IN THE SUPREME COURT OF FLORIDA

JOHN F. MOSLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC20-195

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL

WILLIAM DAVID CHAPPELL
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 120449
The Capitol, PL-01
Tallahassee, Florida 32311
Telephone: (850) 414-3300
Facsimile: (850) 414-0997
William.Chappell@myfloridalegal.com
capapp@myfloridalegal.com

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

Appellant, John F. Mosley, the defendant in the trial court, will be referred to as Appellant. Appellee, the State of Florida, will be referred to as the State. The record below will be referred to as "R." and then the page number, i.e., "(R. 1)." The transcript will be referred to as "T." and then the page number, i.e., "(T. 1)." Appellant's brief shall be referred to as "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

I. Procedural History

This appeal arises from Appellant's resentencing proceeding wherein the jury unanimously recommended a sentence of death and the trial court imposed said sentence. Appellant was convicted of two counts of first-degree murder for the April 2004 deaths of his girlfriend, Ms. Wilkes, and their infant son, Jay-Quan Mosley. This Court affirmed Appellant's convictions and sentence of death on direct appeal. *Mosley v. State*, 46 So. 3d 510 (Fla. 2009) (*Mosley I*). The Court summarized the relevant facts as follows:

> Although Mosley was married, he had a number of romantic relationships with other women in the Jacksonville area, including Lynda Wilkes. Because Wilkes was receiving Medicaid benefits for their son, Jay-Quan, she was required to participate in a proceeding to establish paternity. After Mosley failed to answer the petition to determine paternity, a default judgment was entered against him, and he was ordered to pay $35 a week in child support, with an additional $5 a week for retroactive child support. On March 12, 2004, Mosley filed a motion to have the final judgment set aside. A hearing on this motion was set for May 3, 2004.
>
> Around this time period, Mosley, who was thirty-nine, met Bernard Griffin, who was fifteen, and asked Griffin if he would be willing to kill a baby. During his attempts to convince Griffin to kill the child, Mosley pointed out Wilkes's house and gave him a sketch of the house's layout, but Griffin refused.
>
> On April 21, 2004, Mosley went to see Wilkes at her house in Jacksonville and asked Wilkes to meet him the next day at J.C. Penney so he could take Jay-Quan shopping. On April 22, 2004, Wilkes took her other children to

school. That afternoon, she and Jay-Quan met Mosley at J.C. Penney, and together they left in Mosley's vehicle, a burgundy Suburban. Mosley picked up Griffin, and eventually drove to a deserted dirt road in another part of Jacksonville. Mosley asked Wilkes to get out and pretended to look for something in the seat. He then turned and strangled Wilkes, who futilely attempted to defend herself. After she stopped moving, Mosley took a plastic shopping bag from the back of the vehicle, put it over Wilkes's head, and put her body in the back of the Suburban. Mosley put a crying Jay-Quan in another garbage bag, tied it, and also placed it in the back of his vehicle. He used a blue tarp to cover Wilkes's body and the bag with the baby in it. Initially, Griffin heard the baby crying, but after a while, the baby stopped. Mosley dropped Griffin off and went to work.

Later that evening, while he was still at work, another of Mosley's girlfriends, Jamila Jones, called and asked him for some gas money. He agreed that he would give her some money before she needed to leave for work the next day. That evening, Mosley clocked out of work at 11:01, and sometime after that picked up Griffin again in his Suburban. Griffin noticed that the vehicle smelled bad. Mosley drove out of Jacksonville towards Waldo, which was approximately sixty miles from Jacksonville. A few miles south of Waldo, Mosley turned and went down a number of dirt roads, eventually finding a suitable spot to dispose of Wilkes's body. After Griffin refused to participate, Mosley pulled Wilkes to a clearing by himself, poured lighter fluid over her body, and then tossed a burning rag on her body. As the body began to burn, Mosley and Griffin ran to the vehicle and left. Mosley then drove approximately forty miles further south to Ocala and dumped the trash bag with the baby in a dumpster behind a Winn-Dixie store. He also threw his shoes and gloves into the dumpster. On the way back to Jacksonville, Mosley gave Griffin $100.

Once they arrived in Jacksonville, it was daylight. After asking Griffin to give him back $20, Mosley stopped by Jones's apartment at approximately six that morning and gave her $20. Jones asked Mosley why he did not answer his cell phone when she tried to call him the previous evening, and Mosley replied that he was "doing something for his mom." Although Mosley was supposed to be back at work at six that same morning, he called in and said that he would be late because he did not get any sleep that night. He finally arrived at work at 12:49 p.m. on April 23.

The victim's family knew something was wrong when Wilkes failed to pick up her children from school on the afternoon of April 22. The family called the police, reported Wilkes as missing, and began a search for her and Jay-Quan immediately. During the evening hours of April 22, they found her car abandoned at the J.C. Penney's parking lot.

On the morning after her disappearance (April 23), one of Wilkes's daughters (Naquita) and a family friend saw Mosley driving his vehicle and caught up to him while he was stopped at a traffic light. They told Mosley that Wilkes was missing. Initially, Mosley denied seeing her. After Naquita asked Mosley whether he failed to show up at J.C. Penney the previous day, Mosley admitted that he saw Wilkes the day before but claimed that he had dropped her off at her car. They asked Mosley if he could pull over, but he refused and drove away.

On Saturday, April 24, Mosley changed all four tires on the Suburban, despite the fact that the tires could be driven for a few more thousand miles. Mosley was adamant that the mechanic load his old tires into his vehicle.

During the investigation into Wilkes's disappearance, the police attempted to contact Mosley numerous times, trying to arrange for an in-person interview. Mosley never met with any police officer until after he was taken into custody, but he did talk to numerous officers over the phone. He claimed that he and Wilkes met at the J.C. Penney's parking lot on April 22 and left to see some nearby houses that Wilkes was considering renting. He further claimed that he dropped her off back at her car around one that afternoon.

Days after the murder, after seeing news reports about the missing woman and baby, Griffin told his mother that he knew something about the case. He then talked to the police and eventually led police to the locations where Mosley killed Wilkes, where he burned her remains, and where he dumped the baby. Griffin was subsequently convicted of two counts of being an accessory after the fact for his involvement in the murders.

Based on Griffin's assistance, the police were able to recover Wilkes's remains, which were badly burned. Wilkes's watch, which was found with the burned body, stopped at 2:29. Mosley's cellular phone records established that at 2:24 a.m., on April 23, an outgoing call was made from Mosley's cellular phone, and the cellular antenna used for this call was close to where Wilkes's body was found. Despite a diligent search for the baby's body, the baby's body was never recovered.

Wilkes's DNA was found on a carpet sample from the Suburban. The medical examiner testified that after a person was strangled to death, the body could exude pinkish blood from the nose and mouth.

After Mosley was arrested, he wrote Jones a letter, asking her to tell the police that he was alone when he came to her house on April 23 at 6:08 a.m. He also told her, "It is legal and okay to change your statement in court if you let the jury know the police pressured and coerced you to say something before they took the statement and during the statement."

> Mosley also talked to his wife, Carolyn Mosley, asking her to "remember" that his mother stayed over that night and that he came home from work that night at 11:30. He told his wife that he needed her, their daughters, and his mother to write notarized statements that he arrived home that night at 11:30 and was there all night.
>
> During his defense at trial, Mosley presented evidence through his wife and daughters that he was at home the night that Griffin claimed they disposed of the bodies. Mosley's doctor also testified that he was treating Mosley for some injuries sustained in a car accident. While the doctor discussed Mosley's injuries in depth, he also admitted that the injuries would not have made it impossible for Mosley to lift a body.

Id. at 514-16 (footnotes omitted). The jury convicted Appellant of two counts of first-degree murder, recommended a life sentence for the murder of Ms. Wilkes, and recommended a death sentence for the murder of Jay-Quan by a vote of eight to four. *Id.* at 517. The trial court subsequently sentenced Appellant to life in prison for the murder of Ms. Wilkes and death for the murder of Jay-Quan. *Id.* at 517-18. This Court affirmed Appellant's convictions and sentences on direct appeal. *Id.* at 529.

Appellant subsequently filed a postconviction motion for relief under Florida Rule of Criminal Procedure 3.851 alleging eighteen claims. *Mosley v. State*, 209 So. 3d 1248, 1257-58 (Fla. 2016) (*Mosley II*). After an evidentiary hearing, the postconviction court denied the motion on all grounds. *Id.* Appellant then appealed that denial to this Court and simultaneously filed a habeas petition raising an additional issue pertaining to ineffective assistance of appellate counsel. *Id.* at 1270. This Court affirmed the postconviction court's denial of his 3.851 motion on all grounds related to his guilt-phase claims and denied his habeas petition claims pertaining to ineffective assistance to appellate counsel. *Id.* at 1284. However, this Court granted Appellant's request to vacate his death sentence by retroactively applying this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *Id.*

II. Pre-Resentencing Proceedings

On April 12, 2017, Judge McCallum presided over a status hearing where Appellant was represented by Mr. Hernandez. (R. 1468-70). Mr. Hernandez requested the appointment of Mr. Korody as his second-chair in Appellant's case. (R. 1473-76). On May 17, 2017, Judge McCallum informed the parties that she had appointed Mr. Korody as co-counsel on Appellant's case and set a preliminary date of February 12, 2019, for the second penalty phase. (R. 1482-86). On September 25, 2017, Judge McCallum disclosed that her husband had worked on Appellant's case as an investigator for the State Attorney's Office and Appellant could file a motion asking her to recuse if Appellant so wished. (R. 1494-95). On November 7, 2017, defense counsel informed the court that it would not ask Judge McCallum to recuse herself from the case. (R. 1500). On December 11, 2017, Judge McCallum granted Appellant's motion for a continuance and an extension of time to file witness names. (R. 1508).

