No.

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LAWRENCE WOODBURY, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIROARI TO THE SUPREME COURT OF FLORIDA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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320 So.3d 631
Supreme Court of Florida.

Michael Lawrence WOODBURY, Appellant,
v.
STATE of Florida, Appellee.

No. SC19-8
|
April 15, 2021

Synopsis
Background: Pro se defendant was convicted on guilty plea in the Circuit Court, 19th Judicial Circuit, Okeechobee County, Sherwood Bauer, J., of first-degree premeditated murder and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

[1] defendant's diagnosis of bipolar disorder, without more, did not provide reasonable ground to believe that defendant was not mentally competent to stand trial;

[2] trial court did not abuse its discretion when it determined that defendant's waiver of right to counsel was knowing and intelligent;

[3] defendant's announcement in front of jury of his intent to change plea to guilty of first-degree murder after he presented his case, even though he knew it was "crazy" to do so, by itself, did not provide reasonable basis to believe that defendant was incompetent to enter guilty plea;

[4] adequate factual basis was established for guilty plea;

[5] defendant's case-in-chief after State rested was not new critical stage of trial at which trial court was required to renew offer of counsel and new *Faretta* inquiry;

[6] defendant's waiver of right to present mitigation case in penalty phase of trial was knowing, voluntary, and intelligent;

[7] trial court adequately considered mitigation case in favor of defendant after he waived right to present mitigation case;

[8] trial court had no obligation to appoint special counsel for defendant after he waived right to present mitigation case;

[9] whether defendant knew difference between right and wrong and appreciated criminality of his conduct at time he beat cellmate to death was not relevant to determination of existence of statutory mitigating factor that he was under influence of extreme mental or emotional disturbance at time of killing; but that

[10] such error was harmless.

Affirmed.

Labarga, J., concurred in result, with opinion.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection; Trial or Guilt Phase Motion or Objection; Plea Challenge or Motion; Pre-Trial Hearing Motion.

West Headnotes (46)

[1] **Criminal Law**⇨Doubt as to competency; reasonable cause or grounds
Criminal Law⇨Evidence

Defendant's diagnosis of bipolar disorder, without more, did not provide reasonable ground to believe that defendant was not mentally competent to stand trial for first-degree murder, as would necessitate competency evaluation; nothing in his behavior in court indicated present inability to understand proceedings against him or inability to consult with standby counsel, at no time did trial court, standby counsel, or prosecutors express any concerns about defendant's competency, and he filed motions on his own behalf, was consistently alert, demonstrated knowledge of legal issues, and said multiple times that he understood proceedings, and report prepared by psychologist appointed by trial court to conduct mental health evaluation for mitigation case never suggested inability of defendant to understand charges or consult with counsel. Fla. R. Crim. P. 3.210(b).

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[2] **Criminal Law**⇨Insanity or Incompetency at Time of Proceedings

An accused has a right to adequate process to ensure he is not tried or sentenced while mentally incompetent to stand trial. Fla. R. Crim. P. 3.210(b).

[3] **Criminal Law**⇨Preliminary proceedings

When a defendant claims a trial court failed to order a competency hearing, either sua sponte or on request from a party, the appellate court will uphold the trial court's determination absent an abuse of discretion. Fla. R. Crim. P. 3.210(b).

[4] **Criminal Law**⇨Evidence, Information, or Conduct Invoking Inquiry

Not every manifestation of mental illness demonstrates incompetence to stand trial, as would warrant a competency evaluation; rather, the evidence must indicate a present inability to assist counsel or understand the charges. Fla. R. Crim. P. 3.210(b).

[5] **Criminal Law**⇨Right of defendant to counsel

The trial court rulings regarding a defendant's competency to waive counsel are reviewed for abuse of discretion. U.S. Const. Amend. 6.

[6] **Criminal Law**⇨Right of Defendant to Counsel

While an accused has a right to the assistance of counsel, that right confers just what it says—assistance. U.S. Const. Amend. 6.

[7] **Criminal Law**⇨In general; right to appear pro se

To thrust counsel upon the accused, against his considered wish, violates the logic of the Sixth Amendment right to self-representation; in such a case, counsel is not an assistant, but a master. U.S. Const. Amend. 6.

[8] **Criminal Law**⇨In general; right to appear pro se

Each defendant must be free personally to decide whether in his particular case counsel is to his advantage, and although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law. U.S. Const. Amend. 6.

[9] **Criminal Law**⇨Hearing; necessity and conduct

Given the constitutional right to self-representation, once an unequivocal request for self-representation is made, the trial court is obligated to hold a hearing, to determine whether the defendant is knowingly and intelligently waiving his right to court-appointed counsel. U.S. Const. Amend. 6.

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[10] **Criminal Law**⇨Duty of Inquiry, Warning, and Advice

The purpose of a *Faretta* inquiry is not to assess whether the defendant possesses a degree of technical skill at trial advocacy, but whether his waiver of counsel is knowing and intelligent. U.S. Const. Amend. 6.

[11] **Criminal Law**⇨Capacity and requisites in general

While a defendant's technical skill is not part of the *Faretta* calculus when the defendant seeks to waive his right to counsel, 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. U.S. Const. Amend. 6.

[12] **Criminal Law**⇨Capacity and requisites in general

After conducting a *Faretta* inquiry, a trial court may preclude a defendant from exercising his right to proceed pro se if the court finds that the defendant is unable to carry out the basic tasks needed to present his own defense without the help of counsel. U.S. Const. Amend. 6.

[13] **Criminal Law**⇨Capacity and requisites in general
Criminal Law⇨Mental competence in general

A Florida trial court may deny a defendant's request to proceed pro se if: (1) the defendant's waiver of his right to counsel was not made knowingly and intelligently; or (2) the defendant suffers from severe mental illness to the point of being incompetent to conduct trial proceedings without assistance. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.111(d)(3).

[14] **Criminal Law**⇨Mental competence in general

The competency standard to waive one's right to counsel is the same as the competency standard to stand trial, whereas the competency standard to conduct trial proceedings without assistance of counsel is somewhat higher. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.111(d)(3).

[15] **Criminal Law**⇨Guilty plea
Criminal Law⇨Mental competence in general

Trial court did not abuse its discretion when it determined that defendant's waiver of right to counsel was knowing and intelligent, in trial for first-degree murder; trial court conducted multiple *Faretta* inquiries throughout course of trial, trial court explained benefits of counsel and pitfalls of self-representation, defendant responded appropriately to trial court's questions and indicated that he understood both proceedings against him and rights he was giving up by proceeding pro se, although defendant had been diagnosed with bipolar disorder, there was no indication that diagnosis rendered him incompetent to represent himself, record revealed instances where defendant's self-representation could easily be mistaken for work of veteran trial attorney, and most of alleged moments of "erratic behavior" during trial merely suggested lack of technical skill. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.111(d)(3).

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[16] **Criminal Law**⇐Right to plead guilty; mental competence
Mental Health⇐Mental disorder at time of trial

The competency standard to plead guilty is the same as the competency standard to stand trial. Fla. R. Crim. P. 3.210(b).

[17] **Constitutional Law**⇐Guilty pleas

Due process requires a trial court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary. U.S. Const. Amend. 14; Fla. R. Crim. P. 3.210(b).

[18] **Criminal Law**⇐Right to plead guilty; mental competence

Pro se defendant's announcement in front of jury of his intent to change plea to guilty of first-degree murder after he presented his case, even though he knew it was "crazy" to do so, by itself, did not provide reasonable basis to believe that defendant was incompetent to enter guilty plea, as would preclude finding that guilty plea was knowing and intelligent; trial court did not simply accept plea without question, but conducted colloquy to determine if plea was intelligent and voluntary, it explained that first-degree murder had only two possible sentences: life in prison or death, it informed defendant that plea form would indicate that there was no agreement for his open plea, so that defendant could still be sentenced to death, trial court went through plea form line-by-line to ensure defendant understood what he was doing, defendant affirmed that he understood consequences of plea, and at no time did defendant say anything to suggest that he did not understand plea or consequences of plea. Fla. R. Crim. P. 3.210(b).

[19] **Criminal Law**⇐Requisites and Proceedings for Entry

In order to challenge a guilty plea for lack of a factual basis determination by the trial judge, a defendant must show prejudice or manifest injustice.

[20] **Criminal Law**⇐Requisites and Proceedings for Entry

The inquiry to determine if a plea has a factual basis need not be a mini-trial; a court may be satisfied from statements and admissions made by the defendant, or by his counsel, or by the prosecutor.

[21] **Criminal Law**⇐Requisites and Proceedings for Entry

When the defendant raises the possibility of a defense to his guilty plea during the plea colloquy, the potential prejudice is apparent and so the trial judge should make extensive inquiry into factual basis before accepting the guilty plea.

