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IN THE FLORIDA SUPREME COURT

CASE NO. SC19-0008

MICHAEL LAWRENCE WOODBURY,
Appellant

v.

STATE OF FLORIDA,
Appellee

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT (CRIMINAL DIVISION)

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PRELIMINARY STATEMENT

Appellant, Michael Lawrence Woodbury, will be referred to by his proper name, rather than Appellant or Defendant. Appellee, the State of Florida, will be referred to as "the State". The State's Answer Brief will be referred to as "AB" followed by the appropriate page number. Appellant's Initial Brief will be referred to as "IB" followed by the appropriate page number. Citations to the record will be consistent with the citations in the Initial Brief.

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)

As an initial matter, the State may misapprehend Woodbury's argument. In its answer brief, the State summarizes Woodbury's argument as "the court should have denied his demand to proceed pro se, despite the fact that there was no visible indication of mental illness." (AB 32, 35). In actuality, the argument is that the court should not have granted the request, in light of Woodbury's bipolar diagnosis, unless and until it sufficiently inquired into (1) whether he suffered from severe mental illness to the point where he was not competent to conduct trial proceedings by himself and (2) whether his mental illness interfered with his ability to make an

intelligent and voluntary waiver of counsel, as required by Florida Rule of Criminal Procedure 3.111(d)(3).

The State asserts that the court had no reason to doubt Woodbury's pro se competence because there were no "visible" indications of mental illness. (AB 32). This argument, however, overlooks the court's knowledge that Woodbury suffered from bipolar disorder, was taking psychiatric medication and experiencing side effects, had an extensive ongoing psychiatric history (including hospitalizations) dating back to when he was 18 years old, and repeatedly denied his mental illness referring to psychologists as a "bunch of quacks." (T 24-25, 122, 196, 1009-12). This information was sufficient to alert the court to potential mental health issues.

It was an abuse of discretion thereafter for the court to ignore this issue in its interactions with Woodbury, and to conclude that he was competent to represent himself without further investigation into his mental state. Without sufficient inquiry, the court remained entirely unaware of facts essential to an informed decision on Woodbury's competency to proceed pro se and waive counsel.

The crux of the State's argument is that aspects of Woodbury's trial performance showed that he was competent. (AB 35, 45-47). But the State fails to consider several significant irrational decisions which indicated active mental illness. These instances are fully explained in the initial brief (IB 56), but a few of the most egregious included:

- Despite a lengthy history and current treatment for bipolar disorder, Woodbury repeatedly refused to acknowledge that he was in fact mentally ill.
- Woodbury demanded speedy trial on a capital trial without possessing any discovery, filing any pre-trial motions, or conducting any depositions.
- Woodbury appeared before the jurors in his prison clothing while handcuffed as a matter of personal choice and strategy. He thought it was "excellent" to wear his prison uniform at trial. (T 209).
- Woodbury thought lightning would strike before 12 jurors would give him the death penalty. (T 59).

While it is true that Woodbury showed some familiarity with courtroom procedures and was able, a few times, to rationally articulate legal arguments and objections, mental illness fluctuates over time and the State cannot simply point to the coherent and ignore the irrational.

Moreover, Woodbury does not have to prove that he was mentally ill enough to be incompetent to conduct trial proceedings by himself. To require such an analysis places the burden onto the incompetent defendant to determine the gravity of his own mental illness. That reasoning defeats the purpose of any inquiry at all. Further, the court's lack of inquiry makes such an assessment impossible on direct appeal. Without proper inquiry, facts essential to an informed decision on competency are missing from the record.

Furthermore, the State offers no rebuttal to the argument that mental illness is not something that would always be readily apparent to a trial judge. Mental illness manifests itself in a variety of ways. Sometimes, it can go undetected by those untrained in how to look for its symptoms. It is not always "visibly" apparent but that does not mean it is not impairing. This is why it is essential for trial courts to conduct more than a cursory inquiry into the serious mental illness of a defendant in order to comply with the requirement that it determine that a defendant does not suffer "from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by his or her self." Fla. R.Crim. P. 3.111(d)(3).

