know, read the case law, I've prepared for this hearing today. I find no reasonable cause to believe that counsel's rendering ineffective representation. I make that finding of record, I'm going to advise -- Mr. McGirth, I'm not going to replace the attorneys.

(V30, R51).

Primarily, postconviction counsel (or McGirth, after acting as his own counsel) never argued that the trial court's *Nelson* inquiry was insufficient. As a result, this claim was not preserved below and is procedurally barred now. *See McDonald v. State*, 952 So. 2d 484 (Fla. 2006). Assuming that the current challenge to the adequacy of the circuit court's *Nelson* inquiry is properly before this Court, the claim is without merit and should be denied.

The court was not even required to do a *Nelson* hearing as McGirth's request was deficient. As this Court stated in *Davis v. State*, 136 So. 3d 1169, 1209 (Fla. 2014), *reh'g denied* (Aug. 28, 2014), "the requirements of *Nelson* depend upon a clear and unequivocal statement from the criminal defendant that he wishes to discharge counsel." *Logan v. State*, 846 So. 2d 472, 477 (Fla. 2003). "This Court has consistently found a *Nelson* hearing unwarranted where a defendant presents general complaints about defense counsel's trial strategy and no formal allegations of incompetence have been made." *Id.*, at 477. Expressions of disagreement with trial counsel's strategy do not necessitate a *Nelson* hearing. *Davis v. State*, 136 So. 3d at 1209; *Stephens v. State*, 787 So. 2d 747, 758 (Fla. 2001).

McGirth did not make a clear and unequivocal statement that he wished to discharge counsel alleging a formal allegation of incompetence. McGirth merely

makes expressions of disagreement with counsel's trial strategy and uses those disagreements to ask for a continuance. *See Morrison v. State*, 818 So. 2d 432, 440 (Fla. 2002). The three disagreements McGirth raises are: 1) Gemmer's strategy of using mental health mitigation; 2) Gemmer's declination to raise a claim under *Alleyne*, that the State should have to list the aggravating factors in the indictment; and, 3) Gemmer's declination to discuss with McGirth or file in his case a *McClesky* motion filed by another attorney in an unrelated case. These complaints can best be described as general complaints about his attorney's trial preparation, witness development, and trial strategy. *See Morrison v. State*, 818 So. 2d at 441 (holding complaints about counsel's refusal to provide copies of legal documents and efforts in contacting witnesses do not clearly allege incompetence); *Dunn v. State*, 730 So. 2d 309, 312 (Fla. 4th DCA 1999) (holding trial court was not required to conduct a *Nelson* inquiry where the defendant was not unequivocally seeking counsel's discharge or clearly alleging his incompetence when he expressed dissatisfaction with counsel's trial preparation, witness development, and lack of contact).

McGirth's actual request to the postconviction court was, in pertinent part:

> I would like to ask that you remove these lawyers from my case. I would like you to remove these lawyers from my case and appoint new counsel of allow me to go pro se and appoint a legal advisor because we have some issues of conflict between how they want to represent me, and as we all know there's no such thing as a defense

> without a defendant and there's some frivolous issues that they are raising when could have been some other issues that could have been raised.
>
> . . .
>
> And I have some other grounds, as far as previous Alleyne Rule that was released from the Supreme Court June 13th, I asked Mr. Gemmer several times to bring it [specifically that the aggravators are not alleged in his indictment] to the Court's attention but he always say other lawyers are not doing this, and I'm not worries about what other lawyers doing, I'm worries about what my defense team's doing.
>
> . . .
>
> …[W]e never discussed that motion [based on *McClesky* that was mass-emailed by the attorney for another inmate] because simply all Mr. Gemmer and them are concerned with doing is saying oh, I'm going here and scream mental health, mental health, and on the record would show that they did their due diligence when they didn't do that.
>
> . . .
>
> I would just ask for you to rule for my case and I ask for a continuance of just six months. You ain't even got to give me an attorney, give me a legal advisor and I come in here on my own in six months with something better than what they trying to come with now.

(V30, R9-12).

When the postconviction court informs Appellant that the *McClesky* motion was denied in that other case, Appellant continues:

> That's okay as well but they had an obligation to explain or present me with that motion. They didn't do that as well as other things. When I speak to Mr. Gemmer and I give him something which the law states, Mr. Gemmer comes back to me and say oh, the Court

won't do this or the Court is not going to do this.

It is clear that McGirth takes issue with counsel's strategy and not his competence. In fact, during the same hearing, McGirth asks the court to "disregard [his] previous [*Nelson* motion] " and as the court summarized, "So in other words, what we've all talked about for the last couple hours we're now back to where we were before; is that a fair summary?" (V30, R82). To which Gemmer replies in the affirmative and the hearing proceeds. (V30, R82). Then, taking issue with the line of questioning, McGirth again asserts that he would like to represent himself and asks for a continuance. (V30, R94-95). The ambiguity is clear on the face of the record.

In any event, the postconviction court then indicates that it will proceed with a *Nelson* hearing, and McGirth asks, "[w]hat about my continuance of six months?" (V30, R13). It is evident McGirth's true intention is to secure a continuance, and not to inform the court of issues of incompetence with his counsel. Recognizing this possibility, the court asks, "[l]et me ask you this. If I choose not to continue it and you are representing yourself, would you want then to have Mr. Gemmer and Mr. Viggiano represent you?" (V30, R13). McGirth responds, "[i]f you choose not to continue it and I go on and see if I can let you all do what you all do." (V30, R14). This ambiguous request voicing complaints about trial strategy should not be sufficient to require a *Nelson* hearing. *See generally Logan v. State*, 846 So. 2d 472, 477 (Fla. 2003).

Even if this Court finds that McGirth's request *was* sufficient to trigger a *Nelson* hearing, the postconviction court's *Nelson* inquiry was sufficient. *See Gudinas v. State*, 693 So. 2d 953, 961 (Fla. 1997) (holding that although Gudinas never specifically claimed that defense counsel was acting in a legally incompetent manner, the trial judge still conducted the inquiry properly and in accord with the procedure this Court approved). When a defendant asserts a sufficient basis to support a contention that his attorney was incompetent, the trial court must make "sufficient inquiry to determine whether there was reasonable cause to believe that counsel was not rendering effective assistance." *McLean v. State*, 29 So. 3d 1045, 1050-51 (Fla. 2010) (citing *Morrison v. State*, 818 So. 2d 432, 440 (Fla. 2002)); *see also Sexton v. State*, 775 So. 2d 923, 931 (Fla. 2000). The proper procedure for a *Nelson* inquiry was approved by this Court in *Hardwick v. State*, 521 So. 2d 1071, 1074-75 (Fla. 1988) *superseded by, McKenzie v. State*, 29 So. 3d 272, 281 (Fla. 2010), stating:

> On this question, we approve the procedure adopted by the Fourth District:
>
> 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 or not 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.
>
> In the present case, we find no error. The trial court made a proper inquiry, allowed the defendant to state his reasons for asserting his claims, and specifically found that defense counsel was competent as to those reasons. Since nothing in the record otherwise establishes defense counsel's incompetence as alleged by Hardwick in his motion, we therefore may not disturb the trial court's finding.