On December 18, 2017, Appellant filed a pro se "Motion for New Discovered Evidence — Not Known Before Trial" in which he claimed that the State failed to disclose that medical examiner Dr. Margarita Arruza had dementia at the time she worked on Appellant's case and requested an evidentiary hearing on his motion before proceeding with his resentencing. (R. 30-46). The trial court struck this motion as a nullity because Appellant was represented by counsel at the time it was filed. (R. 368-69).

On February 15, 2018, defense counsel filed various motions challenging the death penalty and called for a motion hearing on February 26. (R. 377-78). On February 26, 2018, Appellant filed a "Motion to Instantly (Right Now) Represent Myself (Pro Se) in

‘All’ Matters/Manners of this Case in Postconviction, New Trial/New Judgment, and/or Current Proceedings” in which he accused the trial court of violating his constitutional rights by refusing to consider his motion on newly discovered evidence in a postconviction context before proceeding with his resentencing. (R. 380-91).

On March 1, 2018, the trial court rendered an amended order denying Appellant’s motion based on newly discovered evidence because he was represented by counsel and his motion was premature as his sentence was not yet final. (R. 392-93). Appellant filed a pro se motion for rehearing on this issue, but the court denied his motion. (R. 406-23; 446-47). On March 1, 2018, at a pre-trial hearing, the trial court stated that it was aware of Appellant’s pro se motion based on newly discovered evidence, but it had just learned of Appellant’s motion to represent himself, and the court passed the issue until it could bring Appellant to court. (R. 1545-48).

On March 20, 2018, the trial court conducted a *Faretta* inquiry into Defendant’s desire to represent himself and initially granted the motion and appointed standby counsel and a mitigation specialist, but then the court orally overruled itself because it found that Defendant did not understand what giving up the right to counsel would actually entail. (R. 478-97). During the hearing, the trial court explained to Defendant that his motion on newly discovered evidence was a postconviction motion and could not be heard by the court until his sentence was finalized after his new penalty phase. (R. 456-66). The court then conducted a lengthy colloquy to ensure Appellant understood all of the rights he was giving up by foregoing counsel with regards to his new penalty phase. (R. 466-87). The court then found Appellant was knowingly, intelligently, and voluntarily waiving his right to counsel and was permitted to represent himself and appointed Mr. Hernandez as

standby counsel. (R. 486-87; 489). Appellant then requested vouchers to pay for a private investigator and an order allowing him access to the prison law library, which the court denied. (R. 494-97). Appellant again complained that the court was not going to provide him an order permitting him access to the prison's law library but that he understood the rights he was waiving by proceeding pro se. (R. 497-98). The trial court then noted that Mr. Korody, acting as standby counsel, was assisting Appellant during the current hearing, because Appellant did not understand that he had to file written motions with the court in order to procure written orders from the court and standby counsel had to constantly assist him. (R. 498-500).

On March 26, 2018, Judge McCallum then revised her order denying Appellant's motion to proceed pro se and rendered an order staying Appellant's motion to proceed pro se because she was granting Appellant's motion to disqualify her and a new judge would have to conduct a *Faretta* inquiry. (R. 452-53). On April 12, 2018, Judge Weatherby was assigned to preside over Appellant's new penalty phase. (R. 502-03).

On April 18, 2018, Appellant filed a motion for rehearing on the order denying his motion on newly discovered evidence, and Judge Weatherby subsequently denied it as untimely. (R. 504-52; 555-62; 553-54; 568-70). Appellant also filed pro se motions seeking an extension of time to file a motion to disqualify Judge Weatherby, but the trial court denied them as nullities because they were not adopted by his attorney and they pertained to a postconviction matter, not his new penalty phase. (R. 563-67; 576-77; 571-72; 579-80).

On June 13, 2018, Judge Weatherby heard Appellant's request to proceed pro se. (R. 1553; 1559-73). During the hearing, Appellant informed the court that he did not want

to represent himself, but he did not want to be represented by Mr. Hernandez. The trial court informed Appellant that he was provided a competent, death-qualified attorney and that attorney would not be removed in favor of another attorney just because Appellant could not get along with him on a personal level. The court denied Appellant's request for another attorney and Appellant withdrew his request to represent himself. Mr. Hernandez then informed the trial court that the previous judge had appointed a mental health expert to develop mitigation for Appellant. (R. 1574). The trial court subsequently rendered an order denying Appellant's motion to represent himself. (R. 583-84).

On August 23, 2018, the trial court held a status conference where the parties agreed that the new penalty phase would be scheduled for late in 2019. (R. 1583-91). On January 10, 2019, the trial court held another status hearing and Mr. Hernandez informed the court that Appellant had helped to develop mitigating evidence to present on his behalf. (R. 1597). On March 19, 2019, the trial court held a status hearing and set Appellant's new penalty phase for December 2, 2019. (R. 1618-21). On July 9, 2019, the trial court held a status hearing and determined that Appellant had to list any witnesses he intended to call, including experts, by October 1, 2019. (R. 1641).

On October 10, 2019, the trial court noted that two mitigation reports had been prepared on Appellant's behalf and it was noted that Appellant was acting uncooperatively with the defense experts. (R. 1649). During the status conference, defense counsel informed the court that Appellant was being uncooperative and wanted a continuance, but defense counsel refused to file a motion for a continuance because there was not a valid reason for a delay. (R. 1651).

On November 20, 2019, the trial court held the final pre-trial conference for Appellant's new penalty phase, and granted Appellant's motion in limine to preclude the State from admitting evidence of his prior arrests on the condition that Appellant waive the mitigating circumstance of no significant prior criminal history. (R. 1679-80). The court also granted in part a motion in limine to preclude the State from mentioning Appellant's extra-marital affairs unless Appellant later opened the door and denied a motion in limine regarding allegedly cumulative testimony relating to the circumstances of the two victims. (R. 1684-91). The court then stated that it would consider Appellant's motion to limit the victim impact statements that pertained to both victims instead of just the infant victim. (R. 1692-94). Appellant's request to preclude the State from arguing the heinous, atrocious, and cruel and the pecuniary gain statutory aggravators was then denied. (R. 1695-1706). The parties discussed a proposed verdict form and how the jury should be instructed on mitigating circumstances. (R. 1706-15). The court then agreed to allow Appellant to allocate to the jury in a limited fashion and the parties agreed on a statement of the case to be read to the potential jurors at the venire. (R. 1715-23).

After resolving these matters, the court heard from Appellant directly because Appellant contended that he had irreconcilable differences with his attorney. (R. 1731). Appellant demanded an immediate *Nelson* hearing because he wanted different counsel, and the trial court informed Appellant that he was not going to receive different counsel. (R. 1731-32). Appellant then demanded to proceed pro se and the court denied his request after inquiring into his reasons. (R. 1732-33). After a discussion with the attorneys on another matter, Appellant again addressed the court and requested a *Faretta* hearing and withdrew his request for a *Nelson* hearing. (R. 1735-37). The court then conducted a

Faretta inquiry and the State prosecutors stepped outside the room. (R. 1737-42). The court repeatedly asked Appellant why he wanted to discharge counsel to ascertain whether his attorneys could remain as standby counsel. (R. 1737-42). Appellant refused to answer the court's questions and eventually the court asked the State prosecutors to return to the room. (R. 1737-42). After further discussion with defense counsel, the State, and Appellant, the trial court granted Appellant's motion to proceed pro se and appointed defense counsel as standby counsel. (R. 1744-45). Appellant then immediately requested a continuance for eighteen months to prepare for his new penalty phase, but the trial court denied the motion. (R. 1746-49).

On November 27, 2019, Appellant filed a motion for an eleven-month continuance and an ex parte motion for costs to appoint a private investigator, paralegal, IT computer tech, and mitigation specialist. (R. 750-61). The trial court denied both motions on December 2, 2019. (R. 938; 943).

III. Resentencing

On December 2, 2019, the trial court proceeded with the jury selection for Appellant's new penalty phase. (T. 3). Appellant addressed the court before jury selection began and asked Judge Weatherby to recuse himself, asked for additional discovery based on previously denied motions, a motion for an eleven-month continuance, and a motion to appoint various investigators to his case. (T. 7-10). The trial court denied all of Appellant's motions as they had been previously ruled upon and the court informed Appellant it was not going to continue a case that was set for jury selection that same day. (T. 7-10). Appellant also filed a motion for additional discovery based on Dr. Arruza's Alzheimer's diagnosis, but the court denied the motion (T. 17-18). The trial court also

informed Appellant repeatedly that he was not permitted to argue his innocence to the jury during his new penalty phase because it was not permitted under Florida law. (T. 25-28).

The initial voir dire performed by the court was conducted and Appellant, outside of the presence of any potential jurors, again asked the court to consider his five pre-trial motions and again the trial court denied those motions. (T. 84-85). Appellant then moved for the court to strike the new penalty phase and impose a life sentence based on "double jeopardy" and the court denied his motion. (T. 85-87). Appellant then demanded that the trial court give him more time to prepare or else he would cease participating in the proceeding and the court denied his motion for a continuance. (T. 87-95). The court also engaged in a lengthy conversation with Appellant about whether he wished to continue to represent himself and Appellant continually argued with the court about only wanting to represent himself if the court granted him a continuance. (T. 87-95). The trial court eventually re-appointed Mr. Hernandez and Mr. Korody to represent Appellant after Appellant said, "I don't have constitutional rights since I'm a modern day slave and you can go ahead and appoint them" and "They can handle the case. I wanted a *Nelson* hearing." (T. 93-95).

At the State's request, the trial court then conducted a *Nelson* hearing. (T. 95). Appellant asserted that his attorneys had not called witnesses or advanced his newly discovered evidence motion and he therefore did not trust them to represent him. (T. 96). He also asserted that his attorneys should have filed a motion requesting Judge Weatherby recuse himself from the case. (T. 97-98). The trial court explained that Appellant's newly discovered evidence claim was not properly before the court because

it did not pertain to his new penalty phase, the witnesses Appellant wished to call were not relevant to his new penalty phase, and there was no basis for Judge Weatherby to recuse himself. (T. 97-99). The trial court then affirmed that Mr. Hernandez and Mr. Korody were re-appointed to represent Appellant. (T. 98-99). Later, out of the presence of the jury, Appellant again requested to proceed pro se but the trial court denied the request. (T. 147-48).