Take for example, in *People v. Lego*, 168 Ill. 2d 561 (1995), a defendant's waiver of counsel was found, post-conviction, to be invalid because his organic brain syndrome caused a delusion that his legal skills were equal to or exceeded those of virtually any attorney who might represent him. This disorder was not obvious from his remarks and behavior at trial. The symptoms were subtle enough not to be recognized by the trial judge or prosecutor, but blatant enough to be later recognized as genuine by experienced psychiatric experts.

In the case at bar, the facts are even more glaring because the trial court did not learn of Woodbury's diagnosis in post-conviction proceedings but was aware of the bipolar diagnosis from the onset of the case. Further, and most disconcerting, the trial court had, prior to sentencing, an evaluation report from Dr. Sesta indicating

that the court should consider Woodbury's decompensated mental state and that he was actively mentally ill prior to the start of the penalty phase:

> 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.

(R 587) (emphasis added);

> SECTION SUMMARY: ABNORMAL. Clinical mental status exam revealed ***active manic episode*** in a setting of Bipolar disorder with subtherapeutic response to pharmacotherapy with carbamazepine.

(R 589) (emphasis added);

> Standardized psychological testing and clinical mental status examination provided ***convergent evidence of active mental illness***, currently manifesting as a manic episode in a setting of Bipolar disorder.

(R 590).

This report serves to illustrate and corroborate the limitations of the trial court's competency assessment based solely on its own observations. Like in *Lego*, the symptoms of Woodbury's mental disorder went unrecognized by the trial court and prosecutor, but were identified by a trained mental health professional.

In its brief, the State attacks the report as being "dubious." (AB 47). This attack is not based upon anything in the record, and should be rejected on that basis alone. Moreover, it was the State that requested and introduced the report. The report was entered as State's exhibit 1. (T 1882). When entering the report into evidence at

the *Spencer* hearing, the prosecutor did not express any concerns regarding its validity. (T 1878-82).

The State claims that the report was based on Woodbury's self-serving hearsay. (AB 46-47). This is simply not so. This ignores the fact that Dr. Sesta extensively reviewed over 8,000 pages of medical records. These records served to independently verify Woodbury's history and treatment for bipolar disorder. In addition, Dr. Sesta conducted psychological testing. In regards to the State's comment about when Woodbury reinitiated his medication regime, Dr. Sesta relied on the medical records from the Department of Corrections, a much more reliable source of information than Woodbury. This highlights why relying on a mentally ill defendant's representations can be problematic.

The State argues that the court did not have the report in its possession at the time of the waivers of counsel. (AB 46). However, this lack of information is due to the court's own failure to inquire into Woodbury's mental illness. This was not a report that the court was unaware of, in fact, the court specifically ordered the evaluation report completed before the start of the penalty phase and scheduled a hearing to address it. (R 192; T 1425-27). But the court chose not to inquire into the report after it was ordered. In that respect, the court failed to remain diligent to circumstances that suggested Woodbury was not competent.

The State's argument also fails to address that the report was in the court's possession prior to imposing sentence. (T 1882). Sentencing is a critical stage of the proceeding. Even assuming arguendo that the bipolar diagnosis and irrational choices at trial were not sufficient to trigger further inquiry before trial, the report clearly provided reasonable doubts as to Woodbury's pro se competence to proceed to sentencing, calling into question the choices he made at the *Spencer* hearing.

Having information that Woodbury suffered from chronic bipolar disorder strongly indicates that his mental capacities were compromised, and is precisely the type of evidence that should have provoked the court to conduct further inquiry into the severity of Woodbury's psychiatric symptoms and their interference with his rational thinking. A competency evaluation would have addressed "whether the defendant has a rational, as well as factual, understanding of the pending proceedings." Fla. R. Crim. P. 3.211(a)(1). But, the court never exercised its discretion to order such an evaluation.