Hardwick, 521 So. 2d 1071, 1074-1075 (Fla. 1988) (citing *Nelson v. State*, 274 So. 2d 256, 258–59 (Fla. 4th DCA 1973). *McKenzie* subsequently held that a *Faretta* inquiry need not include questioning into a defendant's experience in criminal proceedings stating, "the ability to prepare a competent legal defense and technical legal knowledge (or lack thereof) are not relevant issues in a self-representation inquiry."

This Court has recognized the trial judge's inquiry can only be as specific as the defendant's complaint. *Logan v. State*, 846 So. 2d 472, 477 (Fla. 2003). The trial judge is not required to conduct a full *Nelson* inquiry when the court inquires counsel and the defendant regarding Defendant's complaints and the court believes defendant's concerns have been addressed and alleviated by the inquiry and the explanations given to him. *See Morrison*, 818 So. 2d at 441-42; *Davis*, 703 So. 2d at 1059 ("Davis's silence after hearing what his attorney had been doing to ready the case for trial would lead one to believe that Davis felt his concerns had been heard by the judge and his lawyer and he was content to proceed.") It is clear that the trial court intended to comply with *Hardwick/McKenzie* when it states: "[w]ell, I believe we have to proceed with the Nelson hearing, make sure this is what Mr.

McGirth is wanting to do so [sic]. All right, so under *Nelson* I need to have – I need to inquire both the Defendant and defense counsel."

Once under oath, McGirth is asked again what his specific reasons for requesting the discharge of counsel are. He replies:

> I told you as I stated earlier, we are in conflict about how to best represent me. There are issues that I wanted to be raised that Mr. Gemmer denied, he didn't wanted [sic] to raise 'em. As well as there were, there were a few other things we discussed and he, instead of considering them, he simply said these other lawyers in Florida are not doing this as far as that as the Alleyne issue or the Alleyne ruling, I should say.

(V30, R25). McGirth's primary complaints were that he felt as though he was being "disregarded," counsel's pursuit of "frivolous" issues that this Court has held meritless such as *Ring*, and which witnesses to call. When the trial court attempted to have McGirth address specifically what witnesses were listed that he disagreed with, Appellant refused to answer, saying there was "no need to go into discussion about all the details about the witnesses and the strategies of the defense," citing another case. To which, the court repeated it wanted to conduct a proper *Nelson* inquiry. (V30, R29-30).The court then questioned Mr. Gemmer directly from his "black book" of colloquies regarding the proper *Nelson* inquiry. The court was very cautious in creating a record and was thorough in the *Nelson* inquiry, which spans 52 pages in the record, after which the court proceeds to the *Faretta* inquiry. (V30, R9-61). Gemmer was asked about each of the concerns Appellant raised. In his *Initial Brief*, Appellant asserts that the court did not ask Gemmer about a

Brady/Giglio claim. (*IB* at 34). However, McGirth first complains of a *Brady* issue only after the *Nelson* questioning of Gemmer has concluded and the court had moved on to McGirth's next request. (*See* V30, R45-53, 55).The questioning was interwoven throughout the proceedings, and begins and stops at different intervals.

The court conducted a sufficient *Nelson* inquiry and found that counsel was not ineffective, and the issue was merely that McGirth disagreed with counsel's strategy in defending him. McGirth agreed. (V30, R107). The court did not abuse its discretion in finding that postconviction counsel was not incompetent and declining to appoint new counsel.

ARGUMENT II: THE POSTCONVICTION COURT WAS CORRECT IN DETERMINING MCGIRTH WAS COMPETENT TO REPRESENT HIMSELF. (*IB* 39-51, RESTATED).

In his second claim, Appellant argues that the trial court erred in finding McGirth competent to represent himself. Appellant makes the clearly erroneous argument, "[w]ithout any further inquiry the court found McGirth competent to make that decision." (*IB* at 39). Appellant's assertion that the court, "without any further inquiry" found the McGirth competent – is disingenuous – and ignores the approximately 50 pages in the record discussing McGirth's *Nelson* and *Faretta* concerns.

Primarily, postconviction counsel never argued that the trial court's *Faretta* inquiry was insufficient, even as counsel requested a competency evaluation. (*See* V33, R40; V30, R100-01). In fact, postconviction counsel stated, "I would think

going *pro se* is a bit more stressful than being a client. I think Your Honor explained that to him very well at the Faretta hearing." (V33, R41). As a result, this claim was not preserved below and is procedurally barred now. *See McDonald v. State*, 952 So. 2d 484 (Fla. 2006). Assuming that the current challenge to the adequacy of the circuit court's *Faretta* inquiry is properly before this Court, the claim is without merit and should be denied.

In *Faretta v. California*, 422 U.S. 806 (1975), the United States Supreme Court held:

> Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Id., at 835. (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

Here, the court conducted a thorough *Faretta* inquiry. While it is accurately reflected in Appellant's brief that the court pronounced McGirth competent on record page 62, this occurs hours into a hearing wherein the court has heard both procedural and substantive argument from the defendant beginning at record page 8. The court has questioned McGirth throughout the proceeding wherein the *Faretta* and *Nelson* questioning was interrelated. The fact that the court had already heard extensively from McGirth allowed the court to more quickly address

his competency. For example, the court had previously determined that McGirth was not "under the influence of any alcohol, drugs, medication or medical condition or disease that would affect [his] ability to address these matters." (V30, R24). The court points out that McGirth is competent in his research ability and is "eloquently stating" his position, "conversant" on the pertinent issues, and is on the "cutting edge of new US Supreme Court cases." (V30, R44-45).

At the conclusion of the lengthy discussion, the court advised, "[a]ll right, counsel, I mean, I don't have any real question that he's competent to make this choice right now and that he's knowingly and voluntarily doing this." (V30, R75). McGirth made another request to discharge his attorneys when the court concluded its *Faretta* warnings (V30, R68-74), and asked the defendant, "[w]ell, in light of – in light of these advantages of having a lawyer and the disadvantages of not having a lawyer, it's still your position that you want to represent yourself?" To which McGirth replied, "[y]es, sir." (V30, R73). The court then asked, "[y]ou're sure you don't want me to keep your lawyers? You're sure you want to represent yourself?" To which McGirth replied, "[y]es, sir." (V30, R75). The court stated, "I think he understands the position the State is taking and the issues raised" and "… I find that he's competent to do that." (V30, R99-100).