The following day, December 3, 2019, Appellant again asked to represent himself. (T. 286-87). After a lengthy *Faretta* inquiry, the trial court granted Appellant's request and proceeded with the next phase of jury selection. (T. 287-301). The State then proceeded to ask the venire additional questions pertaining to whether the potential jurors would be open to imposing the death penalty depending on the evidence. (T. 302-40). Appellant declined to ask the venire any questions. (T. 340). The State and Appellant then agreed on a jury after exercising their peremptory strikes. (T. 350-52). Appellant then proceeded to re-raise the issue of his five pre-trial motions which the court again denied, contested the State's use of evidence presented from his guilt-phase proceeding fifteen years ago which the court denied, and argued that the entire proceeding was illegal as a result of a violation of the prohibition against double jeopardy which the court also denied. (T. 352-77).

On December 4, 2019, the trial court began Appellant's new penalty phase and offered Appellant the assistance of counsel which he declined. (T. 382-83). Appellant then proceeded to argue that his new penalty phase was a violation of the prohibition against double jeopardy, the State and the court violated his constitutional rights when they randomly selected the venire because he alleged there were insufficient African-American

men, and he argued the State was seeking to introduce irrelevant and inadmissible evidence. (T. 383-92). The trial court denied all of Appellant's motions.

Lieutenant Romano of the Jacksonville Sheriff's Office (JSO), testified as to the basic facts surrounding the murders of Lynda Wilkes and her ten-month-old son Jay-Quan Mosley. (T. 420-74). Appellant cross-examined Lieutenant Romano extensively about the case, attempting to cast doubt on his credibility and the thoroughness of the investigation. (T. 475-515). The State then called Bernard Griffin, Appellant's co-perpetrator in the murders, who testified as to the basic facts surrounding the murders and his involvement. (T. 525-62). Appellant then cross-examined Mr. Griffin extensively, seeking to impeach his credibility. (T. 562). The trial court sustained a State objection that Appellant was improperly impeaching Mr. Griffin about his prior criminal history. (T. 562). The trial court sustained another State objection when Appellant called Mr. Griffin a liar on the stand multiple times. (T. 563-65). Appellant then had Mr. Griffin read an affidavit that had been prepared for Appellant's postconviction hearing in which Mr. Griffin swore that the Assistant State Attorney prosecuting Appellant would ensure Mr. Griffin received little to no jail time if he testified at Appellant's trial. (T. 566-70). Mr. Griffin then testified that at Appellant's trial he testified that he did not have a deal with the State in exchange for his testimony and after Appellant's conviction he was sentenced to community control and probation. (T. 569-70). Appellant then asked Mr. Griffin whether the State was going to cut his current present sentence down for his favorable testimony and whether he was going to lie about it again. (T. 570-71). The trial court instructed the jury that Mr. Griffin was serving a twenty-year sentence and there was no legal avenue for that sentence to be changed. (T. 571). Appellant argued with the trial court, asserting that the State could

send letters asking to reduce Mr. Griffin's sentence and the trial court informed Appellant that he could move to the next topic or sit down. (T. 571-73). After Appellant then asked Mr. Griffin if the State had coached him on "that little dive thing you did," the trial court ended Appellant's cross-examination. (T. 573).

The court took a recess and reconvened. (T. 578). Appellant informed the court he wanted to call several witnesses to testify that he was not the father of Jay-Quan Mosley, the ten-month old infant he was convicted of murdering. (T. 580-87). The trial court denied his request to present any witnesses for that purpose. (T. 586-87).

Lieutenant Waldrup of the JSO then testified as to the basic facts of the case. (T. 588-610). Wesley Owens, a former attorney that contracted with the Florida Department of Revenue to pursue child support cases, then testified as to the child support action against Appellant in 2003 and 2004 before Jay-Quan and his mother were murdered. (T. 613-26). The State then read the original trial testimony of Dr. Arruza, the former chief medical examiner for Duval County, because she was unable to testify. (T. 638-56). Dr. Alexander, a pediatrician specializing in child abuse victims, testified that Jay-Quan would have asphyxiated in a tied off garbage bag, it would take four minutes for the infant to lose consciousness and then die, and the infant would experience fear and pain before losing consciousness. (T. 657-70). The trial court dismissed the jury for the day and spoke to the parties about the remaining witnesses and again offered Appellant the use of an attorney. (T. 676-79).

The following day, December 5, 2019, the trial court again asked Appellant if he wished to proceed pro se and Appellant insisted that he did. (T. 685). Marquita Wilkes,

Jay-Quan's oldest sister, and Nakita Wilkes, Jay-Quan's second oldest sister, then read victim impact statements. (T. 688-94). The State then rested. (T. 694).

Appellant called his mother, Barbara Mosley, who testified that Appellant was a good son, his father was physically abusive although not around for long, Appellant attended high school, college, a few police academies, worked as a medical technician, and served as a Navy medical corpsman. (T. 705-08). She also testified he was a good father and he would be able to help other inmates. (T. 708-11). He then called Carolyn Mosley, his wife, who testified that she was married to Appellant for thirty years, he was an attentive father to all his children, and he served as a father figure to a man named Derrale. (T. 714-24). He then called Amber Mosley, his daughter, who testified that Appellant was a great father and he influenced and helped her earn a few college degrees and become a nurse. (T. 725-30).

Appellant then recalled Lieutenant Romano to the stand. Prior to Appellant's questioning of the lieutenant, the trial court warned Appellant that his questions needed to be limited to mitigation and that Lieutenant Romano could answer his questions in a way that would undercut Appellant's case. (T. 730-33). Lieutenant Romano testified as to some basic facts of the case and tried to highlight an alleged inconsistency between a report from Lieutenant Romano and an Investigator Tyson, but Appellant did not put one of the reports into evidence and ceased questioning the lieutenant when the trial court informed him that he had to introduce the absent report into evidence. (T. 735-41).

Appellant then called Alexis Mosley, his younger daughter, who testified that Appellant was a great father who gave her a good childhood and that his service in the Navy inspired her to enlist in the Navy as well. (T. 742-47). Appellant then called Joel

Jackson, his brother, who testified that Appellant was a good brother who helped raise him and was still an influence in his life. (T. 755-66).

The next day, December 6, 2019, the trial court continued with Appellant's new penalty phase and re-offered Appellant the assistance of counsel which Appellant declined. (T. 785-87). Appellant then called Marven Baker, his childhood neighbor, who testified that she was raised in the same neighborhood as he was, he was raised by his grandmother because his father was abusive, and he was a good father. (T. 790-91). The trial court sustained the State's objection to Appellant asking her whether his father ever abused his sisters. (T. 792). Appellant then called Jeff Pace, a close friend, who testified that he recruited Appellant into the Navy Reserves, he developed a close, trusting friendship with Appellant, and he knew that Appellant worked as a volunteer firefighter and coached various little league sports. (T. 794-821). Appellant then called Eric Roper, an active member of the Navy Reserves, who testified as to the nature of a "leave earning statement" and that it would be unusual for a sailor to be honorably discharged after being convicted for two murders. (T. 822-26).

Appellant then recalled his mother to the stand and the trial court proffered her testimony outside the presence of the jury. (T. 827). She proffered that his father was physically abusive to him, his father sexually abused his sisters, and Appellant was mostly raised by his grandmother. (T. 827-29). The trial court ruled that all the proffered testimony was admissible except for the allegations that Appellant's father abused his sisters because his father was not a witness, his credibility was not at issue, and there was no evidence that Appellant was the recipient of the alleged abuse or involved with the alleged

abuse. (T. 829-32). The jury was then brought in and Appellant's mother testified in line with the proffer. (T. 832-35).

Appellant then called Dr. Stephen Bloomfield, a forensic psychologist, who testified as to his psychological and competence evaluations of Appellant. (T. 836-38). Specifically, he testified that Appellant was competent to represent himself and operated within the normal ranges of human development and Appellant has obsessive compulsive traits, although not a disorder, and he is a loner. (T. 838-39). He also testified that Appellant had experienced childhood abuse but exhibited many prosocial traits as well. (T. 839-40). On cross-examination, he testified that Appellant refused to submit to psychological testing before his new penalty phase because he was worried the results could be used against him and Appellant did not exhibit any mental impairments or disorders. (T. 840-43).

Appellant then called Dr. Gold, a trauma psychologist, who testified that Appellant had several traumas in his history including an abusive grandmother, an abusive father, and an absentee mother. (T. 848-54). He also testified that Appellant was involved in many prosocial activities which was a healthy way for someone who suffered from abuse as a child to overcome their traumas. (T. 852-54). Appellant then rested his case. (T. 862-63).

The court dismissed the jury and then proceeded to the charge conference where it went over the proposed jury instructions and the verdict form with the parties. (T. 866-83). During the charge conference the trial court reminded Appellant that he was representing himself and he was only permitted to present a closing argument based on the evidence presented during the penalty phase and if he strayed from that evidence the

State could object and remind the jury that Appellant had not taken the witness stand and was not under oath. (T. 881-83).

The following Monday, December 9, 2019, the trial court did not offer Appellant an attorney before proceeding to closing arguments. (T. 887-88). The trial court also denied Appellant's motion for mistrial before jury deliberation. (R. 2011). The State then presented closing argument, during which Appellant did not object. (T. 887-914). Appellant then presented closing argument, during which the trial court sustained multiple objections from the State because Appellant was contesting his guilt, not what his appropriate sentence should be. (T. 915-37). The trial court then read the agreed-upon jury instructions and sent the jury to deliberate. (T. 937-62). The jury unanimously agreed to sentence Appellant to death. (T. 974).

