Filing # 96073651 E-Filed 09/20/2019 04:44:21 PM

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IN THE FLORIDA SUPREME COURT

CASE NO. SC19-0008

MICHAEL LAWRENCE WOODBURY,
Appellant

v.

STATE OF FLORIDA,
Appellee

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT (CRIMINAL DIVISION)

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INTRODUCTION

This is a direct appeal from a judgment of guilt for first-degree murder and a sentence of death for Michael Lawrence Woodbury. This case arose when an inmate suffering from bipolar disorder killed his cellmate after unwanted sexual advances. Despite a long history of mental illness, Woodbury was permitted to proceed pro se. After testifying at the guilt phase, Woodbury entered an open plea of guilty to first degree murder. He continued to proceed pro se through the penalty phase and the *Spencer*[1]hearing.

Judge Jerald Bryant presided over the first appearance hearing. Judge Sherwood Bauer presided over all further proceedings in the circuit court for the Nineteenth Judicial Circuit in Okeechobee County. Woodbury will be referred to by his proper name, rather than Appellant or Defendant. The State of Florida was the prosecution below and will be referred to as "the State."

The record on appeal has 643 pages, and will be referred to as "R." The supplemental record has 21 pages, and will be referred to as "SR." The trial transcript has 1,921 pages, and will be referred to as "T." Each record citation will be followed by the appropriate page numbers in parenthesis.

[1] *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993).

STATEMENT OF THE CASE

Woodbury was indicted by a grand jury for the first degree premeditated murder of his cellmate, Antoneeze Haynes, which occurred at Okeechobee Correctional Institution ("OCI"). (R 18-19, dup. 30-31). Six months later, he was sentenced to death. (R 245-46).

At first appearance, Woodbury asserted his right to self-representation. (R 25, duplicate 32; SR 651-61). He informed the court of his bipolar diagnosis and current medication. (SR 658-59).

The State filed a notice of intent to seek the death penalty. (R 35-36). The next day, the case was reassigned to Judge Bauer. (R 37). Two weeks later, Woodbury filed demands for discovery and a speedy trial. (R 39-42).

At the calendar call hearing, Woodbury reaffirmed his desire to represent himself. (R 51). The court conducted a *Faretta*[2] inquiry. (T 5-37). The court granted Woodbury's request, and issued a written order appointing standby counsel. (R 56-57; T 37).

During a pre-trial status conference, the court adopted the State's proposed *Faretta* inquiry (see Point I for the pertinent facts with regards to the *Faretta*

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

inquiries). (R 52, 75-84; T 101). Woodbury waived his right to obtain experts to present mitigation evidence. (R 147-48; T 119-20).

After two days of jury trial, Woodbury entered an open plea to the court for first degree murder. (R 182). The court accepted the plea and ordered a pre-sentence investigation ("PSI"). (R 186-88). The court granted the State's motion to appoint a mental health expert to conduct a comprehensive mental health evaluation. (R 187; T 1424-27). Three days later, the court appointed Dr. Joseph Sesta to complete the evaluation. (R 192).

The following month, a status conference was held. (R 216). The State became "aware that the defendant was hospitalized in a mental health facility (now known as the Riverview Psychiatric Center) located in Augusta, Maine during the 1990s." (R 204). The court confirmed that Woodbury was not using mental health mitigation and did not intend to introduce the hospital records. (R 216; T 1435-36). Despite Woodbury's willingness to sign a medical waiver, the State decided not to obtain the records. (T 1436-37).

The penalty phase began on July 23, 2018. (R 235-36). On the second day of trial, the court denied Woodbury's request for a mercy instruction. (R 237-38; T 1715-16).

The jury unanimously recommended a sentence of death. (T 1798). In its verdict, the jury found four aggravating factors and no mitigating circumstances.

The jury also found the aggravating factors were sufficient to warrant a death sentence and that they outweighed the mitigating circumstances. (R 239-41; T 1802-04).

Two months later, after a brief *Spencer* hearing (T 1815-95), the court orally pronounced a sentence of death. (R 245-46; T 1892). The court issued a written sentencing order on September 27, 2018. (R 275-304). A notice of appeal was filed on December 13, 2018.[3] (R 316). This appeal follows.

STATEMENT OF FACTS

I. The Guilt Phase

Woodbury initially plead not guilty to the murder of Haynes. The facts relevant to this appeal about the crime are as follows:

A. The Initial Response to Cell 1208

On September 22, 2017 at approximately 3:45 a.m., count was conducted in the C-Dorm at OCI. (T 1064). C-Dorm houses 258 inmates and is "shaped like a T" with three two-story wings. (T 1054-55, 1193). There is one sergeant and one officer assigned to monitor the dorm. (T 1055-56, 1191). It is a close custody unit where inmates are "secured behind a locked door every night." (T 1193).

[3] The notice was misfiled with the Fourth District Court of Appeals. An order transferring the case to this Court was filed on January 3, 2019. (R 325).

Woodbury and Haynes were housed in Cell 1208, which was on the second floor. (T 1056). The cell is enclosed by a solid metal door which includes an unbreakable window. (T 1042). The dimensions are "5 x 10, 5 x 9." (T 1305). There is no air conditioning. (T 1306).

Woodbury was serving three consecutive life sentences from New Hampshire. (R 631). Haynes was serving five consecutive life sentences. (T 1524).

At 4:00 a.m., correctional officer Castro was informed there was a shirt blocking the cell window. (T 1056, 1060). He went over and asked "what's going on?" (T 1057). Woodbury peaked around the shirt and stated "Well, I don't see a white shirt, I'm not going to talk to you." (T 1057). A "white shirt" is a lieutenant or above. (T 1197).

Woodbury slid his identification card ("ID") under the door. The word "Phoenix" was written on the back. (T 1057). He demanded to be called Phoenix. (T 1061-62). Castro described Woodbury as being "very frantic." (T 1060). Woodbury "wanted to be in control." (T 1061).

Castro asked Woodbury to take the shirt down. (T 1057). Castro saw Haynes "laying face down on the bottom bunk with splattered blood on the back wall." (T 1057, 1063).

Woodbury showed Castro a "piece of metal" and said "I'm going to hurt him if anybody comes to this door." (T 1062). He said the door was barricaded. (T 1062).

Castro did not attempt to open the door. (T 1063). Instead, he radioed for the response team. (T 1058).

The A-team "quick responders" arrived. (T 1038). Officer Ramos looked in the cell and saw Woodbury acting "aggressive, yelling at that time. He was very excited about the whole situation and how everything was going on." (T 1039).

Woodbury appeared "excited" and "extremely upset." (T 1045). Woodbury said he woke up and Haynes was touching his "private parts." Even though Woodbury identified as gay, "he's not going to let no other man touch him anywhere." (T 1046).

Woodbury had a "combination lock." (T 1043). He would hold the lock in his hand and punch Haynes in the back of the head. (T 1043). Alternatively, he looped a sock through the lock and swung it; hitting Haynes throughout his body. (T 1043-44). Ramos estimated that Woodbury hit Haynes "over 50 times." (T 1043). In addition, he saw Woodbury break Haynes's fingers and toes. (T 1042-43).

The behavior exhibited by Woodbury was "not normal." (T 1047). Woodbury had a smile on his face when he hit Haynes. (T 1046). Ramos described the following exchange with Woodbury (T 1041):

> So after he was hitting him, he went --he asked me, "Am I crazy?" At that time I told him, "No, I don't think you're crazy. I just think you're misunderstood, you're not understanding what's going on." And he said, "Oh, so you don't think I'm crazy?" With his three fingers he wiped the back of the other inmate's head covered in blood. He sat

down on his locker and licked his fingers and said, “Am I crazy now?” Three fingers.

Sergeant Mark Wright, with the Rapid Response Team, attempted to negotiate with Woodbury. (T 1068, 1071). Woodbury stated “I’m not talking to no sergeant” and put the shirt back over the window. (T 1068). Sergeant Wright heard a “thud.” (T 1068). Woodbury told Sergeant Wright “That was for you, that was your fault.” (T 1068). Therefore, Sergeant Wright left. (T 1069-70). Woodbury wanted to talk to a major or above. (T 1069-70).

At around 4:45 a.m., Major Frank Gatto arrived. (T 1188-89, 1191). He described Woodbury’s demeanor as being “very agitated” and “very demanding.” (T 1195-96). He continued to insist on being called “Phoenix.” (T 1197). If his real name was used, he would strike Haynes. (T 1197-98).

B. Video Showing the Incident From Approximately 5:00 a.m. to 7:15 a.m.

Major Gatto instructed an officer to videotape the cell door from the opposite side of the wing. (T 1193). The video recording was entered as State’s exhibit 1. (T 1204-33, 1239-87, 1302). References to State’s exhibit 1 will be listed at SE#1 followed by the appropriate time stamp from the video. The time is the duration on the video and not the time when the incident occurred. The video is approximately two hours long. (T 1195). It was published during Major Gatto’s testimony. (T 1204-33, 1239-87, 1302).

The trial transcript contains limited transcription of the audio. It is hard to hear the audio with the exhaust fans on. (T 1194-95). At 15:15 on the video, the fans are turned down and the audio becomes clearer. (T 1195, 1198). The following is a summary of the relevant contents of the video along with clarifications provided by Major Gatto's testimony.

The warden attempted to speak with Woodbury. (T 1198). At the start of the video, the warden can be seen wearing a blue shirt with a baseball cap. (T 1204). The warden asked Woodbury: "Are you ready to come out?" (T 1207). Woodbury responded by hitting Haynes with the lock. (T 1207-08). He demanded to be transferred to New Hampshire. The warden replied: "I can't do that right now, but I'll look into it." (T 1208). In an agitated state, Woodbury yelled: "Get the eff away from my door. You look like you're drunk… I don't want anything to do with you, there's no way you could be a warden." (T 1199, 1204). The warden left to "put a tactical plan together." (T 1199, 1205, 1209; SE#1 7:04).

Woodbury agreed to speak with Major Gatto because he is a "fellow Yankee." (T 1214). But, he warned that "if you're stupid, say something stupid. Every time you talk now he's going to get it." (T 1215).

Once the audio became clearer, Woodbury is heard saying: "no matter what happens as long as [Haynes] stays flat on that bed I'm not gonna kill him." (T 1213; SE#1 15:30).

When Haynes lost consciousness, Woodbury said: “Hey, he’s actually snoring. He actually went [to] sleep. He’s snoring.” (T 1215).

At approximately 19:33 on the video, Woodbury is seen placing a picture on the window. Major Gatto explained (T 1216):

> Right there is where the whole Phoenix thing starts. That’s a picture of Phoenix, that’s his compound name. He’s showing me that picture and he’s telling me it’s his -- he starts talking religious and that’s his spirit animal or his spirit something he says, and that’s where -- and that’s where it all starts.

Afterwards, Woodbury cleaned up around the cell. (T 1217; SE#1 19:45-23:25). He discussed religion with Major Gatto: “He’s talking about the Bible. He’s asking me if I’m a Christian at this point. He’s talking about religion and he’s going into -- to different just religious stuff, quotes from the Bible and different things.” (T 1217).

Even though Woodbury quotes the Bible, he claims to be Wiccan. (T 1218). Later in the video, he is a Satanist. (T 1224). He also hears voices. (T 1218).

When Haynes made a noise, Woodbury said: “hey man I heard noise, if I hear another one I’m gonna take away your sight.” (SE#1 24:42). Major Gatto saw Woodbury poke Haynes in the eye with “a piece of pencil lead or something.” (T 1219).

Woodbury explained that Haynes tried to "put down on" him. (T 1219; SE#1 24:55). Prison terminology for "put down on me" means to exert control over someone. Major Gatto agreed that it could have a sexual connotation. (T 1220).

Woodbury went on a rant about baseball. (T 1221). He recognized that Major Gatto has a New York accent and became upset. Woodbury is from Boston and a Red Sox fan. (T 1221). He struck Haynes because the Red Sox lost to the New York Yankees. (T 1221-22). He yelled out: "Let it be known you're getting one because of the Boston Red Sox." (T 1221; SE#1 26:24).

Woodbury demanded again to be sent back to New Hampshire: "Two things are going to happen. I'm going back to New Hampshire or we're going to have maggots, maggots here -- I promise you -- nah, nah, nah, nah." (T 1223).

Woodbury asked Major Gatto when the "real cops" were going to arrive (T 1224):

> **Woodbury:** You need a real cop down here.
>
> **Major Gatto:** For what?
>
> **Woodbury:** Cops that'll actually shoot me. Don't try to get a tactical team in here because people are going to get -- if y'all see the top man, just let him know, man. You already know who it is. You already know who I'm talking to, you my fellow satanists, you my nigger, you my -- you my chico. You know what to do. The writings on the wall.

The words "Interstate" and "No roommates, Ms. Prescott" were written on the cell walls. (T 1109, 1114).

When the Phoenix picture fell off the window, Woodbury talked about religion and telekinesis (T 1225-26):

> **Woodbury:** Hello? Right now I'm going to speak to the Holy Ghost, all right? Holy Ghost. I'm going to take a message from the Holy Ghost. You hear me?
>
> **Major Gatto:** I hear you.
>
> **Woodbury:** All right. Like I said, Jesus is your Lord and Savior. To me, Jesus is a brother. I respect Jesus' mind now, but I need to find my- I'm free. Listen, that's my spirit. Play games if you want to. That was pretty freaky, huh?
>
> **Major Gatto:** It was.
>
> **Woodbury:** Do you know who Jean Grey is? Do you know who Jean Grey is? This right here, what's that about?
>
> **Major Gatto:** Telepathy?
>
> **Woodbury:** And telekinesis, okay? You just seen it. Don't make me show you again. If I show you again, you're not going to like it. Don't make me show you again.

A short while later, Woodbury struck Haynes because he was "smiling." (T 1228). He told Haynes to raise his hand to show that he was still alive (T 1228):

> You all right? Raise your hand. Make sure you're still alive. Raise your hand, show him that you're still alive. You want me to stick something up your ass? Raise your hand. He's alive. He's faking it. I'm going to stick something up his ass. He's a faker.

Woodbury confronted Haynes about the sexual assault: "I was sleeping and you woke me up and touched me and you tried to -- and you touched my groin area." (T 1229). He told Haynes to lay on his stomach or he would bring out "Tracy;" his homemade knife. (T 1229-30; 37:26). Woodbury hit Haynes and yelled (T 1230-31):

> "What are you looking at? I said to lay on your stomach. Lay on your stomach and I'll stop. Lay on your stomach and I'll stop. Lay on your stomach and I'll stop. I'm giving you direction here. Lay on your stomach. All right. He's bleeding all over the place, it's just getting disgusting. I'm still waiting for you to decide what you're going to do about this. I guess it's going to be the wheelchair."

Then suddenly, he stopped and switched to a discussion with Major Gatto about how the prison's faith based program is a "chomo sanctuary" (chomo means child molester). (T 1226-27). When Major Gatto did not respond appropriately to a question about religion, Woodbury said "shut the fuck up" and hit Haynes repeatedly. (T 1232, 1239; SE#1 44:17, 47:09). He yelled: "And then you try to get right with Jesus? What? Are you fucking out of your mind?" (T 1239).

During the beating, Haynes attempted to get up in defense. (T 1240). Woodbury reacted by saying: "Whoa. Lay down now. Whoa, I wasn't expecting that. That was some miraculous shit. That was -- you see how he rolled right back up and I was swinging at him. Holy shit." (T 1240; 47:23). Woodbury continued to strike Haynes, telling him: "Hey, man, who's in charge here again? Do you really think a demon is going to give you mercy?" (T 1241).

Abruptly, he stopped hitting Haynes to discuss baseball. (T 1241-42). He then started singing. (SE#1 49:22-51). He hit Haynes and said: "I know it hurts, I know. You deserved that one, you know you did. It's called torture. Welcome to the house of pain. Welcome to the house of pain. The house of pain actually exists. It's in the ninth level of hell. I used to run it. Tracy, Tracy." (T 1242-43; 50:02).

Haynes was repeatedly hit for moving too much; this was "breaking the rules." (SE#1 53:49). Woodbury explained the rules were "supernatural shit, you're seeing a supernatural battle right now." (SE#1 53:54-54:04).

At 6:25 a.m., Woodbury announced that his "roommate is still alive, but has been thoroughly, thoroughly tortured." (SE#1 58:00-10).[4]

A prisoner yelled at Woodbury. (T 1253-54; SE#1 1:02:28 to 1:03:04) In response, Woodbury demanded that Major Gatto order the prisoner to confinement. (T 1254, 1256). He told the prisoner: "Phoenix said you're going to jail, bye." (T 1256).

A couple of minutes later, Woodbury slid the lock under the door. (T 1257-58; SE#1 1:06:19). Major Gatto asks Woodbury to "cuff up" (be handcuffed) and unblock the door. (T 1260-61). Woodbury said: "Haven't I been cooperative with you. New Hampshire -- until someone tells me I'm going back home to see my dad, it's not happening, bro." (T 1260).

Woodbury stated that "this is just the tip of the iceberg, I mean it could be a lot worse, cause I'm the leader of my satanic gang." (SE#1 1:13:42).

Colonel Zamora Baldridge arrived to assist Major Gatto. (T 1263; SE#1 1:15:00). Woodbury slid "some kind of magazine article with writing on it, some

[4] The transcript inaccurately states Woodbury said the time is 6:45 and "fully, fully tortured." (T 1253).

religious stuff on it" under the door. (T 1265). Colonel Bladridge asked Woodbury about the paper but he punched Haynes, telling her: "Just know that you did this." (T 1266). He punched Haynes 15 to 20 times. (T 1266).

Major Gatto attempted to reinitiate a conversation, but, Woodbury said to stop "playing games." He wanted to go back to New Hampshire to see his dad before he died. (T 1269-70). In reality, Woodbury's dad was not dying. He was in good health. (T 1738). He told Major Gatto: "I'm done talking to you about it. Get out of here. Shut up." (T 1270). Major Gatto stepped away and left Captain Wells to talk with Woodbury. (T 1272).