When a criminal defendant unequivocally requests to dismiss his counsel and proceed pro se, the trial court must inquire to establish whether he is voluntarily

and intelligently electing to do so. *Indiana v. Edwards*, 554 U.S. 164 (2008) (citing *Faretta*). In *Potts v. State,* 718 So. 2d 757 (Fla. 1998), this Court explained that in assessing the validity of a waiver of counsel, a reviewing court should focus not on the specific advice rendered by the trial court—for there are no "magic words" under *Faretta*—but rather on the defendant's general understanding of his rights. *Id.* at 760. In *Aguirre–Jarquin v. State,* 9 So. 3d 593, 602 (Fla. 2009), this Court reaffirmed that principle of law, holding that what matters is not the words the trial court employs but rather that the record reflects a defendant who "makes a knowing and voluntary waiver of counsel." In *McCray v. State*, 71 So. 3d 848 (Fla. 2011), this Court held, "[t]he omission of one or more warnings in a particular case does not necessarily require reversal so long as it is apparent from the record that the defendant made an intelligent and knowledgeable waiver of his right to counsel." *Id.*at 867. Moreover, where issues of mental health arise, "the Supreme Court in *Edwards* gave trial courts more discretion in the context of a *Faretta* inquiry to examine a defendant's mental competency and mental capacity to represent himself." *Muehleman v. State,* 3 So. 3d 1149, 1159 (Fla. 2009) (citing *Tennis v. State*, 997 So. 2d 375, 378(Fla. 2008)). *See Hernandez-Alberto v. State*, 126 So. 3d 193, 210 (Fla. 2013) (Trial court did not abuse its discretion by allowing capital murder defendant, who suffered from mental infirmities, to proceed *pro se*, when defendant indicated during the *Faretta* inquiry that he

understood the charges against him, that he wished to represent himself, and that he understood the consequences of representing himself).

The court had carefully considered McGirth's competency to represent himself in the context of the prevailing legal standard, reasoning:

> But if he's competent to make the choice whether he's going to be – isn't that the issue as opposed to his competency to be effective? I mean, --
>
> . . .
>
> I mean, we may sit and say, you know, this is really a foolhardy move, that any Defendant would want to dismiss their post-conviction counsel and proceed on their own. But if that's –underlying, if that's what they want to do and they understand the risk and ramifications of doing that, I mean, I didn't understand Indiana v. Edwards to say there's some excessively heightened level for me to determine whether he's qualified because as he acknowledges himself, he was not a lawyer, and so I don't know if a school teacher or a physician's assistant would have that same ability in the refined area that we're talking about in the area of the law here now but is that really the standard?
>
> . . .
>
> From what I remember from the evidence and from the sentencing order that I did, Mr. McGirth's IQ level is like a 98 or right in that range, so he has a standard, normal intelligence in the population. I mean, he's certainly not at the 70 level where we're talking you know, issues of whether he's even competent to be executed but I mean, and he's certainly being eloquent this morning. You may disagree with his position, but I mean, he's eloquently stating it and he's researched it to the extent that, you know, being on death row, whatever limitations he may have on death row to be able to research issues, but he's clearly conversant with things and talking about McClesky and Alleyne's a recent case that I dealt with in a different setting a few

> weeks ago, but I mean, he's on the cutting edge of new US Supreme Court cases, for lack of a better term. I give him credit for that so.

(V30, R43-45).

Moreover, at the prosecutor's request, the postconviction court continues to question McGirth as to his competency, where the following exchange takes place:

> THE COURT: Well, he's told us he's 25, he has a high school education, I believe his IQ was 98, I found that in the sentencing order.
>
> Tell me what your understanding is about any mental health issues or concerns or problems that you have, Mr. McGirth.
>
> THE DEFENDANT: My understanding is I'm healthy.
>
> THE COURT: You understand you're mentally healthy?
>
> THE DEFENDANT: Yes, sir.

(V30, R62).

In response to the court's inquiry about the mental health issues, including hallucinations, raised by CCRC, McGirth expressed exasperation and called those allegations "frivolous." (V30, R63-64). McGirth testified he took no mediations for mental illness, and took no regular medication except ibuprofen for headaches. (V30, R65, 67). His Department of Corrections records verified that he, in fact, had only ever taken ibuprofen. (V30, R67-68). He did not suffer from hallucinations. (V30, R65). He did not believe he had any significant brain injury and was suffering no affects from any brain injury. (V30, R65). He stated he understood

everything going on in the courtroom, and could read, write, and understand the cases and pleadings at issue. (V30, R66). He is of average intelligence, graduated high school, can read, write, and understand the cases and pleadings. (V30, R66).There was no reason, according to McGirth, why he could not "honestly and intelligently decide" how he wanted to proceed in his case. (V30, R68). The trial court recognized that it had observed McGirth throughout his trial (approximately 5 weeks) and observed "he sat though the whole trial and he was present throughout the trial, he was not disruptive, he followed along." (V30, R68-69). McGirth operated with full comprehension of what was happening in the courtroom with regard to his case. (V30, R65-66, 67). He stated, "I know my case, I know who I am and I can understand and comprehend quite well." (V30, R54). "I'm not crazy or psychotic." (V30, R93).

When CCRC attempted to qualify a response, McGirth corrected them and stated:

> Excuse me, I understand exactly what Mr. King's saying. None of his questions had no double ontans [sic]. He said are you having hallucinations, are you on any medications. That mean right now, in the present, within the last year, within the last six months or however long you want to go back. (V30, R67).

The postconviction court made a finding that McGirth had been present throughout his trial in January and February of 2008. He had never been disruptive, he was well-behaved, and followed along. (V30, R 68-69, 73). He had not been

involved in any other trials, but he understood the procedural posture of his case. (V30, R69).

To the extent Appellant is now arguing he did not request to represent himself because expressed a desire to have a "legal advisor," the postconviction court was correct. Even when he was advised representing himself with the limitations imposed on prisoners would be a "foolhardy move," McGirth advised he wanted to represent himself. (V30, R43).

While the court can, in its discretion, appoint standby counsel, McGirth does not have a constitutional right to combine self-representation with representation by counsel or engage in any type of hybrid representation. *McCray v. State*, 71 So. 3d at 864-65; *Mora v. State*, 814 So. 2d 322, 328 (Fla. 2002); *see also Logan v. State*, 846 So. 2d 472, 475 (Fla. 2003) ("[T]he defendant, under appropriate circumstances, has the constitutional right to waive counsel and represent himself. The defendant has no right, however, to partially represent himself and, at the same time, be partially represented by counsel." (quoting *Sheppard v. State*, 391 So. 2d 346, 347 (Fla. 5th DCA 1980)). Here, the court made clear to McGirth that he would be his own lawyer, responsible for his own case, and a legal advisor would not be his new attorney. (V30, R110-11). McGirth acknowledged that he would be the one responsible for his case, and not any appointed standby counsel, before continuing in his request to proceed pro se. (V30, R114-17).