The jury found that the State had proven the following aggravators beyond a reasonable doubt: (1) Appellant was previously convicted of another capital felony; (2) the murder was especially heinous, atrocious, or cruel; (3) the murder was committed in a cold, calculated, and premeditated manner; and (4) the victim was less than twelve years of age. (R. 2000-01). The jury also unanimously found that the aggravating factors were sufficient to impose the death penalty. (R. 2001). The jury found the existence of no mitigating circumstances, although some of the jurors voted to find the presence of a few. (R. 2002-09). The jury unanimously found that the aggravating factors outweighed the mitigating circumstances. (R. 2009). The jury then unanimously found that Appellant should be sentenced to death. (R. 2010).

The trial court then offered Appellant the use of counsel for the *Spencer* hearing, which Appellant accepted. (T. 976-77). The court then set the *Spencer* hearing for the

last week of January 2020. (T. 979). On January 21, 2020, Appellant filed a motion to proceed pro se. (R. 2012-15).

IV. *Spencer* Hearing

On January 30, 2020, the trial court held a hearing to address the remaining issues outstanding in Appellant's case. (R. 1754). During the hearing the trial court ordered the defense attorneys to present argument as to the written motion for a new penalty phase before it ruled on Appellant's motion to represent himself and noted that Appellant had filed an appeal and petition for writ of mandamus with the Florida Supreme Court that had already been denied. (R. 1754-56). The court did not note any motion for new trial other than the one filed by defense counsel at this time. Defense counsel argued that the trial court erred in accepting the verdict rendered by the jury because the jury's findings with respect to Appellant's proposed mitigating circumstances indicated that the jurors had not followed the law. (R. 1756-64). The court denied the motion. (R. 1767).

Defense counsel then submitted the testimony of a witness from Appellant's first penalty phase, Ms. McKinney, who testified that Appellant's father was arrested for sexually assaulting Appellant's sisters and that event negatively impacted him as a child. (R. 1767-68). Defense counsel noted that the trial court had prevented Appellant's mother from testifying about Appellant's father allegedly sexually assaulting Appellant's sisters. (R. 1768-69). The court indicated it would proceed to sentence Appellant without written sentencing memoranda because defense counsel "capably argued" for the court to impose a sentence of life by disregarding the jury's verdict. (R. 1769).

The trial court then stated the following:

> I have considered and I did at the trial the matter of — I'm sorry, the rehearing, the matter of the sexual abuse. While I understand that it may

> have — my ruling was on the matter of the admissibility from that particular witness as I recall about that but I have that in mind when I impose this sentence. And so having gone through all of this, the motion for new penalty phase hearing is denied.

(R. 1770).

After orally denying defense counsel's motion for new penalty phase, the trial court proceeded to sentence Appellant to death. (R. 1770).

After sentencing Appellant, the trial court inquired about Appellant's motion to proceed pro se. (R. 1770). Appellant stated that he intended to represent himself at the *Spencer* hearing. (R. 1771). The court rejected Appellant's argument, stating that it had re-appointed his attorneys, at Appellant's request, after the jury had rendered its verdict and it was not going to allow Appellant to proceed pro se. (R. 1771).

On January 30, 2020, Appellant filed a "Motion for Prohibition and Mandamus and Notice of Appeal" with the Florida Supreme Court seeking to halt the penalty phase proceedings until an evidentiary hearing was held on his claims of newly discovered evidence with respect to the medical examiner. (R. 1348-74). On February 3, 2020, the trial court rendered an order denying Appellant's "Supplement to Motion for Disqualification of Judge" because it had denied Appellant's original motion to disqualify as a nullity and Appellant's claims in the supplemental motion were untimely. (R. 2017-18).

On February 11, 2020, the trial court rendered its written sentencing order. (R. 2019-40). The court found that the State had proven beyond a reasonable doubt the four aggravating factors found by the jury and assigned them great weight: (1) Appellant was previously convicted of another capital felony; (2) HAC; (3) CCP; and (4) the victim was

under twelve years of age. (R. 2024-27). The court found that the aggravating factors were sufficient to impose the death penalty. (R. 2027).

The court then found the following mitigating circumstances, despite the fact that the jury found no mitigation: (1) Appellant was emotionally neglected, moderate weight; (2) Appellant's father abandoned him, slight weight; (3) Appellant grew up in a dysfunctional environment, no weight because it was taken into account via other mitigating circumstances; (4) Appellant honorably served in the Navy Reserves, slight weight; (5) Appellant has great love and concern for his daughters, slight weight; (6) Appellant graduated from high school, circumstantial minimal weight; (7) Appellant was affected by seeing physical and mental abuse growing up, no weight because it was taken into account via other mitigating circumstances; (8) Appellant has the love and support of his relatives, slight weight; (9) Appellant was a good father to his daughters, slight weight; (10) Appellant was a good son, slight weight; (11) Appellant was a good friend, slight weight; (12) Appellant was never disciplined while he was in the Navy, slight weight; (13) Appellant graduated college with an Emergency Medical Care certificate, slight weight; (14) Appellant maintained steady employment, no weight as the record did not demonstrate Appellant maintained employment throughout his adult life; (15) Appellant was vice president of programs for the PTA and participated in similar activities at the state and local levels, slight weight; (16) Appellant volunteered for the Tenant Advisory Council, slight weight; (17) Appellant completed a volunteer basic course from the Division of State Fire Marshal, slight weight; (18) Appellant was a volunteer fireman, slight weight; (19) Appellant completed a certified nursing assistant program, no weight as Appellant failed to provide any evidence supporting this mitigating circumstance; (20)

Appellant mentored Derrale Lee, slight weight; (21) Appellant's psychological profile indicates he can be a productive inmate, slight weight; (22) Appellant successfully completed law enforcement training, slight weight; (23) Appellant coached neighborhood youth in sports, slight weight; (24) Appellant encouraged others to complete their education, slight weight; (25) Appellant helped his daughters with school, slight weight; (26) Appellant gives life advice to his family while in prison, slight weight; (27) Appellant's daughter joined the Navy following his advice, slight weight; (28) Appellant's other daughter became a registered nurse, no weight as this was not a mitigating circumstance; and (29) Appellant was traumatized at age ten by learning that his maternal step-grandfather killed his maternal grandmother, moderate weight. (R. 2028-37). The court also noted that Appellant did not argue any statutory mitigating circumstances and the court independently reviewed the record and could find no evidence that would support the existence of statutory mitigating circumstances either. (R. 2028).

The court then concluded that the aggravating factors outweighed the mitigating circumstances. (R. 2037). The court's order then sentenced Appellant to death. (R. 2037-38).

This timely appeal follows.

SUMMARY OF THE ARGUMENT

Issue I: The trial court did not abuse its discretion in limiting Appellant's cross-examination of Mr. Griffin because the court was exercising its broad powers to control the proceedings and correct Appellant's misleading and inaccurate assertions to the jury and, even if the trial court erred, the error was harmless.

Issue II: The trial court did not err in excluding potentially mitigating evidence during the penalty phase because the court was enforcing the rules of evidence and, alternatively, if the court did err then the error was harmless beyond a reasonable doubt under *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020).

Issue III: The trial court did not err in denying Appellant's request for self-representation because Appellant's request was untimely and, even if the court did err, the error was harmless because Appellant has not demonstrated what evidence or argument he wanted to present to the trial court that was not presented by his attorneys.

Issue IV: The trial court did not violate any constitutional or statutory provision when it orally sentenced Appellant to death and rendered its written order a few days later.

Issue V: The trial court did not commit fundamental error when it instructed the jury because the sufficiency of the aggravating factors and the weighing of the aggravating factors and mitigating circumstances are not elements that must be found beyond a reasonable doubt by a jury.

Issue VI: The trial court did not reversibly err in denying Appellant's postconviction motion based on newly discovered evidence because Appellant's sentence was not final, Appellant cannot file a pro se postconviction motion, and Appellant's motion was meritless.

ARGUMENT

ISSUE I: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT LIMITED APPELLANT'S CROSS-EXAMINATION OF A WITNESS AND INFORMED THE JURY THAT THE STATE COULD NOT REDUCE THE WITNESS'S PRISON SENTENCE

Appellant contends that the trial court abused its discretion by preventing Appellant from cross-examining a key witness against him and by informing the jury that there was

no potential that the witness could benefit from testifying during his penalty phase. Appellant's argument is wholly without merit because the trial court acted to correct Appellant's erroneous interpretation of Florida law in front of the jury.

This Court reviews a trial court's decision to limit a party's cross-examination of a witness under the abuse of discretion standard, subject to the rules of evidence and applicable case law. *See, e.g.*, *Moore v. State*, 701 So. 2d 545 (Fla. 1997).

A criminal defendant is entitled to cross-examine an adverse witness during the penalty phase of a death penalty proceeding and may do so by attacking the witness's credibility. *See Rodgers v. State*, 948 So. 2d 655, 663 (Fla. 2006) (citing *Rodriguez v. State*, 753 So. 2d 29, 43 (Fla. 2000)). However, "[t]he scope of cross-examination is not without bounds." *McDuffie v. State*, 970 So. 2d 312, 324 (Fla. 2007). In a capital case, the criminal defendant is permitted wide latitude in cross-examination provided that the questioning is "germane to that witness's testimony on direct examination and plausibly relevant to the defense." *Id.* Moreover, a trial court retains wide latitude in imposing reasonable limits on cross-examination based on concerns about confusion of the issues, interrogation that is repetitive, or interrogation that is only marginally relevant. *Moore*, 701 So. 2d at 549 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

In the instant case, the State elicited testimony from Mr. Griffin during direct examination that he was serving twenty years in prison "day for day" for committing an aggravated assault with a discharge of a firearm. (T. 560). During cross-examination, the trial court permitted Appellant to have Mr. Griffin read an affidavit that had been prepared for Appellant's postconviction hearing in which Mr. Griffin swore that the Assistant State Attorney prosecuting Appellant would ensure Mr. Griffin received little to no jail time if he

testified at Appellant's trial. (T. 566-70). The trial court then permitted Appellant to elicit testimony from Mr. Griffin that at Appellant's trial he testified that he did not have a deal with the State in exchange for his testimony and after Appellant's conviction he was sentenced to community control and probation. (T. 569-70). Appellant then asked Mr. Griffin why he was currently in prison and Mr. Griffin responded that he had committed aggravated assault and possession of a firearm by a convicted felon. (T. 570).