Woodbury sang "enter the sandman." (SE#1 1:33:58 to 1:34:50). He told Captain Wells that Haynes was still alive. (T 1273; SE#1 1:35:14). Haynes was "not even really that fucked up." (SE#1 1:36:18).

Woodbury talked about his gang of "shadow stalkers" and that "they don't let nobody know nothing about anything." (T 1275; SE#1 1:38:08). He made another transfer request and agreed to cuff up if FDLE or the sheriff's department arrived. (T 1279-80; SE#1 1:45:28). He quoted the Bible and went on a long, incoherent and indecipherable ramble culminating with another request to return to New Hampshire. (T 1281; SE#1 1:47:25).

Major Gatto returned and upset Woodbury by stating "be quiet." However, Major Gatto was speaking to another prisoner. (T 1283-84). Woodbury said "you keep thinking you're in charge" and hit Haynes again. (T 1282-83).

Woodbury noticed that Haynes was "circling the drain" (about to die) and agreed to be cuffed up. (T 1284; SE#1 1:52:27, 1:53:29). According to Major Gatto, Woodbury "starts removing some stuff from his door." (T 1285). But, Woodbury yelled out to the tactical team, which is now surrounding the area, that the door was "not jammed" and that he "didn't jam it." (SE#1 1:54:43-1:55:14).

After about three and a half minutes, the tactical team opened the door and escorted Woodbury out of the dorm and into the yard. (T 1286; SE#1 1:57:35).

Another officer with a camera was positioned downstairs. (T 1301). This brief recording shows Woodbury leaving the cell and Haynes laying in the bunk. (T 1303). The video was entered as State's exhibit 2. (T 1303).

C. The Medical Examiner

Dr. Shanedelle Norford, a medical examiner for the District 19 Medical Examiner's Office in Fort Pierce, performed the autopsy on Haynes. (T 1134). The injuries sustained were:

> Lacerations, abrasions and areas of hemorrhage to his head (T 1140-41, 1156); fracture of the mandible (jaw) on the left side (T 1153); twelve lacerations to the arms and legs (T 1154); fracture of the second metacarpal bone of the left hand (T 1150); a fracture of the third finger on the left hand (T 1150); twenty-one lacerations and abrasions to the face and skull area (T 1154); a fractured sternum (T 1155); laceration

> of the liver (T 1154); anterior and posterior rib fractures on both sides (T 1154-55); and numerous abrasions or superficial cuts to the torso, the chest, the abdomen, the legs, the ankles and the arms. (T 1142-43, 1148).

Dr. Norford explained the cause of death: "So he bled out as a result of the severe blunt force trauma he sustained." (T 1157). The injuries would have caused "an extreme amount of suffering." (T 1157).

D. The FDLE Investigation

FDLE Agent Steven Harris was notified about the death at around 8:00 a.m. (T 1076, 1079). He interviewed the correctional officers who were on duty about why it took so long to get Woodbury out of the cell. (T 1082). He explained that "[t]hrough our interviews, we learned that the cell door was unhinged and barricaded." (T 1082). However, he could not state how the door had been barricaded. (T 1088-89).

Major Gatto explained that the "poor design" of the doors meant that "if you put enough pressure to push the cell door forward from the inside and you stick something underneath that rail, it basically stops the door from opening and it's really almost impossible to open at that point." (T 1206).

Along with Kate Fahey, a FDLE crime laboratory analyst, Agent Harris attempted to re-enact the scenario. (T 1083). The control center opened the cell door. (T 1105). There were no issues with opening the door. (T 1105). Agent Harris kicked the bottom of the door and dislodged it. This caused the door to strike the door jam

and prevented it from being opened. (T 1083). It took 5 to 6 minutes for the officers to get the door open using pry bars. (T 1084). However, on cross examination, Agent Harris admitted "[t]here was no testimony that the door was kicked" by Woodbury. (T 1089).

E. The Defense's Case and Guilty Plea

Woodbury called two witnesses. Charmin Prescott, a DOC housing sergeant, explained that a computer database is used to determine whether inmates are compatible to be housed together. (T 1333-35, 1337). Woodbury had been removed from the faith-based program at the request of the chaplain. (T 1335). He was placed in a cell with Haynes eight days before the incident. She did not know why Woodbury was assigned to room with Haynes. (T 1337). OCI Sergeant Kurt Sanders provided information on prison uniforms. (T 1338-41). However, he would not agree with Woodbury that it was atypical for an inmate to wear pants to sleep in the summer. (T 1341). Woodbury introduced as defense exhibit 1 a photograph which depicted that Haynes wore pants, shorts and boxers. (R 337; T 1311).

Woodbury testified in the narrative. (T 1352-64). He said the jury "got lied to" about the door being jammed. (T 1356). He repeatedly played the part of State's exhibit 1 which showed the door open. (T 1353-55).

He explained that the incident went on for such a long time because he was "waiting for the tactical team to show up." (T 1360). He asserted that the correctional

officers made a “mistake” because they waited too long to call the tactical team. (T 1356-57).

He introduced a toothbrush as defense exhibit 3. (T 1358). He clarified that inmates in close management are not provided with a full-size toothbrush; which is the only item that can jam the door. (T 1359).

In addressing the beating of Haynes, he said “[t]his case is about a rape case.” (T 1360). He was “illegally removed in the middle of the night” and placed in a cell with Haynes. (T 1363). He insisted that he “should’ve never placed in the room with this man, never.” (T 1363-64). Haynes tried the “boo game” to “creep on” Woodbury so that he wouldn’t resist his sexual advances. (T 1362-63).

Woodbury said inmates do not wear pants to sleep in the summer. (T 1360). Haynes wore pants to protect his groin area when he attempted the sexual assault. (T 1360-61).

He did not plan to kill Haynes. His interpretation of premeditation is different from that used by the prosecution. (T 1361). If he planned to kill Haynes, he would have sharpened his knife. (T 1361-62). Haynes provoked him and “at a certain point, it went above and beyond vengeance, it went above and beyond self-defense. I’ll admit that.” (T 1361). The “situation kept escalating, escalating, escalating” because he was worried Haynes would get up and attack him. (T 1362). Haynes weighed more than him. (T 1362). When Haynes was able to sit up, he “refreshed him with

the business." (T 1360). He didn't want to do it but he was "afraid this man was going to attack [him] again." (T 1360).

He expressed regret for what happened, addressed his mental health disorder, and decided to plead guilty (T 1364):

> And it went bad, it went bad, it went real bad. And it was really -- I regret it, I regret it. Nobody deserves to die like that, nobody. I mean maybe Hitler or Stalin, Polpot, some people like that. But the punishment did not fit the crime, but he provoked me. I went to sleep that night with the intention of waking up in the morning and going to cut grass, not waking up the middle of the night and doing this. I am legitimately bipolar, I'm on medication for it. There's certain triggers I have, and being attacked is one of them. So in the eyes of the law, you know, what the prosecution has charged me with is true. And at this time, I'd like to plead guilty to first-degree premeditated murder, your Honor. What you got?

Outside the presence of the jury, the trial court confirmed that Woodbury wished to plead guilty. (T 1365). Woodbury declined to have an attorney review the plea form with him. (T 1372). The court did not conduct a *Faretta* inquiry. (T 1371). Instead, the court explained the standard plea form. (T 1366-80). The State inquired whether Woodbury understood that the State was still seeking the death penalty. (T 1381). Woodbury said he understood. (T 1382).

The State requested that the court conduct a full *Faretta* inquiry before accepting the plea. (T 1385-86). The court agreed that an inquiry was needed to "get it right the first time" and not be reversed. (T 138-93). The court found Woodbury competent to waive counsel, and accepted the guilty plea as being made "freely and

voluntarily, with a knowing and an intelligent waiver of the defendant's rights, consequences of the plea, that there is a factual basis for the Court to accept the plea." (T 1393-96).

II. The Penalty Phase

A. State's Case

The prosecution's case in aggravation was based on the circumstances of the crime presented at the guilt phase, testimonies and documents about previous crimes and a video of Woodbury's FDLE interrogation.

In order to establish the prior violent felony aggravator, the State presented the testimonies of victims and investigators, along with judgments of convictions and prison records, in regards to six robberies; all of which occurred in the 1990s when Woodbury was a teenager. (T 1564-69, 1577-82, 1583-84; R508-23, 533-40).

The State presented the testimonies of an investigator, and two medical examiners, from New Hampshire to establish that Woodbury committed three previous capital murders on July 2, 2007 at the Army Surplus Store in Conway, New Hampshire. (T 1643). Woodbury shot and killed a store clerk and, while leaving the scene, two customers that were entering the store. (T 1642-43, 1674-76).

The State relied on the guilt phase evidence to establish the HAC aggravator. (T 1520). The State admitted five video clips from Woodbury's interrogation in

rebuttal of his trial testimony that the killing wasn't planned but rather an overreaction to unwanted sexual advances.

FDLE Special Agent Kevin Sapp interrogated Woodbury on the day of the killing. (T 1684, 1687-88). Mr. Ashley Albright, the prosecutor, was also present. (T 1687-88). Woodbury was not aware the interrogation was being audio/video recorded. (T 1688). The five video clips were entered as State's exhibit 11 and published. (T 1691-1709).

During the interrogation, Woodbury appeared manic; he went on rants, could not stay on topic, constantly shifted in his seat and had periods of uncontrollable laughter. This Court is encouraged to watch the video as Woodbury's affect cannot adequately be described in writing. The following is a brief summary of the clips.

In the first clip, Woodbury expressed little concern over the incident: "I can walk up out of here, it's not that serious. I'm not worried about this, I got a interstate contract with New Hampshire, I'm a superstar criminal." (T 1693-94).

When interrupted with questions, Woodbury stated: "If you want me to tell the story, you're going to have to -- you got to let me tell you my way." (T 1692). He didn't like being "cut off." He explained it was a "prison thing, let people talk." (T 1694).

Woodbury waited for a specific correctional officer to be on duty. (T 1692, 1695). He described her as being "stupider than a bag of hammers." (T 1692). He

didn't want to attack Haynes in his sleep. He would give Haynes "every fighting chance to defend himself." (T 1695). He clarified that he doesn't read fiction, he reads the Bible. He believed Haynes wanted to "start a prayer circle as a form of hustle." (T 1695-96).

In the second clip, Woodbury became irritated with the interview and said: "This is getting boring actually now." (T 1696). He admitted to killing Haynes and could "prove that I premeditated killing the roommate. I told them beforehand, ha-ha." (T 1697). He killed Haynes "through the brutal beatdown" explaining that "[t]hey brainwash you. It's just – it's just when in Rome, you have to be alone, alone. Okay?" (T 1697). He couldn't remember the specifics of the killing because of the "bloodlust." He had a "werewolf on [his] back." (T 1697). He enjoyed the torture. Haynes deserved it because of the prayer circle (T 1698):

> …It's just he's my roommate type of shit, really. But also but he was safe. But when he went -- when he decided to establish a [C]hristian prayer circle to hustle people for money, I'm like you're mine now. Even Job, when the sons of God showed up in heaven, Satan was with him. And God said, Hey, man, what is that from? What? What do you mean? Whoa, whoa, there's a problem right there.

He handled it "[b]ecause Jesus sometimes won't do it." (T 1698-99). Woodbury is "an A1A leader of all." (T 1699).

In the third clip, Woodbury said he barricaded the door "[w]ith paper, it's very easy to do. Whoever built them -- whoever built them dorms was smoking crack and

drinking a lot." (T 1699). For no reason, Woodbury interjected "I am transgender in my life." (T 1699). He intended to "maim the crap out of [Haynes]" because he was trying to get back to New Hampshire. (T 1701).

In the fourth clip, Woodbury detailed how he tortured Haynes. (T 1701-04). For example, this exchange with the agent transpired (T 1701-02):

> **[Q.]:** How long do you think you took to torture this guy?
>
> **[Woodbury]:** Dude, I was getting tired. I was hitting him because I was, you know, I was study, study, study, study, study, study, study, study, I'm a studier. I don't have time for fiction. I study.

After describing the torture, Woodbury said on behalf of the "stupid" correctional officer: "Don't fire her, she's not that bad. So she's new, too, so don't take it out on her." (T 1702-03).

He explained that he took "a long time" to answer some of the interrogator's questions because: "I've been doing some other shit, a lot of physical stuff that is just playing games with you people's minds." (T 1703).

In the final clip, he provided more details about the beating. (T 1704-09). He compared the beating to a mixed martial arts fight "before they started making all the rules." He "went crazy and just went berserk." (T 1706).

However, he did give Haynes a fighting chance because his "favorite novel of all times was The Most Dangerous Game." He encouraged the interrogators to read it because "it's insane." (T 1707).

B. Defense's Case

Woodbury waived mental health mitigation. (T 1451-52, 1719). He believed the only mitigation needed was that he killed Haynes in response to a sexual assault. (T 1451-52). The court declined to appoint special counsel to present mitigation to the jury. (T 1452, 1454-56, 1719-23).

The jury did not hear any mental health mitigation. Woodbury did not call any witnesses. The only evidence presented were two OCI incident reports which established that Woodbury told officers that Haynes "touched his dick." (T 1724; R 546, 548).

Woodbury testified. (T 1729-49). He expressed remorse for the New Hampshire murders. (T 1731-32). He asked the jury not to kill him for what happened in New Hampshire. (T 1731-32). He "wanted to go to death row" because his life has been "hell" since 2007. (T 1730). This was the reason he was "making stuff up" during the interrogation. (T 1730-31). The video clips showed him at his "bipolar worst." (T 1731). However, he didn't present "doctors and stuff" because, in his opinion, mental illness wasn't why he killed Haynes. He killed him because he "tried to rape" him. (T 1731). He had no choice, if he didn't kill Haynes, he would have tried it again. DOC staff would not have been able to prevent it given the ratio of 250 inmates to 2 guards. (T 1733).

While he now believed suicide was a “mortal sin,” he didn’t appear to care if the jury voted for death. (T 1730-31). Specifically, he said: “Killing me really wouldn’t solve anything. But if that’s what -- if anyone thinks differently, be my guest and vote for it, you know.” (T 1731).

On cross-examination (T 1734-46), Woodbury emphasized that 95 percent of the interrogation was a lie to manipulate the prosecutor into seeking the death penalty. (T 1737, 1739-40). He explained: “I wanted to die, I wanted you to give me the death penalty, charge me with death because I know a lot inmates that kill inmates hardly ever get charged with the death penalty.” (T 1740, 1743). He reiterated that there was no intent to kill Haynes and that he was “beserking.” (T 1744). It was the first time another inmate had tried to rape him. (T 1744).

He tortured Haynes to “get back” at him, “it was just vengeance.” (T 1748). Haynes did not deserve the way he died, but “he deserved death.” Woodbury believed “all rapists and child molesters should die.” (T 1745).

C. Jury Instructions and Recommendation

Woodbury requested instructions on the following two mitigating circumstances: (1) the murder was committed while Woodbury was under the influence of extreme mental or emotional disturbance; and (2) the existence of any other factors in Woodbury’s character, background or life, or the circumstance of offense that would mitigate against the imposition of the death penalty. (T 1758-59).

In addition, Woodbury requested a special instruction on mercy. He provided two proposed instructions. (T 1636; R 553-54). The trial court denied the request and found the standard instructions were sufficient. (T 1715-16).

The jury unanimously recommended the death penalty. (T 1796, 1798, 1802-04).

D. Spencer Hearing

At the *Spencer* hearing (T 1815-1895), the court conducted a *Faretta* inquiry and permitted Woodbury to proceed pro se. (T 1817-33). During the inquiry, Woodbury expressed that he didn't believe in his mental health diagnosis. (T 1829). The court denied Woodbury's request to waive the hearing. (T 1833-34). But, the court said: "I guess effectively, if you choose not to present anything you're waiving it, right?" (T 1834).

Woodbury did not present any witnesses or evidence. He made a brief statement outlining five issues to be considered in mitigation (T 1839-59): (1) the prosecutor lied to him about recording the interrogation and the confession was false (T 1839-41); (2) he was not made aware prior to trial that the interrogation was video recorded and, as a result, did not have the opportunity to view it (T 1841-42); (3) the correctional officers lied about inmates wearing pants to sleep in the summer (T 1842-43); (4) he was "stupid" not to present mental health mitigation because he had "significant mental health" issues and was not acting rational at the time of the

murder (T 1844-45, 1858-59); and (5) he thought the death penalty was for people that kill cops, women or children (T 1848).

The court made an additional inquiry regarding Woodbury's waiver of mental health mitigation. (T 1862- 88). At the State's request, Stanley Glenn, standby counsel, was questioned about whether he looked into mitigation and discussed it with Woodbury. (T 1862-70). Glenn agreed that the State provided significant mental health mitigation in discovery but did not advise Woodbury because it was outside the scope of his role as standby counsel. (T 1865, 1867-68).

The State introduced the mental health report from Dr. Sesta. (T 1878-79). The court briefly reviewed the report, commenting that Dr. Sesta found "some chronic history of severe and persistent mental illness." (T 1882-87).

However, the court determined that the report and the PSI "do not show that there's any significant mitigation as it relates to mental health issues." (T 1887-88). Therefore, it was not "improper" to waive mental health mitigation. (T 1888). The court proceeded immediately to sentencing. Woodbury was sentenced to death. (T 1892).

III. Sentence Order

In sentencing Woodbury to death, the court found established and weighed the four aggravating factors: (1) under sentence of imprisonment (great weight); (2) prior capital or violent felony convictions (great weight); (3) especially heinous,

atrocious, or cruel (great weight); and (4) cold, calculated, and premeditated (great weight). (R 284-93). Additionally, the court found some mitigating circumstances had not been proven. But it also found established and weighed a few mitigating circumstances: (1) murder was committed while Woodbury was under the influence of emotional disturbance (minimal weight); (2) the murder was committed in reaction to sexual advance of victim (minimal weight); (3) bipolar diagnosis (little weight); (4) schizophrenia diagnosis (minimal weight); and (5) Woodbury's comment that he was "stupid" not to present mental health evidence as there are "significant mental health" issues (little weight). (R 294-99).