Competent, substantial evidence supports the conclusion that McGirth had a general understanding of his rights and that his decision to proceed without counsel was made with "eyes open." Even when he was advised representing himself with the limitations imposed on prisoners would be a "foolhardy move," McGirth advised he wanted to represent himself. (V30, R43). This is what is required under *Faretta*, and this Court's jurisprudence on a request to proceed *pro se*. This claim is meritless and should be denied.

ARGUMENT III: THE POSTCONVICTION COURT DID NOT ERR IN THE APPOINTMENT OF STANDBY COUNSEL. (*IB* 51-57, RESTATED).

In direct contrast to the previous competency claim, in which appellate counsel asserts that McGirth was incompetent to represent himself due to mental illness, in his third claim, counsel alleges error by infringing upon McGirth's right to represent himself in appointing standby counsel. *See also, McCray v. State*, 71 So. 3d at 863. McGirth's argument seems to be that the court appointed CCRC-Middle as standby counsel without first consulting with McGirth.

In *Jones v. State*, 449 So. 2d 253 (Fla. 1984), *cert. denied*, 469 U.S. 893 (1984), this Court held that the appointment of standby counsel, under *Faretta*, is constitutionally permissible, but not constitutionally required. *Jones*, 449 So. 2d at 258. *Faretta* recognizes that the trial court may, even over a defendant's objection, "appoint 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Jones*, at 258 (citing *Faretta*, 422

U.S. at 835 n. 46).

Even without a disruptive defendant, it is within the discretion of the trial court whether or not standby counsel should be appointed. As this Court stated in *Behr v. Bell*, 665 So. 2d 1055, (Fla. 1996), "[t]he purpose of standby counsel is to assist *the court* in conducting orderly and timely proceedings," even though "a defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel." *Id.*, at 1056-57 (emphasis added). Because McGirth, on numerous occasions, asked for a "legal advisor," the postconviction court was prudent and did not abuse its discretion to appoint one. In *Jones,* this Court held, "[w]e do not view the appointment of standby counsel over defendant's objection as interposing counsel between defendant and his Sixth Amendment right to self-representation." *Id*. at 257.

The postconviction court did not abuse its discretion in appointing standby counsel because whether or not to appoint standby counsel is in the discretion of the court. This claim is directly refuted by *Jones* and should be denied.

ISSUE IV: THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING MCGIRTH TO REPRESENT HIMSELF AT HIS COMPETENCY HEARING. (*IB* 57-75, RESTATED).

In his fourth claim, Appellant again argues that McGirth's Sixth Amendment right to counsel was denied when he was allowed to represent himself, this time at the competency hearing held on November 24, 2014.

McGirth was within his rights to request to represent himself in postconviction proceedings, even at a competency hearing where there had been no indication that

he was incompetent, and he had previously been found competent. *See McDonald v. State*, 952 So. 2d 484 (Fla. 2006) (holding that the postconviction court did not abuse its discretion in allowing a defendant to represent himself during postconviction proceedings when the court had adequately advised him under the dictates of *Faretta* and his waiver of postconviction counsel was knowing, intelligent, and voluntary.) "Competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose." *Durocher v. Singletary*, 623 So. 2d 482, 483 (Fla. 1993) (citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). The competency standard for pleading guilty or waiving right to counsel is the same as the competency standard for standing trial, and is not a higher standard. *Godinez v. Moran*, 509 U.S. 389, 414 n.2 (1993). Prior to the amendment of *Fla. R. Crim. P.* 3.851(b) (6), McGirth had the right to proceed *pro se* in capital trial and postconviction proceedings.[8] As this Court explained in *Durocher*, "[i]f the right to

[8] As cited by the postconviction court it its order denying McGirth's motion, *Fla. R. Crim. P.* 3.851 was amended as of January 1, 2015 to disallow pro se representation in 3.851 proceedings, stating in pertinent part (… a defendant who has been sentenced to death may not represent himself or herself in a capital postconviction case in state court; he or she must be represented by an attorney. Indeed, the only basis on which a defendant may seek to dismiss counsel is pursuant to statute due to an actual conflict, or pursuant to rule 3.851(i) (Dismissal of Postconviction Proceedings). However, because McGirth's present proceedings began in 2012, the prior rule applied under the amended statute.

representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived," as long as that waiver of collateral counsel is "knowing, intelligent, and voluntary." *Id.* at 483, 485.

The postconviction court conducts a *Faretta*-type inquiry to determine the defendant's competency and ability to understand the consequences of the waiver of counsel and the waiver or dismissal of postconviction proceedings. As this Court stated in *Hernandez-Alberto v. State*, 126 So. 3d 193, 199-200 (Fla. 2013), "[f]ollowing *Durocher*, this Court has consistently held that the right to counsel and to prosecute postconviction claims may be waived so long as the waiver is made voluntarily, knowingly, and intelligently." (citing *James v. State*, 974 So. 2d 365, 367 (Fla. 2008); *Alston v. State*, 894 So. 2d 46 (Fla. 2004); *Castro v. State*, 744 So. 2d 986 (Fla. 1999); *Sanchez–Velasco*, 702 So. 2d 224 (Fla. 1997)).

A trial court's decision regarding a determination of competency is subject to review for abuse of discretion, and the trial court's resolution of factual disputes will be upheld if supported by competent, substantial evidence. *McCray v. State*, 71 So. 3d 848, 862 (Fla. 2011), *cert. denied*, ––– U.S. ––––, 132 S.Ct. 1743, 182 L.Ed.2d 536 (2012). In a similar case, this Court discussed the relevant analysis as follows:

> The criteria for determining competence to proceed is whether a prisoner "has sufficient present ability to consult with counsel with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the pending collateral proceedings." *Hardy v. State*, 716 So. 2d 761, 763 (Fla. 1998) (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4

L.Ed.2d 824 (1960)); *see also* § 916.12(1), Fla. Stat. (2010); Fla. R.Crim. P. 3.211(a)(1); Fla. R.Crim. P. 3.851(g)(8)(A). Section 916.12(3), Florida Statutes (2010), provides that an expert examining a defendant for competence to proceed shall consider the defendant's capacity to appreciate the charges or allegations against him; appreciate the range and nature of possible penalties; understand the adversarial nature of the legal process; disclose to counsel facts pertinent to the proceedings; manifest appropriate courtroom behavior; testify relevantly; and any other factor deemed relevant by the expert. Similarly, Florida Rule of Criminal Procedure 3.851(g)(8)(B) provides that the experts shall consider and include in their report: the prisoner's capacity to understand the adversary nature of the legal process and the collateral proceedings; the prisoner's ability to disclose to collateral counsel facts pertinent to the postconviction proceeding at issue; and any other factors considered relevant by the experts and the court as specified in the order appointing the experts.