The State characterizes Woodbury as not having a severe mental illness. (AB 44, 46). In doing so, the State failed to acknowledge the serious nature of bipolar disorder, distinguishing it from the hundreds of other disorders listed in the DSM-V. For example, under federal law, bipolar disorder is defined per se as a disability under the Americans with Disabilities Act ("ADA"). The ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life

activities. 42 U.S.C. §12102. Moreover, the Equal Employment Opportunity Commission (EEOC) lists bipolar disorder as an impairment which will "virtually always" be a disability. In a section titled "predictable assessments," the regulations state that: "it should easily be concluded that... major depressive disorder, ***bipolar disorder***, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function." 29 C.F.R. §1630.2(j)(3) (emphasis added).

Moreover, Woodbury's bipolar disorder coupled with his psychiatric medication would have been sufficient, not only to question his competency, but to deny him self-representation. *See Visage v. State*, 664 So. 2d 1101 (Fla. 1st DCA 1995) (no error to deny self-representation to defendant suffering from bipolar disorder, currently taking psychiatric medication and with psychiatric history which included hospitalization); *see also Da Silva v. State*, 966 So. 2d 1013 (Fla. 4th DCA 2007) (no error to deny self-representation to defendant suffering from schizophrenia).

The State next argues that a "a defendant can represent himself even if he suffers from or previously suffered from mental illness." (AB 44). This statement is not disputed, but again, the issue is the sufficiency of the inquiry. The State does not cite to any case law in which a trial court failed to order an evaluation of a defendant with a serious mental illness prior to granting a request to waive counsel.

While a trial court is not required to inquire as to the competency of every defendant who wishes to proceed pro se, a defendant who, the court knows, suffers from a mental illness as serious as bipolar disorder would at least qualify for a minimal investigation of his competency to self-represent.

Likewise, the trial court's superficial inquiry into Woodbury's mental illness did not ensure that his waiver of counsel was intelligent and voluntary. Whether a counsel waiver is voluntary, knowing and intelligent requires a factual and case-specific determination. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Courts are to "indulge every reasonable presumption" against waivers of counsel. *Id*.

Under the circumstances of Woodbury's case, which included a history and current treatment of serious mental illness, the court should have engaged in a more extended colloquy, allowing him to state his understanding of the requirements and consequences of giving up his right to counsel in his own words. In this way, the record would have shown if he truly understood what had been conveyed to him by the court.

Instead, the court chose to read a script provided by the State which consisted of questions involving no more than a "yes" of "no" response. The trial court never asked a simple open-ended question such as: "Tell me why you want to represent yourself, sir." The American Bar Association explains:

> [P]ersons with severe mental illnesses, such as brain damage and schizophrenia, can appear to be normal at times or may try to control or

> inhibit their behaviors in the courtroom. Thus, if judges rely only on court observations, it is quite possible to miss incompetency, particularly if the defendant is asked only leading and/or "yes" or "no" questions.

National Benchbook on Psychiatric and Psychological Evidence and Testimony, ABA 1998, p. 163.

The State emphasizes that the trial court conducted this inquiry 12 times. However, at each inquiry, the court used the same script. Doing something wrong 12 times does not make it right.

The ultimate test for whether there has been a valid waiver of the right to counsel is not the trial court's express advice, but rather the defendant's understanding. *See Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993); *Potts v. State*, 718 So. 2d 757, 760 (Fla. 1998). Whether a waiver is knowing and intelligent is a fact-specific determination which must take into account all of the surrounding circumstances, including the background, experience and conduct of the accused. *See Tennis v. State*, 997 So. 2d 375, 378 (Fla. 2008). "[T]he specific elements of that "thorough inquiry" will vary depending on circumstances related to the defendant that are known to the trial judge." *Hooks v. State*, -- So. 3d --, 2019 WL 6906461, December 19, 2019.

This Court has opined that "self-representation is best safeguarded not by an arcane maze of magic words and reversible error traps, but by reason and common sense." *Potts*, 718 So. 2d at 760.