[22] **Criminal Law**⇐Requisites and Proceedings for Entry

Adequate factual basis was established for defendant's guilty plea to first-degree premeditated murder of his cellmate; during trial prior to change of plea, law enforcement and correctional officers who responded to defendant's assault incident described assault as

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"methodical" and planned out, defendant had barricaded cell door to prevent corrections officers from interfering with assault, video showed that defendant had weapons on hand and that he brutally attacked victim several times over period of four hours and continued to beat victim after victim had been completely incapacitated, and defendant said nothing during plea colloquy to suggest that killing was not premeditated.

[23] **Homicide**⇨Sufficiency of deliberation; time required

Premeditation, as an element of first-degree murder, can be formed in moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.

[24] **Criminal Law**⇨Duty of Inquiry, Warning, and Advice

The rule providing that if a waiver of counsel 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," does not require a renewed offer of counsel each time the defendant appears in court; rather, a court must renew the offer of counsel at critical stages of the proceedings. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.111(d)(5).

[25] **Criminal Law**⇨Waiver of right to counsel

Pro se defendant's case-in-chief after State rested was not new critical stage of trial for first-degree murder at which trial court was required to renew offer of counsel and new *Faretta* inquiry; rather, transition from State's case-in-chief to defendant's case-in-chief was part of same critical stage, namely, trial. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.111(d)(5).

[26] **Criminal Law**⇨Waiver of right to counsel

Pro se defendant's announcement after State rested its case that he intended to change plea to guilty of first-degree murder did not warrant renewed offer of counsel and new *Faretta* inquiry; on day before announcement, defendant informed trial court that he intended to change his plea to guilty when he finished testifying, trial court conducted *Faretta* inquiry at start of trial next morning, there was no intervening stage of trial that separated court's *Faretta* inquiry from defendant's announcement of his change of plea, and trial court conducted full *Faretta* inquiry and made renewed offer of counsel before accepting defendant's plea. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.111(d)(5).

[27] **Sentencing and Punishment**⇨Reception of evidence

A competent defendant may waive his right to present mitigating evidence in the penalty phase of his first-degree murder trial.

[28] **Sentencing and Punishment**⇨Discretion of lower court

The Supreme Court reviews for abuse of discretion a trial court's determination on a

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defendant's competence to waive mitigation in the penalty phase of a capital murder trial.

[29] **Sentencing and Punishment**⇨Necessity
Sentencing and Punishment⇨Form and Contents
Sentencing and Punishment⇨Evidence in mitigation in general

When a defendant does not challenge the imposition of the death penalty and refuses to present mitigation evidence on his own behalf during the penalty phase of trial, the trial court has an obligation to require the preparation of a meaningful, comprehensive presentence investigation report (PSI), and in such circumstances, the trial court should require the State to place into the record all evidence of a mitigating nature that the State has in its possession.

[30] **Sentencing and Punishment**⇨Counsel
Sentencing and Punishment⇨Reception of evidence

When the defendant waives his right to present a mitigation case during the penalty phase of a capital murder trial, if the presentence investigation report (PSI) and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion either to call its own witnesses or appoint an independent, special counsel, who can call witnesses to present mitigation evidence.

[31] **Sentencing and Punishment**⇨Reception of evidence

Pro se defendant's waiver of right to present mitigation case in penalty phase of capital murder trial was knowing, voluntary, and intelligent; trial court conducted new *Faretta* inquiry at start of penalty phase, it advised defendant about statutory aggravators being alleged by State, it went over possible mitigating circumstances with defendant, and it explained to defendant his right to present mental health mitigation, and defendant's responses during colloquy provided no ground for believing that defendant was not competent to waive mitigation. U.S. Const. Amend. 6.

[32] **Sentencing and Punishment**⇨Reception of evidence

Pro se defendant's diagnosis of bipolar disorder, by itself, did not provide trial court with reason to believe that defendant was incompetent to waive right to present mitigation case in sentencing for capital murder.

[33] **Sentencing and Punishment**⇨Necessity
Sentencing and Punishment⇨Evidence in mitigation in general
Sentencing and Punishment⇨Reception of evidence

Trial court adequately considered mitigation case in favor of pro se defendant after defendant waived right to present mitigation, during penalty phase of capital murder trial; trial court ordered presentence investigation report (PSI) and appointed psychologist to conduct mental health evaluation, State introduced psychologist's report as potential mitigation, trial court found that defendant had been diagnosed with bipolar disorder and "some sort of schizophrenia," and it found existence of mental health mitigation in record and assigned it weight.

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[34] **Sentencing and Punishment**⇨Counsel

Trial court had no obligation to appoint special counsel for pro se defendant after defendant waived right to present mitigation case during penalty phase of capital murder trial.

[35] **Sentencing and Punishment**⇨Vileness, heinousness, or atrocity
Sentencing and Punishment⇨Psychiatric disabilities

Trial court did not abuse its discretion in assigning little weight to defendant's mitigating factor of diagnoses of bipolar disorder and "some form of schizophrenia," during penalty phase of capital murder trial, when balanced against aggravating factors that defendant's murder of his cellmate was heinous, atrocious, or cruel (HAC), that it was committed in cold, calculated, and premeditated manner (CCP), and that he killed cellmate while serving life sentences killing three people during robbery.

[36] **Sentencing and Punishment**⇨Planning, premeditation, and calculation
Sentencing and Punishment⇨Vileness, heinousness, or atrocity
Sentencing and Punishment⇨Nature, degree, or seriousness of other offense

Heinous, atrocious, or cruel (HAC), cold, calculated, and premeditated manner (CCP), and prior violent felony are qualitatively three of the weightiest aggravating circumstances, in capital sentencing proceedings.

[37] **Sentencing and Punishment**⇨Presentation and reservation in lower court of grounds of review

Any error in trial court immediately pronouncing death sentence for capital murder, without recess, after hearing of evidence presented during penalty phase, was invited by pro se defendant, who expressly objected to trial court delaying pronouncement of sentence and told trial court to proceed directly to sentencing.

[38] **Sentencing and Punishment**⇨Emotional distress or disturbance

Whether defendant knew difference between right and wrong and appreciated criminality of his conduct at time he beat cellmate to death was not relevant to determination, during penalty phase of capital murder trial, of existence of statutory mitigating factor that he was under influence of extreme mental or emotional disturbance at time of killing. Fla. Stat. Ann. § 921.141(7)(b).

[39] **Sentencing and Punishment**⇨Harmless and reversible error

Trial court's error during penalty phase of capital murder trial in finding that there was no evidence that defendant's "emotional state was anywhere close to the level of obviating his knowledge of right and wrong" at time he beat cellmate to death, which was irrelevant to existence of statutory mitigating factor that he was acting under influence of extreme mental or emotional disturbance at time of murder, was harmless, where trial court stated that it "cannot say there is no evidence of emotional disturbance" and assigned it some weight. Fla. Stat. Ann. § 921.141(7)(b).

[40] **Sentencing and Punishment**⇐Planning, premeditation, and calculation

Evidence supported finding that murder was cold, calculated, and premeditated, as aggravating factor in sentencing for capital murder; although defendant testified during guilt phase of trial that victim attempted to rape him, he described killing as act of retribution, and not self-defense, and testified that murder of cellmate "was just getback, it was just vengeance, it was just wanting to hurt [him] for what [he] tried to do to me, for what [he] thought [he] could do," thus indicating that defendant had no moral or legal justification for his actions, and defendant admitted to procuring weapon that he used to beat victim to death, to waiting until correctional officer whom he viewed as particularly inept came on duty, and to barricading his cell door to prevent officers from entering cell during assault.

[41] **Sentencing and Punishment**⇐Presentation and reservation in lower court of grounds of review

Defendant failed to preserve for appellate review claim that presentence investigation report (PSI) violated requirements of rule governing same when defendant waives right to present mitigation case, in sentencing for capital murder, and thus claim was reviewable for fundamental error, where he raised no objection to PSI before trial court. Fla. R. Crim. P. 3.710(b).

[42] **Sentencing and Punishment**⇐Other particular issues

Presentence investigation report prepared by Department of Corrections on order of trial court after defendant waived right to present mitigation during penalty phase of capital murder did not lack comprehensive summary of defendant's mental health history; during guilt phase, defendant had described his long history of bipolar disorder during numerous *Faretta* inquiries and gave trial court documentation describing his treatment and medication, and trial court appointed psychologist to conduct mental health evaluation of defendant for mitigation purposes that was admitted into evidence at sentencing and which addressed defendant's mental health issues and included additional diagnoses, and therefore, trial court had ample information about defendant's mental health at time it evaluated aggravating and mitigating circumstances. Fla. R. Crim. P. 3.710(b).

[43] **Sentencing and Punishment**⇐Other particular issues
Sentencing and Punishment⇐Use and effect of report

Recommendation of death penalty included in presentence investigation report (PSI) that was prepared after defendant waived his right to present mitigation case did not render PSI invalid, for purposes of sentencing for capital murder; sentencing order contained trial court's findings on each aggravating and mitigating circumstance, including four weighty aggravators, and order never mentioned recommendation of death sentence. Fla. R. Crim. P. 3.710(b).