SUMMARY OF THE ARGUMENT

POINT I

Woodbury suffered from bipolar disorder. The court abused its discretion in granting Woodbury's request for self-representation without sufficient inquiry into his severe mental illness, as required by Rule 3.111(d), which resulted in an actively mentally ill, and potentially incompetent, defendant representing himself and ultimately being sentenced to death.

POINT II

Woodbury's history of severe mental illness provided a reasonable ground to question his competency to proceed. The court abused its discretion in not ordering a competency evaluation and invoking the procedure set forth in Rule 3.210.

POINT III

A review of the circumstances surrounding, and the nature of, Woodbury's guilty plea shows that it was not knowingly, voluntarily and intelligently entered.

POINT IV

The trial court failed to renew an offer of counsel to Woodbury at the beginning of the change in plea stage and at the beginning of the defense case.

POINT V

Woodbury was not competent to waive mitigation. The court erred in accepting his waiver of mitigation and failing to appoint special counsel to present significant mental mitigation. The court failed to properly consider and weigh mental mitigation.

POINT VI

The killing was committed when Woodbury was in an emotional rage. The evidence did not show that the killing was cold or without the pretense of legal or moral justification. It was error for the court to instruct the jury that the killing was cold, calculated and premeditated.

POINT VII

The court abused its discretion in admitting a PSI report which was not comprehensive and included an impermissible sentencing recommendation.

POINT VIII

The court failed to properly consider and weight the statutory mitigating circumstance that Woodbury was under the influence of extreme mental or emotional disturbance.

POINT IX

The court erred in denying Woodbury's special requested jury instruction on mercy.

POINT X

The court's failure to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances amounted to fundamental error because those determinations are elements of capital murder.

POINT XI

A legitimate proportionality review cannot be performed because there was mitigation that was never considered.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING WOODBURY'S REQUEST FOR SELF-REPRESENTATION WITHOUT ADEQUATELY ASSESSING WHETHER HIS SEVERE MENTAL ILLNESS IMPACTED HIS ABILITY TO CONDUCT TRIAL PROCEEDINGS BY HIMSELF IN VIOLATION OF RULE 3.111(d)

This is a "very, very unusual" case. (T 991). It is uncommon for a defendant with a severe mental illness to represent himself on a capital offense. The court acknowledged that in its thirteen years as a judge there were "one or two other cases where somebody represented themselves and certainly not in such a serious case." (T 990-91). From the onset of the case, the court was aware Woodbury suffered from bipolar disorder. Nevertheless, the court granted Woodbury's request for self-representation. This constituted reversible error.

The standard of review for trial court decisions involving self-representation is abuse of discretion. *Trease v. State*, 41 So. 3d 119, 124-25 (Fla. 2010); *Holland v. State*, 773 So. 2d 1065, 1069 (Fla. 2000).

With certain limitations, a defendant in a criminal trial has the right to self-representation. *Godinez v. Moran*, 509 U.S. 389 (1993) (right to self-representation is not absolute). A critical limitation is a defendant's severe mental illness.

Notwithstanding that a defendant is competent to stand trial, a defendant with mental illness may still not be viewed as sufficiently competent to proceed pro se.

A defendant who is competent to stand trial is not ipso facto competent to waive the right to counsel. "[I]t is well settled that a defendant may be competent to stand trial yet lack the ability to knowingly and intelligently waive counsel." *Visage v. State*, 679 So. 2d 735 (Fla. 1996).

Therefore, a court may conclude that, in the particular case, mental illness prevents a defendant from gaining the understanding to knowingly and intelligently waive counsel. For example, mental illness may preclude an acceptable waiver because of its impact upon the defendant's ability to exercise reason in choosing self-representation over counsel's expertise.

Furthermore, the United States Supreme Court held that the states may limit the right of self-representation by mentally-ill defendants. *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

In *Edwards*, a defendant with a history of mental illness moved to represent himself. The trial court denied the motion for self-representation, finding that while Edwards was competent to stand trial under the *Dusky* standard,[5] he was not competent to defend himself. The Indiana Supreme Court reversed on the ground that *Faretta* imposed an absolute rule and thus required the state to permit Edwards to represent himself. The United States Supreme Court reversed, holding that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental

[5] In *Dusky v. United States*, the Supreme Court held that the standard for competency to stand trial is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and whether he has a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).

illness to the point where they are not competent to conduct trial proceedings by themselves." *Id*. at 178.

The Court reasoned that the standards for trial competence "assume representation by counsel and emphasize the importance of counsel," and that given such a defendant's uncertain mental state, self-representation "threatens an improper conviction or sentence" and undermines the Constitution's overriding insistence that an individual receive a fair trial. *Id*. at 177.

The Court pointed out that the "right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense at trial without the assistance of counsel." *Id*. at 176. The Court recognized that "[e]ven at the trial level... the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id*. at 177 (quoting *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 163 (2000)[6] (internal quotations omitted). The state also has an interest in ensuring not only that proceedings be "fair," but they "appear fair to all who observe them," and that appearance hardly can be achieved where a defendant "by reason of his mental condition stands helpless and alone before the court." *Id*.

[6] In *Martinez*, the Court held there was no right to self-representation on direct appeal in a criminal case.

As permitted by *Edwards*, Florida adopted a higher level of competency in deciding whether a mentally ill defendant can represent himself at trial. This Court noted that "[p]rior to the decision in *Edwards*, Florida Rule of Criminal Procedure 3.111(d) did not permit the trial court to take into consideration a defendant's mental capacity to represent himself. *Hernandez-Alberto v. State*, 126 So. 3d 193, 209 (Fla. 2013) (internal quotations and citation omitted). However, Rule 3.111(d)(3) was amended to provide (emphasis added):

> Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, *and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by himself or herself.*

In the case at bar, the trial court failed to adequately inquire into Woodbury's severe mental illness. Given the serious nature of Woodbury's mental illness, the questions asked of Woodbury by the court were insufficient to determine, as required by Rule 3.111(d)(3), whether he suffered from a severe mental illness to the point where he was not competent to conduct trial proceedings by himself.

The following section will summarize the relevant facts about Woodbury's mental illness revealed during the *Faretta* inquiries and in the psychological report provided by Dr. Sesta.

Pertinent Facts

a. *The Faretta Inquiries*

Woodbury unequivocally requested the right to self-representation throughout the proceedings. However, he repeatedly informed the court about his bipolar diagnosis. Only the *Faretta* inquiry questions relevant to mental health will be included in this summary.

At first appearance, the following exchange occurred (SR 658-59):

> THE COURT: Have you ever been diagnosed or treated for a mental illness?
> MR. WOODBURY: A long time ago.
> THE COURT: And what was nature of that mental illness?
> MR. WOODBURY: Bipolar Disorder.
> THE COURT: Any others?
> MR. WOODBURY: No, sir.
> THE COURT: Do you take medication for that?
> MR. WOODBURY: Yes, sir.
> THE COURT: What medication?
> MR. WOODBURY: Tegretol.
> THE COURT: And how often do you take it?
> MR. WOODBURY: Twice day.

A month later, at calendar call, the court employed a list of pre-prepared questions to conduct a *Faretta* inquiry. Prior to the inquiry, the court stated: "There's a list of questions that we're supposed to ask, so I'm going to go down a list basically." (T 6). The court proceeded to conduct the inquiry of "yes or no" answer questions. (T 5-37). The only questions which required more of an answer involved mental illness. (T 24-26). The following exchange occurred (T 24-26):

THE COURT: Have you ever been diagnosed or treated for a mental illness?
MR. WOODBURY: Allegedly, yes.
THE COURT: Allegedly diagnosed or allegedly treated?
MR. WOODBURY: They say yes, but I'm saying not really. I don't feel I have a mental - -
THE COURT: How about this, when was that?
MR. WOODBURY: I'm a conscientious objector and their -- their take on it, so.
THE COURT: Conscientious objector.
MR. WOODBURY: Yeah. I don't really feel like that's proper.
THE COURT: You mean to ask that?
MR. WOODBURY: No. I just don't think that's an issue - -
THE COURT: Okay.
MR. WOODBURY: - - any type of issue. Yes, I have. Yes, I have. I've been diagnosed as bipolar, manic depressive, but --
THE COURT: Were you supposed to take any treatment that you didn't do?
MR. WOODBURY: No, sir.
THE COURT: So you completed whatever treatment they asked you to do?
MR. WOODBURY: Yes, sir.
THE COURT: Okay. Just give me a ballpark on the time frame. That was back in the last two years?
MR. WOODBURY: Yes, sir.
THE COURT: Last year?
MR. WOODBURY: It's been a recurrent theme since I've been like 18 years old.
THE COURT: All right.
MR. WOODBURY: Mood swings, just stuff like that.
THE COURT: Well, okay. But is bipolar was what the diagnosis was?
MR. WOODBURY: Yes, sir. But I don't feel like that's a – that's not - -
THE COURT: Well, it may not be.
MR. WOODBURY: I don't feel like that's correct.
THE COURT: It may not be.
MR. WOODBURY: I've had – I've had other doctors telling me that it's not. So it's like I've had some doctors say yes, some doctors say no. It's like - -
THE COURT: I gotcha.

MR. WOODBURY: - - I don't really --
THE COURT: Okay. All right. So some doctors did not diagnosis you with that, some did.
MR. WOODBURY: Yeah. I believe that whole branch of science is a bunch of quacks.
THE COURT: All right….

The court did not inquire further into Woodbury's mental illness. He did not order a mental health or a competency evaluation. Despite this lack of information, the court determined Woodbury was competent to represent himself. (T 37).

At a pre-trial status conference, the court conducted another *Faretta* inquiry. From this point on, the court used a list of questions prepared by the prosecutor. (R 76-84). The State wanted these questions read at every hearing to "bulletproof" the record. (T 176). During the inquiry, the following discussion about Woodbury's mental illness transpired (T 121-23):

THE COURT: Have you ever been diagnosed and treated for a mental illness?
MR. WOODBURY: Yes.
THE COURT: How so?
MR. WOODBURY: Bipolar disorder.
THE COURT: Bi what?
MR. WOODBURY: Bipolar disorder.
THE COURT: Right. And we discussed that last time - -
MR. WOODBURY: Uh-huh.
THE COURT: - - but just to cover it again, that diagnosis occurred when you were approximately how old?
MR. WOODBURY: Eighteen.
THE COURT: How long did you receive any type of treatment, what period of time?
MR. WOODBURY: All my life.
THE COURT: Still, right?
MR. WOODBURY: Yeah.

THE COURT: When you were in prison, right, even to today?
MR. WOODBURY: And today, yes.
THE COURT: Okay.
MR. WOODBURY: I take medication for it.
MR. ALBRIGHT (prosecutor): Your Honor, could you inquire as to where that was so we could attempt to obtain those records for him as well if we need to?
THE COURT: Sure. Let's say when you were -- when you were a young man, 18 --
MR. WOODBURY: Eighteen.
THE COURT: Where was that?
MR. WOODBURY: Augusta Health Mental Institute in Florida, also called AMI. Augusta Health Mental Health. It's a State hospital, it's the only one.
MR. ALBRIGHT: And where was that located?
MR. WOODBURY: It's in Augusta.
MR. ALBRIGHT: Okay.
MR. RICHARDSON (prosecutor): Augusta, Maine?
MR. WOODBURY: Yeah, Augusta, Maine. And the other one is going to be Jackson Brook Institute. It's in South Portland. However, that company got taken over by some other company. They call themself something different now.
THE COURT: Okay. What about when you were a little bit older, like in --
MR. WOODBURY: I know you're going to have trouble getting the records because my -- my defender that I had in New Hampshire in 2007, she had real trouble getting them.
THE COURT: Okay.
MR. ALBRIGHT: Where was that one located?
MR. WOODBURY: South Portland. It's either South Portland or Westport, it's right on the line. I can't – I don't know which, and then Maine State Prison. The rest you should have.
THE COURT: Anything while you were in Florida, since you were transferred to Florida from --
MR. WOODBURY: Yeah. But he -- he got a subpoena. I think he got --
THE COURT: Department of Corrections?
MR. WOODBURY: I think he did.
THE COURT: That all would have been the Department of Corrections….

The court did not ask any questions about Woodbury's medication nor the extent of his prior commitments to psychiatric facilities. Again, the court did not order any evaluations and found Woodbury competent to represent himself. (T 126).

Prior to the start of jury selection, the limited inquiry into mental illness was as follows (T 196):

> THE COURT: Have you ever been diagnosed or treated for a mental illness?
> MR. WOODBURY: Yes, sir.
> THE COURT: And you've explained these to me before, I believe it was bipolar?
> MR. WOODBURY: Bipolar, manic depressive. I'm on medication.
> THE COURT: Was there anything different than what you've explained in the past?
> MR. WOODBURY: No, sir.

Prior to the start of trial, the following inquiry into Woodbury's mental illness occurred (T 1009-1013):

> THE COURT: Have you ever been diagnosed and treated for a mental illness?
> MR. WOODBURY: Yes, sir.
> THE COURT: And we had some discussion on this. This was a bipolar –
> MR. WOODBURY: Yes, sir.
> THE COURT: - - diagnosis - -
> MR. WOODBURY: Yes.
> THE COURT: when you were 18, is that correct?
> MR. WOODBURY: Yes, sir. It's been a lifelong diagnosis, nothing serious.
> THE COURT: Are you - - did you -- have you received any treatment for that?
> MR. WOODBURY: Yes, sir. I'm on medication presently.
> THE COURT: When did you begin to take medication?

MR. WOODBURY: I've been taking it off and on for like the last 22 years.
THE COURT: What medication are you taking?
MR. WOODBURY: Right now, Tegretol.
THE COURT: Say that again.
MR. WOODBURY: Tegretol, sir.
THE COURT: What is that? What is that, what type of drug is that?
MR. WOODBURY: Actually, I have a -- actually, can the bailiff give this to the Judge? I have a listing of it --
THE COURT: That's fine. I'll take that, sir. Do you mind handing me that?
MR. WOODBURY: -- what it is exactly.
THE BAILIFF: (Handing.)
THE COURT: Thank you. All right. What was handed to me was the Tegretol, which is T-e-g-r-e-t-o-1. The medication is used to treat symptoms associated with disorders of mood. Common side effects include, but not limited to, sleepiness, blurred vision, nausea, difficulty urinating, sexual dysfunction, nervousness, changes in appetite, upset stomach. And apparently that was --
MR. WOODBURY: Only the circled one apply, sir.
THE COURT: I'm sorry, what?
MR. WOODBURY: Only the ones I circled apply. The rest of them are not - -
THE COURT: Okay. So you actually have felt sleepiness, had blurred vision, had some difficulty urinating and some nervousness, is that correct?
MR. WOODBURY: Yes, sir.
THE COURT: Okay. And this looks like it was originally prescribed perhaps back this 2009?
MR. WOODBURY: Yeah.
THE COURT: Okay.
MR. WOODBURY: But I -- I haven't been on it straight time. I've gone off it, been on it, gone off it, been on it.
THE COURT: Okay. When's the last time you took any of it?
MR. WOODBURY: About a couple hours ago.
THE COURT: A couple hours ago. Did you take any yesterday?
MR. WOODBURY: Yes, sir.
THE COURT: The day before?
MR. WOODBURY: I've been on it for six months straight now. Well, five months, four months, five months.

> THE COURT: All right. Do you find that it assists as it's supposed to in your -- in treating symptoms associated with disorders of mood?
> MR. WOODBURY: Yes, sir, definitely.
> THE COURT: Okay. So it actually does assist you - -
> MR. WOODBURY: Yes it does.
> THE COURT: - - in maintaining your mood?
> MR. WOODBURY: Most certainly.
> THE COURT: All right. Are you having any difficulty understanding what's been occurring in court the last few days or even today?
> MR. WOODBURY: No, sir.

During the plea colloquy, his mental illness was briefly addressed. The court simply confirmed that Woodbury was diagnosed with bipolar disorder since the age of 18 and was on medication. (T 1370). Woodbury informed the court that he had been "hospitalized several times" for mental illness. (T 1370).

At the start of the penalty phase, the court took "judicial notice" of the prior discussions about mental illness rather than addressing it again with Woodbury. (T 1484).

The final *Faretta* inquiry occurred at the start of the *Spencer* hearing. (T 1817-33). The discussion about Woodbury's mental illness and medication was as follows (T 1829, 1831-33):

> THE COURT: Have you ever been diagnosed or treated for mental illness?
> MR. WOODBURY: I think we've been through that.
> THE COURT: You mentioned that when you were approximately 18 years old you were diagnosed with bipolar, that you did go receive some treatment, that you haven't received treatment really since you've been in prison, is that all correct?
> MR. WOODBURY: Yes, sir.

THE COURT: All right. Are there any other mental illnesses that you've been diagnosed with?
MR. WOODBURY: No, sir.
THE COURT: No? Okay. You had a hesitation. It's fine with me if you answer it. I mean, now -- look, it's for your benefit.
MR. WOODBURY: None that I believe. None that I believe.
THE COURT: None that you believe, okay.
….
THE COURT: Okay. Well, let me ask you about that. Are you taking any medications at this time or recently, let's say within the last week or so?
MR. WOODBURY: Yes, sir. Today actually.
THE COURT: What medication do you take?
MR. WOODBURY: Tegretol.
THE COURT: And what's that for?
MR. WOODBURY: Bipolar illness.
THE COURT: Does the fact that you've been taking that medication, does that affect you in way? In other words, does it cause you to not be able to understand the questions I'm asking or what people are talking to you about or understanding what you hear?
MR. WOODBURY: I hope not, sir.
THE COURT: Okay. Do you feel that you've understood everything that I've asked you this morning?
MR. WOODBURY: Yes, sir.
THE COURT: And throughout the case, have you felt that you've understood what people were talking about, what they were saying, understanding what they were saying?
MR. WOODBURY: Yes, sir.
THE COURT: All right.
MR. ALBRIGHT: Can the Court ask if he's been taking that throughout the entire trial?
MR. WOODBURY: We just went through that.
THE COURT: Okay. Actually, I think he was talking about - -
MR. WOODBURY: Do you want my statement on it then?
THE COURT: When did you first start taking it?
MR. WOODBURY: As soon as -- right after this, right after this crime.
THE COURT: So when you got to the county jail or when you were still prison?
MR. WOODBURY: Pretty soon that I got put on maximum I started taking it at FSP about a year ago.