In the instant case, the trial court failed in its duty to make an assessment of Woodbury's actual understanding. Instead, it engaged in a recitation of boilerplate questions, a procedure this Court has cautioned against. *See id*. A common sense inquiry would have consisted of, at the bare minimum, engaging Woodbury in a meaningful discussion to determine whether, in light of his mental illness, he possessed the requisite understanding and knowledge to waive counsel.

The trial court did not conduct a sufficiently probing and comprehensive examination on the issue of his waiver of counsel either for trial or sentencing considering Woodbury's mental illness. Woodbury's waiver of counsel was therefore not knowingly or intelligently made.

This is not the kind of case where the lack of a sufficient colloquy can be overlooked. *See United States v. Cash*, 47 F. 3d 1083, 1089-90 (11th Cir. 1995) (Defendant's mental health issues tipped "the balance" and his waiver of counsel was held not to be knowing, voluntary and intelligent because "the court's colloquy was not specific or thorough enough, especially in light of the defendant's mental problems."); *see also People v. Davis*, 352 P. 3d 950 (Colo. 2015) (waiver found unacceptable where defendant acknowledged that his paranoia, which he could not control, led him to distrust lawyers, and trial court, looking also at other aspects of defendant's behavior, that his "desire to represent himself being driven, at least in part, by … [his] personality disorder").

Lastly, the State implies, in a footnote, that further inquiry into Woodbury's mental illness would interfere with his individual dignity. (AB 37, fn. 16).

Indiana v. Edwards accepts the notion of the defendant's autonomy interest, but insists that it must be balanced against the State's interests in reliability, and that where the State's interest is strong (as it is in a capital case), the defendant's autonomy interest may be restricted. 554 U.S. 164, 176-77 (2008).

Woodbury agrees that the right to proceed pro se is grounded in the Founders' belief in the "inestimable worth of free choice," and that a criminal defendant must, therefore, "be free personally to decide whether in his particular case counsel is to his advantage . . . voluntarily exercising his informed free will." *Faretta v. California*, 422 U.S. 806, 833-35 (1975). But an individual is not exercising "free choice" if his mental disorder is interfering with his brain function.

In its answer brief, the State ignores, as did the trial court, that symptoms of active bipolar disorder exhibited by Woodbury include grandiosity, recklessness and impulsivity. It is likely that these symptoms, which existed at the time Woodbury waived counsel, and throughout his trial and sentencing hearings, demonstrate the bipolar disorder rendered him unable to understand or appreciate the dangers and disadvantages of waiving his right to an attorney; in other words, that his waiver was not the rational and reasoned product of his own free will, but was instead the product of his chronic mental disorder.

Therefore, it is essential for Woodbury's "individual dignity" that the court ensure that his decision to waive counsel was grounded in reality and not mental illness. *See e.g. United States v. Sandles*, 23 F. 3d 1121, 1127 (7th Cir. 1994) (Where a defendant's psychological evaluation indicated that he suffers from "grandiose delusions about his own capabilities," the need exists for the trial court to "engage in some level of 'reality testing' to determine if [he] is indeed up to the task of representing himself.").

The trial 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 State dismisses the argument made on this point, asserting that the court had no reason to doubt Woodbury's competency to proceed. (AB 48). The State's position here appears to rest primarily on its assertion that Woodbury's trial performance established that he was competent. As stated in the response to Point I, the State overlooked several instances of irrationality and it is not Woodbury's burden to show that he was incompetent but, rather, that the trial court ignored

reasonable grounds to doubt his competency. These instances are fully discussed in the Initial Brief. (IB 63-65).

The issue lies in the procedural deficiency. Woodbury is not making a substantive claim alleging that he was tried and convicted while incompetent, though he probably was, which would require proof of incompetency by a preponderance of the evidence.

Woodbury has established that the trial court ignored facts that raised a bona fide doubt as to his competency. His diagnosis of bipolar disorder and taking of medication, coupled with his irrational choices and comments, should have alerted the trial court that he may not be competent.