[44] **Sentencing and Punishment**⇐Instructions

Proffered special instruction during penalty phase of capital murder trial that jury "may always consider mercy" in deciding between sentence of life imprisonment or death, and proposed alternative instruction that "mercy itself is sufficient to justify a sentence other than death" were adequately covered by standard instruction given that jury was not compelled to impose death even if it found that aggravating factors outweighed mitigating factors, which decision indicates a "mercy" vote.

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[45] **Sentencing and Punishment**⇨Manner and effect of weighing or considering factors

When a juror votes for a life sentence despite finding that the aggravators outweighed the mitigators and were sufficient to impose death, this decision is often referred to as a "mercy vote."

[46] **Sentencing and Punishment**⇨Degree of proof

Whether aggravating circumstances outweighed mitigating circumstances, for purposes of sentencing for capital murder, was not subject to "reasonable doubt" standard of proof.

***638** An Appeal from the Circuit Court in and for Okeechobee County, Sherwood Bauer, Judge – Case No. 472018CF000164CFAXMX

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Opinion

PER CURIAM.

Michael Lawrence Woodbury appeals his conviction of first-degree murder and sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

FACTS AND PROCEDURAL HISTORY

In March 2018, Woodbury was indicted on one count of first-degree murder for killing his cellmate, Antoneeze Haynes. At the time of the offense, Woodbury was serving life sentences for killing three people in New Hampshire during a 2007 robbery.

The evidence presented at trial showed that on September 22, 2017, Woodbury barricaded the door to the cell he shared with Haynes and then proceeded to brutally assault Haynes for hours, using his fists, boots, and makeshift weapons Woodbury had gathered in preparation for the attack. Woodbury appeared to delight in torturing Haynes, at one point telling the victim: "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." The assault lasted about four hours, and it involved what Woodbury admitted was a hostage situation, with Woodbury threatening to further harm Haynes if officers on the scene failed to meet Woodbury's demands. At one point, Woodbury instructed the correctional officers to take away medical equipment that had been brought in to treat the victim, saying: "You're probably going to need a body bag, but not medical equipment. You can take that stuff with you." Woodbury only stopped assaulting Haynes and surrendered when he realized a forcible extraction was imminent.

At his first appearance in court, Woodbury invoked his right to represent himself at trial, which prompted the court to conduct a *Faretta*[1] inquiry. Woodbury indicated that he understood every question asked and informed the court that he was taking medication for treatment of bipolar ***639** disorder. The next time Woodbury appeared in court, he remained adamant about wanting to represent himself at trial, and when the court explained the advantages of counsel and the disadvantages of self-representation, Woodbury said he understood. He expressed frustration when told to expect renewed offers of counsel and *Faretta* inquiries throughout the proceedings.

The court asked Woodbury about his history of bipolar disorder and Woodbury told the court that he had experienced "[m]ood swings, just stuff like that." The court also asked about the treatment Woodbury was undergoing for his disorder and asked if there were any

physical issues that would impair Woodbury's ability to represent himself, and Woodbury said he had no other issues. The court granted Woodbury's request to proceed pro se, finding that Woodbury's waiver of counsel was made freely and voluntarily with a full understanding of his rights, and that Woodbury was competent to make that decision. With Woodbury's agreement, the court appointed standby counsel for Woodbury and told him that counsel would be appointed to represent him if, at any point in the proceedings, he ever decided that he wanted an attorney.

At a subsequent pretrial hearing, the trial court conducted another *Faretta* inquiry and again found Woodbury competent to waive counsel and that he had done so knowingly and intelligently. The State asked the court to conduct new *Faretta* inquiries each day of the trial to perfect the record. Woodbury objected to having to endure so many inquiries, saying he had read more than 105 cases and failure to conduct repeated *Faretta* inquiries was not a basis for appeal.

Woodbury's trial began on May 14, 2018. On the first day of trial, the court renewed the offer of counsel and conducted another lengthy *Faretta* inquiry. Woodbury maintained his decision to proceed pro se, explaining that he would want an attorney to handle his appeal if he were to be convicted but that he did not want counsel for the trial. Woodbury answered more questions about his bipolar disorder and other issues that might affect his ability to proceed pro se. The court again found that Woodbury understood the charges against him and the consequences of waiving counsel, and found that he had voluntarily, knowingly, and intelligently waived his right to counsel.

During jury selection that same day, Woodbury conducted voir dire on the potential jurors and occasionally consulted with his standby counsel. The State asked for a finding on Woodbury's competence and demeanor, and the court said:

> I think you've done actually very well for somebody in your circumstance with what you're charged with, the seriousness of it .... I actually will compliment you on your behavior. It's a little more laid back than an attorney is going to do, there's no question about that, you know what I mean. But overall I think you've complied with the general courtroom demeanor that's necessary and I appreciate that for what it's worth.
>
> ....
>
> ... You'd be surprised, some people come here unrepresented and you can't figure what their focus is. Yours I think is pretty clear. So I'll leave the record at that and I think it's actually ... quite impressive.

The following day, the court renewed the offer of counsel and Woodbury maintained his insistence on representing himself. The trial court found that Woodbury was competent to waive his right to counsel and that he had done so knowingly and voluntarily.

In his opening statement to the jury, Woodbury claimed that the victim had ***640** tried to sexually assault him and that the assault and killing of the victim was in response to that attempted sexual assault. Woodbury admitted, however, that he "went berserk" and that he kicked the victim in the face "like a 50-yard field goal that would have been good from 60."

During the State's case-in-chief, law enforcement officers and prison staff provided gruesome details about Woodbury's four-hour assault on the victim. Correctional officers testified that they were unable to enter the cell because Woodbury had barricaded the door, but that they could see Woodbury through a window and could see another inmate lying face down on a bunk with blood "all over the place." The State introduced photographs of the victim's extensive injuries, and the medical examiner testified that by the time officers got into Woodbury's cell, the victim had died from severe blunt force trauma, and that he died experiencing a "great, great, great deal of suffering."

During a brief recess to discuss time to call defense witnesses, Woodbury told the court that he was planning to change his plea to guilty. He said, "I know, it's crazy, but that's what I'm doing tomorrow. I'll be changing my plea to guilty of first-degree murder tomorrow after I get done testifying." The next day of trial, the court renewed the offer of counsel and conducted a truncated *Faretta* inquiry. The court stated that a full inquiry was unnecessary because one had already been conducted during the same stage of the proceeding. The State called Major Frank Gatto, who testified that Woodbury was "very malicious ... in his intent on what he was trying to do" and appeared "methodical" with his actions, which "seemed to be almost planned out, like he had a plan in mind." The State played a lengthy video recording filmed during Woodbury's assault on the victim, in which Woodbury could be heard assaulting, torturing, and tormenting the victim.

The next day of trial began with another renewed offer of counsel, and Woodbury said he understood the disadvantages of representing himself and rejected the

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offer. The trial court found that Woodbury was competent to waive counsel and had done so knowingly, voluntarily, and intelligently. When the State rested, the court began yet another *Faretta* inquiry, but Woodbury objected, declaring: "I have a constitutional right to represent myself, and this has rose to the level of harassment." The court replied:

> You know what. For the record, I don't disagree. I think the fact is you've understood this the multiple times I've done it. That doing it again, if an appellate court were to think that it's a good idea to do this as often as we have, I think that I would disagree with them and you'd be in agreement with me. However, the above trial level courts have a different way of viewing things. They're not as worried about practicality as they are about structural integrity of the system. So I'm going to go through them relatively quickly, you can answer them yes or no. If at any point, though, you do have a question, please let me know. So, again, I'm going to do it relatively quickly.

Woodbury asked the court: "[H]ow long do I got to answer? We're going to play the game now. ... Do I got five minutes, ten minutes? I might want to think about each question and consider it." Woodbury insisted that his right to represent himself superseded the need for constant *Faretta* inquiries, and he threatened to stall the proceedings. The court asked, "[A]m I right to conclude you are requesting the Court not to ask you these questions at this time?" Woodbury stated that this was exactly what he was requesting and declared ***641** that in all the cases he had read, "every time they only did the *Faretta* hearing one time and that was enough." Woodbury acknowledged that a new *Faretta* inquiry would be required before moving to the penalty phase, and he said he would cooperate fully with that inquiry when the time came. The court found that Woodbury validly requested to forgo a *Faretta* inquiry before the defense case-in-chief, and that Woodbury had knowingly and voluntarily waived counsel and was competent to do so.

During the defense case-in-chief, Woodbury briefly called two defense witnesses and then took the stand on his own behalf. He testified that he woke up on the morning in question to find the victim attempting to sexually assault him. Woodbury admitted he had a weapon at the ready but he claimed the victim's death was not premeditated, saying: "[I]f I was planning on killing my roommate before I went to bed, I would have at least put a point on my knife." He also admitted to holding the victim hostage but claimed he only did so to stall for time until a tactical team with cameras arrived. He insisted he did not wish to keep hurting the victim but that the victim kept sitting up, and so "every time he sat up, [Woodbury] refreshed him with the business."