"It is the duty of the trial court to determine what weight should be given to conflicting testimony." *Alston v. State,* 894 So. 2d at 54 (quoting *Mason v. State,* 597 So. 2d 776, 779 (Fla. 1992)). "The reports of experts are 'merely advisory to the [trial court], which itself retains the responsibility of the decision.' " *Id.* (quoting *Hunter v. State,* 660 So. 2d 244, 247 (Fla. 1995)). Thus, when the experts' reports or testimony conflict regarding competency to proceed, it is the trial court's responsibility to consider all the relevant evidence and resolve such factual disputes. *Id.; see also Hardy,* 716 So. 2d at 764.

"Where there is sufficient evidence to support the conclusion of the lower court, [this Court] may not substitute [its] judgment for that of the trial judge." *Alston,* 894 So. 2d at 54 (quoting *Mason,* 597 So. 2d at 779). A trial court's decision regarding competency will stand absent a showing of abuse of discretion. *Id.; see also Hardy,* 716 So. 2d at 764; *Carter v. State,* 576 So. 2d 1291, 1292 (Fla. 1989). Thus, the issue before this Court is whether the circuit court abused its discretion in finding Hernandez–Alberto competent to proceed in his postconviction proceedings. A trial court's decision does not constitute an abuse of discretion "unless no reasonable person would take the

> view adopted by the trial court." *Alston*, 894 So. 2d at 54 (quoting *Scott v. State*, 717 So. 2d 908, 911 (Fla. 1998)).

Hernandez-Alberto v. State, 126 So. 3d 193, 204-05 (Fla. 2013).

As discussed, *supra*, McGirth unequivocally waived his right to counsel and the postconviction court conducted a proper *Faretta* inquiry. (V5, R967). The court below properly warned McGirth of the disadvantages to proceeding without counsel and McGirth was proceeding with eyes open. Because the court made a finding that CCRC-Middle was not rendering ineffective assistance of counsel, McGirth was properly advised he was not entitled to new appointed counsel and if he still chose to discharge counsel the court would treat his request to discharge CCRC-Middle as an exercise of right to self-representation. (V5, R968). The court made a finding that McGirth had no physical or mental disabilities hindering self-representation. (V5, R968). The Court also found there had been "no suggestion or indication of mental incompetence nor does the Court find any." (V5, R968).

There was no credible evidence or facially sufficient evidence presented to suggest McGirth's incompetence. The postconviction court weighed standby counsel's motion against what he's personally observed, stating, "I've sat in the long trial with Mr. McGirth years ago and we've seen him sometimes on the post-conviction things. There's not been anything that I've ever actually seen of him that says my goodness, we need to have a competency evaluation." (V33, R12-13). The court continued, "[t]here wasn't any – I did not interpret any whiff of there's some issues of competency there in your filings" (V33, R16) and "…there's nothing I've seen that suggests incompetence" (V33, R58). *See Potts v. State,* 718

So. 2d 757, 759 (Fla. 1998) (holding that because the trial court must weigh the right of self-representation against the rights to counsel and to a fair trial, the trial court's ruling turns primarily on assessment of demeanor and credibility, and thus its decision is entitled to great weight, and will be affirmed on review if supported by competent substantial evidence). The trial court cited the correct standard for competency. (V33, R43). The defendant himself had no issues with his competence stating, "I think I'm competent but I'm not an expert, so." (V33, R28). Even still, in an abundance of caution the court again halted the proceedings and ordered a competency evaluation. (V33, R59).

McGirth again asserted that he wished to represent himself, and the court again made the proper *Faretta* inquiry, finding him competent to continue representing himself. (V34, R7-19). After reviewing the experts' reports and hearing the testimony from both Dr. Prichard and Dr. Berland, the court found McGirth competent based on the court's own observations of McGirth, reviewing his pleadings, and the testimony of Dr. Prichard showing no signs of paranoia, hallucinations, loose associations, or other mental illness indicators. (*See* V34, R66, 68-70, 84).

Appellant's reliance on *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990) and *U.S. v. Klat*, 156 F. 3d 1258 (D.C. Cir. 1998) for the proposition that a trial court "cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel," is misplaced. Here,

Appellant exhibited no "bizarre behavior" and was never adjudicated incompetent. Moreover, the trial court never actually *questioned* McGirth's competence. After a lengthy analysis and argument on this issue, it is clear from the record the trial court ordered the competency hearing in an abundance of caution, with the default position still that McGirth was competent.

This case should be decided analogous to this Court's decision in *Larkin v. State*, 147 So. 3d 452, 464 (Fla. 2014), *reh'g denied* (Sept. 5, 2014), *cert. denied*, 135 S. Ct. 2310, 191 L. Ed. 2d 982 (2015) where the trial court ordered a competency examination solely because defense counsel requested it and not because a "reasonable ground" to doubt McGirth's competence had been demonstrated. *Id.* at 465. Here, like in *Larkin*, there was never any reasonable doubt about McGirth's mental competence. McGirth, like Larkin, had been continuously meeting the standard of competence required for self-representation, including during the competency hearing, by arguing motions on valid legal grounds, cross-examining witnesses, and arguing to the court. McGirth was well-mannered throughout the proceedings and was not combative with the trial court or the witnesses. *See Id*. Dr. Berland's testimony at the hearing did nothing to alter the trial court's conclusion that McGirth was competent, especially when Dr. Prichard's examination concluded that McGirth was competent to proceed. Appellant's attempt to distinguish this case from the law on this point as set forth by this Court in *Larkin* is unpersuasive because the dissimilarities in the backgrounds of the respective defendants are not at issue, and did not affect the

analysis Court relied on in deciding *Larkin*.

To the extent that Appellant argues his right to an attorney was infringed upon by not appointing new counsel, his argument is clearly without merit. As discussed *supra*, when a defendant alleges ineffectiveness on the part of his counsel, the court conducts a *Nelson* hearing, and finds, as the court did here, that there is no reasonable basis to believe counsel is rendering ineffective assistance; the defendant is not entitled to new appointed counsel. *See Taylor v. Illinois*, 484 U.S. 400, 417–418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval); *Puglisi v. State*, 112 So. 3d 1196, 1206-07 (Fla. 2013) ("Defense counsel must have the ultimate authority in exercising his or her client's constitutional right to present witnesses as such is a tactical, strategic decision within counsel's professional judgment"). Because the court correctly found that counsel was not ineffective for having a different strategy than McGirth would have liked, his insistence on counsel's discharge was unfounded, and he was not entitled to new counsel. *Potts v. State*, 718 So. 2d 757, 759-60 (Fla. 1998); *Hearns v. State*, 16 So. 3d 969, 970-71 (Fla. 3rd DCA 2009). McGirth also does not have a constitutional right to combine self-representation with representation by counsel or engage in any type of hybrid representation. *See Mora v. State,* 814 So. 2d 322, 328 (Fla. 2002); *see also Logan v. State,* 846 So. 2d 472, 475 (Fla. 2003) ("[T]he defendant, under appropriate circumstances, has the constitutional right to waive counsel and represent himself. The defendant has no right, however, to partially represent himself and, at the same time, be partially

represented by counsel." (quoting *Sheppard v. State*, 391 So. 2d 346, 347 (Fla. 5th DCA 1980)).