THE COURT: Okay. And you've been taking it - -
MR. WOODBURY: Solid, yeah.
THE COURT: - - as prescribed through that whole period of time?
MR. WOODBURY: Yes, sir. Solid, the whole time. Good?
MR. RICHARDSON: (Nods head.)

Without further discussion, the trial court found Woodbury competent to represent himself. (T 1833).

b. The Comprehensive Psychological Report

A month after the change of plea, Dr. Sesta completed a comprehensive psychological evaluation of Woodbury on June 19, 2018. A report was issued prior to the start of the penalty phase. (R 568).

Dr. Sesta diagnosed Woodbury with "Bipolar I Disorder, Current or most recent episode manic, moderate." (R 591). In addition, he opined that "Schizoaffective disorder, Bipolar type" and "Unspecified Schizophrenia Spectrum and Other Psychotic Disorder" needed to be ruled out. (R 591). There was no evidence of malingering. (R 591).

The standardized psychological testing showed a "moderate degree of global psychological distress" and "an acute level of psychological distress." (R 589). While his appearance, orientation and speech were normal, his thought process presented as abnormal. (R 588). The productivity and structure of his thought process were "consistent with active manic state of Bipolar disorder." (R 588).

Additionally, Dr. Sesta noted (1) Woodbury's attention was abnormal: "Fluctuating attention, appeared distracted at times by external stimuli." (2) his arousal was abnormal "Fluctuating from hypervigilant to appropriately alert during testing;" (3) his mood was abnormal: "I have one mood ... everything is great." Active manic episode;" (4) his affect was abnormal "Increased intensity and reactivity with inappropriate jocularity and bursts of laughter inappropriate to thought content. Inappropriate to situation;" and (5) his behavior was abnormal: "Disinhibited, with socially inappropriate comments at times. Volition fluctuating from initial resistance and hostility to cooperation and engagement as the exam progressed." (R 588-89).

Woodbury re-started Carbamazepine (brand name Tegretol) in November of 2017. (R 587). With regard to this medication, Dr. Sesta opined that Woodbury was having a "subtherapeutic response" to the levels of the drug being administered. He explained that the "acute symptoms of Bipolar disorder (manic stage) were not yet in pharmacological remission at time of examination." (R 589). Dr. Sesta noted that "1.) the drug was not at therapeutic level during time of trial and 2.) was still not at therapeutic level during the current exam, given the defendant's active manic state." (R 591).

Dr. Sesta cautioned the court to consider Woodbury's "decompensated" mental state (R 587) (emphasis added):

> Carbamazepine is considered a second line drug for treatment of Bipolar disorder given it may take several weeks to months to stabilize mood and has a host of potentially severe side effects that require careful monitoring (aplastic anemia, agranulocytosis, Stevens Johnson Syndrome).… As the defendant was again re-starting carbamazepine at the time of the current exam, he likely had a low plasma level of the drug, consistent with his actively manic state. *It may be instructive to the court to take note of the defendant's decompensated mental state during the current exam and the extent to which it approximates his condition during trial.*

While the penalty phase began on July 23, 2018, the trial court did not review the report until the *Spencer* hearing on September 21, 2018. (T 1879, 1882).

During the hearing, the State admitted the report into evidence in "an abundance of caution." (T 1879-80). After a brief review of the report, the trial court immediately proceeded to sentencing. (T 1879-88). Despite the findings in the report, the court did not suspend the proceedings to have Woodbury further evaluated to determine whether his mental illness inhibited his competency to represent himself. Rather, the court sentenced Woodbury to death. (T 1891-92).

Discussion

Rule 3.111(d) requires the court to take an additional step with a severely mentally ill defendant before granting self-representation, even though that defendant is competent to stand trial and has made a waiver that reflects both the awareness and reasoned choice required by *Faretta*. The court must determine that the defendant "does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by himself or herself."

The question of what is severe mental illness was addressed in *Loor v. State*, 240 So. 3d 136, 140 (Fla. 3d DCA 2018):

> Accordingly, we must begin our analysis by first determining what constitutes "severe mental illness" under Edwards and under Rule 3.111(d)(3). In Edwards, the defendant suffered from schizophrenia and other personality disorders, which were found to constitute severe mental illness. 554 U.S. at 168, 128 S.Ct. 2379. In applying Edwards, courts have narrowly interpreted what qualifies as severe mental illness. For example, a defendant's misguided writing style, bizarre statements, and incorrect legal arguments alone are not evidence of "severe mental illness." Sturdivant v. State, 61 N.E.3d 1219, 1225 (Ind. Ct. App. 2016); see also United States v. Barajas–Cuevas, 492 Fed.Appx. 745, 748 (9th Cir. 2012) (finding that the defendant's "perplexing" behavior and obvious inability to present viable legal arguments was not enough to constitute severe mental illness). Hostile behavior is also not "severe mental illness." United States v. Glass, 357 Fed.Appx. 58, 60 (9th Cir. 2009). A mental evaluation diagnosing the defendant with a personality disorder was not severe mental illness to the point where he could not stand trial, United States v. Heard, 762 F.3d 538, 543 (6th Cir. 2014), and a history of depression and learning disabilities does not constitute severe mental illness, United States v. Rodgers, 537 Fed.Appx. 273, 275 (4th Cir. 2013). In contrast, in Holland v. Florida, 775 F.3d 1294 (11th Cir. 2014), the court found that the defendant had a severe mental illness where he suffered from "organic psychosis" from a brain injury, displayed memory loss, and often appeared incoherent. Id. at 1298–99, 1314.

Here, Woodbury, like Edwards, suffered from a major mental illness. Bipolar disorder constitutes severe mental illness, and has been held sufficient to deny self-representation. *See Visage v. State*, 664 So. 2d 1101 (Fla. 1st DCA 1995) (trial court did not err by denying request for self-representation where defendant had been diagnosed with bipolar disorder for which he was presently taking medication and had psychiatric history that included suicide attempt and hospitalization).

Therefore, the additional step contained in Rule 3.111(d)(3) applied. However, the court's cursory inquiry into Woodbury's bipolar diagnosis failed to determine whether Woodbury did not suffer from severe mental illness to the point where he was not competent to conduct trial proceedings by himself.

The instant case is a cautionary tale about the limitations of a trial judge's ability, on its own, to assess mental illness and why it should not be allowed to do so. The court simply could not properly assess Woodbury's mental capabilities without the assistance of an evaluation by a mental health professional with expertise in his particular mental illness.

For example, if a defense attorney was aware of the same information, he or she would be ineffective in not requesting a competency evaluation. *See Bouchillon v. Collins*, 907 F. 2d 589 (5th Cir. 1990) (defense attorney by declining to pursue any investigation regarding defendant's competency after being told defendant had mental problems, had previous hospitalizations and was on medication "fell below reasonable professional standards.").

In the rare instance where a mentally ill defendant sought self-representation, courts have ordered mental health evaluations prior to finding a defendant competent or incompetent to self-represent. For example, in *Loor* the trial court ordered a pro se competency evaluation prior to denying self-representation. *Loor*, 240 So. 3d at

138. In *Larkin*, the trial court ordered three evaluations prior to ruling on competency to waive counsel. *Larkin v. State*, 147 So. 3d 452 (Fla. 2014).

Without further probing, a court cannot "take 'realistic account' of a defendant's mental capabilities, such as '[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness.'" *Loor*, 240 So. 3d at 139 (quoting *Indiana v. Edwards*, 554 U.S. at 176).

Here, the scope of the trial court's inquiries into Woodbury's severe mental illness were confined to his self-assessment. Such an inquiry is wholly insufficient.

For example, in Rhode Island, a trial court cannot merely ask a defendant if he has a mental illness and make no further inquiry. The Rhode Island Supreme Court held that a trial court's acceptance of a *Faretta* waiver was error because the court failed to inquire sufficiently about his psychiatric condition before deciding that the defendant's waiver of counsel was knowing and intelligent: "the trial court's examination was confined to a single question asking defendant whether he believed himself capable to represent himself despite his mental illness." In overturning the waiver, the Rhode Island Supreme Court opined that "the court failed to ascertain the nature and extent of defendant's mental disability, much less did it order a competency evaluation that would have." *State v. Holdsworth*, 798 A.2d 917 (R.E. 2002).

Additionally, relying on a mentally ill defendant's self-report is problematic. It is not uncommon for mentally ill persons to insist that they are entirely sane and dispute any diagnosis. This makes them not the best nor most reliable source of information.

Here, Woodbury repeatedly disputed his bipolar diagnosis. This is a red flag that the court should further inquire into his mental illness through a psychological evaluation. A trial judge with an understanding of mental illness would have known that Woodbury's denial could in fact be a manifestation of the illness itself.

"Anosognosia is a psychological condition that exists in the form of an individual lacking insight regarding the adversity of a medical condition." Henry A Montero, *Anosognosia: How to Treat the Lack of Insight in Mental Health*, Volume 3 Issue 5 Psychology & Psychological Research International Journal (June 28, 2018), https://medwinpublishers.com/PPRIJ/PPRIJ16000171.pdf

Research shows that "nearly half of bipolar and over 60% of schizophrenia diagnosed individuals are bound to experience Anosognosia." *Id*. "This is not surprising, since the brain, the same organ we use to think about ourselves and assess our needs, is the same organ that is affected in schizophrenia and bipolar disorder." E. Fuller Torrey, *Schizophrenia and Manic Depressive Disorder*, page 27 (1995).

The National Alliance on Mental Illness ("NAMI") provides the following explanation of Anosognosia:

> When someone rejects a diagnosis of mental illness, it's tempting to say that he's "in denial." But someone with acute mental illness may not be thinking clearly enough to consciously choose denial. They may instead be experiencing "lack of insight" or "lack of awareness." The formal medical term for this medical condition is anosognosia, from the Greek meaning "to not know a disease." When we talk about anosognosia in mental illness, we mean that someone is unaware of their own mental health condition or that they can't perceive their condition accurately. Anosognosia is a common symptom of certain mental illnesses, perhaps the most difficult to understand for those who have never experienced it. Anosognosia is relative. Self-awareness can vary over time, allowing a person to acknowledge their illness at times and making such knowledge impossible at other times. When insight shifts back and forth over time, we might think people are denying their condition out of fear or stubbornness, but variations in awareness are typical of anosognosia.

https://www.nami.org/learn-more/mental-health-conditions/related-conditions/anosognosia (viewed August 6, 2019).

Here, Woodbury made several comments indicative of anosognosia. Consider that Judge Bauer's first inquiry into mental illness at calendar call consisted solely of Woodbury's assertion that his bipolar diagnosis was not an issue. Rather, Woodbury was a "conscientious objector" and that "whole branch of science is a bunch of quacks." (T 24-26).

Other instances of possible anosognosia were revealed during the trial. For example, during the guilt phase opening statement, he commented: "I am on -- I have a bipolar diagnosis. I really am not going to drag out a bunch of doctors and tell you about it because I don't like it. I don't -- I don't even accept it really. I believe that I'm just different." (T 1035).

Woodbury's denial of his mental illness, in and of itself, should have precipitated the court to order a competency evaluation prior to accepting the waiver of counsel because (1) the lack of insight into his mental illness could be a sign of active mental illness; and (2) was an indication that he was being less than forthcoming about the true extent of his mental illness.

Without a full understanding of his mental illness, the court was not in a position to independently assess whether Woodbury possessed the mental ability to understand what he was doing in purporting to waive counsel and in proceeding to trial pro se.

Moreover, the trial court's observations of Woodbury's behavior at the hearings was insufficient to adequately gauge whether Woodbury had a level of psychological symptoms that would interfere with him effectively representing himself. *See Pate v. Robinson*, 383 U.S. 375, 378 (1966) (defendant's apparently competent demeanor could not be relied upon to dispense with hearing on competence in view of history of mental illness).

In regards to the first *Faretta* inquiry, the court had only interacted with Woodbury for approximately 15 minutes. This amount of time would be insufficient for a trained professional, let alone a judge without specialized training, to assess whether mental illness would affect his competency to represent himself.

The *Edwards* Court made important observations about mental illness including that the relevant literature established that "mental illness itself is not a unitary concept," as it "interferes with an individual's functioning at different times in different ways." Various "common symptoms of severe mental illness" (e.g. "disorganized thinking, deficits in sustaining attention and concentration, impaired expression, and anxiety") could "impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." *Indiana v Edwards*, 554 U.S. at 176.

NAMI defines mental illnesses as "a condition that affects a person's thinking, feeling or mood. Such conditions may affect someone's ability to relate to others and function each day." https://www.nami.org/learn-more/mental-health-conditions (viewed August 8, 2019).

Therefore, mental illness is more than just impaired expressive abilities. For example, a defendant may have sufficient communication skills, but might not have the basic cognitive functions needed to construct a legally logical defense and to make arguments in support of his position. The latter being difficult to assess without specialized training.

Take into consideration, the American Bar Association's guidelines about trial counsel's observations of their clients (which is far more extensive than a trial court's interactions with a defendant): "[c]ounsel's own observations of the client's

mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance." *A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. Feb. 2003) Guideline 4.1 - The Defense Team and Supporting Services, at p. 31.

A more thorough examination by a trained mental health professional is needed especially since some less severe manias could escape detection by the untrained eye, since the sufferer retains the ability to act rationally on subjects beyond the sphere of the controlling delusion. This is of special concern with bipolar disorder which includes "hypomania." NAMI explains that:

> To be diagnosed with bipolar disorder, a person must have experienced at least one episode of mania or hypomania. *Hypomania is a milder form of mania that doesn't include psychotic episodes. People with hypomania can often function well in social situations or at work.* Some people with bipolar disorder will have episodes of mania or hypomania many times throughout their life; others may experience them only rarely. Although someone with bipolar may find an elevated mood of mania appealing—especially if it occurs after depression—the "high" does not stop at a comfortable or controllable level. Moods can rapidly become more irritable, behavior more unpredictable and judgment more impaired. During periods of mania, people frequently behave impulsively, make reckless decisions and take unusual risks. Most of the time, people in manic states are unaware of the negative consequences of their actions. With bipolar disorder, suicide is an ever-present danger because some people become suicidal even in manic states.

https://www.nami.org/Learn-More/Mental-Health-Conditions/Bipolar-Disorder (viewed August 6, 2019) (emphasis added).

To allow a trial court to base its determination, that a defendant does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings, solely on its own observations can lead to active mental illness going undetected. This can result in a severely mentally ill defendant, who is helpless to defend himself, being granted self-representation. And that is exactly what happened here.

This is evidenced by Dr. Sesta's report which found Woodbury, prior to the start of the penalty phase, to be suffering from the active manic state of bipolar disorder. He opined that there was no evidence of malingering. (R 591).

Therefore, all of Woodbury's decisions are called into question. Were his decisions based on a rational understanding or the result of a thought process rooted in mental illness?

As stated in the NAMI quote above, people in the manic state of bipolar disorder "frequently behave impulsively, make reckless decisions and take unusual risks. Most of the time, people in manic states are unaware of the negative consequences of their actions."

According to the Mayo Clinic, common signs and symptoms of mania and hypomania include:

- Abnormally upbeat, jumpy or wired
- Increased activity, energy or agitation
- Exaggerated sense of well-being and self-confidence (euphoria)
- Decreased need for sleep
- Unusual talkativeness
- Racing thoughts
- Distractibility
- Poor decision-making — for example, going on buying sprees, taking sexual risks or making foolish investments

https://www.mayoclinic.org/diseases-conditions/bipolar-disorder/symptoms-causes/syc-20355955 (viewed on September 3, 2019).

Given these symptoms, Woodbury's active manic state could have impaired his capacity to make a rational decision to forgo counsel. After all, his entire decision to represent himself could be the result of grandiosity associated with the manic state.

Most concerning is that the manic state of bipolar disorder can lead to impaired judgment and impulsiveness causing a person to act recklessly without thinking about the consequences.

Looking at Woodbury's behavior throughout the trial process, there are several instances which demonstrate impulsivity and irrationality:

- Capital cases are extremely complex and yet Woodbury filed a demand for speedy trial prior to receiving any discovery; and only two weeks after the State filed its notice of seeking the death penalty. (R 35, 41). There were 8,124 pages of discovery. (T 205).
- At calendar call, only a month after his arrest and prior to receiving discovery, Woodbury announced that he was "ready today" to start trial. (T 38-40).
- In regards to the guilt phase, he stated: "Can I speak candidly? Can I speak candidly for a second? This -- the guilt phase is kind of like going to be like a lay-up slam dunk, okay. That's not where I'm like focusing on. It's not even that serious to me, it's like a clown." (T 59).
- He thought lightning would strike before 12 jurors would give him the death penalty. (T 59).
- He thought it was "excellent" to wear his prison uniform at trial. (T 209). He was also cuffed because he refused to wear a stun belt.
- He explained to a juror his reason for self-representation: "The reason why I am – it's a good question. The reason why I am representing myself, sir, is because it is so simple, a child could do this. I should not even be charged with this crap, that's why. That's all I got to say." (T 940).
- He admitted guilt during his guilt phase testimony. (T 1364).
- In opening statement during the penalty phase, he practically invited the jurors to give him the death penalty: "It's - - it's pointless to kill me, but if that's what you fixin - -if that's - - if that will make you feel better, go on and do it." (T 1525). He said it again during his testimony: "Killing me really wouldn't solve anything. But if that's what -- if anyone thinks differently, be my guest and vote for it, you know." (T 1731).

In addition to opining that Woodbury was in the active manic state, Dr. Sesta found that the medication provided was at a subtherapeutic level. Such a finding evidences that a court should not rely on the simple fact that a defendant is being

medicated to discount the effects of severe mental illness. It is proper to have a mental health professional, after evaluation, inform the court that the medication is at an adequate level to control the symptoms and educate the court on potential side effects to ensure they are not inhibiting his ability to represent himself.