After giving the jury his version of events, Woodbury declared in open court: "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?"

The trial court quickly excused the jury and then went through the plea form line-by-line, with Woodbury's input. The court conducted a colloquy on the voluntariness of Woodbury's plea, and Woodbury indicated that he understood that the death sentence was still a possibility. Before it accepted Woodbury's plea, the court renewed the offer of counsel, conducted another *Faretta* inquiry, and found that Woodbury was competent to waive his right to counsel. The court then complimented Woodbury again, stating:

> [Y]our ability to understand, you're obviously intelligent and you have been able to handle yourself in court, whether it's questioning or just behavior or being -- being able to ask your standby counsel. Even asking to do so, you've been polite, you've been courteous, and I think your behavior has been, compared to all the other pro se people in the past, actually better than all of them combined.

Woodbury told the court that his standby counsel had provided excellent assistance with all legal questions, and the trial court accepted Woodbury's guilty plea. Woodbury then asked to be permitted to represent himself at the penalty phase trial and said he had consulted with

standby counsel about that decision. The court ordered a presentencing investigation, and the State asked the court to appoint a mental health expert for potential mitigation. Three days later, the court appointed Dr. Joseph Sesta to conduct a mental health evaluation for mitigation.

Woodbury's penalty phase trial began on July 23, 2018. The proceeding began with another renewed offer of counsel and *Faretta* inquiry, and with the court taking judicial notice of Woodbury's previous statements about his bipolar disorder. Woodbury indicated that he understood the rights he was waiving and the disadvantages of self-representation, and the court granted his request to proceed pro se after finding him competent to waive his right to counsel.

Woodbury asked the court to read either of two special jury instructions Woodbury had prepared that would have informed the jurors that even if they found death to be justifiable, they could still recommend ***642** life in prison as an act of mercy. Following a recess and an abridged *Faretta* inquiry, the court rejected Woodbury's instructions. Woodbury did not object to the final instructions read.

The State presented penalty phase testimony from law enforcement officers and victims of Woodbury's prior crimes, introduced fingerprint evidence and a judgment from another case to show that Woodbury had prior convictions for robbery and three other murders, and presented evidence to show that Woodbury killed his cellmate while serving a sentence of imprisonment and that the killing was particularly heinous and cruel. The State also played portions of an interview given shortly after the murder, in which Woodbury made no mention of the victim attempting to sexually assault him but did describe how he had sharpened a piece of metal, taken a lock from his locker, waited until an inept correctional officer was on duty, put on and laced up his boots, and barricaded his cell door to prevent entry by responding officers. Woodbury testified on his own behalf. He admitted that his assault on the victim constituted torture, but he claimed that the victim had tried to rape him and that "it was getback time. ... It was just getback, it was just vengeance, it was just wanting to hurt you for what you tried to do to me, for what you thought you could do. ... That's really why I did what I did."

The court instructed the jury that in order to recommend the death penalty, it must unanimously find that at least one aggravating factor had been proven beyond a reasonable doubt. The court read instructions on the four aggravators alleged by the State: (1) Woodbury was previously convicted of a felony and under sentence of imprisonment; (2) he was previously convicted of another capital felony or a felony involving the use or threat of violence to another person; (3) the murder was especially heinous, atrocious, or cruel; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court then instructed the jury to consider mitigation, such as whether the crime was committed while Woodbury was under extreme mental or emotional disturbance or any other factors that mitigate against the death penalty. The jury unanimously recommended the death penalty after unanimously finding that the State had proved all four aggravators alleged and that the aggravators outweighed the mitigators and were sufficient to impose death.

A *Spencer*[2] hearing was held on September 21, 2018. It began with a *Faretta* inquiry that included asking Woodbury if he understood that the State was in possession of mental health mitigation evidence. Woodbury said he understood all questions asked. The court asked Woodbury about his bipolar disorder and treatment for it. Woodbury said he began taking Tegretol shortly after the murder, that he took it consistently during the trial, and that it did not affect his ability to understand the proceedings. The court asked Woodbury if he had been diagnosed with any other mental illnesses. When he said no, the court replied: "You had hesitation. It's fine with me if you answer it. I mean, now–look, it's for your benefit." Woodbury said: "None that I believe." The court found that Woodbury knowingly and intelligently waived counsel and was competent to do so.

Standby counsel testified at the hearing that Woodbury knew there was a factual basis for mental health mitigation, including opinions contained in the report written by Dr. Sesta, but that Woodbury elected not to present any such mitigation. ***643** When pressed on that issue by Woodbury, standby counsel agreed with Woodbury that the decision was strategic in nature—that Woodbury already had a penalty phase strategy and never intended to present mental health mitigation. After Woodbury explained why he did not wish to present mental health mitigation on his own behalf, the State offered Dr. Sesta's report into evidence, and the court admitted the report for potential mitigation.

Woodbury was adjudicated guilty and sentenced to death. In the sentencing order, the court found that all four aggravators alleged by the State had been proved and assigned great weight to each aggravator. The court then examined whether the murder was committed while Woodbury was under the influence of extreme mental or emotional disturbance. The court found that although

there was no *competent* evidence to support that mitigator, it could not say there was no evidence whatsoever in the record, and so assigned the mitigator minimal weight. The court then examined whether Woodbury's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, finding that this mitigator was never raised and that any applicability would be covered by the findings on mental or emotional disturbance.

The court also found that although the facts cast doubt on Woodbury's version of the incident, there was at least *some* mitigation on that issue in the record, but only worthy of minimal weight. In addition, the court found that although Woodbury did not present any mental health mitigation on his own behalf, there was mental health mitigation in the record because Dr. Sesta's report mentioned bipolar disorder and schizophrenia. The court assigned little weight to Woodbury's diagnosis and history of bipolar disorder and assigned minimal weight to Dr. Sesta's mention of schizophrenia. After making findings on each aggravator and mitigator, the court sentenced Woodbury to death.

ANALYSIS

In this direct appeal of the judgment of conviction and sentence of death, Woodbury argues that the trial court erred by: (1) granting Woodbury's waiver of counsel and request to proceed pro se without first ordering a mental health evaluation; (2) failing to sua sponte order a competency hearing to determine if Woodbury was competent to stand trial; (3) accepting a guilty plea that was not entered intelligently and voluntarily and had no factual basis; (4) failing to renew the offer of counsel at the start of the defense case-in-chief and when Woodbury announced his change of plea; (5) accepting Woodbury's waiver of mental health mitigation without appointing special counsel to present mitigation evidence; (6) finding that the murder was committed in a cold, calculated, and premeditated manner, and instructing the jury on that aggravator; (7) admitting a noncomprehensive presentence investigation report that contained impermissible sentencing recommendations; (8) assigning minimal weight to the mitigator of extreme mental or emotional disturbance; (9) rejecting a requested special jury instruction on mercy; and (10) failing to instruct the jury that it must find *beyond a reasonable doubt* that the aggravators outweighed the mitigators and were sufficient for the death penalty.[3] We address each claim in turn, and for the reasons set forth below, we affirm Woodbury's conviction and sentence of death.

*644 1. Competency to Stand Trial and the Right to Self-Representation

[1]Woodbury insists that the record shows that the trial court knew of Woodbury's history of bipolar disorder and observed instances of erratic behavior from Woodbury in court. Thus, Woodbury argues that the trial court knew he suffered from a severe mental illness to the point of being incompetent to conduct the proceedings without assistance and should therefore have denied his request to proceed pro se at trial. Even more fundamentally, Woodbury argues that his bipolar disorder diagnosis and erratic behavior gave the trial court reasonable ground to believe Woodbury was not mentally competent to stand trial, and that the court should therefore have ordered a competency hearing before proceeding.

A. Whether a Competency Hearing was Required

[2] [3]An accused has a right to adequate process to ensure he is not tried or sentenced while mentally incompetent to stand trial. *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Florida Rule of Criminal Procedure 3.210(b) provides:

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition ....

When a defendant claims a trial court failed to order a competency hearing, either sua sponte or on request from a party, we will uphold the court's determination absent an abuse of discretion. *Rodgers v. State*, 3 So. 3d 1127, 1132 (Fla. 2009).

[4]Woodbury argues that his admission of bipolar disorder gave the court reasonable ground to believe he was not mentally competent, but "[n]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *Barnes v. State*, 124 So. 3d 904, 913 (Fla. 2013) (defendant's disclosure of mental illness did not require the trial court to order a competency hearing because nothing about the defendant's behavior during the proceedings created grounds to believe he was incompetent) (quoting *Card v. Singletary*, 981 F.2d 481, 487-88 (11th Cir. 1992)); *see also* *Nelson v. State*, 43 So. 3d 20, 29 (Fla. 2010) (defendant's suicide attempt and treatment with antipsychotic medication did not raise doubts about his competency to stand trial).