Competent, substantial evidence supports the conclusion that McGirth had a general understanding of his rights and that his decision to proceed without counsel was made with eyes open. This is what is required under *Faretta* to proceed *pro se*. *McCray v. State*, 71 So. 3d 848, 866-67 (Fla. 2011). This Court should find that the trial court did not abuse its discretion by allowing McGirth to continue to represent himself during his competency hearing.

ISSUE V: THE TRIAL COURT WAS CORRECT NOT TO RECUSE ITSELF. (*IB* 75-79, RESTATED)

In his fifth claim, Appellant argues that the postconviction court abused its discretion by denying his motion for recusal filed on February 13, 2015.

In considering a motion to disqualify, the trial court is limited to "determining the legal sufficiency of the motion itself and may not pass on the truth of the facts alleged." *Rodriguez v. State*, 919 So. 2d 1252, 1274 (Fla. 2005); Fla. R. Jud. Admin. 2.330(f). In determining legal sufficiency, the question is whether the alleged facts would "create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Riechmann v. State*, 966 So. 2d 298, 317-18 (Fla. 2007), *as revised on denial of reh'g* (Sept. 20, 2007) (quoting *Rodriguez*, 919 So.2d at 1274.) To warrant recusal, a motion for disqualification must concretely allege a well-founded, reasonable fear on the part of the defendant that he or she will not receive a fair trial before a particular judge. *Jackson v. State*, 599

So. 2d 103, 107 (Fla. 1992). A mere 'subjective fear[ ]' of bias will not be legally sufficient; rather, the fear must be objectively reasonable." *Diaz v. State*, 132 So. 3d 93, 115 (Fla. 2013) (quoting *Lynch v. State*, 2 So. 3d 47, 78 (Fla. 2008); *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005)).

McGirth alleges several adverse rulings in his motion for recusal. "The fact that the judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others,' are generally considered legally insufficient reasons to warrant the judge's disqualification." *Waterhouse v. State*, 792 So. 2d 1176, 1194 (Fla. 2001) (quoting *Jackson*, 599 So. 2d at 107)). ." *See also Lambrix v. State*, 124 So. 3d 890, 903 (Fla. 2013); *Mansfield v. State*, 911 So. 2d 1160, 1171 (Fla. 2005).

Like in *Waterhouse*, there is nothing in McGirth's motion for recusal that necessitates the postconviction judge's recusal. None of his allegations constitute a prejudgment of any pending or future motions that the defendant might file, and nothing that indicates a predisposed bias against the defendant. Moreover, nothing in the record indicates that Judge Lambert was biased or prejudiced against McGirth. On the contrary, it is clear on the record that Judge Lambert was patient, accommodating, and went out of his way in trying to give McGirth the benefit of every legal right to which he was entitled. *See Waterhouse*, 596 So. 2d at 1014.

The postconviction court properly denied the motion as facially insufficient and declined to address the merits. A motion to disqualify will be dismissed as legally insufficient if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing." *Diaz v. State*, 132 So. 3d 93, 115 (Fla. 2013) (quoting *Griffin v. State*, 866 So. 2d 1, 11 (Fla. 2003)). This claim should be denied because McGirth failed to allege any specific grievance that could lead to a reasonable belief that the postconviction judge could not be fair and impartial in presiding over his postconviction case.

ISSUE VI: MCGIRTH KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO PRESENT EVIDENCE IN SUPPORT OF HIS CLAIMS. (*IB* 79-94, RESTATED).

In Appellant's sixth claim, he again argues that McGirth's waiver of counsel was not knowingly, intelligently, and voluntarily waived. He also argues his waiver of his right to present evidence at his evidentiary hearing was not knowingly, intelligently, and voluntarily waived. This *Answer* will address the waiver of the hearing, as the waiver of counsel was discussed, *supra*.

The postconviction court made a factual finding that McGirth's witnesses, including expert witnesses and transported jailhouse witnesses, were subpoenaed, present, and ready to testify and that McGirth "waived his right to present evidence as to his claims set for the evidentiary hearing." (V21, R2040-41). This finding is supported by competent, substantial evidence in the record.

As discussed *supra*, McGirth was adjudicated competent both before and after a full competency hearing. He expressed on multiple occasions his wish to

represent himself, both before and after a thorough *Nelson* and multiple comprehensive *Faretta* inquires. He was advised that he was not entitled to new appointed counsel merely because he disagreed with CCRC-Middle's defense strategy and related complaints, and he insisted he still wanted to represent himself. McGirth declined every opportunity the court presented to re-appoint CCRC-Middle as counsel. McGirth never expressed confusion about his choice to waive his hearing, and, after being fully advised as to the consequences, strategically opted to do so. Contrary to Appellant's assertion, his reasons and strategy for waiving his hearing is not relevant to this Court's analysis of whether or not the waiver was knowingly, intelligently, and voluntarily made. (*IB* at 79). McGirth now merely attempts to have another "bite at the apple" after validly and permanently waiving his evidentiary hearing.

The morning the evidentiary hearing was finally set to begin, and no further continuances or amendments or delays would be entertained, McGirth stated, "[a]t this time, I would like to move to waive the evidentiary hearing and preserve the right to appeal all rulings up to this point." (V36, R5). The court proceeded to a lengthy *Faretta*-type inquiry as to the knowing, intelligent, and voluntary nature of McGirth's waiver. (V36, R7-16). The court then discussed the implications of the waiver of the evidentiary hearing with McGirth, including that fact that his claims would fail for lack of proof, and his appellate claims would be severely limited. (V36, R16-21). The court then preserved the record on the point that subpoenas had been issued, witnesses were in the hall waiting to testify, and payment

arrangements had been made for expert witnesses. There was no hindrance to McGirth proceeding with his hearing. (V36, R23-24, 25). The court also advised McGirth that by proceeding to the hearing he would not be waiving any of his prior appellate issues. (V36, R24). At each step and after each inquiry, McGirth stated he understood, agreed, and had no questions. When the court asked, "[y]ou want to say anything as to why you're doing this or –" McGirth responded simply, "No." (V36, R25). The court found that McGirth "freely and voluntarily waived his right to an evidentiary hearing" and that he was competent to make that choice. (V36, R26). Neither standby counsel nor McGirth objected to this finding or the sufficiency of the questioning. Thus, this argument is not preserved for appeal and should be deemed procedurally barred.