The following exchange then occurred between Appellant and the trial court:

> Appellant: So now you're back on the stand for the state, so are you going to say you have a deal again or after this hearing is done you going to get to go free again or they going to cut your time in half? What's —
> The Court: Okay. Let me — let me assure the jury right now —
> Appellant: Yes, sir.
> The Court: — Mr. Griffin is under a 20-year sentence. There is no legal avenue for that sentence to be changed at all except perhaps by his death in custody. Next topic, Mr. Mosley.
> Appellant: Your Honor, if I may —
> The Court: Next topic.
> Appellant: Yes, sir. With all due respect the state can send letter recommendations to the state —
> The Court: Mr. Mosley, next topic.
> Appellant: Asking to reduce his time.
> The Court: Next topic.
> Appellant: If these state prosecutors send a letter to —
> The Court: Mr. Mosley, next topic or you'll sit down.
> Appellant: You're not allowing me to let the jury know what's going on.
> The Court: Well, as if there were anything going on, Mr. Mosley. You have any further questions that you want to ask Mr. Griffin. Now is your time.
> Appellant: Well, Your Honor, I'm trying to —
> The Court: Do you have any further questions you want to ask him? I'm not talking about arguing with me or arguing with him. Are there any questions that you think are relevant to aid the jury in deciding whether to impose a sentence of death or life in prison?
> Appellant: Well, I'm trying. You won't let me establish his motive —
> The Court: I'm not going to let you establish something that is non-existent. There is absolutely no evidence of that at all and the Court has no authority whatsoever to change a sentence once the period of expiration has occurred, so I don't care who writes the letter. He ain't going anywhere.

(T. 571-73).

The trial court clearly permitted Appellant's proper impeachment of Mr. Griffin with respect to his prior inconsistent statements and his prior felony convictions. The trial court did not infringe upon Appellant's right to properly cross-examine the adverse witness by eliciting testimony that could undermine the witness's credibility in front of the jury. The court only interjected when Appellant erroneously claimed that Mr. Griffin, who is serving a minimum mandatory sentence of twenty years in prison,[1] could receive a reduced sentence if the State requested one in exchange for his favorable testimony in Appellant's case. This was eluded to most specifically in re-direct examination, when Mr. Griffin testified that he was serving a mandatory twenty-year prison sentence. (T. 574).

Appellant contends that the State could request the sentencing court reduce or suspend Mr. Griffin's sentence because he provided substantial assistance to the State in its prosecution of Appellant under section 921.186, Florida Statutes, and therefore the trial court impermissibly and erroneously curtailed Appellant's cross-examination of Mr. Griffin and misled the jury about the law. Appellant's argument is legally incorrect.

Section 921.186, states:

> Notwithstanding any other law, the state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of violating any felony offense and *who provides substantial assistance in the identification, arrest, or conviction* of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in criminal activity that would constitute a felony. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the

1 Although not contained in the record, Mr. Griffin's judgment and sentence can be found at https://core.duvalclerk.com/CoreCms.aspx?mode=PublicAccess, which clearly reflects that he is serving a twenty-year mandatory minimum sentence in case 16-2009-CF-002949-AXXX-MA under section 775.087(2)(a)2., Florida Statutes. This Court may take judicial notice of "Records of any court of this state," such as Mr. Griffin's criminal judgment and sentence. § 90.202(6), Fla. Stat. (1978).

> sentence if the judge finds that the defendant rendered such substantial assistance.

§ 921.186, Fla. Stat. (2010).(Emphasis added.)

The statute, by the plain meaning of the text, only applies to individuals who provide substantial assistance in the identification, arrest, or conviction of a person engaged in felonious activity. The statute makes no reference to sentencing proceedings or penalty phase proceedings. In the instant case, Mr. Griffin's testimony was utilized by the State in Appellant's new penalty phase and therefore cannot apply to Mr. Griffin, as Appellant had already been identified, arrested, and convicted. *Mosley I*, 46 So. 3d at 529; *cf. Wright v. State*, No. SC19-2123 at *2-3 (Fla. Jan. 7, 2021) (holding that Florida's crime of first-degree murder has statutorily enumerated elements and the additional factual findings required by *Hurst v. State* are not elements of that crime). Since section 921.186 cannot apply to Mr. Griffin in exchange for his testimony at a penalty phase and Mr. Griffin was serving a twenty-year prison mandatory-minimum sentence, the trial court's statement to the jury was a correct statement of law that prevented Appellant from misleading the jury.

Accordingly, the trial court's interjection cannot be an abuse of discretion in this case as Mr. Griffin could not have received a reduced sentence under section 921.186. Appellant was both misstating Florida law and misleading the jury, so the court was within its broad authority to limit cross-examination to ensure that the jury was not confused or misled. *See Moore*, 701 So. 2d at 549 (quoting *Van Arsdall*, 475 U.S. at 679).

However, if this Court finds that the trial court committed error by limiting Appellant's cross-examination of Mr. Griffin, Florida law requires further analysis. A trial court's decision to limit the scope for a criminal defendant's cross-examination is subject

to harmless error analysis. *See, e.g.*, *McDuffie*, 970 So. 2d at 326. Based on the particular facts present in this case, this Court should conclude that any error was harmless and could not have influenced the jury's decision.

The harmless error test requires the State to prove that there is no reasonable possibility that the alleged error contributed to the jury's decision. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). "Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *Id.* at 1138.

There are three reasons why the trial court's alleged error was harmless: (1) Mr. Griffin subsequently answered the question posed by Appellant so the jury had the benefit of the answer; (2) Appellant introduced actual impeachment evidence of Mr. Griffin changing his testimony that did not cause the jury to disbelieve his testimony, so there is no reasonable possibility that the inclusion of hypothetical future impeachment evidence would have resulted in a different verdict; and (3) Appellant's cross-examination of Mr. Griffin was predicated on his improper argument that he was not guilty of the murders and Mr. Griffin had framed him.

In the instant case, after the trial court prohibited Appellant from asking Mr. Griffin if he was going to get a "deal" from the State in exchange for his testimony, the prosecutor asked Mr. Griffin the same question on re-direct and Mr. Griffin replied "No, not at all." (T. 573-74). The jury thus heard Mr. Griffin's response to Appellant's proposed question and was able to consider the answer in determining Mr. Griffin's credibility during deliberations.

The operative analysis under the harmless error test is what effect the evidence, both permissible and impermissible, could have had on the trier of fact. *DiGuilio*, 491 So. 2d at 1135. Here, even if the trial court erred by prohibiting Appellant from asking Mr. Griffin whether he was getting a "deal" from the State in exchange for his testimony, that error was obviously cured when the State asked the same question on re-direct and Mr. Griffin answered the question. Accordingly, the alleged error that occurred must be harmless.

The proposed impeachment evidence disallowed by the judge was weak and speculative. In fact the "impeachment" evidence was entirely hypothetical and predicated on the idea that Mr. Griffin could, possibly, receive a deal from the State in the future in exchange for his testimony in Appellant's new penalty phase. The trial court permitted Appellant to introduce into evidence the affidavit Mr. Griffin signed for Appellant's postconviction proceeding in which Mr. Griffin swore that the State would ensure Mr. Griffin received little to no jail time if he testified at Appellant's trial and testified that he did not have a deal with the State. (T. 566-70). This was actual evidence that Mr. Griffin had previously received a beneficial sentence from the State in exchange for his testimony against Appellant and that Mr. Griffin had changed his testimony since the original trial on at least one occasion. Such evidence was far more impactful on the jury than the hypothetical benefit that Mr. Griffin may or may not receive in the future. Accordingly, the trial court's decision to limit Appellant's cross-examination of Mr. Griffin was harmless.

Lastly, Appellant contends that the trial court impermissibly bolstered Mr. Griffin's testimony with its interjection. This assertion is also subject to harmless error review and

cannot survive said analysis. Bolstering occurs when the State, or a court, "places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." *Valentine v. State*, 98 So. 3d 44, 56 (Fla. 2012) (quoting *Williamson v. State*, 994 So. 2d 1000, 1013 (Fla. 2008)). Here, the trial court informed the jury that there was no legal avenue for a court to reduce Mr. Griffin's current sentence:

> The Court: Do you have any further questions you want to ask him? I'm not talking about arguing with me or arguing with him. Are there any questions that you think are relevant to aid the jury in deciding whether to impose a sentence of death or life in prison?
> Appellant: Well, I'm trying. You won't let me establish his motive —
> The Court: I'm not going to let you establish something that is non-existent. There is absolutely no evidence of that at all and the Court has no authority whatsoever to change a sentence once the period of expiration has occurred, so I don't care who writes the letter. He ain't going anywhere.

(T. 572-73).

The Court did not directly opine on the credibility of the witness but did indirectly inform the jury that Appellant's attempt to impeach Mr. Griffin was without any legal basis. As argued above, this was not error because the trial court was exercising its broad authority over cross-examination to ensure that Appellant did not mislead the jury. However, if this Court finds that the court erred by indirectly bolstering Mr. Griffin's testimony, the error was harmless because there is no reasonable possibility that the court's statement impacted the jury's verdict.