Despite a lengthy history of psychiatric illness (Woodbury suffered from bipolar disorder since he was 18 years old and was 42 years old at the time of trial), the trial court, without the assistance of professionals with expertise in the defendant's particular mental illness, determined that "there was no mental health issue." (T 1876). In doing so, the court acknowledged that he was not qualified to make such an assessment: "I have a J.D. degree, I don't have an M.D. degree. So somebody else I guess smarter than me is going to have to make that decision. But, you know, I've been sitting in a courtroom since '88, so I've seen a lot of people and I've represented a lot of people." (T 1876-77).

Given the abovementioned comments, the court might have been under the misconception that Woodbury did not have a severe mental illness and completely disregarded the provision contained in Rule 3.111(d)(3).

The knowledge that Woodbury suffered from bipolar disorder, was on medication, and had prior psychiatric hospitalizations was sufficient to trigger the need for a pro se competency evaluation. Given the complexities of bipolar disorder, a court cannot make an assessment without input from mental health professionals.

In sum, throughout the proceedings, the trial court's inquiries into the present state of Woodbury's mental health failed to ascertain the nature and extent of his mental state. The court abused its discretion by not ordering Woodbury evaluated for pro se competency and letting him proceed pro se while actively mentally ill. In doing so, the trial court left Woodbury without a rational advocate representing his interests before the court and deprived Woodbury of his right to a fair trial. As explained in *Edwards*, "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." *Indiana v. Edwards*, 555 U.S. at 176-177.

"[W]e must never lose sight of the terror that mental illness may inflict upon its victims. To compound this by leaving them alone to be chewed up by the legal process is simply cruel." Clive A. Stafford Smith, Remy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 Loy. L. Rev. 55, fn.171 (Spring 1999).

The court's failure to sufficiently inquire into Woodbury's severe mental illness denied Woodbury due process in violation of the Fifth, Sixth and Fourteenth Amendments to U.S. Constitution; Art. 1 Sections 2, 9, 16, and 22, Fla. Constitution.

POINT II

THE TRIAL COURT FAILED TO SUA SPONTE ORDER A COMPETENCY EVALUATION WHERE REASONABLE

GROUNDS EXISTED TO SUGGEST APPELLANT WAS INCOMPETENT

The facts of the offense are bizarre. Woodbury's wildly erratic behavior during the commission of the killing appeared symptomatic of severe mental illness. It is abnormal for a person to commit such a violent act while smiling, singing and randomly conversing about baseball and religion. Such behavior would have alerted a reasonable court to a potential competency issue. This concern was compounded by his bipolar diagnosis, medication and prior hospitalizations. Given these facts, there was a reasonable concern to question his competency to proceed and the court erred in its failure to sua sponte order an evaluation and hold a hearing on his competence.

A trial court's determination concerning whether a competency evaluation and hearing is necessary is reviewed for an abuse of discretion. *Rodgers v. State*, 3 So. 3d 1127, 1132 (Fla. 2009).

A criminal defendant has a due process right to adequate procedures to ensure he will not be tried and sentenced while mentally incompetent. *Pate v. Robinson*, 383 U.S. at 378; *Drope v. Missouri*, 420 U.S. 162, 172 (1975). The Supreme Court has recognized that one of the required procedural protections is "further inquiry," when there is a sufficient doubt raised about a defendant's competency. *Drope*, 420 U.S. at 180.

In accordance with the Supreme Court's guidelines, Florida Rule of Criminal Procedure 3.210(b) provides that once a court has reasonable grounds to question a defendant's competency, it must order a competency hearing. Failure to do so is reversible error. *See Scott v. State*, 420 So. 2d 595, 597 (Fla. 1982).

It is fundamental to our adversary system of justice that an individual whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial. *See Drope*, 420 U.S. at 162.

Woodbury's due process rights were violated by the court's failure to order, sua sponte, pre-plea and pre-sentencing competency evaluations when presented with information that raised sufficient doubt as to his competency to proceed. The majority of this information has been detailed in Point I, in regards to competency to proceed pro se.

a. Competency At Time Of Guilty Plea

Prior to accepting Woodbury's guilty plea, the court was aware that he had a significant mental health history (being diagnosed with bipolar disorder since the age of 18), was currently taking mood stabilizing medication and had previously been hospitalized on several occasions for psychiatric disturbances.

While mental illness alone does not necessarily mean legal incompetence, it is a factor for consideration in determining whether there are reasonable grounds to believe a defendant may be incompetent.

Cases interpreting Rule 3.210(b) hold that the standard embodied in the rule is not whether there are reasonable grounds to believe the defendant *is* incompetent, but whether there are reasonable grounds to believe the defendant *may* be incompetent. *See Tingle v. State*, 536 So. 2d 202, 203 (Fla. 1988).

Although the Supreme Court has never "prescribe[d] a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure for determining competency, it has explained that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required." *Drope*, 420 U.S. at 172, 180. The Supreme Court noted that: "[t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestation and subtle nuances are implicated." *Id*. The trial court "must consider all the circumstances, including the representations of counsel, and unless clearly convinced that an examination is unnecessary, order an examination before beginning or proceeding with trial." *Jones v. State*, 362 So. 2d 1334, 1336 (Fla. 1978).

Here, Woodbury's bipolar diagnosis merited further inquiry into his competency due to potential disordered thinking associated with mania or hypomania. Such disordered thinking could render him incapable of making intelligent, knowing decisions. In addition, confusion and poor judgment are symptoms of bipolar disorder. *See, e.g., United States v. Kauffman*, 109 F. 3d 186, 189 (3d Cir. 1997) ("loose associations, tangentiality, chronic poor judgment"); *In re Maricopa Cty.*, 897 P. 2d 742, 744 (Ariz.App.Ct. 1995) (lack of good judgment and insists on taking actions without a definite plan); *Anderson v. Ylst*, 1995 W.L. 20465 (N.D. Cal.) ("inability to distinguish the important from the unimportant and a foresighted view of the future.").

Woodbury's past hospitalization, and repeated treatment while in prison, indicated that his mental illness had been both consistent and at times severe.

Also relevant to Woodbury's mental condition was his repeated self-diagnosis that he was not mentally ill. "Anosognosia is a critical psychological issue characterized by lack of self-awareness on the existence of a medical condition." Henry A Montero, *Anosognosia: How to Treat the Lack of Insight in Mental Health*, Volume 3 Issue 5 Psychology & Psychological Research International Journal (June 28, 2018). This lack of insight could be a sign of active mental illness.

Moreover, Woodbury's psychiatric medication posed questions about how the medication or its side effects affected his faculty to understand. Despite its

awareness that Woodbury had experienced side effects (sleepiness and nervousness), the court did not inquire whether Woodbury was experiencing side effects at the time of the plea. (T 1011). It would seem reasonable to order a competency evaluation when a defendant is taking medication which may have an impact on his mental capabilities.

Even though Woodbury did say the medication did not affect his ability to understand, his belief that he is competent does not relieve the trial court of the obligation to hold a competency hearing if there are reasonable grounds to question competency. *See Walker v. State*, 237 So. 3d 1162 (Fla. 1st DCA 2018) (defendant cannot stipulate to competency when there are reasonable grounds to question competency).

In sum, the circumstances regarding his mental illness, when taken together, created reasonable grounds to believe Woodbury may be incompetent.

Furthermore, these reasonable grounds are supported by the court's observations of several decisions made by Woodbury which showed deficits in rational thinking. There are three particular instances of special concern.

First, Woodbury’s trial preparation and participation provided evidence that he was not able to understand and focus on pertinent legal issues. Woodbury demanded speedy trial prior to receiving any discovery; and only two weeks after the State filed its notice of seeking the death penalty. (R 35, 41). At calendar call,

only a month after his arrest and prior to receiving discovery, Woodbury announced that he was "ready today" to start trial. (T 38-40).

During the guilt phase, his questioning of witnesses rarely had any relevance to the material issues. Instead, he focused on the victim's clothing, how the correctional officers opened the cell door and that he did not sharpen his homemade knife. Woodbury made no attempt to challenge the prosecution's case.

The second issue of concern was Woodbury's reason for self-representation: "The reason why I am representing myself, sir, is because it is so simple, a child could do this. I should not even be charged with this crap, that's why. That's all I got to say." (T 940). This nonchalant attitude with regard to such a serious charge, one that could ultimately cost him his life, is cause to question his understanding of the severity of the proceedings.

Lastly, Woodbury's "crazy" decision to plead guilty to first-degree murder, without any agreement by the State not to seek the death penalty, is irrational. Woodbury referred to the decision as "crazy" and "convoluted." (T 1163). There is no conceivable defense strategy to enter a guilty plea at this juncture. All it served to do was waive a jury verdict on his guilt and any guilt phase appellate issues.

Woodbury's joking manner during the plea colloquy also provided a reasonable ground to question his competency. He did not appear to grasp the

severity of his situation; almost like it was a game to him. For example, during the colloquy, the following exchange took place (T 1377):

> THE COURT: Twenty, and I can tell you you're not going to be released on bond pending sentencing, so I'm going to --
>
> MR. WOODBURY: You're serious?
>
> THE COURT: Yeah, it's not going to happen.
>
> MR. WOODBURY: Wow.
>
> THE COURT: So we're going to put a scratch through that, too. Twenty-one, and you're not going to get probation either so I'm actually going to scratch number 21.
>
> MR. WOODBURY: That's BS.

Further, when the court allowed the State to ask questions prior to accepting the plea, Woodbury stated to the prosecutor: "So this is 110 percent my idea [to plea] to spin a circle around you like I said I was going to." (T 1385). He would "moonwalk" on the prosecutor's case. (T 1386). When the court attempted to regain Woodbury's focus on the plea colloquy, he stated: "I like talking to Mr. Richardson, I can't help it. My bad." (T 1386). No rational person would think pleading guilty was "spinning a circle" or "moonwalking" on the prosecution's case; in reality, it made the prosecution's job that much easier.

In light of Woodbury's history of mental illness and his irrational decisions, the court had a reasonable basis to question competency, and a duty to order a competency evaluation prior to accepting his plea.

b. Competency At Time Of Sentencing

Even if this court were to find that the court did not have reasonable grounds to question competency prior to the plea, the court became aware of substantial evidence of Woodbury's possible incompetence prior to pronouncement of sentence.

Before imposition of sentence, the court reviewed Dr. Sesta's report which gave a professional opinion that Woodbury had been in the active manic state of bipolar disorder prior to the start of the penalty phase. While his appearance, orientation and speech were normal, his thought process, mood, affect and behavior were abnormal. (R 588-89). Dr. Sesta described Woodbury as having "an extensive history of major mental illness characterized by severe mood disturbance, psychotic symptoms, antisocial/violent behavior and partial therapeutic response to pharmacotherapy with mood stabilizers and antipsychotic medications." (R 590). "[H]is mental disorder appears to be severe, persistent and refractory to pharmacotherapy with poor prognosis." (R 590). Dr. Sesta expressed concern about Woodbury's "decompensated mental state" and how it would affect him during trial proceedings. (R 587).

Clearly, an expert psychological report indicating that Woodbury was in the active manic state of bipolar disorder, and having a subtheraputic response to medication, was reasonable cause to believe that he might not be mentally competent to understand the proceedings against him.

But, despite this extensive and uncontroverted evidence, the court did not declare a doubt as to competence. Instead, the court sentenced Woodbury to death.

Any objective evaluation of the facts in this case would establish that a hearing on Woodbury's competency should have been held.

c. The court's observations and standby counsel's failure to request evaluation were insufficient to alleviate the concern about Woodbury's competence

The court indicated that it had a concern about appellate review of this issue (T 1169) (emphasis added):

> …. so your future attorneys will raise all kinds of issues. They'll raise the issue that, whatever it may be, including that you that the Court should have been aware that you weren't competent to proceed on your own because of look at your behavior. And they'll look at minor comments you made or things you might have said that may -- that are going to be blown out of proportion probably for somebody to believe that you didn't know what you were doing. *So the State is concerned about that and, heck, I'm concerned about that to some extent*….

The court could have easily alleviated this concern by ordering a competency evaluation. Rather, it attempted to insulate the record by making findings that its observations of Woodbury's behavior in court did not raise a competency concern.

However, the court's observations aren't sufficient to obviate the concern raised about Woodbury's competency. *See Pate*, 383 U.S. at 386 (holding that defendant's apparently competent demeanor could not be relied upon to dispense with hearing on competence in view of history of mental illness); s*ee also Odle v. Woodford*, 238 F. 3d 1084 (9th Cir. 2001) (denial of due process not to conduct

competency hearing, despite evidence that defendant had suffered massive head trauma, was missing piece of his brain the size of grapefruit, and had exhibited psychotic behavior, some of it while awaiting trial, notwithstanding that defendant appeared calm in courtroom, and that defense counsel never asked for hearing).

As this Court recognized in *Hill*, "mental alertness at trial is not sufficient to eliminate the need for a hearing if other information brings a defendant's competency into question." *Hill v. Wainwright*, 473 So. 2d 1253, 1257-58 (Fla. 1985).

As explained in Point I, a trial court's observations cannot substitute for an expert's evaluation of his condition. *See Tingle*, 536 So. 2d at 203 (trial court's independent investigation into defendant's competency is not sufficient to ensure defendant is not deprived of his due process right not to be tried while incompetent).

With regard to standby counsel's failure to raise a concern about Woodbury's competence, this also cannot be a basis to dispel concern. Standby counsels had limited interactions with Woodbury and did not assist him in presenting his defense nor in making any decisions. The court ordered that standby counsel "do nothing except watch the trial and be prepared to step in if [Woodbury] ask[ed] for them." (T 1454). In all likelihood, standby counsel felt compelled to accede to Woodbury's desire not to initiate the competency proceedings, even though they had a bona fide doubt as to competence, due to the limitations on representation placed by the court.

Further, the court cannot abdicate its responsibility to standby counsel. *See Nowitzke v. State*, 572 So. 2d 1346, 1349-50 (Fla. 1990) ("Ensuring a defendant's competency is a continuing obligation of the court.").

In conclusion, the totality of information in the court's possession at the plea hearing, and at sentencing, gave the court a reason to question Woodbury's competency to proceed. Thus, the court had an obligation to order a competency evaluation prior to accepting his guilty plea to first-degree murder and sentencing him to death. Its failure to do so denied Woodbury due process in violation of the Fifth, Sixth and Fourteenth Amendments to U.S. Constitution; Art. 1 Sections 2, 9, 16, and 22, Fla. Constitution. Relief is proper.

POINT III

WOODBURY'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED

In death penalty cases this Court has a mandatory obligation to review the sufficiency of the evidence to support the conviction. *See, e.g.*, *Bevel v. State*, 983 So. 2d 505, 516 (Fla. 2008). Where the defendant pleads, this Court reviews the circumstances and nature of the plea. See *Tanzi v. State*, 964 So. 2d 106, 121 (Fla. 2007).

Logically no one should be sentenced to death unless there is sufficient evidence to prove murder in the first degree. This holds true regardless if the conviction results from a plea or from a trial.

Where a defendant is not made aware of the elements of the charges he is pleading to, a plea cannot be considered voluntary. *See Henderson v. Morgan*, 426 U.S. 637 (1976) (relief granted because defendant unaware of the elements of his crime).

In the present case, the plea colloquy showed an insufficient factual basis for premeditated murder, Woodbury had offered a possible defense to premeditated murder, and there was an insufficient inquiry into his mental condition which included a bipolar diagnosis, being on medications, and hospitalizations.

a. Factual Basis

The court found there was a factual basis for the plea – but there was no indication as to how the court had reached such a conclusion. (T 1396). The court apparently reached the conclusion there was a factual basis from Woodbury's testimony and the State's evidence at trial. The problem is that Woodbury's testimony actually refuted that he killed with a premeditated design and the State's evidence did not prove a premeditated design to kill.

The requirement of a factual basis is to insure "that the facts of the case fit the offense with which the defendant is charged." *Williams v. State*, 316 So. 2d 267, 271 (Fla. 1975).

If a defendant indicates a possible defense, such as lack of criminal intent or self-defense, "the plea is subject to attack unless the defendant specifically and

understandingly waives that defense." *Id*., at 273. *See also State v. Kendrick*, 336 So. 2d 353 (Fla. 1976); *State v. Lyles*, 316 So. 2d 277 (Fla. 1975); *Williams v. State*, 534 So. 2d 929 (Fla. 4th DCA 1988).

In *Kendrick*, this court noted the possibility of a defense by the defendant requires an extensive inquiry (336 So.2d at 355):

> Where a defendant raises the possibility of a defense to his guilty plea, the potential prejudice is apparent. In such circumstances, a trial judge should make extensive inquiry into factual basis before accepting the guilty plea.

For example, in *Allen v. State*, 876 So. 2d 737 (Fla. 1st DCA 2004) the defendant pleaded guilty to improper exhibition of a firearm and discharge of a firearm in public. When the trial court asked for a factual basis for the plea the prosecutor stated that the defendant discharged a firearm and the defendant stated he was cleaning the gun and he always fires a couple shots after doing so. *Id*. at 739. For the purpose of the plea the defendant stipulated to the factual basis. *Id*. The reviewing court reversed due to the failure to conduct an adequate inquiry into the factual basis:

> Here, petitioner's comments at the plea colloquy establish that he was not cognizant of the particulars of the charges against him. Moreover, petitioner's comments demonstrate existence of a possible defense to both charges, but the trial court failed to inquire further, thereby raising doubt as to the validity of the plea.

Id. at 741; *see also Kendrick*, 876 So. 2d at 737 (defendant must be made to understand he is waiving a defense – defendant denied possession of a knife when

pleading to aggravated assault -- "Where a defendant raises the possibility of a defense to his guilty plea, the potential prejudice is apparent. In such circumstances, a trial judge should make extensive inquiry into factual basis before accepting the guilty plea").