Like the defendant in *Barnes*, Woodbury disclosed a history and diagnosis of bipolar disorder, but nothing about his behavior in court indicated a present inability to understand the proceedings against him or an inability to consult with his standby counsel (or with counsel, had an attorney been appointed). Woodbury filed motions on his own behalf, was consistently alert, demonstrated knowledge of legal issues, behaved appropriately, and stated multiple times that he understood the proceedings. At no time did the trial court, Woodbury's standby counsel, or the attorneys for the State express any concerns about Woodbury's competency. Rather, the trial court outright *praised* Woodbury more than once for his ability to conduct himself appropriately and properly engage with the court, jury, and standby counsel. The court went so far as to call Woodbury's behavior better than all other pro se defendants the court had seen, combined.

Woodbury invokes *Drope v. Missouri*, 420 U.S. 162, 179, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), where the Supreme Court held ***645** that a trial court ignored details that raised doubts about the defendant's competency. But the defendant in *Drope* did not merely disclose a history of mental illness and demonstrate attention problems; he attempted suicide during the trial. *Id.* at 180, 95 S.Ct. 896. That suicide attempt *plus* uncontested testimony about the defendant's wildly irrational recent behavior—including trying to choke his wife to death just before trial—created sufficient grounds to doubt the defendant's competency to stand trial. *Id.*

Here, by contrast, Woodbury did nothing so extreme as attempting suicide during the trial, and the trial court was given no evidence of wildly irrational recent behavior.[4] Woodbury points to moments from trial that supposedly show erratic and irrational behavior, but at most, the cited conduct suggests attention span problems or overconfidence; nothing put the court on notice that Woodbury had a present inability to understand the proceedings or to consult with counsel.[5]

Likewise, although Dr. Sesta's psychological report, which was entered for potential mitigation, described Woodbury as having a fluctuating attention span, the report never suggested that Woodbury's behavior during the examination indicated an inability to understand the charges or consult with counsel. Thus, even though the trial court knew that Woodbury had been diagnosed with (and treated for) bipolar disorder, nothing about his behavior in court, and nothing presented to the trial court, created a reasonable ground to believe Woodbury was not mentally competent to stand trial. Accordingly, the trial court was not required to sua sponte order a competency hearing.

B. Whether the Court Erred in Granting Woodbury's Request to Represent Himself at Trial

[5]Woodbury argues that even if he was competent to stand trial, the trial court knew he had a severe mental illness that rendered him incompetent to represent himself, and that the trial court therefore erred in granting his request to proceed pro se. Trial court rulings regarding competency to waive counsel are reviewed for abuse of discretion. *Trease v. State*, 41 So. 3d 119, 124 (Fla. 2010).

[6] [7] [8]An accused has a Sixth Amendment right to represent himself at trial. *Tennis v. State*, 997 So. 2d 375, 377 (Fla. 2008). And while an accused also has a right to the assistance of counsel, that right confers just what it says—assistance. "To thrust counsel upon the accused, against his considered wish ... violates the logic of the [Sixth] Amendment. In such a case, counsel is not an assistant, but a master ...." *Faretta*, 422 U.S. at 820, 95 S.Ct. 2525. Therefore, each defendant "must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " ***646** *Id.* at 834, 95 S.Ct. 2525 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring)).

[9] [10]Given the constitutional right to self-representation, "once an unequivocal request for self-representation is

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made, the trial court is obligated to hold a hearing, to determine whether the defendant is knowingly and intelligently waiving his right to court-appointed counsel." *Tennis*, 997 So. 2d at 378. The purpose of this inquiry (often called a *Faretta* inquiry) is not to assess whether the defendant possesses a degree of technical skill at trial advocacy, but whether his waiver of counsel is knowing and intelligent. *McKenzie v. State*, 29 So. 3d 272, 281 (Fla. 2010); *see also* *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525 ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation ....").

[11] [12]That said, while technical skill is not part of the *Faretta* calculus, "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." *Indiana v. Edwards*, 554 U.S. 164, 177, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) (quoting *Martinez v. Court of Appeal*, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000)). Thus, after conducting a *Faretta* inquiry, a trial court may preclude a defendant from exercising his right to proceed pro se if the court finds that the defendant is "unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Id.* at 175-76, 128 S.Ct. 2379.[6]

[13] [14]In Florida, Rule of Criminal Procedure 3.111(d)(3) addresses the right to self-representation. It accounts for the aforementioned bases by which a court may lawfully force counsel on an unwilling defendant, stating:

> 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.

Fla. R. Crim P. 3.111(d)(3). Thus, a Florida trial court may deny a defendant's request to proceed pro se if: (1) the defendant's waiver of his right to counsel was not made knowingly and intelligently; or (2) the defendant suffers from severe mental illness to the point of being incompetent to conduct trial proceedings without assistance. The competency standard to waive one's right to counsel is the same as the competency standard to stand trial, whereas the competency standard to conduct trial proceedings without assistance is somewhat higher. *See Wall v. State*, 238 So. 3d 127, 140 (Fla. 2018) ("[D]efendants may be competent to waive counsel yet incompetent to represent themselves.").

[15]Here, starting from his first appearance, Woodbury never wavered in his insistence on representing himself at trial. As it was required to do upon receiving an unequivocal request for self-representation, the trial court explained the benefits ***647** of counsel and the pitfalls of self-representation and conducted a full *Faretta* inquiry. The court renewed the offer of counsel and conducted additional *Faretta* inquiries approximately a dozen times over the course of the proceedings.[7] At the conclusion of each inquiry, the court found that Woodbury's rejection of the offer of counsel was knowing and intelligent and that Woodbury was competent to make his decision. We agree. Woodbury responded appropriately to the court's questions and indicated that he understood both the proceedings against him and the rights he was giving up by proceeding pro se.

That leaves the question whether Woodbury's behavior in court, together with his bipolar disorder diagnosis, required the trial court to find that Woodbury suffered from severe mental illness to the point of being incompetent to conduct the proceedings by himself. To that end, Woodbury filed pro se discovery motions and a demand for speedy trial, conducted voir dire examination of the potential jurors by himself, cross-examined witnesses, argued evidentiary objections, and even requested a special jury instruction derived from the federal standard instructions. In fact, the record reveals several instances where Woodbury's pro se representation could easily be mistaken for the work of a veteran trial attorney.

Take for example this excerpt from voir dire of Woodbury questioning a potential juror's ability to set aside biases and consider mitigation:

> MR. WOODBURY: Sir, just three minutes ago you said you have a very biblical view of the Bible, that it should be an eye for an eye, a tooth for a tooth, a life for a life. With respect to what he just said, do you still

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feel like that now?

PROSPECTIVE JUROR: I have to say yes, but you still have to take each situation, you know, you have to take each case, case by case.

MR. WOODBURY: So would -- so I am to understand that you can look past the Bible and obey Florida law and give consideration to mitigators such as self-defense, a bad childhood, level of involvement, all the mitigators that may be out there, you can give due consideration even though now the Florida law has trumped your Bible law, you're not going to have a problem with that?

PROSPECTIVE JUROR: No. I can – that's tough.

Thus, Woodbury's behavior in court defeats any claim that he was not competent to conduct the proceedings on his own. And Woodbury cites no authority—and we are aware of none—where a bipolar disorder diagnosis, without more, established that a defendant suffered from severe mental illness to the point of being incompetent to conduct trial proceedings without assistance. Woodbury's own arguments on appeal describe bipolar disorder as a broad spectrum of mental conditions, with varying degrees of symptoms and severity, including "hypomania," which Woodbury describes as a less severe form of mania in which individuals are able to function well in social situations or at work and can retain the ability to act rationally on subjects beyond the sphere of the controlling delusion. Given that certain people with bipolar disorder function well and act rationally, we see no logic in creating a per se rule or presumption that all individuals with bipolar disorder suffer so severely ***648** from mental illness that they are unable to carry out basic trial tasks without assistance.

Woodbury points out that some individuals with bipolar disorder exhibit "confusion and poor judgment" and "potential disordered thinking," but these are only *possible* symptoms of bipolar disorder. When asked how bipolar disorder affected him personally, Woodbury told the trial court that prior to taking Tegretol (which he claimed was very effective at treating his symptoms), he experienced "[m]ood swings, just stuff like that." Mood swings, without more, do not indicate that a defendant is suffering from a severe mental illness to the point of incompetency. Accordingly, on this record, knowledge of Woodbury's bipolar disorder did not require the court to go beyond a *Faretta* inquiry before granting Woodbury's request to proceed pro se.