The jury was informed at the outset of the proceeding, before opening arguments were presented, that Appellant was guilty of the first-degree murder of Lynda Wilkes and Jay-Quan Mosley. (T. 33; 394; 403). The jury was further informed that Appellant's guilt or innocence was not open for consideration; rather, the jury was there solely to determine

whether Appellant received life in prison or the death sentence. (T. 403). The State called Mr. Griffin to testify at Appellant's new penalty phase in order to provide the jury with the factual basis for the murder of Jay-Quan. Appellant's cross-examination, in contrast, was specifically designed to cast doubt on Appellant's guilt by calling into question the veracity of all of Mr. Griffin's testimony. (T. 562-73). This was further evidenced by Appellant's closing argument, during which the trial court sustained multiple objections from the State because Appellant was contesting his guilt and was not presenting an argument as to his appropriate sentence. (T. 915-37). Appellant's closing argument was, in fact, predicated on the assertion that Mr. Griffin committed the murders and framed Appellant for them. (T. 919; 923-26).

Accordingly, any error committed by the trial court in limiting Appellant's cross-examination of Mr. Griffin was harmless because Appellant's questions were specifically designed to contest his guilt, not to contest the aggravating factors proposed by the State or present mitigating circumstances on his own behalf.

Appellant is not entitled to relief on this issue because the trial court did not abuse its discretion in correcting Appellant's erroneous legal statements to the jury and, alternatively, any error that occurred was harmless.

ISSUE II: THE TRIAL COURT DID NOT ERR IN SUSTAINING THE STATE'S OBJECTION TO APPELLANT INTRODUCING POTENTIALLY MITIGATING EVIDENCE

Appellant contends that the trial court abused its discretion by preventing Appellant's mother from testifying that Appellant's father sexually abused his two sisters, was arrested for his crimes, and that these actions had an effect on Appellant as a child.

The trial court did not err in excluding this evidence because Appellant's mother did not have the personal knowledge to properly introduce it.

A penalty phase proceeding is subject to the rules of evidence, although the trial court is provided a greater amount of discretion in admitting evidence that would normally be excluded. *See, e.g.*, *Cozzie v. State*, 225 So. 3d 717, 728-29 (Fla. 2017) (citing § 921.141(1), Fla. Stat.)). This Court reviews a trial court's ruling on the admissibility of evidence under the abuse of discretion standard, subject to the rules of evidence. *See, e.g.*, *Glover v. State*, 226 So. 3d 795, 806 (Fla. 2017).

In the instant case, Appellant asked the trial court if he could re-call his mother to the stand to provide additional testimony during his case-in-chief because he wanted to introduce additional mitigating evidence. (T. 827). The trial court agreed to allow him to proffer her testimony. (T. 827). Appellant's mother proffered that his father was physically abusive to him, his father sexually abused his sisters, Appellant's father was arrested for his crimes, and Appellant was mostly raised by his grandmother. (T. 827-29). The trial court ruled that the proffered testimony was admissible except for the allegations that Appellant's father abused his sisters because his father was not a witness, his credibility was not at issue, and there was no evidence that Appellant was the recipient of the alleged abuse or involved with the alleged abuse. (T. 829-32). The jury was then brought in and Appellant's mother testified in line with the proffer and the trial court's ruling. (T. 832-35). At Appellant's *Spencer* hearing, the trial court also stated that it excluded the aforementioned evidence because it was being offered by Appellant's mother, implying that the evidence could have otherwise been admissible. (R. 1770).

Section 90.604, Florida Statutes, states, “Except as otherwise provided in s. 90.702, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may be given by the witness's own testimony.”

Here, Appellant failed to demonstrate that his mother had personal knowledge of how his father’s arrest for allegedly sexually assaulting his sisters affected him. Appellant’s mother testified that Appellant was primarily raised by his grandmother, not herself, and did not provide any testimony concerning how she knew that Appellant’s father’s arrest adversely affected Appellant. Accordingly, the trial court did not abuse its discretion by prohibiting Appellant from introducing this testimony under the rules of evidence.

However, if this Court finds that the trial court did err in excluding the aforementioned testimony, the alleged error is still subject to harmless error analysis. *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020). In *McKinney*, the United States Supreme Court evaluated a case where the defendant’s death sentence was affirmed by a state supreme court after the Ninth Circuit ordered the state supreme court to reconsider the sentence because the sentencing court failed to consider the defendant’s post-traumatic stress disorder diagnosis as mitigation in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *McKinney*, 140 S. Ct. at 706. The Court concluded that the state supreme court did not err in upholding the defendant’s death sentence because a state appellate court is permitted to reweigh aggravating factors and mitigating circumstances in a capital case to determine the appropriateness of a death sentence when a trial court either erroneously included an aggravating factor or erroneously excluded a mitigating

circumstance. *Id.* at 706-07. The Court analogized the case to *Clemons v. Mississippi*, 494 U.S. 738 (1990), in which it upheld a defendant's death sentence after the state supreme court invalidated one of the aggravating factors in that case, reweighed the remaining aggravating factor and the mitigating circumstances, and affirmed the defendant's death sentence. *McKinney*, 140 S. Ct. at 707. Ultimately, the Court held:

> there is no meaningful difference for purposes of appellate reweighing between subtracting an aggravator from one side of the scale and adding a mitigator to the other side. Both involve weighing, and the Court's decision in *Clemons* ruled that appellate tribunals may perform a "reweighing of the aggravating and mitigating evidence." In short, a *Clemons* reweighing is a permissible remedy for an *Eddings* error.

Id. (citation omitted).

This Court has conducted such analyses in the context of *Clemons* errors for decades. *Demps v. Dugger*, 714 So. 2d 365, 367 (Fla. 1998); *White v. Dugger*, 565 So. 2d 700, 702 (Fla. 1990). Accordingly, if this Court finds that the trial court erroneously excluded mitigating evidence in Appellant's case, then it should conduct a reweighing as authorized by the United States Supreme Court in *McKinney*.

Here, the trial court's detailed sentencing order incorporates the four aggravating factors found by the jury beyond a reasonable doubt and twenty-eight mitigating circumstances, none of which were found by the jury. The court specifically identified and gave weight to multiple mitigating circumstances that are substantially related to the evidence it excluded including: (1) Appellant was emotionally neglected, moderate weight; (2) Appellant's father abandoned him, slight weight; (3) Appellant grew up in a dysfunctional environment, no weight because it was taken into account via other mitigating circumstances; (4) Appellant was affected by seeing physical and mental abuse growing up, no weight because it was taken into account via other mitigating

circumstances; and (5) Appellant was traumatized at age ten by learning that his maternal step-grandfather killed his maternal grandmother, moderate weight. (R. 2028-37). The court also noted that Appellant did not argue any statutory mitigating circumstances and the court independently reviewed the record and could find no evidence that would support the existence of statutory mitigating circumstances either. (R. 2028).

Since the trial court found that Appellant's father's abandonment was a mitigating circumstance and that Appellant was emotionally neglected, any alleged *Eddings* error that occurred here can only be viewed as harmless. Moreover, the four aggravating factors in Appellant's case, (1) previous violent felony conviction, (2) HAC, (3) CCP, and (4) the victim was under twelve years of age (R. 2024-27), are "[some] of the most serious and weighty aggravators in the capital sentencing scheme." *Craft v. State*, 2020 WL 6788794, at *8 (Fla. Nov. 19, 2020) (citing *Bush v. State*, 295 So. 3d 179, 215 (Fla. 2020)). Accordingly, there is no possibility that either the jury, which found no mitigating circumstances at all, or the trial court would have reached a different decision with regards to Appellant's sentence.

This Court should affirm Appellant's death sentence as any alleged *Eddings* error was harmless beyond a reasonable doubt and this Court, after reweighing the aggravating circumstances and mitigating factors, cannot come to a different conclusion.

ISSUE III: THE TRIAL COURT DID NOT REVERSIBLY ERR IN DENYING APPELLANT THE OPPORTUNITY TO REPRESENT HIMSELF AT THE *SPENCER* HEARING

Appellant argues that the trial court violated his right to self-representation under the Sixth and Fourteenth Amendments of the United States Constitution and article 1, section 16 of the Florida Constitution when the trial court denied his request to proceed pro se at the *Spencer* hearing.

This Court reviews a trial court's denial of a request for self-representation for an abuse of discretion, but this Court has held that a trial court's failure to hold a *Faretta* hearing after a defendant makes an unequivocal demand for self-representation is per se reversible error. *McCray v. State*, 71 So. 3d 848, 864 (Fla. 2011).

The right to self-representation in a criminal prosecution is derived from the Sixth Amendment and the right to effective assistance of counsel. *Faretta v. California*, 422 U.S. 806, 818 (1975). The right is not absolute, and can only be utilized after (1) the defendant has made a clear and unequivocal demand to represent himself; *id.* at 835, (2) a court has made a determination that the defendant's waiver of the right to counsel is knowing, intelligent, and voluntary; *see, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 400 (1993), and (3) the defendant's demand is timely. *United States v. Young*, 287 F.3d 1352, 1354-55 (11th Cir. 2002); *United States v. Lawrence*, 605 F.2d 1321, 1324 (4th Cir. 1979); *Chapman v. United States*, 553 F.2d 886, 893 (5th Cir. 1977); *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976). These requirements are designed to ensure that criminal defendants do not game the system because:

> A defendant who vacillates at trial places the trial court in a difficult position because it "must 'traverse ... a thin line' between improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation." *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (*en banc*) (quoting *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)).

United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir. 2000).

In those cases where a criminal defendant repeatedly vacillates between representing himself and requesting the representation of an attorney, federal courts have routinely held that the right to counsel is of "constitutional primacy" because it serves both

the collective and the individual good as opposed to the individual interests conveyed by the right to self-representation. *Frazier-El*, 204 F.3d at 559 (citing *United States v. Singleton*, 107 F.3d 1091, 1102 (4th Cir. 1997)); *see also Tuitt v. Fair*, 822 F.2d 166, 174 (1st Cir. 1987); *Brown v. Wainwright*, 665 F.2d 607, 610-11 (5th Cir. 1982). Additionally, the right to self-representation may be curtailed when a defendant uses it as a tactic for delay, disruption, distortion of the system, or for manipulation of the trial process. *Frazier-El*, 204 F.3d at 560 (citing *Lawrence*, 605 F.2d at 1324-25; *Faretta*, 422 U.S. at 834 n.46; *Singleton*, 107 F.3d at 1102; *Lawrence*, 605 F.2d at 1325).