The State is correct in stating that a mental health diagnosis does not per se equal incompetency. (AB 51). But it does raise a reasonable doubt as to competency. The question is not whether, based on the information before the court, the evidence was insufficient to show that Woodbury clearly lacked competence, but whether there was reasonable cause to believe that he may lack competence.

Given the unique circumstances of this case, the record demonstrates that a reasonable judge, early in the proceedings, would have had a genuine doubt about Woodbury's competence to proceed and would have inquired further as to his psychiatric history before allowing a trial to commence and continue.

First, the trial court could not rely on a defense counsel's representation that the defense was not aware of a problem with competency because there was no defense counsel. This is not a case in which Woodbury initially had counsel whom he later chose to dismiss and proceed pro se. Rather, Woodbury waived his right to counsel at his first court appearance. As a result, there was never an attorney in this case in a position to discover the extent of Woodbury's mental disorder through extended close contact, who could have requested a psychiatric examination.

The State's reliance on standby counsel's failure to question competency is misplaced. The trial court specifically ordered that standby counsel was under no obligation to provide legal counsel. (R 56-57). From the record it is unclear as to the substance of the contact standby counsel had with Woodbury. Unlike a defense counsel, standby counsel would not have had extensive out of court contact with Woodbury discussing the intricacies of his defense. The failure of standby counsel to raise a concern cannot be equated with that of a defense counsel.

The trial court did not rely on prior medical opinions or evaluations of Woodbury's mental state. This is so, because the trial court chose not to review his extensive mental health records nor order, in light of his mental illness, a pre-trial competency evaluation.

Requiring a defendant to present actual incompetence to trigger procedural protections is self-defeating because those procedural protections exist for the very purpose of determining actual incompetence.

Woodbury's comments to the court showed a lack of awareness of his mental illness. (T 24-26, 1035, 1829). The court should have been troubled by Woodbury's reluctance to acknowledge his mental disorder rather than agreeing that he might not be mentally ill. As stated in the initial brief, this lack of awareness is a potential sign of active mental illness (a condition known as Anosognosia). (IB 62).

Next, the State argues that not every manifestation of mental illness demonstrates incompetence to stand trial. (AB 50-51). The State compares this case to *Barnes v. State*, 124 So.3d 904, 912 (Fla. 2013), where this Court found another capital defendant competent to proceed despite a mental illness diagnosis. (AB 50). However, Barnes contains important distinctions from the instant case.

Barnes' mental health history is much different than Woodbury's history of severe mental illness. Barnes "had been "Baker Acted" once in 1990 for three days for observation and at some point had been diagnosed with borderline personality disorder." *Id*. at 911. Barnes advised the court that he had completed a year of college, taken several criminal justice courses, was a certified law clerk at the Department of Corrections, worked in the prison law library for 20 years, watched a

criminal trial, and had never been treated for mental illness, although he had been diagnosed with a personality disorder. Id. at 912-13.

Barnes, unlike Woodbury, did not show a lack of awareness of his mental illness, take psychiatric medication, nor have thousands of pages of medical records detailing an extensive history of mental illness and treatment.

Most importantly, the trial court in *Barnes* made an extensive inquiry and had the benefit of pre-trial competency evaluations. In *Barnes*, the trial court prior to permitting Barnes to proceed pro se properly ordered Barnes' school records and appointed a forensic psychologist, to provide a psychological evaluation of Barnes. *Barnes v. State*, 29 So. 3d 1010, 1014 (Fla. 2010).

To the contrary, in the instant case (as explained in Point I), despite knowledge of the medical records and mental illness, the trial court chose not to acquire the records for review nor order an evaluation.

Likewise, the State's reliance on *Wickham v. State*, 124 So. 3d 841 (Fla. 2013), another post-conviction case finding no error in the court's failure to order sua sponte a competency evaluation at trial, is misplaced. (AB 50). In *Wickham*, the trial court had the benefit of a pre-trial competency evaluation which found Wickham competent to stand trial. *Id*. at 862. In addition, defense counsel testified at the evidentiary hearing that he never had any indication that Wickham was not competent to stand trial. *Id*.