Woodbury argues that in addition to his history of bipolar disorder, his erratic courtroom behavior created reasonable ground to doubt his competence. Woodbury points out that he: (1) filed a demand for speedy trial before receiving any discovery; (2) announced he was ready to start trial just a month after being arrested; (3) indicated that he was unconcerned about the guilt phase; (4) compared the likelihood of a death penalty recommendation to getting struck by lightning; (5) said his prison outfit and handcuffs made for "excellent" courtroom attire; (6) told the jury he had chosen to represent himself because it was simple; (7) admitted his guilt during his guilt phase testimony; and (8) goaded the jurors by telling them to sentence him to death if it would make them feel better.

Even without any context, most of these purportedly erratic moments merely suggest a lack of technical skill. They can be considered "irrational" only insofar as they imply a nonchalant attitude from Woodbury about being found guilty. But Woodbury was already serving life sentences for three prior murders; the only way this trial could have affected him in any meaningful sense was in the penalty phase. In fact, Woodbury told the court that he expected to be found guilty and that his focus was on sentencing. Thus, the cited behavior suggesting a blasé attitude toward a guilty verdict did not create grounds to doubt his competence.

As to the "lightning strike" comment, although Woodbury's appellate counsel frames this remark as a manic rant showing that Woodbury believed he was more likely to get struck by lightning than get the death penalty, Woodbury was not raving about the likelihood of weather phenomena. He was explaining to the court that while he was confident a jury would recommend a life sentence, he wanted a guilt phase trial "in case lightning strikes and somehow you find 12 people to agree and I get the death penalty, I want appeal issues for the guilt phase." If this comment demonstrates anything, it is not that Woodbury had erratic outbursts in court; it is that he was cognizant of the fact that a death penalty recommendation was possible notwithstanding his confidence in his penalty phase case, and that an appellate record would be helpful should he need to appeal.

Woodbury further argues that Dr. Sesta's psychological report created doubts about Woodbury's competence to proceed pro se. In that report, Dr. Sesta opined that Woodbury was experiencing an active manic episode during the examination, had a fluctuating attention span, made some inappropriate comments, and was undermedicated. But Woodbury points to no case where inattentiveness or overenthusiasm rendered a defendant incompetent to represent himself at trial.

In sum, nothing in the record shows that the court abused its discretion by finding ***649** that Woodbury knowingly and intelligently rejected the court's offer of counsel, or that the court was required to find that Woodbury suffered from severe mental illness to the point of incompetency. Thus, the trial court did not err in allowing Woodbury to invoke his constitutional right to conduct his own defense.

2. Woodbury's Guilty Plea

Woodbury argues that the trial court erred in accepting his guilty plea. He insists that his decision to change his plea to guilty in open court, in front of the jury, gave the trial court reasonable ground to believe he was not mentally competent to enter the plea. Woodbury further argues that the trial court erred in finding that there was a factual basis for the plea. We find no error on either basis.

A. Whether the Court Erred in Finding Woodbury Competent to Plead Guilty

[16] [17]The competency standard to plead guilty is the same as the competency standard to stand trial, *Wall*, 238 So. 3d at 140, and so, "[d]uring 'any material stage' of a criminal proceeding, a defendant must immediately be examined for competence if the trial court 'has reasonable ground to believe that the defendant is not mentally competent to proceed.' " *Id.* (quoting Fla. R. Crim. P. 3.210(b)). "If that sufficient basis exists, the trial court 'shall immediately enter its order setting a time for a [competency] hearing ... and may order the defendant to be examined by no more than 3 experts, as needed, prior to the date of the hearing.' " *Id.* (modifications in original) (quoting Fla. R. Crim. P. 3.210(b)). "Due process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." *Sanchez-Torres v. State*, 130 So. 3d 661, 668 (Fla. 2013) (quoting *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992)).

[18]Woodbury points out that when he initially told the court that he was planning to change his plea to guilty, he himself called the decision "crazy." But while the decision to change one's plea in open court may be unorthodox, and while Woodbury may have believed at the time that he was doing something crazy, he points to no authority declaring that announcing a change of plea in front of a jury creates reasonable ground to believe the defendant is not mentally competent.

In any event, the trial court did not simply accept Woodbury's plea without question. It went through a colloquy with Woodbury to determine if his plea was being entered intelligently and voluntarily, and it explained to Woodbury that first-degree murder has only two possible sentences: life in prison and the death penalty. The court also told Woodbury that the plea form would indicate that there was no agreement for his open plea, meaning Woodbury could still be sentenced to death. Woodbury said he understood. The court then went through the plea form line-by-line with Woodbury to make sure he understood what he was doing, and at no time did Woodbury say anything that suggested he did not understand the plea or the consequences of pleading guilty.[8] On ***650** this record, we find no error in finding Woodbury competent to enter a guilty plea.

B. Whether There Was a Factual Basis for the Plea

[19] [20] [21]Woodbury argues that the trial court erred in finding that there was a factual basis for his guilty plea. "[I]n order to challenge a guilty plea for lack of a factual basis determination by the trial judge, a defendant must show prejudice or manifest injustice." *State v. Kendrick*, 336 So. 2d 353, 355 (Fla. 1976). The inquiry to determine if a plea has a factual basis "need not be a 'mini-trial' "; a court may be satisfied from "statements and admissions made by the defendant, or by his counsel, or by the prosecutor." *Farr v. State*, 124 So. 3d 766, 778 (Fla. 2012) (quoting *Monroe v. State*, 318 So. 2d 571, 573 (Fla. 4th DCA 1975)); *see also Santiago-Gonzalez v. State*, 301 So. 3d 157, 180 (Fla. 2020) ("The State provided a factual basis for the murder, to which the defense conceded for the purpose of the guilty plea."). However, when the defendant raises the possibility of a defense to his guilty plea during the plea colloquy, "the potential prejudice is apparent" and so the trial judge "should make *extensive* inquiry into factual basis before accepting the guilty plea." *Kendrick*, 336 So. 2d at 355.

[22]Here, the trial court did not err in finding a factual basis for Woodbury's guilty plea to premeditated first-degree murder. During the trial, law enforcement and correctional officers who responded to the incident described Woodbury's assault on the victim as "methodical" and planned out. And video played at trial showed that Woodbury had weapons on hand and that he brutally attacked the victim several times *after* the victim

had been completely incapacitated.

[23]Woodbury also said nothing during the plea colloquy suggesting a defense to premeditated murder. Although he testified on the stand that he had no intent to kill the victim when he went to bed *the night before*, this does not establish a defense to the charged offense such that an extensive inquiry into factual basis was required, for "[p]remeditation can be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.' " *DeAngelo v. State*, 616 So. 2d 440, 441 (Fla. 1993) (quoting *Asay v. State*, 580 So. 2d 610, 612 (Fla. 1991)).

Because the guilty plea to premeditated first-degree murder in this case was entered intelligently and voluntarily and there was a factual basis for the plea, we affirm the trial court's acceptance of Woodbury's plea.

3. Renewed Offer of Counsel

Woodbury's next claim is that the court failed to renew the offer of counsel at all critical stages of the proceedings. Specifically, Woodbury argues that the trial court was required to, but did not, offer counsel at the start of the defense case-in-chief and at the time Woodbury announced his change of plea.

[24] Florida Rule of Criminal Procedure 3.111(d)(5) provides that if a waiver of counsel 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 rule does not require a renewed offer of counsel each time the defendant appears in court; rather, a court must renew the offer of counsel at "critical" ***651** stages of the proceedings. *Knight v. State*, 770 So. 2d 663, 670 n.6 (Fla. 2000); *see Muehleman v. State*, 3 So. 3d 1149, 1156 (Fla. 2009) ("[T]he waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented." (quoting *Traylor v. State*, 596 So. 2d 957, 968 (Fla. 1992)).

[25]Woodbury points to no case holding that the transition from the State's case-in-chief to the defense's case-in-chief marks a new critical stage of the proceedings such as to require a new offer of counsel and new *Faretta* inquiry. To the contrary, in *Knight*, we held that a renewed offer of counsel was not required "during the same stage of the proceeding where Knight waived his right to counsel, the trial portion." *Knight*, 770 So. 2d at 669.

[26]As to whether a new offer of counsel was required at the time Woodbury announced his change of plea, there was no intervening stage of the proceeding that separated the court's previous *Faretta* inquiry from Woodbury's announcement of his change of plea. *See id.* at 669-70 (holding that a *Faretta* inquiry conducted at a pretrial hearing satisfied the requirement to offer counsel at the start of trial because the pretrial hearing was held to discuss the upcoming trial and there were no intervening proceedings). On the previous day of trial, Woodbury told the court that he intended to change his plea to guilty when he finished testifying, and the court held a *Faretta* inquiry at the start of the next day of trial. The court also conducted a full *Faretta* inquiry and made a renewed offer of counsel before *accepting* Woodbury's plea. These inquiries and offers of counsel were sufficient to satisfy the obligations imposed by rule 3.111(d)(5).