In *Davis v. State*, 605 So. 2d 936 (Fla. 1st DCA 1992), the defendant pleaded guilty to first degree murder. The defendant did not dispute the acts with which he had been charged but claimed he had been intoxicated at the time and thus did not have the required intent. The court held that the trial court was required to conduct an extensive inquiry into the possible defense to insure the defendant had knowingly waived such a defense (*Id*. at 938; emphasis added):

> Voluntary intoxication is a defense to the specific intent crime of first degree murder. *Gardner v. State*, 480 So.2d 91, 92 (Fla.1985); *Burch v. State*, 478 So.2d 1050 (Fla.1985). Therefore, appellant's statements raised the possibility of a defense, i.e., that he lacked the specific intent to commit the crime charged. At that point, *the trial judge was obligated to inquire further, to determine whether a defense existed, and if so, whether appellant was aware of, and knowingly waived, such possible defense*.

Here, Woodbury testified that Haynes provoked him and that he went beyond self-defense. (T 1361). But Woodbury repeatedly testified he did not plan to kill Haynes. (T 1361-62). Woodbury indicated that based on his understanding of premeditation there was no premeditation to kill but that the State with its legalese posited he was guilty of a premeditated killing. (T 1362). Woodbury's final words were (T 1354):

> But the punishment did not fit the crime, but he provoked me. I went to sleep that night with the intentions of waking up in the morning and going to cut grass, not waking up the middle of the night and doing this. I am legitimately bipolar, I'm on medication for it. There's certain triggers I have, and being attacked is one of them. So in the eyes of the law, you know, what the prosecution has charged me with is true. And at this time, I'd like to plead guilty to first-degree premeditated murder, your Honor, What you got?

Although Woodbury gave a legal conclusion that he was guilty of premeditated murder under the law— his testimony shows he did not understand the legal meaning of premeditated murder. The trial court never explained premeditation to Woodbury. Woodbury believed the acts the State charged him with was proof of premeditation. This case is like those listed above where the defendant has raised a possible defense and the trial court was required to hold an extensive inquiry into the factual basis. The trial court did not hold an inquiry even though Appellant claimed the killing was not premeditated. Reversal is warranted.

Even disregarding Woodbury's testimony, a factual basis for premeditated murder was not provided at or before the plea.

Premeditation is more than the intent to kill, it is a fully formed conscious purpose to kill done with reflection:

> More than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997) (quoting *Wilson v. State*, 493 So. 2d 1019, 1021 (Fla. 1986)); *McCutchen v. State*, 96 So. 2d 152, 153 (Fla. 1957).

In this case, the State's evidence did not show premeditation. *See Kirkland v. State*, 684 So. 2d 732, 735 (Fla. 1996). Woodbury did not testify he had any plan to kill. In fact, he testified that he did not intend to kill Haynes. Thus, there was evidence of an unpremeditated killing.

The State presented evidence through witnesses and recordings that supported the intent to harm Haynes but did not support a premeditated intent to kill Haynes. The two are not the same – only one can potentially lead to a death sentence.

In fact, the evidence showed Woodbury had no intent to kill Haynes. If he intended to kill Haynes he had every opportunity but he took no specific action to do so. A single blow did not kill Haynes. During the beating of Haynes, Woodbury expressed frustration over Haynes not correcting what he had done and expressed the ultimate destiny of Haynes by saying "guess going to be the wheelchair" (T 1230-1231). While the intent to cripple may be disgusting – it is not premeditation to kill.

Witnesses testified to conditional threats by Woodbury to kill Haynes if certain actions were taken, but he never followed through with the threats. (T 1044, 1196). In fact, he made sure to demonstrate to observers that Haynes was still alive. (T 1048,1200,1214,1228,1253,1273). If there was actually the intent to kill the

threats would not be conditional and he would have simply administered a blow or cut to kill. Instead, he tried to keep Haynes alive and talked of "sparing" him so that he could inflict more punishment. (T 1219).

In cases with far more evidence involving weapons and flagrant use of the weapons, this Court has held the evidence insufficient to prove premeditation. In *Kirkland*, the state asserted that evidence of numerous stab wounds including a very deep neck wound that was caused by many slashes, blunt trauma, use of both a cane and a knife, and the defendant being sexually tempted by the victim was sufficient for premeditation. *Kirkland*, 684 So. 2d at 734-735. This Court found this was insufficient evidence of premeditation. First, this Court noted that "there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide." *Id*. at 735. The same is true in the present case. Second, this Court stated, "there were no witnesses to the events immediately preceding the homicide." *Id*. The same is true here—except for Woodbury's statements and testimony as to the provocation by Haynes. Third, "there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide." *Id*. (Kirkland had always owned the knife and cane). The same is true in the present case. Fourth, "the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan." *Id*. This is also true in the present case. This

Court reversed Kirkland's first degree murder conviction with instructions to enter judgment and sentence for second degree murder. Likewise, Woodbury's conviction for first degree murder should be reversed.

b. Woodbury's Bipolar Disorder and Several Hospitalizations and Medications

During the plea colloquy it was disclosed that Woodbury had bipolar disorder, had been hospitalized several times, and was on and off medications over the years. (T 1369-1370). These are obvious red flags as to Woodbury's mental state at the time of the crime and at the time of taking his plea. But the court did not ask any follow up questions but instead merely stated the discussion was "good enough for me right now" and believed there would be more discussions during the penalty phase. (T 1371).

The inquiry as to Woodbury's mental health at the plea was insufficient. *See Forster v. State*, 779 So. 2d 550 (Fla. 2d DCA 2001) (at time of plea Forster suffered from bipolar disorder and was on medication at time of plea); *Boyle v. State*, 742 So. 2d 398, 399 (Fla. 3d DCA 1999) (Boyle had been found competent but diagnosed with bipolar disorder which would have "undercut the voluntariness of the plea"). In *Boyles* the court was concerned that the bipolar disorder may have impacted the defendant's decision making and noted other such cases: If defendant's apparently irrational decision-making process was, in fact, a product of an untreated Bipolar

Disorder, then that would undercut the voluntariness of the plea ….” 742 So. 2d at 399-400.

Similarly, in this case there was not a sufficient inquiry into the bipolar disorder, hospitalizations, and medications to ensure that the plea was knowingly and intelligently made and where such information may be relevant to the factual basis in this particular case. The acceptance of a plea without factual basis violated the Eighth, and Fourteenth Amendments to the United States Constitution.

POINT IV

THE TRIAL COURT ERRED BY FAILING TO RENEW THE OFFER OF COUNSEL TO APPELLANT PRIOR TO THE SUBSEQUENT OR CRUCIAL STAGES INCLUDING THE BEGINNING OF THE CHANGE OF PLEA AND AT THE DEFENSE CASE

Appellant chose to represent himself prior to trial. Appellant did in fact represent himself. The court did not renew an offer of counsel at the beginning of the change in plea stage and at the beginning of the defense case.

A trial court must renew the offer of counsel to an unrepresented defendant at all crucial stages of the criminal proceeding. *Monte v. State*, 51 So. 3d 1196, 1199-1200 (Fla. 4th DCA 2011). This renewal is mandated by Florida Rule of Criminal Procedure 3.111(d)(5), which provides:

> If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

This issue is reviewed *de novo* because the trial court has no discretion not to renew an offer of counsel to an unrepresented defendant at a subsequent or crucial stage of a criminal proceeding.

The need to renew the offer of counsel is not determined by the passage of time but instead depends on whether there are intervening stages. *Monte*, 51 So. 3d at 1200; *see also Howard v. State*, 147 So.b3d 1040 (Fla. 1st DCA 2014) (motion for new trial is crucial/critical stage); *Cleveland v. State*, 135 So. 3d 425 (Fla. 1st DCA 2014) (sentencing); *Wilson v. State*, 76 So. 3d 1085 (Fla. 2d DCA 2011) (hearing on a motion to suppress is a critical stage).

It was error not to renew the offer of counsel. *See Pall v. State*, 632 So. 2d 1084 (Fla. 2d DCA 1994) (renewal of offer of assistance of counsel must be made at every subsequent stage of the proceedings).

Change in plea is a crucial stage of the criminal proceeding. *See Archie v. State*, 176 So. 3d 364 (Fla. 1st DCA 2015); *Velasquez v. State*, 146 So. 3d 1253 (Fla. 2d DCA 2014); *Guzman v. State*, 994 So. 2d 1252 (Fla. 4th DCA 2008).

Because a change in plea is a critical stage of the proceedings, Woodbury was entitled to the appointment of counsel to assist him and the court should not have proceeded to consider a change in plea until the offer of counsel was renewed. *Cf. Passino v. State*, 174 So. 3d 1055 (Fla. 4th DCA 2015).

As explained in *U.S. v. Novaton*, 271 F. 3d 968, 998 (11th Cir. 2001) the defense case is a critical stage of a criminal proceeding:

> The Due Process Clause's guarantee of presence during all "critical stages" of a trial applies because Rosell was absent during both the government's case-in-chief relating to him as well as the presentation of his own defense case. Stages of a trial could hardly be more critical for a defendant.

In fact, the critical nature of this stage and the importance of counsel has been recognized in *Cole v. State*, 89 So. 3d 993 (Fla. 2d DCA 2012), by concluding a defendant's assertion at trial that it was his decision not to testify did not preclude him from seeking post-conviction relief for alleged ineffective assistance of counsel in failing to prepare him to testify at trial.

The error denied Woodbury his rights to due process and a fair trial. Fifth, Sixth, Fourteenth Amendments, U.S. Constitution; Art. 1 Sections 2, 9, 16, and 22, Fla. Constitution. His conviction and sentence must be reversed and this cause remanded for a new trial.

POINT V

THE TRIAL COURT ERRED IN FINDING THAT THE WAIVER OF MENTAL HEALTH MITIGATION WAS PROPER AND NOT APPOINTING SPECIAL COUNSEL TO PRESENT SIGNIFICANT MENTAL MITIGATION AND THE COURT FAILED TO PROPERLY CONSIDER AND WEIGH THE LIMITED MENTAL HEALTH MITIGATION CONTAINED IN THE RECORD

Death should be imposed, if at all, only if it is deserved. Only the "worst of the worst offenders" should be sentenced to death. *See Gregg v. Georgia*, 428 U.S.

153 (1976). The penalty phase fails most egregiously when it permits the undeserving to be condemned.

Fundamental fairness and the need for reliability requires consideration of mitigation - and therefore is worthy of the utmost protection.

Mitigating circumstances may include any aspect of a defendant's character or background, any circumstance of the offense, or any other relevant fact or circumstance which might indicate that the defendant should not be sentenced to death. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

In the present case, the court failed to properly consider Woodbury's mental illness; an aspect of his character that might indicate that he did not deserve to be sentenced to death.

a. The court erred in accepting Woodbury's waiver of mitigation and not appointing special counsel to present significant mental mitigation

A complete picture of Woodbury's mental illness was never obtained. This was because he had succeeded in waiving his right to counsel and represented himself throughout the entire trial. He did not wish to put his mental state in issue (did not even agree that he had one), and was thus able to prevent the court and the jury from learning substantial information regarding his mental illness.

Instead, Woodbury presented provocation (that the victim tried to sexually assault him) in mitigation. This in essence is residual doubt which the United States

Supreme Court has indicated is not mitigation. *See Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (plurality opinion).

Thus, the jury was left without any evidence of mitigation as supported by its verdict finding no mitigating circumstances. This triggered the procedural protection set forth in *Muhammed v. State*, 782 So. 2d 343, 361 (Fla. 2001) where this Court explained that when a defendant fails to present any mitigation, a jury is stripped of the ability to make a sound recommendation based on the character and background of the defendant. This Court held that a comprehensive PSI report should be ordered and considered by the trial court when no mitigation was presented by the defendant at the penalty phase. *Id*. at 363.

The purpose of the PSI is to assist the court in determining what mitigation exists. If the court is alerted to the probability of significant mitigation, the court has discretion to call its own witnesses or to appoint special counsel for purposes of introducing such evidence. *Sparre v. State*, 164 So. 3d 1183 (Fla. 2015).

In the present case, prior to the start of the penalty phase, the court ordered a PSI and a comprehensive mental health evaluation to uncover potential mitigation. Yet, it purposefully chose not to review the PSI or the comprehensive psychological report prior to the penalty phase. This constituted error.

A trial court's acceptance of a defendant's waiver of the right to present mitigating evidence is reviewed for an abuse of discretion. *See Spann v. State*, 857

So. 2d 845, 854 (Fla. 2003). A trial court's judgment about whether to call its own mitigation witnesses or appoint special mitigation counsel is subject to an abuse of discretion standard on review. *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988).

The court should not have permitted Woodbury to waive mitigation because his severe mental illness prevented him from entering a knowing, voluntarily, and intelligent waiver; the concerns about his competency are explained in points I and II and will not be repeated here. *See Hojan v. State*, 3 So. 3d 1204, 1211 (Fla. 2009) (competent defendant may waive presentation of mitigation evidence); *see also Brooks v. State*, 175 So. 3d 204 (Fla. 2015) (waiver of mitigation must be made knowingly, voluntarily, and intelligently).

Further, Woodbury submits that the court abused its discretion in two ways- (1) failing to have the mental mitigation disclosed and considered, and (2) not adequately ensuring Woodbury understood the concept of mitigation and what the mental mitigation was, and its importance.

From the start of the case, the court knew about Woodbury's decades long bipolar diagnosis and treatment. Therefore, even without the PSI (which turned out to be useless) and the evaluation report (which had an abundance of pertinent information), the available information indicated that Woodbury could have significant mental health problems. No reasonable jurist wouldn't have found potential for significant mental mitigation in these circumstances and not appoint

special counsel. Further inquiry into Woodbury's mental illness was essential to ensure the jurors and court made an individualized judgment regarding the punishment that Woodbury deserved.

The court believed that the appointment of special counsel would interfere with Woodbury's right to represent himself. (T 1721-23). The court failed to grasp that the role of special counsel is simply to facilitate the court's duty to seek a fair sentencing determination based on consideration of all relevant factors. This does not violate Woodbury's right to self-representation, he is still free to represent himself, call witnesses, and present such argument as he wishes. It merely assures that the court's sentencing decision will be based on a fair consideration of all sentencing circumstances which is essential to ensure that every death sentence in this state is reliable, proportionate, and imposed in accordance with all constitutional and statutory directives. *See Marquardt v. State*, 156 So. 3d 464 (Fla. 2015).

The court's mistaken belief that the appointment of special counsel would violate Woodbury's right to self-representation constituted an abuse of discretion which prevented the jury and the court from hearing mental mitigation which was essential for individualized sentencing. The court failed to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court.

It is also questionable whether Woodbury understood that he could present the mental mitigation at the *Spencer* hearing. Woodbury made comments that he didn't want to present mental mitigation to the jury because they may view him as "crazy" (T 1873), but tells the court that "it's rather stupid not to present mental health evidence, you know. Again, I never believed that 12 Americans would find me guilty for I just didn't believe it, you know." (T 1844). These inconsistencies call into question the validity of the waiver of mitigation. The court should have confirmed that Woodbury understood that he was still able to present mental mitigation to the court even though it was not presented to the jury. The court's failure to dispel Woodbury's possible misunderstanding placed in doubt the knowing and intelligent nature of his waiver at the *Spencer* hearing.

At the *Spencer* hearing, Woodbury attempted to testify about his mental mitigation but, again the court implied bipolar was not significant. (T 1844-46). A pattern that emerged throughout these proceedings, was the court's downplaying of Woodbury's bipolar diagnosis. This nonchalance toward his mental illness may have impacted Woodbury's choice not to present mental mitigation. A layman, such as Woodbury, would logically believe judges properly exercise discretion - thus where the judge does not exercise discretion to unearth and present mitigation- the message to Woodbury is that the mitigation in his case is probably not worthy of consideration.

In actuality, mental mitigation can be of great significance. This Court has found death disproportionate in cases due to mental mitigation, even when the murder is unquestionably brutal. *See, e.g.*, *Hawk v. State*, 718 So. 2d 159, 163-64 (Fla. 1998) (death disproportionate despite substantial aggravation, including contemporaneous attempted murder of separate victim, where mental mitigation was substantial); Miller v. State, 373 So. 2d 882, 886 (Fla. 1979) (death disproportionate despite substantial aggravation, including HAC, where mental mitigation was substantial and related to crime).

It is inconceivable to think a lifelong diagnosis, including hospitalizations, was insignificant, and yet that is exactly what the court determined. (T 1887).

Dr. Sesta indicated a nexus between the chronic and severe mental illness and the murder. This constitutes significant mitigation which deserved further inquiry. *See Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999) ("The killing here appears to be similar to the killing that occurred in *Livingston* and to have resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces.").

Ultimately, the court's failure to ensure Woodbury's waiver was knowingly made, coupled with the court's unreasonable (and unfathomable) determination that there was no probable existence of significant mitigation to warrant the appointment of special counsel, resulted in Woodbury being sentenced to death without full

consideration of his mental mitigation. Such a result does not protect society's interests in seeing that the death penalty was not imposed improperly.

This error in the sentencing process requires reversal of the death sentence and a new penalty phase trial where all mitigating factors are properly considered.

b. The trial court failed to properly weigh the mental mitigation contained in the record

Mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent that it is believable and uncontroverted, even where the defendant argues in favor of the death penalty, asks the trial court not to consider mitigating evidence or refuses to present mitigating evidence. *LaMarca v. State*, 785 So. 2d 1209 (Fla. 2001).

Here, the court assigned little weight to Woodbury's bipolar diagnosis and minimal weight to "being diagnosed with some degree of Schizophrenia." (R 297).

In the sentencing order, the court found: "Dr. Sesta diagnosed the Defendant with bi-polar disorder and some degree of Schizophrenia. Nothing contained in the report or the Pre-Sentence Investigation shows any probability of significant mental health mitigation as it relates to the mental state at the time of the offense or even at this time." (R 294).

No reasonable person would take the view adopted by the court that Dr. Sesta's report did not contain significant mental mitigation. The court abused its discretion in applying a clearly erroneous assessment of the evidence in weighing

the mitigation. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007) (trial court abuses its discretion if ruling is based on clearly erroneous assessment of evidence); *see also Foster v. State*, 679 So. 2d 747, 755 (Fla. 1996) (court findings on mitigation are reviewed for an abuse of discretion).

The court did not say why it assigned such little weight to the mental mitigation. It appears the court afforded little weight to evidence of Woodbury's mental illness because it believed that it did not overwhelm his free will. For example, at the *Spencer* hearing the court found the mental mitigation insignificant because it "does not seem to indicate that there's a break with reality or even anything close to that." (T 1887).