In the same respect, the State's citations to *Nelson v State*, 43 So. 3d 20 (Fla. 2010) and *Drope v. Missouri*, 420 U.S. 162 (1975), fail to consider that those cases also contained pre-trial competency evaluations finding the defendant competent to proceed. (AB 50-51).

Moreover, *Nelson* involves a completely different scenario than the case at bar. *Nelson* was a post-conviction claim that defense counsel was ineffective in failing to raise a concern about Nelson's competency. Defense counsel had the benefit of extensive contact with Nelson and an evaluation from a mental health professional. While Nelson's psychiatric medication was not per se evidence of incompetency, this Court did opine that its administration "warrants an evidentiary hearing when a postconviction claim of ineffective assistance of counsel is raised for failure to seek a competency determination." Id. at 29.

Here, unlike in *Nelson*, there was evidence that the medication may have contributed to Woodbury's decompensated mental state. Dr. Sesta's report provides evidence that Woodbury was having a subtheraputic response to the medication and was actively mentally ill. (R 587, 589-91). The State's comment that he was "properly medicated" is not support by the record. (AB 51).

Finally, Woodbury highlights that the State, in its brief, fails to rebut the reasonable grounds raised in Dr. Sesta's report, which at a minimum, would have called Woodbury's competency to be sentenced into question. Despite the clarity of

the report, specifically directing the court's attention to Woodbury's "decompensated mental state," the trial court did not order an evaluation. (R 587).

In sum, although a competency evaluation is not required whenever a defendant presents with mental illness, given the circumstances of Woodbury's case, the trial court's observations of Woodbury's behavior were insufficient to dispel the reasonable grounds presented which indicated possible incompetency. The trial court's failure to sua sponte order an evaluation 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 III

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

The knowing, intelligent and voluntary nature of Woodbury's guilty plea is questionable because he suffers from bipolar disorder and was under the influence of psychotropic medication at the time he entered the plea.

The State's responds that Woodbury did not present any signs of mental illness and nothing about his behavior would suggest he was incompetent. (AB 53-54). This, however, overlooks the manner in which Woodbury decided to plead guilty and how it reasonably called into question his mental state.

Woodbury made the decision to enter a guilty plea while on the witness stand testifying in his defense. (T 1364). The State contends that this was a "highly

sophisticated" choice to avoid cross-examination. But, in actuality it is highly irrational. Woodbury himself described the decision as "crazy." (T 1163). It is irrational for a defendant to plead not guilty and proceed to trial, amassing several days of jury selection and testimony, with the intent to admit guilt during his case-in-chief. This impulsive change in strategy evidences an irrational decision-making process, which could, in fact, be a product of his mental illness.

The State asserts that the trial court "followed proper procedures to ensure that Appellant's constitutional rights were protected." (AB 53). But Woodbury's irrational and impulsive decision to plead guilty, coupled with his bipolar disorder, prior psychiatric hospitalizations, and psychotropic medication required the trial court to conduct an extensive inquiry into his mental state prior to accepting the plea to "ensure that Appellant's constitutional rights were protected," specifically that he was competent to enter a guilty plea and that the voluntariness of the plea was not impaired by his mental illness and medication. Without such an inquiry, the record does not contain the necessary information to determine that the plea was knowingly, intelligently and voluntarily entered.

An example of a trial court that followed proper procedures is described in *Covington v. State*, 228 So. 3d 49 (Fla. 2017), in which this Court held on direct appeal that the defendant understood the ramifications of his plea even though he was on psychiatric medications. In *Covington*, the defendant announced on the day

of opening statements in his trial for three counts of first-degree murder, three counts of abuse of a dead body, and one count of cruelty to an animal, that he wanted to change his pleas to guilty. *Id*. at 54. However, unlike the court in the instant case, the trial court did not accept Covington's guilty pleas at that time but instead appointed two experts to evaluate his competency to plead guilty. *Id*. The evaluations and the doctors' reports were completed that evening. *Id*. The next day, the trial court accepted his pleas after an extensive colloquy and hearing from Covington's attorney, who supported his decisions. *Id*.