With respect to timeliness, federal courts have held that a criminal defendant's invocation of the right to self-representation after a jury has been sworn is untimely and the decision to allow the defendant to proceed pro se thus rests soundly in the trial court's discretion. *Young*, 287 F.3d at 1354; *Chapman*, 553 F.2d at 888. Accordingly, a trial court is permitted substantially more deference when evaluating a defendant's request to proceed pro se when the defendant's request occurs after a jury has been sworn.

Moreover, the United States Supreme Court has not addressed whether a criminal defendant may reassert a right to counsel after waiving the right and choosing to proceed pro se. *Wellmon v. Colo. Dep't of Corr.*, 952 F.3d 1242, 1250 (10th Cir. 2020) (holding that there is no clearly established federal law prohibiting a trial court from denying a pro se defendant's request for assistance of counsel after the defendant has properly waived the right in the first place). This holding, in conjunction with the holdings of federal courts regarding the timeliness of a criminal defendant's request to proceed pro se, indicates that a trial court has the discretion to deny a criminal defendant the right to represent

himself if the defendant has vacillated in his decision, particularly after a jury has already been sworn.

In the instant case, Appellant made numerous requests to engage in self-representation before his penalty phase, during his penalty phase, and before his *Spencer* hearing. (R. 380-91; R. 478-97; R. 1553; R. 1559-73; R. 1732-33; R. 750-61; R. 938; 943; T. 7-10; T. 87-95; T. 147-48; T. 287-301; T. 685; T. 785-87; T. 976-77; R. 2012-15). Appellant vacillated between representing himself and being represented by counsel multiple times throughout the proceedings, including several instances where he changed his mind in the middle of jury selection. (T. 4-7; T. 87-95; T. 147-48; T. 287-301). Ultimately, Appellant chose to represent himself before the jury during his penalty phase. However, on December 9, 2019, after the jury rendered a unanimous verdict recommending Appellant receive the death sentence, he vacillated once again and requested the appointment of counsel to handle the *Spencer* hearing and sentencing memoranda. (T. 976-77). On January 21, 2020, Appellant vacillated once more by filing a motion to proceed pro se, nine days before the court was scheduled to hold Appellant's *Spencer* hearing. (R. 2012-15).

At Appellant's *Spencer* hearing, the trial court addressed Appellant's motion to proceed pro se and ultimately denied his request:

> If you had intended it to be — happen beforehand there's no provision for you representing yourself under the present circumstances. I don't think there would have been any provision at this time anyway because we've gone through everything, but given the fact that I gave you the opportunity to represent yourself during the course of the trial and then you asked me to reappoint your attorneys which I've done I am not now going to reappoint you to handle the matter today.

(R. 1771).

Accordingly, the trial court did not violate Appellant's right to self-representation under the Sixth Amendment because Appellant changed his mind multiple times during the pendency of his penalty phase and his last request was untimely. The trial court was thus not required to engage in a *Faretta* inquiry because the defendant did not make a timely request to proceed pro se. *See Young*, 287 F.3d at 1354-55. At most, Appellant can contend that the trial court had the discretion to grant his request to proceed; he cannot, however, demonstrate that the trial court abused its discretion when it denied his request. *See Brown*, 665 F.2d at 611; *Lawrence*, 605 F.2d at 1324-25, *cert. denied*, *Lawrence v. United States*, 444 U.S. 1084 (1980); *United States v. Dunlap*, 577 F.2d 867, 869 (4th Cir. 1978), *cert. denied*, *Dunlap v. United States*, 439 U.S. 858 (1978); *cf. United States v. Cyphers*, 556 F.2d 630, 634 (2d Cir. 1977), *cert. denied*, *Cyphers v. United States*, 431 U.S. 972 (1977) (holding that the trial court properly denied defendant's right to represent himself for summation). This is particularly true in this case, where the defendant vacillated between being represented by an attorney and representing himself multiple times throughout his penalty phase.

Similarly, the trial court did not violate article 1 section 16 of the Florida Constitution. In *McCray* this Court explicitly held that a trial court's decision on a criminal defendant's belated request to proceed pro se after a trial has commenced is reviewed for an abuse of discretion, in line with federal courts that have held the same. *McCray v. State*, 71 So. 3d 848, 870 (Fla. 2011).[2] Accordingly, since Appellant's request to proceed

2 In *McCray*, this Court cited favorably to a Fifth District decision where the court held that a criminal defendant's belated request to proceed pro se is soundly within the trial court's discretion and cited to federal court cases for support. *Thomas v. State*, 958 So. 2d 995, 996 (Fla. 5th DCA 2007) (citing to *Singleton*, 107 F.3d at 1096, and *Young*, 287 F.3d 1352). McCray, 71 So. 3d at 870.

pro se at his *Spencer* hearing was untimely under the Sixth Amendment, it was also untimely under article 1, section 16 of the Florida Constitution and therefore was soundly within the discretion of the trial court to deny.

A *Spencer* hearing, unlike the totality of a penalty phase, is a limited hearing before a trial court to afford the parties an opportunity to be heard, present additional evidence they want the trial court to consider, and afford the parties the opportunities to rebut any evidence contained in a presentence report or medical report. *See Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993). Accordingly, a criminal defendant who demands to represent himself at a *Spencer* hearing a week before the hearing is not entitled to self-representation and a trial court does not abuse its discretion in denying the request.

As discussed above, Appellant changed his mind about whether to proceed pro se or be represented by an attorney multiple times throughout his penalty phase including during jury selection, after the jury rendered the verdict, and a week before his *Spencer* hearing. The trial court permitted Appellant to vacillate between representing himself, being represented by an attorney, representing himself again, and then being represented by counsel again. On these facts, Appellant cannot demonstrate that the trial court abused its discretion when it denied him the opportunity to represent himself during his *Spencer* hearing.

This Court has interpreted article 1, section 16 of the Florida Constitution as establishing a "broader" state constitutional right to counsel. *Plank v. State*, 190 So. 3d 594, 601 (Fla. 2016); *State v. Kelly*, 999 So. 2d 1029, 1041-42 (Fla. 2008); *see also Traylor v. State*, 596 So. 2d 957, 968 (Fla. 1992). However, Florida's right to counsel is only more expansive than the federal right to counsel because Florida provides criminal

defendants with representation in proceedings that do not implicate the Sixth Amendment. *Plank*, 190 So. 3d at 601; *Kelly*, 999 So. 2d at 1040-41.

Federal courts have long recognized that the right to assistance of counsel and the right to self-representation are mutually exclusive and, axiomatically, a defendant cannot exert both at the same time. *See, e.g.*, *Frazier-El*, 204 F.3d at 558. It is because these federal constitutional rights are diametrically opposed that a state constitution cannot afford more deference to one of these rights at the expense of the other. Extending more deference to either right in excess of the protections provided by the federal constitution would thus violate the other right.

The instant case, therefore, does not present a situation that runs afoul of Florida's "broader" protections to the right to assistance of counsel under the state constitution because the timeliness analysis of Appellant's request to proceed pro se is the same under both the federal constitution and the state constitution.

If this Court finds that the trial court improperly denied Appellant the opportunity to represent himself at his *Spencer* hearing, it should nonetheless conclude that the error was harmless because there is no possibility that the error materially affected the proceedings in Appellant's case.

Generally, a violation of a criminal defendant's right to represent himself is considered "structural" or per se reversible error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984)). However, the courts that have addressed this issue have done so in the context of a defendant who makes a pre-trial request for self-representation, not a post-trial request. *Id.* at 150. The United States Supreme Court has held that a structural error, such as the

deprivation of a defendant's right to choose his own attorney before the commencement of a trial, is one that is not subject to harmless error analysis because there is no meaningful way for a court to conduct such an analysis:

> It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

Id.

However, in the instant case, Appellant was permitted to represent himself before the jury during voir dire, opening statements, the presentation of evidence, and closing arguments. After the jury rendered its verdict, the trial court reinstated standby counsel, at Appellant's request, solely to conduct the *Spencer* hearing. A *Spencer* hearing, again, is a limited hearing before a trial court to afford the parties an opportunity to be heard, present additional evidence they want the trial court to consider, and afford the parties the opportunities to rebut any evidence contained in a presentence report or medical report. *See Spencer*, 615 So. 2d at 690-91.

While there may be some *Spencer* hearings that involve the presentation of multiple experts, numerous additional witnesses, and reams of additional evidence, there are also *Spencer* hearings that involve the presentation of few, if any, witnesses or additional argument. As such, the issues that drove the United States Supreme Court to decry harmless error analysis in *Gonzalez-Lopez* are not present in the context of every *Spencer* hearing. Therefore, this Court need not construct an entire "alternate universe" to assess the differences between a defendant proceeding pro se and one represented

by counsel. Rather, this Court need only examine what occurred in the actual *Spencer* hearing and evaluate what the criminal defendant alleges he would have done differently.

In the instant case, Appellant's *Spencer* hearing was very limited. Counsel presented the court with the transcript of Appellant's original penalty phase in which the trial court permitted testimony from a witness, who did not testify during Appellant's second penalty phase, Ms. McKinney, that Appellant's father was arrested for sexually assaulting Appellant's sisters and that event negatively impacted him as a child. (R. 1767-68). Counsel noted that the trial court prevented Appellant's mother from testifying about Appellant's father allegedly sexually assaulting Appellant's sisters during his second penalty phase. (R. 1768-69).