4. Aggravating and Mitigating Circumstances

Woodbury makes a series of claims related to the trial court's findings on the statutory aggravators alleged by the State, and on certain statutory and nonstatutory mitigators. Woodbury argues that the trial court erred by allowing him to waive his right to mental health mitigation, by failing to consider mental illness mitigation that was in the record, and by not appointing special counsel to argue mitigation. Woodbury further argues that the trial court erred in assessing the "extreme mental or emotional disturbance" statutory mitigator. Finally, Woodbury asserts that the court erred in instructing the jury on the "cold, calculated, and premeditated" aggravator and in finding its existence.

A. Mental Health Mitigation

[27] [28]A competent defendant may waive his right to present mitigating evidence in the penalty phase of his first-degree murder trial. *Spann v. State*, 857 So. 2d 845, 854 (Fla. 2003). We review for abuse of discretion a trial court's determination on a defendant's competence to

waive mitigation. *Id.*

[29] [30]When a defendant does not challenge the imposition of the death penalty and refuses to present mitigation evidence on his own behalf, the trial court has an obligation "to require the preparation of a meaningful, comprehensive presentence investigation report (PSI)." *Marquardt v. State*, 156 So. 3d 464, 491 (Fla. 2015). In such circumstances, the trial court should require the State to place into the record all evidence of a mitigating nature that the State has in its possession. *Id.* Then, "[i]f the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion either to call its own witnesses or ... appoint an independent, special ***652** counsel, who can call witnesses to present mitigation evidence." *Id.*

[31]Woodbury argues that the trial court erred in this case when it let Woodbury waive his right to present mental health mitigation. Woodbury insists that "severe mental illness prevented him from entering a knowing, voluntarily [sic], and intelligent waiver" of his right to present mitigation. Woodbury also argues that a report discussing his mental health revealed an aspect of his character that mitigated against imposition of the death penalty, and that notwithstanding his waiver of mental health mitigation, the trial court should have considered the information in that report and should have appointed special counsel to argue the evidence.

[32]As to whether Woodbury was competent to waive his right to present mitigating evidence, the trial court conducted a *Faretta* inquiry at the start of the penalty phase, advised Woodbury about the aggravators being alleged by the State, went over possible mitigating circumstances with Woodbury, and explained to Woodbury his right to present mental health mitigation. Woodbury's history of bipolar disorder did not in itself create a reasonable ground for the court to believe Woodbury was not competent to waive his right to present mitigation, and Woodbury's responses to the court's inquiries created no such ground.

Moreover, the record demonstrates that Woodbury's waiver of mental health mitigation was not a product of mania, but of strategy. Woodbury told the court that his penalty phase strategy was to emphasize his alleged sexual assault by the victim, and he said, "I don't want to really mess that up with oh, he was a bad kid." And Woodbury's standby counsel testified that he and Woodbury discussed how Woodbury might avoid a mental health evaluation by the State and that Woodbury chose not to present mental health mitigation. Under these circumstances, we find that the trial court had no reasonable ground to doubt Woodbury's competency to waive his right to present mental health mitigation, and we therefore find no abuse of discretion in allowing the waiver.

[33] [34]As to whether the court failed to consider mitigating evidence in the record, particularly information mentioned in Dr. Sesta's psychological report, we note that the trial court properly ordered a PSI report after Woodbury waived his right to present mitigation. The State then introduced Dr. Sesta's report as potential mitigation. Later, in its sentencing order, the court found that "Dr. Sesta diagnosed [Woodbury] with bi-polar disorder and some degree of Schizophrenia." And ultimately, the court found: "[T]here is proof in the record that [Woodbury] has been diagnosed with and is medicated for [bipolar] disorder. The Court will find that the mitigation is reasonably established and will assign little weight to the mitigation." Given that the trial court found the existence of mental health mitigation in the record and assigned it weight, at least in part based on information in Dr. Sesta's report, and given the weighty aggravation and minimal mitigation in this case, any error in the trial court's characterization or assessment of aspects of Dr. Sesta's report was harmless beyond a reasonable doubt.[9]

[35]To the extent Woodbury is asserting that the trial court should have given more *weight* to the mental health mitigation, Woodbury has not demonstrated that the trial court abused its discretion in determining ***653** the degree of weight to assign to this mitigator. *See Covington v. State*, 228 So. 3d 49, 66 (Fla. 2017) (finding no abuse of discretion in the trial court affording moderate weight to a mitigator, given the court's findings on that mitigator).

[36] [37]Moreover, "HAC, CCP, and prior violent felony are three of the weightiest aggravating circumstances." *Damas v. State*, 260 So. 3d 200, 216 (Fla. 2018). Given that all those aggravators (and more) were found in this case and assigned great weight, there is no reasonable possibility that affording too little weight to mental health mitigation affected Woodbury's sentence. *See, e.g.*, *Tanzi v. State*, 964 So. 2d 106, 119-20 (Fla. 2007) ("[T]he trial court [made] a finding that is contrary to this Court's precedent. However, any error present was harmless beyond a reasonable doubt in light of the following: (a) the trial court recognized and gave weight to numerous other mitigating circumstances; (b) this case involves substantial aggravation, including the HAC and CCP aggravating circumstances; and (c) the ... proposed mitigator is minor and tangential with respect to the record in this case.").[10]

B. Extreme Mental or Emotional Disturbance Mitigation

Section 921.141(7), Florida Statutes (2017) lists the statutory mitigators that, if applicable, can weigh against imposition of the death penalty. One such statutory mitigator is when the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. *See* § 921.141(7)(b), Fla. Stat. (2017). Another statutory mitigator—addressed in a separate subsection—is when the defendant's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired. § 921.141(7)(f), Fla. Stat. (2017). Woodbury argues that the trial court conflated the tests for these two distinct mitigators when it assessed whether Woodbury was under the effect of mental or emotional disturbance.

[38]It does appear from the sentencing order that the court applied the wrong test for determining the existence of the extreme mental or emotional disturbance mitigator. Specifically, when evaluating in the sentencing order whether Woodbury was under extreme mental or emotional disturbance, the trial court stated that "[t]here is no evidence that [Woodbury]'s emotional state was anywhere close to the level of obviating his knowledge of right and wrong." But while the degree to which a defendant knows right from wrong is relevant to assess whether the section 921.141(7)(f) mitigator applies (i.e., that defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired), *see Duncan v. State*, 619 So. 2d 279, 283 (Fla. 1993), the section 921.141(7)(b) mitigator (i.e., that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance) does not speak to a defendant's knowledge of right and wrong.

[39]Nonetheless, the court ultimately assigned weight to the mitigator, remarking ***654** that "the Court cannot say there is no evidence of emotional disturbance." Thus, Woodbury cannot complain that the court's incorrect method of analysis resulted in a viable mitigator going unconsidered. Because the mitigator was considered, even if the path to get there was incorrect, and because extremely weighty aggravators were proved in this case, there is no reasonable possibility that Woodbury would have received a different sentence had the trial court engaged in the proper analysis or had given more weight to the mitigator. *See Covington*, 228 So. 3d at 66. Accordingly, we find no reversible error as to the extreme mental or emotional disturbance mitigator.

C. Cold, Calculated, and Premeditated Aggravation

Woodbury next argues that the trial court erred in instructing the jury on the cold, calculated, and premeditated (CCP) aggravating factor and erred in finding the existence of the aggravator. We disagree.

[40]Competent and substantial evidence from the penalty phase supports the trial court's instruction to the jury and its finding as to the CCP aggravator. Although Woodbury had told the jury that the victim attempted to rape him, Woodbury's testimony on the stand during the sentencing phase trial described the killing as an act of retribution, not self-defense. Woodbury said that the murder of his cellmate "was just getback [sic], it was just vengeance, it was just wanting to hurt you for what you tried to do to me, for what you thought you could do." This evidence supports the conclusion that Woodbury had no moral or legal justification for his actions. *See Williamson v. State*, 511 So. 2d 289, 293 (Fla. 1987) (affirming a finding of CCP where the defendant's explanation that the victim posed a danger to others was not held to be a pretense of moral justification).

The penalty phase jury was also informed that Woodbury had admitted to procuring in advance the lock that he later used to beat the victim to death, to sharpening a blade prior to the murder, to waiting until a correctional officer whom Woodbury viewed as particularly inept came on duty, and to barricading his cell door to prevent officers from entering the cell during the assault. All this evidence, taken together, supports a conclusion that Woodbury made calculated and highly premeditated plans to carry out the killing of his victim.

Moreover, the jury watched a video played during the penalty phase, in which Woodbury said that he "was so happy to kill someone again" and that he "enjoyed torturing" the victim. *Cf. Pham v. State*, 70 So. 3d 485, 498 (Fla. 2011) (affirming a CCP finding where the defendant had obtained the murder weapon to commit the killing and then committed the murder as "a matter of course").

Because evidence introduced during the penalty phase supports each aspect of the proof required for the CCP

statutory aggravator, we find no error in the trial court finding the existence of the CCP aggravator or instructing the jury on the aggravator.[11]

***655 5. Presentence Investigation Report**

[41]Woodbury's next claim is that the trial court erred in admitting a presentence investigation report that allegedly violated the requirements of Florida Rule of Criminal Procedure 3.710. Because Woodbury never brought any concerns with the report to the trial court's attention, this claim is reviewed for fundamental error.