As to the court's actual denial of the claims raised in postconviction, they were properly denied for lack of proof. When, as in the case at bar, a defendant waives his right to put on evidence in support of his claims at the evidentiary hearing he has been granted, the postconviction court properly denies the claims for lack of proof. *See Lukehart v. State*, 70 So. 3d 503, 518 (Fla. 2011); *Clark v. State*, 35 So. 3d 880, 888 (Fla. 2010) (noting that postconviction court properly denied a claim when the defendant presented no evidence to support the claim of ineffectiveness at the evidentiary hearing). In *Hartley v. State*, 990 So. 2d 1008 (Fla. 2008), this Court held:

> In denying the claim, the trial court noted that the issue was set for evidentiary hearing, but no evidence was presented on it. The court is correct. In light of Hartley's failure to present any evidence on the

> claim, we affirm the circuit court's conclusion that Hartley has failed to demonstrate either error or prejudice.

Id. at 1014.

In *Carter v. State*, 175 So. 3d 761 (Fla. 2015) *reh'g denied* (Sept. 18, 2015), this Court observed that a postconviction court properly denies a claim of ineffective assistance of counsel when the defendant waives that claim by failing to produce evidence at the evidentiary hearing,[9] stating;

> The circuit court granted an evidentiary hearing on this claim, but the State contends that Carter waived this claim by abandoning it at the evidentiary hearing and presenting no evidence. At the evidentiary hearing, Carter did not question trial counsel about the decision not to file a motion for change of venue. Further, postconviction counsel did not introduce into evidence any of the many news articles that he cites in his postconviction motion as evidence of the prejudicial publicity that he contends required a change of venue. Thus, the circuit court was correct in denying relief in part on the finding that Carter failed to submit any evidence of the alleged inflammatory news articles and stories.

Id. at 776-77 (Fla. 2015).

Appellant's allegation that he "faced extraordinary and unreasonable challenged in subpoenaing and preparing his expert and lay witnesses for the evidentiary hearing" is not compelling. McGirth was warned of these exact challenges in various *Faretta* inquiries and discussions with the trial court throughout the proceedings, as recognized by the Appellant. (*IB* at 93). McGirth

[9] In *Carter*, however, this Court analyzed the venue claim on the merits as well.

accepted these challenges time and time again in opting to represent himself. He may not now claim *pro se* representation was unduly burdensome when he was warned it would be and accepted same.

Moreover, standby counsel, the prosecutor, and the court all attempted to insulate McGirth from these challenges by assuring his witnesses were subpoenaed, experts were available by conference call, and there was a mechanism by which expert witnesses would be paid. (V35, R26-28). There is no indication in the record whatsoever that McGirth was actually prejudiced by the difficulty of pro se representation or that he waived his hearing because a witness was not subpoenaed or an expert was not prepared.

Appellant's argument that he wanted new appointed counsel has been discussed at length in various claims. In the absence of ineffective counsel, defendant is not entitled to new appointed counsel. McGirth was advised of this several times and still decided to proceed *pro se*. (V35, R6). *Potts.* Appellant continues to argue that CCRC-Middle was ineffective as a basis for relief (*IB* at 90). This argument ignores the trial court ruling that they were not ineffective, and the case law that dictates that that finding is entitled to deference. It is supported by competent, substantial evidence to the contrary. A defendant has no constitutional right to dictate which witnesses are called, and a disagreement over strategy, or personality conflicts do not rise to the level of ineffectiveness under *Nelson.*

Appellant cites McGirth's multitude of motions to continue that were denied as evidence that he was "eager to conduct the hearing." (*IB* at 91-92).[10] Since Florida Rule of Criminal Procedure 3.851(d)(1) allows only 1 year for the filing of the motion for postconviction relief after a defendant's judgment and sentence becomes final, it is not a fair characterization that McGirth was under an unreasonable time limitation in the preparation of his case since Appellant had approximately **three and a half years** from the filing of his postconviction motion to prepare for the evidentiary hearing. Appellant states McGirth was prejudiced because he only had 4 months to prepare for his hearing. (*IB* at 93). Florida Rule of Criminal Procedure 3.851(f)(5)(a)(i) provides that the evidentiary hearing should be scheduled no more than 150 days after the case management conference. McGirth's initial evidentiary hearing was scheduled for February 4, 2013, 146 days after his case management conference.

Moreover, Appellant's argument that he had "serious restrictions" on his preparations is negated by McGirth's statements that he has no restrictions on law library time, and the law clerk is there to help him every day. (V31, R70). In addition, both CCRC-Middle and the prosecutor's office offered to facilitate witnesses from setting up conference calls through payment for travel.

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[10] Appellant seems to also argue the merits of various motions to continue under this claim. To the extent Appellant is arguing a denial of a motion to continue as a basis for relief, Appellee asserts that no particular denial of a motion to continue is sufficiently briefed as a claim in this appeal and should be denied.

Appellee is unaware of any "unfair and onerous" conditions set by the trial court for McGirth's self-representation. (*IB* at 94). In fact, the court exceeded what is constitutionally required for pro se litigants at every stage, from 50-page *Faretta* inquiries, to appointing McGirth not only standby counsel, but an investigator to assist him as well. In any event, the standard this Court looks to on whether or not McGirth's waiver of his right to present evidence to support his postconviction claims parallels *Faretta*. There is absolutely no question from the record that McGirth knowingly, intelligently, and voluntarily waived his right to proceed with his hearing. McGirth was silent on why he wanted to waive the hearing, but unequivocal on the waiver itself. Any argument as to McGirth's motivation is outside the record, unsupported, and mere speculation. This is an example of a defendant getting exactly what he asks for but then claiming he is prejudiced by it. This claim is meritless and should be denied.

ISSUE VII: FLORIDA STATUTE 775.082(2) DOES NOT REQUIRE A COMMUTATION TO A SENTENCE OF LIFE IMPRISONMENT OR A REMAND FOR RESENTENCING. (*IB* 94-95, RESTATED).

In his seventh claim, Appellant argues that Fla. Statute §775.082 (2) requires that his sentence be commuted to life in prison based upon the United States Supreme Court's decision in *Hurst*. This argument is without merit. *Hurst* did not determine capital punishment to be unconstitutional; *Hurst* merely invalidated Florida's procedures for implementation, finding that they *could* result in a Sixth Amendment violation if the judge makes factual findings which are not supported

by a jury verdict. *See*, *State v. Perry*, Case No. 5D16-516, (Fla. 5th DCA Mar. 16, 2016).[11] Section 775.082(2), Fla. Stat. does not apply, by its own terms. That section provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional.