Here, despite having a far more concerning factual scenario, the trial court elected to forgo an extensive inquiry, thereby failing to dispel the concerns regarding the voluntariness of Woodbury's guilty plea.

As to the State's comments regarding standby counsels' failure to raise a concern as to his competency (AB 60-61), Woodbury relies on his response contained in Point II of this reply brief. For the remainder of this issue, Woodbury relies on the argument contained in his initial brief.

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

The issue raised here is fairly before this court for resolution, and Woodbury will accordingly rely on his initial brief as to this point.

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

This issue is thoroughly discussed in Woodbury's initial brief, however, a response is needed to a few misconceptions made by the State.

The State contends that the trial court considered the mental mitigation contained in Dr. Sesta's report and did not err when it determined the report was not mitigating. (AB 68). The State fails to appreciate that the trial court's analysis of the mitigation reflects a perfunctory evaluation on the part of the court. Though the report was placed before the court prior to sentencing, its full contents were not read before a sentence of death was imposed. Prior to imposing sentence, the court perused the report, reading the summary of findings. (T 1885-88). The court did not recess to read the entire report nor did it call Dr. Sesta as a witness to explain its contents.

It "is clearly the responsibility of the trial court to affirmatively show that all possible mitigation has been considered and weighed, and it is error to fail to do so." *Robinson v. State*, 684 So. 2d 175, 179 (Fla. 1996).

In *Geliga v. State*, 283 So. 3d 394 (Fla. 4th DCA 2019), the Fourth District Court of Appeals emphasized the importance of the sentencing court's full review of documentation of a defendant's mental health prior to imposing sentence, by including a footnote instructing the resentencing judge to conduct such a review:

> At the sentencing hearing, the judge admitted that he had read some, but not all, of the documents submitted. As we are reversing for a new sentencing hearing, any sentencing judge needs to read all of the documentation of the defendant's prior history of mental disorder before making a determination on the sentence.

Id. at fn. 1.

Here, the trial court admitted to only glancing over the summary of findings in the report prior to the imposition of a death sentence. The court could not render a reasoned, individualized sentencing determination with such a cursory partial review of significant mitigation as mental health.

Further, the mental health evidence was believable and uncontroverted. The State persists in its unfounded attack of Dr. Sesta's report and its conclusory comment that the report is "certainly not believable and uncontroverted." (AB 69). However, it offers no support for this assertion other than the State would have contested the contents of the report had Woodbury presented it into evidence. (AB 69). This argument is meritless and refuted by the record as ***the prosecutor*** requested the evaluation and subsequently entered the report into evidence. (R 187; T 1878-79). Moreover, the bizarre behavior exhibited by Woodbury during the offense, the

thousands of pages of medical records, the psychological testing, the Department of Corrections administering psychotropic medication to Woodbury, and the State's discovery of Woodbury's prior psychiatric commitments, provide ample support. The record clearly establishes that Woodbury suffered from mental illness. The fact that Woodbury did not enter the report himself is immaterial. The report is contained in the record (at the State's request) and, therefore, the trial court was obligated to affirmatively show that it was considered. *See Robinson v. State*, 684 So. 2d at 177 (All "believable and uncontroverted" mitigating evidence contained in record must be considered and weighed in sentencing process).

Even more, the record is unclear as to whether the full contents of the report were ever actually considered because the sentencing order contains little discussion. The sentencing order provides only conclusory statements which support that the court conducted a perfunctory evaluation of the mental health mitigation.

Finally, harmless error does not apply because the trial court arbitrarily and unreasonably imposed death without first affirmatively showing all believable, uncontroverted mitigating evidence had been considered and weighed. *See Griffin v. State*, 820 So. 2d 906, 914 n.10 (Fla. 2002) ("[We] reiterate the importance of *Campbell* and its requirement of a thorough written evaluation of the proposed mitigating circumstances. Certainly, we will not remand where the trial court's order is minimally defective. But where the order is made up of conclusory statements or

otherwise reflects a perfunctory evaluation on the part of the trial court, harmless error analysis will not save that order.”).