The court imposed too high a standard. Whether mental illness prevents a person from exercising free will is a question for criminal liability, such as not guilty by reason of insanity.

Moreover, "[a] trial court cannot require a nexus between the crime and mitigating circumstances." *Fletcher v. State*, 168 So. 3d 186, 219 (Fla. 2015) (*citing Martin v. State*, 107 So. 2d 281, 318 (Fla. 2012)).

But the report did provide mental mitigation in relation to the circumstances of the crime. The report directly contradicts the court's finding that there is no significant mitigation as to his mental state at the time of the offense. Consider the following excerpts:

> Defendant has a chronic history of severe and persistent mental illness that presents with periods of mania and psychosis, including hallucinations, paranoid delusions and thought disorder, *which have been contributory to his violent offenses*. (R 591) (emphasis added).
>
> "Reviewing the voluminous written, audio and video records, there is convergent evidence from multiple witnesses (correctional officers) documenting the *defendant's aberrant mental state* at the time of the offense. Note that while correctional officers are typically very familiar with inmates malingering mental illness within the prison system (e.g., "Going Psych"), there is no mention of any suspicion of such from any correctional officers or medical staff regarding the index offense." (R 587) (emphasis added).
>
> As *there is an apparent nexus between the defendant's psychotic episodes and his violent behavior during both past and instant offenses*; close monitoring of his psychiatric condition and consistent pharmacotherapy will be critical to ensuring his care and safety, as well as that of others within the prison system. (R 591) (emphasis added).

The report also shows a "break from reality" that occurred during the offense. Woodbury repeatedly demanded to be sent back to New Hampshire to see his dying father. In reality, Woodbury's father was in good health. (R 569).

This Court is encouraged to watch the video of the offense (see the summary contained in the statement of facts). No reasonable person could watch the video and not think there was an underlying mental health issue.

Dr. Sesta included statements from the correctional officers about Woodbury's behavior during the offense (R 586):

> Major Gatto described the defendant's behavior as "agitated… appeared to be high or under the influence of something, very erratic behavior, very erratic speech" (Audio SAM0015). C.O. Michael Usher also stated that the defendant was "shouting crazy things" during the offense (Audio SAM0018). For example, C.O. Antonio Wells stated

> that the defendant yelled, "I am the lord of pain in hell" and "I run hell and the house pain" (p. 95; Printed 655-756).

Even more, the report shows that Woodbury was not medicated at the time of the murder. DOC had stopped administering Tegretol, after repeated refusals. (R 579). But, Woodbury requested to be placed back on his medication:

> Prior to the instant offense, defendant was reportedly suicidal and requesting to be re-started on psychotropic medication but was not referred to Psychiatry until 10/11/17 and did not re-start carbamazepine until November of 2017 months after the instant offense.

(R 587). Also consider the following from the DOC records summary (R 579):

> 2/26/17: Inmate requests to be placed back on medications ASAP; non-stop racing thoughts and mood swings.
>
> 2/23/17: Mental health emergency- "I'm suicidal and I have witnesses"
>
> 2/22/17: "I'm suicidal, if I go back to my dorm room I will do something really ugly. I am bipolar and really need to get back on my meds."

As the report relates the mental disorder to Woodbury's decision to commit, or in his actions in committing, the murder, as well as his prior violent felonies, more than little or minimal weight should have been assigned.

Additionally, in the context of mitigation, mental illness is relevant to Woodbury's character beyond the immediate circumstances of the offense; that is whether his character is the result of symptoms beyond his control. In other words, it is not the character he chose to make for himself but one he was compelled to have due to his mental illness.

Mental health evidence offered in the penalty phase of a capital murder prosecution that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating. *Porter v. McCollum*, 558 U.S. 30 (2009).

Dr. Sesta's report contained an abundance of information showing that Woodbury's aberrant character is directly related to his mental illness. However, a full understanding of the correlation between Woodbury's mental illness and his conduct and criminal history is not contained in the record because the trial court elected not to have Dr. Sesta testify and not to appoint special counsel to obtain Woodbury's full mental health history, especially his records from psychiatric hospitalizations.

While limited, the information in Dr. Sesta's report does shed light on Woodbury's repeated struggle with bipolar disorder. Take for example, two of the many excerpts that Dr. Sesta believed would "provide insight into his thought disorder and other psychotic symptoms" (R 570):

> "Nature takes over ... I'll start getting paranoid, then hostile, and before I can get control I start having uncontrollable thoughts about murdering that prison in the most painful way. The more I fight the thoughts the more they repeat ... The psychotic episodes start usually hallucinations both audio and visual … when I'm trapped in a room it really manifests itself."
>
> "The more I fight the thoughts, the more they repeat. The psychotic [sic] start,. Usually hallucinations both audio and visual. Like he will

> say something and I will hear something else. Usually in a twisted dem. [sic] voice or I'll picture him with his throat cut wide open." (p. 94)

The report shows that Woodbury's murder of his cellmate was foreshadowed and likely could have been prevented had he been properly medicated. In 2009, he made a comment that "if they try to put anyone in a cell with him, something bad would happen to them." (R 575). After refusal of medication, he committed an aggravated battery on another inmate. He reported "mood swings, racing thoughts, irritability and is unable to function." He had "dysphoric/ irritable mood and incongruent affect (smiling and joking)." (R 576). In 2013, when off his medication, he attacked another cellmate. (R 579). In 2015, he expressed suicidal thoughts and commented: "I have so much anger in me right now and my compassion is at an all-time low… if I get a roommate it going to be kill or get killed…I've already killed 3 other roommates." The notes indicated that he "appears to be manic at this time." (R 579).

There appears to be a direct link between Woodbury not taking his medication and his violent behavior. Dr. Sesta described that Woodbury's "mental disorder appears to be severe, persistent and refractory to pharmacotherapy with poor prognosis." (R 590).

With regards to his prior armed robberies, consider the following comments made by Woodbury to Dr. Sesta: "A couple weeks before turning 18, the defendant reports experiencing psychosis involving paranoid delusions about the end of the

world. He subsequently committed a “smash and grab” robbery and stole handguns “to go hide out in the woods.” (R 569).

Woodbury has been on several forms of medication for decades: “The defendant reports he has previously taken several classes of psychotropic medications including first- and second-generation antipsychotics, antidepressants, anxiolytics and mood stabilizing anticonvulsants including: lithium, Haldol, Risperdal, Navane, Depakote, Abilify, Vistaril and currently Tegretol.” (R 570).

The abovementioned provides just a sample of the information contained in Dr. Sesta’s report. The impact of his mental disorder on his thought process is reviewed in Point I.

The fact that this was a brutal murder does not discount the mental mitigation. This following case illustrates the importance of a court’s proper consideration of mental mitigation.

In *Offord v. State*, 959 So. 2d 187, 193 (Fla. 2007), this Court found that the death penalty was disproportionate though “[t]here is no question that he committed a brutal murder.” In *Offord*, the 29-year old mentally ill defendant killed his wife by beating her with the claw end of a hammer. *Id*. at 188. “Offord stated that he hit [his wife] about fifty times with the hammer and that he believed he eventually broke her neck.” *Id*. The trial court found that the HAC aggravating factor was proven. *Id*. at 191. However, Offord presented substantial mental health mitigation, including a

history of lifelong mental illness and repeated institutionalization. *Id*. at 193. Significantly, the "[m]urder was unaccompanied by any motivation such as pecuniary gain or avoiding arrest." *Id*.

Here, any jurist that took the time to thoughtfully and comprehensively review the report would have assigned great weight to the mental mitigation.

Of concern, is that the trial court had a pre-commitment to a death sentence by the time it read the report in its entirety (undersigned is assuming the court actually read the full report) and assigned weight to the mitigation contained.

"[D]ue process under Florida's capital sentencing procedure requires a trial judge who is not precommited to a life sentence or a death sentence..." *Porter v. State*, 723 So. 2d 191, 196 (Fla. 1998).

The trial court erred when it summarily addressed and disposed of Dr. Sesta's report while on the bench during the *Spencer* hearing. The report provided a substantial amount of information necessary to properly assess Woodbury's character which could not be fully comprehended in such a short review.

The court could not make an individualized moral inquiry into Woodbury's background and character with such a cursory review of the report. The court should have, at the very least, recessed the proceeding to fully review the report rather than proceed immediately to sentencing. By the time the court read the full report it had already orally pronounced a death sentence.

This Court has cautioned against this form of hasty review of mitigation. Before section 921.141(4), Florida Statutes (2018), allowed a court 30 days to file a written order from judgment and sentence, the courts had to file a written order contemporaneously with the oral pronouncement of sentence. In *Hernandez*, this Court explained that "[t]he purpose of this requirement is to ensure that each death sentence handed down in Florida results from a thoughtful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances surrounding both the criminal and the crime, as dictated by the United States Supreme Court and our own state constitution." *Hernandez v. State*, 621 So. 2d 1353, 1357 (Fla. 1993). The preparation of written findings after the fact runs the risk that the "sentence was not the result of a weighing process or the 'reasoned judgment' of the sentencing process that the statute and due process mandate." *Van Royal v. State*, 497 So. 2d 625, 630 (Fla. 1986) (Ehrlich, J., concurring).

In addition, this Court has provided that: "Following the *Spencer* hearing, the judge *must* recess the proceeding, consider the sentence, write the sentencing order, and then convene a separate hearing to impose the sentence and file the order." *Robertson v. State*, 187 So. 3d 1207, 1216 (Fla. 2016); (*citing to Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993)) (emphasis added).

In this case, the proper procedure was not followed. Given the substantial new information provided in the report, the court's failure to recess the proceedings runs

the risk that the court did not "take the time to consider all relevant circumstances and arrive at an informed decision uninfluenced by haste and initial impressions." *Happ v. Moore*, 784 So. 2d 1091, 1103 n. 12 (Fla. 2001). This undermines confidence in the court's decision and renders Woodbury's sentence unreliable.

The trial court failed to properly consider the mitigating circumstances. Woodbury's death sentence violates his right to be free from cruel or unusual punishments. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const. Woodbury was deprived of a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED.

The court found the aggravating circumstance that the crime was committed in a "cold, calculated and premeditated" manner ("CCP"). (R 577-582). The jury was also instructed on CCP. This was error because there was insufficient evidence that the killing was the product of cool and calm reflection or that there was no pretense of moral or legal justification.

"'A judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented.'" *Aguirre-Jarquin v. State*, 9 So. 3d 593, 607 (Fla. 2009).

This Court has announced a four-pronged test required to establish the CCP aggravator, the evidence must show: (1) "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)"; (2) "the defendant had a careful plan or prearranged design to commit the murder before the fatal incident (calculated)"; (3) "the defendant exhibited heightened premeditation (premeditated)"; (4) "the defendant had no pretense of moral or legal justification." *Williams v. State*, 37 So. 3d 187, 195 (Fla. 2010).

a. The Killing Was Not Cold

The "'cold' element 'generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts.'" *Baker v. State*, 71 So. 3d 802, 819 (Fla. 2011). The murder must be the product of cool and calm reflection and not based on frenzy or rage. *Walker v. State*, 957 So. 2d 560, 581 (Fla. 2007).

Even if the killing was calculated, to be CCP a crime must have been cold rather than emanating from emotion. *See Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992) (Although the killing was clearly calculated, it was not the result of "calm and cool reflection" and thus not cold).

Here, the evidence did not show the killing was cold. Woodbury was awakened by Haynes touching his groin area. (T 1045, 1229). In fact, Woodbury was screaming about what Haynes had done. (T 1229). He reacted in an emotional

manner and not in a calm and cool manner. The recordings and testimony from witnesses describes Woodbury as very frantic and having an agitated demeanor. (T 1063, 1195-96). Witnesses testified that his attacks on Haynes were emotionally triggered by Haynes not following directions or by officials angering him. (T 1199,1207-09,1215,1218-19,1221, 1228,1232,1239-40,1257,1266). In other words, the attacks were emotional and not cold. Even the most calculated cases of preplanned murder are not cold where the defendant is in a state of emotional stress. *See Cannaday v. State*, 620 So. 2d 165, 174 (Fla. 1993) (where distress of the defendant had built up "over a two month period" the killing was not the result of cool deliberation and not CCP).

b. Pretense Of Legal Or Moral Justification

An additional element of CCP is a lack of a pretense of legal or moral justification. "A pretense of legal or moral justification is 'any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense…'". *Nelson v. State*, 748 So. 2d 237, 244 (Fla. 1999). In this case Woodbury was awakened by Haynes touching his groin area. (T 1045, 1229). He believed Haynes would continue touching him so he acted in self-defense. He admitted to going too far in defending himself. This would be a colorable claim to a defense to premeditated murder and would constitute a lesser offense of manslaughter. Thus,

there was a pretense of legal or moral justification. It was error to instruct, and find, the CCP aggravating circumstance.

Even where the event is susceptible to more than one interpretation the evidence is insufficient for CCP. *See Geralds v. State*, 601 So. 2d 1157 (Fla. 1992) (CCP stricken—hypothesis of scouting home and victim's schedule was consistent with two theories—that defendant planned crime for when victims would be present or defendant planned (unsuccessfully) to avoid contact with the victims).

The error was not harmless beyond a reasonable doubt. When an error occurs in penalty proceedings, the burden is on the State to prove beyond a reasonable doubt that the error did not contribute to the sentence. Under the federal and state constitutions, this rule applies to errors in the finding of, and instructing on, aggravating circumstances. *See Parker v. Dugger*, 498 U.S. 308, 321 (1991).

At bar the State emphasized CCP in the jury sentencing proceedings. Appellant's sentence must be reversed and this cause remanded for a new penalty phase. Woodbury was deprived of a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT VII

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A PRE-SENTENCE INVESTIGATION REPORT WHICH WAS NOT COMPREHENSIVE AND INCLUDED AN IMPERMISSIBLE SENTENCING RECOMMENDATION

The preparation of a PSI is required "to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation." Further, "[t]o be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background." *Muhammad*, 782 So. 2d at 363-64. This procedure was codified in Florida Rule of Criminal Procedure 3.710(b).

The purpose of the PSI was to provide a safeguard to the application of death penalty and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which the judge could make a reasoned decision concerning the applicability of the death penalty.

Contrarily, it was not intended to provide evidence in aggravation (weighing in favor of a death sentence). Such evidence may be introduced only as it relates to one of the aggravating circumstances set forth in section 921.141(5), Florida Statutes. *Robertson*, 187 So. 3d at 1217.

In the instant case, the PSI was not meaningful as it lacked a comprehensive summary of Woodbury's mental health history and it contained highly inflammatory opinions of the DOC probation officer along with impermissible victim and witness impact comments. It was error to admit the PSI.

The court's admission of a PSI pursuant to Rule 3.710(b) is reviewed for an abuse of discretion. *Robertson*, 187 So. 3d at 1214.

In *Robertson*, this Court clarified that a PSI under Rule 3.710(b) should not contain a sentencing recommendation. *Id*. at 1215-16. Here, however, the officer provided a lengthy recommendation that Woodbury be sentenced to death and extensive prejudicial information, including improper characterizations and opinions about the crime. (R 628-36). It should be noted that the PSI was completed by DOC and Woodbury killed his cellmate while in DOC custody. This causes concern as to whether a DOC officer can provide a PSI constituting a comprehensive and unbiased source of information for the court to use in capital sentencing; which ultimately it did not.

In actuality, the PSI reads like it was written by a prosecutor and makes every attempt to paint Woodbury in a bad light. The officer provided her own personal opinion about the victim under the section "victim's statement." As the victim is dead and has no family members this section should have been left blank, instead the officer stated (R 630):

> No statement can be obtained from the victim as this is was homicide. Per the Department of Corrections, the victim had no next of kin on file. His body and belongings were not claimed following his death. Though the victim in this case was an inmate with the State of Florida Department of Corrections for his own criminal past, he was still a human being. His sentence for his criminal choices was not death, yet the defendant in this case robbed victim of any possible future outside of the prison. The victim died at the hands of the person he should have

> felt closest to while incarcerated. The victim died alone, and was buried alone. Hardly a justification for any behavior or situation that may have ensued within the four walls of that prison cell on September 22, 2017.

Under the section "residential history" the officer remarked that Woodbury "admittedly manipulated the Interstate Compact Program to gain transfer to Florida" from New Hampshire. (R 634).

Though completely irrelevant for purposes under *Muhammad*, the officer included under the section "court officials' statements" comments from three law enforcement officers about the crime:

> Kevin Sapp (FDLE) Expresses that this crime scene was one of the worst in custody scenes he has ever investigated.
>
> Major Frank Gatto: Stated that the circumstances of this case are ones that he will always remember as a significant case within his career, he expressed his sympathy for the victim, and an officer that was involved whom have since left the department due to the severity of this case. His description of the sounds and experiences of that morning were vivid and horrific: "it was like the sound of a tenderizing mallet striking a steak".
>
> Warden Lars Severson: The Warden of Okeechobee C.I. expressed great haunting that this case has had over him following the incident. He stated that during his many years of experience that this was the worst case of inmate-on-inmate violence that he has ever witnessed. For the remainder of his career, and potentially his life he will always remember that evening.

Of most significance, the PSI contained a long and highly inflammatory sentencing recommendation (R 635):

> Based on the circumstances of this case and the following interpretation of the defendant it is the stance of The Department of Correction to move forward with the death penalty as a resolution to this case. Should

> the State present a compelling enough case, along with the information contained herein, this department will stand behind the decision of the courts and the unanimous vote of the jury to sentence this defendant to the deserved outcome of death. The defendant was "calm cool, and collected during his interview. He found a level of humor in the situation at hand. The defendant expressed regret for his behavior, in only the manner to which the consequences will affect him. He stated that the action of killing another human being, who he even says didn't deserve to die, will mess up his life. It is apparent that the defendant has no remorse or care for the heinous act he has committed, and that the only negative result is that his own personal life will be altered. The defendant discussed the impossibility of him ever being able to interact as an inmate in the general population of a prison, and that all the effort to be moved to Florida was for nothing. The Defendant spoke of the victim very minimally and when asked about his feelings towards the victim, simply talked about the alleged sexual encounter and how it affected him personally. He never once expressed remorse for the actions he took that ended a man's life unjustly. The defendant is already serving 3 consecutive life sentences, and his only concern at this point is that this case is going to ruin his already miserable situation. The defendant does not deserve a consequence of no further action, and based on his selfish, carefree demeanor and criminal history, is a threat to even the population of society isolated to protect the remainder of society.