This new argument based on the recent United States Supreme Court decision in *Hurst* – raised for the first time in Appellant's appeal of the circuit court's denial of his 3.851 motion – is not properly before this Court. McGirth raised a constitutionality claim on direct appeal, and a constitutionality "aggravator as element" claim in his 3.851 motion. His *Ring* claim was properly denied by the

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[11] "*Hurst* determined that Florida's procedure to impose the death penalty was unconstitutional, not the penalty itself. The Court recognized that section 775.082(1), Florida Statutes (2010), "does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" 136 S. Ct. at 622 (quoting §775.082(1), Fla. Stat. (2010)). In holding Florida's capital sentencing procedure unconstitutional, the Court was particularly concerned that "Florida does not require the jury to make the critical findings necessary to impose the death penalty." *Id*. We believe that *Hurst*'s holding is narrow and based solely on the Court's determination that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. at 619. Thus, we have no difficulty in concluding that *Hurst* struck the process of imposing a sentence of death, not the penalty itself." (*Slip op*. at 5).

court below because it had been raised and rejected on direct appeal and because he had been convicted of prior violent felonies. (V21, R2053). Defendants are barred from raising new claims for the first time on appeal.[12] *See Heath v. State*, 3 So. 3d 1017, 1035 n. 12 (Fla. 2009) ("Heath did not raise the instant challenge before the postconviction court and, accordingly, this challenge will not be heard for the first time on appeal") citing *Connor v. State*, 979 So. 2d 852, 866 (Fla. 2007)). This argument is also currently pending before this Court in McGirth's state habeas petition case number, SC16-341. *See Knight v. State,* 923 So. 2d 387, 395 (Fla. 2005); *Baker v. State,* 878 So. 2d 1236, 1241 (Fla. 2004); *Parker v. Dugger,* 550 So. 2d 459, 460 (Fla. 1989); *Blanco v. Wainwright,* 507 So. 2d 1377, 1384 (Fla. 1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.") This claim based on Section 775.082(2), Fla. Stat. is procedurally barred and should be denied.

Procedural bar and inapplicability aside, Hurst was in a distinctly different position from McGirth. Hurst presented the United States Supreme Court with a

[12] Presented as Claim VIII (V2, R71-73).

"pure" claim under *Ring*, where none of the established aggravating circumstances were identifiable as having come from a jury verdict. *Hurst*, 147 So. 3d at 445–47. In Florida, a defendant is *eligible* for a capital sentence if at least one aggravating factor applied to the case. *See Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010); *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005). In McGirth's case, a unanimous jury convicted him of the contemporaneous offenses of the attempted first-degree murder of James Miller, robbery with a firearm, and fleeing to elude law enforcement. The jury also heard that McGirth had been under a sentence of felony probation, which was not contested in the penalty phase, and that he had committed prior violent felonies. Based on these convictions, McGirth was eligible for his 11-1 reccomendation of death. Once the jury found one aggravator, McGirth became eligible for the higher range penalty-death. In *Alleyne*, 133 S. Ct. at 2162-63, the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." In Florida, only one aggravating factor is necessary to support the higher range penalty-death. This Court has consistently rejected *Ring* claims where the defendant is convicted of a qualfying contemporaneous felony. *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012). Unlike Hurst, McGirth's death sentence eligibility is supported by unanimous jury findings. Each of these facts, independently, and

considered together, remove McGirth from any considerations under *Ring/Hurst.*

The Supreme Court specifically excluded from consideration cases in which one of the aggravators was a conviction for a prior violent felony. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almendarez-Torres*, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); *Alleyne*, 133 S. Ct. at 2160 n.1 (affirming *Almendarez-Torres* provides valid exception for prior convictions). In *Franklin v. State*, 965 So. 2d 79, 101-02 (Fla. 2007), this Court held:

> Additionally, *Ring* did not alter the express exemption in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the two cases. This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying *Ring* claims. *See, e.g., Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004) (denying relief on *Ring* claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); *Davis v. State*, 875 So. 2d 359, 374 (Fla. 2003) (stating that "[w]e have denied relief in direct appeals where there has been a prior violent felony aggravator"); *Johnston v. State*, 863 So. 2d 271, 286 (Fla. 2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"), *cert. denied*, 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); *Henry v. State*, 862 So. 2d 679, 687 (Fla. 2003) (stating in postconviction case that this Court has previously rejected *Ring* claims "in cases involving the aggravating factor of a previous violent felony conviction").

Franklin v. State, 965 So. 2d at 101-02.

Here, there is no Sixth Amendment violation as recognized in *Hurst* because McGirth was convicted of a prior violent felony for the contemporaneous attempted first-degree murder of James Miller, and was engaged in the commission of a robbery at the time of the murder. Since McGirth entered the penalty phase already qualified for a death recommendation, any error could only be harmless, even if *Hurst* was found to retroactively apply. This line of authority was undisturbed by the recent decision in *Hurst*. *See also*, *Smith v. Florida*, 136 S.Ct. 980 (2016), *reh'g denied,*136 S.Ct. 980; *Hobart v. Florida*, 2016 WL 1078981 (U.S. Mar. 21, 2016).

In the last line of this argument section McGirth asks, in the alternative, for a new sentencing proceeding. This request is unsupported by any specific argument or authority. The United States Supreme Court has provided no express reason to disturb any capital sentences supported by prior convictions such as McGirth's. In fact, following release of the *Hurst* opinion, the United States Supreme Court denied certiorari review of two direct appeal decisions, leaving intact this Court's denial of any Sixth Amendment error; both cases had sentences supported by prior violent felony convictions. *See Fletcher v. State*, 168 So. 3d 186 (Fla. 2015), *cert. denied*, 136 S.Ct. 980 (2016); *Smith v. State*, 170 So. 3d 745 (Fla. 2015*), cert. denied*, 136 S.Ct. 980, *reh'g denied*, 2016 WL 1079054 (U.S. Mar. 21, 2016).

CONCLUSION

Based on the foregoing authority and arguments herein, the State

respectfully requests that this Honorable Court affirm the order of the circuit court and deny McGirth all relief.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Answer Brief* has been transmitted to this Court through the Florida Courts e-Filing Portal, which will send a notice of electronic filing and a conformed copy to Karen L. Moore, Assistant CCRC-North, karen.moore@ccrc-north.org, Stacey R. Biggart, Assistant CCRC-North, stacey.biggart@ccrc-north.org, Office of the Capital Collateral Counsel-North, 175 Salem Court, Tallahassee, FL 32301, on this 2nd day of May, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Timers New Roman 14 point font.

Respectfully submitted,

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