Woodbury maintains his position that his rights to due process and a reliable sentencing outcome were adversely affected in this case. For the remainder of this issue, Woodbury relies on the argument contained in his initial brief.

POINT VI

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

The issue raised here is fairly before this court for resolution, and Woodbury will accordingly rely on his initial brief as to this point.

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 issue raised here is fairly before this court for resolution, and Woodbury will accordingly rely on his initial brief as to this point.

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 State is correct to the extent it argues that the determination of a mitigating circumstance and the respective weight assigned is within the trial court's discretion. But the trial court's findings are not infallible and this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law. *See Pardo v. State*, 563 So. 2d 77, 80 (Fla. 1990).

In the instant case, the trial court misapprehended the law and applied the incorrect standard in the weighing process. The State attempts to minimize this issue by referring to the misquotation from *Duncan v. State*, 619 So. 2d 279 (Fla. 1993) as a scrivener's error. (AB 86). While this may be true for the misquotation contained in the State's sentencing memorandum, it is not so for the court's sentencing order. That the same misquotation is found in the sentencing order shows the trial court relied on the State's memorandum and did not itself review the opinion.

The State misunderstands the issue; its position rests primarily on a factual basis. However, this is not a factual issue. Instead, it concerns an abuse of discretion based on an erroneous view of the law. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007) (trial court "abuses its discretion if its ruling is based on an 'erroneous view of the law.'").

Woodbury maintains his position that a new sentencing phase is required, where the trial court must evaluate the mitigating factor without imposing a

requirement that the mental or emotional distress obviate Woodbury's knowledge of right or wrong.

POINT IX

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

The issue raised here is fairly before this court for resolution, and Woodbury will accordingly rely on his initial brief as to this point.

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

The State argues that any fundamental error in the jury instructions was waived under the invited error doctrine because Woodbury agreed to the jury instructions. Specifically, the State highlights that the court confirmed, after reading the instructions, that Woodbury accepted the instructions as read. (AB 93).

But, this argument lacks merit because Woodbury did not invite the fundamental error at issue because he merely acquiesced to the omitted instruction and never affirmatively relied on it. This Court has explained:

> We have also recognized, in the context of certain erroneous jury instructions, a fundamental error analysis exception "where defense counsel affirmatively agreed to or requested the incomplete instruction." *State v. Lucas*, 645 So.2d 425, 427 (Fla. 1994), receded from on other grounds by *State v. Spencer*, 216 So.3d 481 (Fla. 2017).

> However, we also recognized in that context that the exception did not apply "where defense counsel merely acquiesced to [the incomplete] instructions." *Spencer*, 216 So.3d at 486; see, e.g., *Black v. State*, 695 So.2d 459, 461 (Fla. 1st DCA 1997) ("[D]efense counsel must be aware that an incorrect instruction is being read and must affirmatively agree to, or request, the incomplete instruction.").

Lowe v. State, 259 So. 3d 23, 50 (Fla. 2018).

Here, Woodbury did not invite the fundamental error related to omitting an instruction to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances. The instructions were prepared by the State and read at its request. While Woodbury failed to object, this mere acquiescence to the instruction is insufficient to apply the exception. There is nothing in the record to indicate that it was a strategic choice; Woodbury did not take an affirmative action to request the incomplete instruction nor tailor it to his defense. Thus, the fundamental error in the instructions was not invited.

For the remainder of this issue, Woodbury relies on the argument contained in his initial brief.

POINT XI

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

The issue raised here is fairly before this court for resolution, and Woodbury will accordingly rely on his initial brief as to this point.

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 28th day of January, 2020.

/s/ Mara C. Herbert
Mara C. Herbert

CERTIFICATE OF FONT

I HEREBY CERTIFY the 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