In addition to the improper evidence in aggravation, the officer failed to include any substantial review of his mental health history. The record contains uncontroverted comments, from Woodbury and the State, that Woodbury had hospitalizations due to mental illness. (T 122, 1370, 1436-37). Dr. Sesta's report reveals that DOC had an extensive amount of mental health records for Woodbury and that DOC provided him with mood stabilizing medication for bipolar disorder. (R 575-80, 582-84, 587).

Yet, under the section titled "physical and mental health" the PSI makes no reference to mental illness except for Woodbury's self-reported comments. The PSI simply states that his mental health status is "satisfactory" and lists the following remarks: "Defendant has been found competent to stand trial and sentencing phases of this case. He indicated a history of bipolar disorder that is treatable via medication and claims to have completed some programs geared toward the successful management of his diagnosis." (R 634).

None of Woodbury's mental health records, from prison or prior hospitalizations, were obtained. While the PSI does not have to attach the records, it does have to at least contain a summary. *See Fitzpatrick v. State*, 900 So. 2d 495, 524 (Fla. 2005) (trial court properly considered PSI that did not include military records because "[t]he substance of the PSI, not the form, is what is important").

A PSI which contains no substance or attached records pertaining to Woodbury's extensive mental health history can hardly be considered comprehensive. The officer's lackadaisical approach to investigating Woodbury's mental health renders the PSI useless and misleading.

To conclude, the contents of the PSI were so prejudicial as to deprive Woodbury of due process and the court abused its discretion in admitting the PSI. Moreover, the court erred in relying on this biased PSI in its determination that there was no significant mental health mitigation. The court should have disregarded the

PSI in its entirety as it failed to adequately serve the purpose contemplated in *Muhammad* of obtaining and presenting available mitigating evidence when the defendant refuses to do so. Woodbury was deprived of a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT VIII

THE TRIAL COURT FAILED TO PROPERLY CONSIDER AND WEIGH THE STATUTORY MITIGATING CIRCUMSTANCE THAT WOODBURY WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE WHILE THE MURDER WAS COMMITTED

The sentencing order reflects that the court's analysis of the statutory mitigating circumstance that Woodbury was under extreme mental or emotional distress at the time of the murder of Haynes was based on an erroneous assessment of law. This constitutes an abuse of discretion. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007) ("a trial court abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence."); *see also Ault v. State*, 53 So. 3d 175, 187 (Fla. 2010) (weight assigned to a mitigating circumstance is reviewed for abuse of discretion).

In large part the court discounted this mitigating circumstance because there was "no evidence that the Defendant's emotional state was anywhere close to the level of obviating his knowledge of right and wrong." (R 295). In reaching its

determination to afford minimal weight, the court listed several facts in support of Woodbury having the mental capacity to conform his conduct to the requirements of law. The sentencing order reads, in pertinent part, as follows (R 295):

> There is no evidence that the Defendant's emotional state was anywhere close to the level of obviating his knowledge of right and wrong. He had the mental capacity to choose a weapon, to barricade the door to avoid interference from the guards, to incapacitate the victim, to ask for a "white shirt" to discuss his surrender, to react by striking the victim repeatedly when he felt the guards were going to try to enter the cell, to have the victim move to show he was still alive, to hide the razor blade in his mouth when extracted, to strike the victim nearly 50 times with a lock, to cut lacerations in the victim in multiple locations, and to generally torture the victim over a near four hour period. During the time period, the Defendant was able to negotiate the terms of his release, while defending his actions in telling Officer Ramos that the victim was a "punk" (gay) and that the victim made him do this. The Defendant told Officer Wright, during the attack, "that was your fault" when the Defendant struck the victim because the officer did something the Defendant did not like. The Defendant surrendered only after seeing the armed extraction team ready to take action. The Court finds no competent evidence in the record which supports this mitigating circumstance, however will assign minimal weight to the mitigating circumstance, as the Court cannot say there is no evidence of emotional disturbance.

In seeking mitigation, Woodbury asserted that the attempted sexual assault caused him to go "berserk" and he was unable to calm down. This was presented in support of mitigation under section 921.141(6)(b), Florida Statues (2018), which provides:

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

By the plain statutory language, this mitigating factor does not require that the mental or emotional disturbance obviate Woodbury's knowledge of right and wrong. Therefore, the trial court erroneously imposed an additional requirement which, as a result, taints the validity of the weight assigned.

It appears the court may have mistakenly combined two statutory mitigators. Section 921.141 (6)(f), Florida Statues (2018) provides a separate mitgator for:

> (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

However, even this mitigating circumstance does not require a mental state which obviates right from wrong. Rather, it requires a mental state that "interferes" with a defendant's knowledge of right and wrong. *Duncan v. State*, 619 So. 2d 279 (Fla. 1993) ("…substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, as used in section 921.141(6)(f), refers to mental disturbance that interferes with but does not obviate the defendant's knowledge of right and wrong.") (internal quotations and citations omitted).

Unfortunately, it appears likely that the court followed this erroneous argument asserted by the State in its sentencing memorandum (R 617):

> In order to establish this mitigating circumstance the defendant must show, by greater weight of the evidence, that the mental disturbance must be one which "interferes with but does obviate the defendant's

knowledge of right and wrong." *Duncan v. State*, 619 So. 2d 279 (Fla. 1993).

The State incorrectly applies the requirements of section 921.141(6)(f) to the emotional disturbance mitigator provided in section 921.141(6)(b). Moreover, it misquotes *Duncan* which actually states "interferes with but does ***not*** obviate the defendant's knowledge of right and wrong." *Duncan*, 619 So. 2d at 283 (emphasis added). The court included the State's misquote in its sentencing order. (R 295).

As section 921.141(6)(b) is devoid of any requirement that the mental or emotional disturbance obviate the defendant's knowledge of right and wrong, the trial court's assessment of this mitigating factor was based on an erroneous assessment of law. Woodbury was deprived of a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT IX

THE TRIAL COURT ERRED IN DENYING THE REQUESTED JURY INSTRUCTION ON MERCY

Mercy is not precluded from entering into the balance of whether the aggravating circumstances outweigh the mitigating circumstances. *See Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (plurality) (explaining that a jury can constitutionally dispense mercy in cases deserving of the death penalty); *see also Caso v. State*, 524 So. 2d 422 (Fla. 1988) (jury and judge may exercise mercy in

their recommendation even if factual situations may warrant capital punishment); *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973) (referring to defending a penalty phase as "seeking the mercy of society.").

Under Florida's death penalty statute, a single juror can recommend a life sentence as an expression of mercy even if he or she determined that there were sufficient aggravating circumstances that outweighed the mitigating circumstances. *See Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016) ("It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances.").

A trial court's decision to withhold a requested jury instruction is reviewed for an abuse of discretion. *Coday v. State*, 946 So. 2d 988, 995 (Fla. 2006).

In the instant case, Woodbury requested an instruction which would have clearly allowed an exercise of mercy. (T 1636-37; R 553-54). In denying the request, the court noted that "if the legislate and/or the Supreme Court had desired to have such language in there, it would have been included." (T 1715). The court felt that instructions that "stray far from or involve new concepts or additional concepts in the jury's consideration" are not properly determined at the "trial court level." (T 1715).

Such a rationale, constitutes an abuse of discretion because, even though standard instructions are presumed correct, the court has a duty to ensure that the

instruction accurately and adequately conveys the law applicable to the circumstances of the case. *See Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001); *see also Brown v. State*, 11 So. 3d 428, 432 (Fla. 2d DCA 2009). A court cannot simply pass the buck to the appellate courts or the legislature.

The court felt that mercy was already incorporated in the standard instructions because "[b]asically, the jury can consider anything that it wants to with regard to whether the mitigators outweigh any aggravators that may or may not be proven, which when advised of that, it really is already telling the jury they can consider anything they want. So if they feel sorry for you [Woodbury], they're allowed to do that, I think." (T 1715-16).

But, this form of reasoning shows that the instructions are ambiguous with regards to the application of mercy. A juror may be left in the same position as the court and "think" that he or she is allowed to apply mercy, but without a definite instruction forgo doing so because the law desires analytic decision making and privileges reason over emotion. It is imperative that jurors understand that in the rare context of a death penalty phase trial, each juror must make a moral judgment about whether a defendant should be executed.

In the court's opinion, the jury would be "further confused" if instructed on "mercy" due to an inability to define the term: "Because then do we define what mercy is? What is mercy? You know, it's an individual thing." (T 1716).

This lacks merit; mercy can easily be defined. For example, Merriam-Webster defines "mercy" as "compassion or forbearance." Merriam-Webster, "mercy" at https://www.merriam-webster.com/dictionary/mercy.

In 2009, this Court amended the penalty phase standard jury instructions to include that the jury is "neither compelled nor required to recommend death, even where the aggravating circumstances outweigh the mitigating circumstances." *In Re: Standard Jury Instructions in Criminal Cases-Penalty Phase of Capital Trials*, No. SC05-1890 (October 29, 2009). This Court has referred to this admonition as a "mercy instruction." *Reynolds v. State*, 251 So. 3d 811 n.5 (Fla. 2018) ("The mercy instruction is the portion of Standard Jury Instruction 7.11 that informs a jury that they are "neither compelled nor required to recommend" death.").

However, this does not sufficiently make it clear that a juror has the authority to dispense mercy. Such a statement "upon close examination… simply seems to instruct the jury on its ability to impose a sentence of life in prison rather than the death penalty." *Flowers v. State*, 240 So. 3rd 1082, 1143 (Miss. 2017).[7]

Either one of Woodbury's proposed instructions would have adequately, and accurately, covered the concept of mercy and not caused the jury to be confused or misled. The court's denial of the instruction left the jury without a clear instruction

[7] There is no Florida case which addresses this issue. However, this issue is currently being raised before this Court in *Sean Bush v. State* SC18-227.

that it could consider mercy as a basis for rejecting the death penalty. A jury cannot be guided or constrained by what it does not comprehend.

The failure of the court to give a special instruction on mercy, creates uncertainty as to the reliability of the jury's death recommendation. Relief is proper.

POINT X

THE TRIAL COURT REVERSIBLY ERRED WHEN IT FAILED TO INSTRUCT THE JURY IT HAD TO FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS ARE SUFFICIENT TO JUSTIFY IMPOSING DEATH, AND THAT AGGRAVATING FACTORS OUTWEIGH ANY MITIGATING EVIDENCE PRESENTED

This issue has recently been decided by this Court in *Rogers v. State*, - - So. 3d --, 2019 WL 4197021 (Fla. 2019), in which this Court receded from *Perry v. State*, 210 So. 3d 630 (Fla. 2016) and held that the jury does not have to find beyond a reasonable doubt that aggravating factors were sufficient to justify the death penalty and that the aggravating factors outweighed the mitigating circumstances. This point is raised to preserve the issue for federal review. *See Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

In the present case the jury was not instructed it had to find beyond a reasonable doubt that the aggravating factors are sufficient to justify imposing death

and that aggravating factors outweigh any mitigating evidence presented. (T 1782-1786).

The entitlement to a jury determination beyond a reasonable doubt extends to any determination that increases the penalty for a crime. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.") (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490 (2000)).

Under Florida's capital sentencing scheme, "to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death." *Perry*, 210 So. 3d at 640. These findings must be made beyond a reasonable doubt. *Id*. at 633 (citing *Hurst v. State*, 202 So.3d 40, 44-45, 53-54, 59-60 (Fla. 2016)).

In the context of capital sentencing, any factor that must be found before the death penalty can be imposed is the "functional equivalent" of an element of the charged offense, at least for sentencing purposes. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citing *Apprendi*, 530 U. S. at 494 n. 19).

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court held that Florida's then-existing capital sentencing scheme violated the Sixth Amendment because it allowed

the death penalty to be imposed based on judicial fact-finding. In particular, the statute at issue allowed the trial court, alone, to conclusively determine the existence of an aggravating circumstance after receiving an advisory verdict from the jury. *Id*. at 620 (citing § 921.141(2)-(3), Fla. Stat. (2010)).

It follows that this general statement can be made: Any determination that increases the available penalty for a capital felony from life in prison to death is the functional equivalent of an element of the capital felony, and must be made by a jury based on proof beyond a reasonable doubt.

Florida's capital sentencing scheme establishes that whether aggravating factors are sufficient to justify the death penalty, and whether those factors outweigh mitigating circumstances, must be determined by the jury (i.e are functioning elements) for sentencing purposes.

Under the statutory provisions, if a jury finds the existence of an aggravating factor beyond a reasonable doubt, but does not separately and unanimously determine that the aggravating factor is sufficient to impose death and that it outweighs any mitigating evidence, the jury's sentencing recommendation must be for a term of life in prison. § 921.141(2), Fla. Stat. (2018). When the jury recommends life, "the court shall impose the recommended sentence." § 921.141(3)(a)1, Fla. Stat. (2018). Without additional unanimous jury determinations that at least one aggravating factor is sufficient to impose the death penalty and that

the aggravating factor outweighs any mitigating circumstances, a defendant cannot be sentenced to death. See *Hurst v. State*, 202 So. 3d at 53. Therefore, for sentencing purposes, these additional determinations are treated as elements of the crime, whether they are called "elements" or something else.

Due process requires proof beyond a reasonable doubt of any determination or element that must be made before the death penalty is available for a particular defendant. Society's interest in the reliability of jury verdicts is even stronger in capital cases than in other criminal cases because of the "qualitative difference between death and other penalties." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). The Court recognized in *Apprendi* that the requirement of a jury finding went hand-in-hand with "the companion right to have the jury verdict based on proof beyond a reasonable doubt." 530 U.S. at 477-78.

The findings required by section 921.141(2)(b), namely the existence of an aggravating factor or factors, whether the aggravating factors are sufficient to impose the death penalty, and whether they outweigh any mitigating circumstances, are "critical findings" requiring jury unanimity. See *Hurst v. State*, 202 So. 3d at 44. Therefore, as a matter of constitutional law, these findings implicate the due process right to proof beyond a reasonable doubt.

In *Hurst v. State*, after a "close review" of the applicable sentencing statutes, this Court stated that the "jury must also unanimously find that aggravating factors

are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge" 202 So. 3d at 54. Subsequently, this Court stated in *Perry v. State* that "the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." 210 So. 3d at 633.

Other jurisdictions have recognized that due process is violated where the jury does not have to find aggravators outweigh mitigators beyond a reasonable doubt. *State v. Wood*, 648 P.2d 71, 83-84 (Utah 1981), cert. denied, 459 U.S. 980 (1982) (certitude required for deciding whether aggravating factors outweighed mitigating factors was beyond a reasonable doubt); *see also State v. Rizo*, 833 A. 2d 363, 403-410 (Conn. 2003) (reasonable doubt standard was appropriate for weighing process).

The trial court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient to justify the death penalty, and whether the aggravating factors outweighed the mitigating factors, created fundamental error.

When the issue involves an incomplete or omitted jury instruction, fundamental error occurs if what is omitted is "pertinent or material to what the jury must consider in order to convict." *Daughtery v. State*, 211 So. 3d 29, 39 (Fla. 2017) (finding the issue of intent was "pertinent or material" to the jury's deliberations where the defendant was charged with first-degree murder and convicted of second-

degree murder). An instruction is material when it involves a disputed issue. E.g., *Reed v. State*, 837 So. 2d 366, 369 (Fla. 2002). Fundamental error is, by definition, harmful. E.g., *Ramroop v. State*, 21 So. 3d 657, 665 (Fla. 2017).

In this case the failure to instruct the jury on the correct burden of proof relating to these disputed issues created fundamental error and denied Woodbury due process. Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution; Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Woodbury's sentence must be vacated.

POINT XI

A LEGITIMATE PROPORTIONALITY REVIEW CANNOT BE PERFORMED BECAUSE THERE WAS MITIGATION THAT WAS NEVER CONSIDERED

In all cases in which a death sentence has been imposed this Court has a mandatory obligation to review that sentence for proportionality. See e.g. *England v. State*, 940 So.2d 389,407 (Fla. 2006); *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990) ("Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases").

In *Russ v. State*, 73 So. 3d 178, 198-99 (Fla. 2011) this Court explained the proportionality review which ensures that death is reserved only where the least mitigating circumstances exist:

> "In reviewing a death sentence for proportionality, we ensure that the death penalty is 'reserved only for those cases where the most aggravating and least mitigating circumstances exist.' " *McGirth v. State*, 48 So. 3d 777, 796 (Fla. 2010) (quoting *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996)), cert. denied, —U.S.—, 131 S. Ct. 2100, 179 L. Ed. 2d 898 (2010). This Court's "review on proportionality is not a comparison between the number of aggravators and mitigators." *McGirth*, 48 So. 3d at 796; *see Barnes v. State*, 29 So. 3d 1010, 1028 (Fla.), cert. denied, —U.S.—, 131 S. Ct. 234, 178 L. Ed. 2d 155 (2010). Proportionality review requires this Court to engage in a qualitative review of the "totality of the circumstances and compare the present case with other capital cases in which this Court has found that death was a proportionate punishment." *Wright v. State*, 19 So. 3d 277, 303 (Fla. 2009) (citing *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998)).

Such an analysis cannot be performed in this case where, as explained in other points of this brief, there is significant mental mitigation present but not fully placed in the record let alone before the jury or judge.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse Woodbury's conviction and remand for a new trial (Points I-IV) or reverse for a new penalty phase (Points V-XI).

CERTIFICATE OF SERVICE

I certify that this brief has been electronically filed with the Court and a copy of it has been served to Rhonda Giger, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 20th day of September, 2019.

/s/ Mara C. Herbert
Mara C. Herbert

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s/ Mara C. Herbert
Mara C. Herbert