Rule 3.710(b) provides that when a criminal defendant refuses to present mitigation evidence, the trial court shall refer the case to the Department of Corrections for the preparation of a presentence investigation report. That report "shall be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background." Fla. R. Crim. P. 3.710(b).

[42]Woodbury argues that the PSI report prepared for this case was inadmissible because it lacked a comprehensive summary of his mental health history. But the trial court had ample information about Woodbury's mental health issues at the time it evaluated the aggravating and mitigating circumstances. At trial, Woodbury described his long history of bipolar disorder during numerous *Faretta* inquiries, and he gave the court documentation describing his treatment and medication. And Dr. Sesta's report, which was placed into evidence for mitigation purposes, addressed Woodbury's mental health issues and included additional diagnoses. Because the trial court had the relevant information and found the existence of mental health mitigation in the record, the absence of a *summary* of that information in the PSI report does not constitute fundamental error.

[43]Woodbury also argues that the PSI report included an improper sentencing recommendation in favor of the death penalty. Woodbury relies upon *Robertson v. State*, 187 So. 3d 1207 (Fla. 2016), where we held that although the governing statute provides that the Department of Corrections must include a disposition recommendation based on several factors in noncapital cases, those factors do not apply to capital sentencing matters. *Id.* at 1215. However, in *Robertson*, the recommendation for death did not render the PSI report invalid, for "the sentencing order show[ed] that while the court relied upon the PSI for information about Robertson's background, the officer's recommendation of a death sentence did not influence the judge's sentencing decision." *Id.* at 1215-16.

In this case, the sentencing order contains the trial court's findings on each aggravating and mitigating circumstance, including four weighty aggravators, and the sentencing order never mentions any "recommendation" from the Department of Corrections. Thus, as in *Robertson*, the sentencing order shows that the trial court's decision on whether to impose a life sentence or the death penalty was not influenced by any recommendation in the PSI report. *See id.; see also Barnes v. State*, 29 So. 3d 1010, 1028 (Fla. 2010) (holding that an unpreserved challenge to a PSI report was barred, but that if preserved, there was "no basis to find that had the trial court not considered the PSI, Barnes would have received a life sentence"). Accordingly, we find that any error in this case in the inclusion of a sentencing recommendation in the PSI report does not rise to the level of fundamental error.

6. Special Jury Instruction on Mercy

[44]Next, Woodbury argues that the trial court erred by rejecting his requested special jury instructions on mercy, and by reading the standard jury instruction instead. Standard Jury Instruction 7.11 ***656** (criminal), which the trial court read to the jury, informs jurors that "[r]egardless of the results of each juror's individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death." *In re Standard Criminal Jury Instructions in Capital Cases*, 214 So. 3d 1236, 1263 (Fla. 2017). Woodbury proposed a special instruction derived from the federal standard instructions, which added: "You may always consider mercy in making this determination." He proposed an alternate instruction that he claimed came from "the ether," which added: "Mercy itself is sufficient to justify a sentence other than death." He now claims that the court erred by rejecting his proposed instructions.

[45]We affirm the trial court's ruling because the instruction that was read to the jury adequately informed the jurors of the applicable legal standard. *See Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006) ("[F]ailure to give special instructions does not constitute error where the instructions given adequately address the applicable legal standards." (quoting *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001)). When a juror votes for a life

sentence despite finding that the aggravators outweighed the mitigators and were sufficient to impose death, this decision is often referred to as a mercy vote. In fact, we have referred to the relevant provision of Standard Instruction 7.11 as the "mercy instruction." *Reynolds v. State*, 251 So. 3d 811, 816 n.5 (Fla. 2018). Thus, the court *did* read an instruction on mercy, and although Woodbury might have preferred the wording of his proposed instruction, Standard Jury Instruction 7.11 is not ambiguous when it comes to addressing the jurors' options.

7. Beyond a Reasonable Doubt Standard for Sentencing Considerations

[46]Woodbury next argues that the trial court reversibly erred by failing to instruct the jury that it must find *beyond a reasonable doubt* that the aggravating circumstances outweighed the mitigating circumstances and were sufficient to justify the death penalty. We affirm because Woodbury did not preserve this claim for appeal and because (as Woodbury acknowledges) we have already determined that "these determinations are not subject to the beyond a reasonable doubt standard of proof." *Rogers*, 285 So. 3d at 886.

CONCLUSION

Because Woodbury has not demonstrated any reversible error, we affirm the judgment of conviction and sentence of death.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

LABARGA, J., concurs in result with an opinion.

GROSSHANS, J., did not participate.

LABARGA, J., concurring in result.

While I agree that Woodbury is not entitled to relief, I write to emphasize the importance of ensuring that a defendant—especially one who is facing the death penalty—is competent to conduct the basic tasks necessary to represent one's self at trial. Here, where the defendant had a significant mental health history, a competency evaluation would have been in order.

All Citations

320 So.3d 631, 46 Fla. L. Weekly S74

Footnotes

1 *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

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

3 Woodbury also asserts that the court's failure to consider mitigators precludes us from conducting proportionality review. In light of our recent decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), we need not address this claim.

4 Certainly, Woodbury's behavior during the assault of the victim could be described as irrational, but that was not as recent as the pretrial behavior in *Drope*, and the court here conducted in-depth inquiries into the mental health treatment and medication Woodbury had received following the murder.

5 Woodbury further argues that the side effects of his medication created reasonable ground to doubt his competency to stand trial. But the side effects he said he had experienced were sleepiness, nervousness, blurry vision, and trouble urinating. Woodbury points to no authority declaring that these side effects create grounds to doubt one's ability to understand the trial proceedings or assist counsel.

6 In *Edwards*, the Supreme Court did not define these "basic tasks," but it did cite a case declaring that basic trial tasks included "organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury." *Edwards*, 554 U.S. at 176, 128 S.Ct. 2379 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 174, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)).

7 We do not suggest that all of these offers and *Faretta* inquiries were legally required. The record indicates that the trial court conducted so many inquiries to ensure that the offer of counsel was renewed at all critical stages of the proceedings. Nothing in the record suggests that any of the inquiries were prompted by new concerns about Woodbury's behavior or competency.

8 The State argues that Woodbury's decision to change his plea in open court was an attempt to game the system by presenting a sympathetic explanation for his actions and then avoid a damning cross-examination that would have impeached him with prior inconsistent statements and convictions for felonies and crimes of dishonesty. It is true that Woodbury objected when told he might still be cross-examined, and that he said his plea change was "110 percent my idea to spin a circle around you like I said I was going to." But it matters not why Woodbury chose to change his plea the way he did; what matters is that his actions did not establish reasonable grounds to believe his plea was not being entered voluntarily and intelligently. *See Brant v. State*, 21 So. 3d 1276 (Fla. 2009).

9 We also find no merit in Woodbury's claim that the trial court was required to appoint special counsel to argue mitigation on Woodbury's behalf. *See Lockhart v. State*, 655 So. 2d 69, 74 (Fla. 1995).

10 Woodbury also asserts a procedural defect, insisting that after the *Spencer* hearing, the trial court should have ordered a recess and convened a separate proceeding for imposition of the sentence. However, Woodbury himself expressly objected to the court delaying the pronouncement of sentence and told the court to proceed directly to sentencing. Thus, the asserted error was invited, and Woodbury may not be heard to complain of it on appeal. *See Lowe v. State*, 259 So. 3d 23, 53 (Fla. 2018). And even if we were to consider this claim, Woodbury has not shown that the asserted procedural defect rose to the level of fundamental error.

11 Because Woodbury failed to preserve his claim that the trial court erred in instructing the jury on the CCP aggravator, we would have corrected the asserted error only if it rose to the level of fundamental error. *See Rogers v. State*, 285 So. 3d 872, 887 (Fla. 2019). Moreover, given the other weighty aggravators found in this case, even if the CCP aggravator were invalid, there is no reasonable possibility that an absence of this one aggravator would have resulted in a different sentence. *See Hall v. State*, 246 So. 3d 210, 215 (Fla. 2018) (an error in finding the existence of CCP was harmless because "Hall has significant and weighty aggravation beyond the invalidated CCP aggravator.").

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Supreme Court of Florida

TUESDAY, JUNE 22, 2021

CASE NO.: SC19-8
Lower Tribunal No(s).:
472018CF000164CFAXMX; 4D18-3704

MICHAEL LAWRENCE WOODBURY vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

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Clerk, Supreme Court

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HON. LAWRENCE MICHAEL MIRMAN, CHIEF JUDGE
HON. JERALD DAVID BRYANT, CLERK
ASHLEY KIRK ALBRIGHT
HON. SHERWOOD BAUER JR., JUDGE

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

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[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-l. 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

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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