Appellant himself never indicated what additional evidence he wanted to present during the *Spencer* hearing. He did not indicate, either orally at the hearing or in his written motion, whether he wanted to call additional witnesses, present heretofore unmentioned expert testimony, or provide any other additional evidence to the trial court. Since Appellant presented broad swaths of mitigation evidence to the jury directly in his penalty phase, and even his attorneys failed to present any type of additional mitigating evidence beyond the testimony of a witness that was not called during Appellant's second penalty phase, any error that occurred by denying Appellant's request for self-representation was harmless beyond a reasonable doubt. The jury unanimously recommended that Appellant receive the death sentence and unanimously found the existence of four statutory aggravators: (1) Appellant was previously convicted of another capital felony; (2) HAC; (3) CCP; and (4) the victim was under twelve years of age. (R. 2024-27).

This Court has routinely held that a prior violent felony offense, HAC, and CCP "are three of the most serious and weighty aggravators in the capital sentencing scheme." *Craft*, 2020 WL 6788794, at *8 (citing *Bush*, 295 So. 3d at 215). And since Appellant does not identify any additional mitigating evidence that he would have presented had he represented himself, any error that occurred when the trial court denied Appellant's request for self-representation was harmless beyond a reasonable doubt. *Cf. McKinney*, 140 S. Ct. at 706.

ISSUE IV: THE TRIAL COURT DID NOT VIOLATE SECTION 921.141(4), FLORIDA STATUTES, WHEN IT SENTENCED APPELLANT TO DEATH

Appellant next contends that the trial court erred when it orally sentenced Appellant to death on January 30, 2020, immediately following his *Spencer* hearing because the court declined to recess and draft a written sentencing order before orally pronouncing a sentence of death. He further contends that the only available remedy for this alleged error is for this Court to remand the case to the trial court with instructions for the trial court to impose a life sentence.

Appellant's argument is flawed for several reasons. First, defense counsel acquiesced to the imposition of a sentence without filing sentencing memoranda; second, defense counsel presented limited, if any, additional mitigating evidence for the trial court to consider when preparing the written sentencing order; and third, the trial court's actions do not violate any statute or constitutional provision. Lastly, if this Court determines that the trial court erred by declining to recess before imposing Appellant's sentence, then the appropriate remedy would be to remand the case for a new sentencing hearing rather than the imposition of a life sentence.

As discussed in Issue III, *Spencer* hearings are limited hearings before a trial court to afford the parties an opportunity to be heard, present additional evidence they want the trial court to consider, and afford the parties the opportunities to rebut any evidence contained in a presentence report or medical report. *See Spencer*, 615 So. 2d at 690-91. Neither party is required to present additional evidence or additional argument by law. The hearing merely provides the parties an opportunity to develop further mitigation or argument that they did not present during the penalty phase itself. *See Kaczmar v. State*, 228 So. 3d 1, 5 (Fla. 2017); *see also McKenzie v. State*, 153 So. 3d 867, 883 (Fla. 2014).

In the instant case, after the jury rendered its verdict and was discharged, the trial court informed Appellant and defense counsel that it was setting Appellant's *Spencer* hearing for the end of January. (T. 976-82). At the *Spencer* hearing, on January 30, 2020, the trial court heard argument as to counsel's motion for a new penalty phase. (R. 1754-67). Counsel also expressly asked the court to consider, for purposes of the *Spencer* hearing, the testimony of Ms. McKinney, via the transcript of Appellant's original penalty phase in which the trial court permitted her to testify that Appellant's father was arrested for sexually assaulting Appellant's sisters and that event negatively impacted him as a child. (R. 1767-68). Counsel noted that the trial court prevented Appellant's mother from testifying about Appellant's father allegedly sexually assaulting Appellant's sisters during his second penalty phase. (R. 1768-69).

The trial court then asked defense counsel if there was anything additional he wished to present. (R. 1769). Defense counsel informed the court that there was no additional evidence to present, but offered to prepare a written sentencing memoranda for the court. (R. 1769). The court declined defense counsel's offer and explicitly asked

"So is there any reason the sentence should not now be imposed?" (R. 1769). Defense counsel responded, "There is none, sir, unless you require the sentencing memorandums." (R. 1769).

The record clearly demonstrates that defense counsel had approximately one month to prepare to argue the motion for new trial and to develop additional evidence and argument for the *Spencer* hearing. However, defense counsel, not the trial court, explicitly stated that he had no additional argument or evidence to present at the *Spencer* hearing and agreed with the trial court's decision to proceed to sentencing immediately following the hearing.

Accordingly, the trial court followed the proper procedure this Court set forth in *Spencer* by providing the parties an opportunity to be heard and to present additional evidence at a post-verdict hearing. Appellant cannot claim that reversible error occurred when his duly appointed and requested attorney affirmatively stated that he had no additional evidence or argument to offer and affirmatively stated that there was no reason the court could not immediately proceed to sentencing. *See Lowe v. State*, 259 So. 3d 23, 50 (Fla. 2018) (holding that a party may not invite error and then argue for relief from that error on appeal); *see also Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990); *Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983).

Appellant also raises a sub-claim, arguing that any "acquiescence" on the part of his attorney cannot be attributed to him because he had invoked his right to self-representation before the *Spencer* hearing. As discussed in Issue III, this argument is flawed for two reasons: (1) Appellant's request was untimely and the trial court's denial of his request was soundly within the trial court's discretion; and (2) any error in this

context was harmless beyond a reasonable doubt because Appellant has not identified any additional evidence or argument that he would have presented to the trial court that would have altered the trial court's imposition of the death sentence. *Young*, 287 F.3d at 1354; *Chapman*, 553 F.2d at 888; *cf. McKinney*, 140 S. Ct. at 706.

Appellant next contends that the trial court nonetheless violated the procedural rules set forth in *Spencer* by failing to recess after the post-verdict hearing before imposing the death sentence and concurrently filing the sentencing order at a subsequent sentencing hearing. As discussed in this Issue and Issue III, a *Spencer* hearing sets forth a judicially created process that trial courts must follow in order to impose a death sentence:

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, *after hearing the evidence and argument*, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

Spencer, 615 So. 2d at 690-91 (emphasis added).

In the instant case, Appellant's attorney presented a single piece of evidence at the *Spencer* hearing for the trial court to consider: the transcript testimony of Ms. McKinney, who testified at Appellant's original penalty phase that Appellant's father was arrested for sexually assaulting Appellant's sisters and that event negatively impacted him as a child. (R. 1767-68). Additionally, the judge who presided over Appellant's second penalty phase, Judge Weatherby, was the same judge who presided over his original trial

and was therefore intimately familiar with the facts of the case (including the testimony of Ms. McKinney), the statutory aggravators, and mitigating circumstances associated with it. *See Mosley I*, 46 So. 3d 510.

Accordingly, since the trial judge in this case was very familiar with the aggravating factors and mitigating circumstances, had a month to ponder the appropriate sentence after the jury rendered its verdict, and defense counsel presented only a single piece of evidence that the trial court was already aware of, there is no basis for reversing Appellant's sentence in this case. Moreover, Appellant has not demonstrated, or even alleged, that the trial court's decision to impose the death penalty occurred in violation of his right to a neutral, detached judge or that the trial court failed to adequately and independently weigh the aggravating factors and the mitigating circumstances. *Cf. Tompkins v. State*, 872 So. 2d 230, 245-47 (Fla. 2003) (holding that the State's ex parte preparation of a sentencing order imposing death did not automatically mean that the trial court failed to independently weigh the aggravating factors and mitigating circumstances). In fact, Appellant does not contend that there is an error in the trial court's sentencing order at all.

The procedures set forth in *Spencer* were specifically designed to ensure that trial courts "think through [the] sentencing decision and to ensure that written reasons are not merely an after-the-fact rationalization for a hastily reasoned initial decision imposing death." *Perez v. State*, 648 So. 2d 715, 720 (Fla. 1995) (stating the purpose for requiring trial courts to render written sentencing orders contemporaneously with making the oral pronouncement of the defendant's sentence). In the instant case, the de minimis presentation of evidence or argument at Appellant's *Spencer* hearing did not require the

court to recess in order to weigh the aggravating factors and mitigating circumstances it had already been evaluating for a month. Accordingly, based on the specific facts present in the record of this case, the trial court did not violate any of Appellant's rights or this Court's procedural rules by sentencing Appellant immediately after the *Spencer* hearing.

Alternatively, the trial court's decision should be upheld because there is no statutory or constitutional basis to reverse Appellant's death sentence. Section 921.141, Florida Statutes, sets forth the process by which a criminal defendant may be sentenced to death. The statute sets forth the creation of a "separate sentencing proceeding" that occurs after a defendant has been convicted of a capital felony to determine whether the defendant is sentenced to life imprisonment or death. § 921.141(1), Fla. Stat. Under previous iterations of the statute, although a court was required to produce a written sentencing order, the legislature failed to include a period of time for the trial court to issue said order. *See* § 921.141(3), Fla. Stat. (1983).

This Court interpreted the prior iteration of the death penalty statute as requiring trial courts that imposed the death penalty to file their written sentencing orders contemporaneously with the oral pronouncement of the criminal defendant's sentence because the statute did not place a time restriction on the requirement for a written sentencing order. *See Hernandez v. State*, 621 So. 2d 1353, 1357 (Fla. 1993); *see also Perez*, 648 So. 2d at 719-20. However, in 1996 the legislature amended the statute to require the trial court to issue a written sentencing order "within 30 days after rendition of the judgment and sentence" or the criminal defendant would automatically be sentenced to life in prison. § 921.141(3), Fla. Stat. (1996).

The Statute has been further amended to its current state which requires the court to enter a written order explaining the court's decision to impose the death penalty within thirty days of the rendition of the judgment and sentence in which it considers and weighs all of the aggravating factors proven beyond a reasonable doubt, the mitigating circumstances reasonably established by the record, whether the aggravating factors outweigh the mitigating circumstances, and whether the aggravators are sufficient to impose the death penalty. § 921.141(4), Fla. Stat.

The statutory amendment including a specific period of time by which the trial court must render a written sentencing order *after* rendering a judgment and sentence imposing the death penalty has thus nullified this Court's holdings in *Grossman*, *Hernandez*, and *Perez* because the legislature expressly addressed the issue. *See, e.g.*, *State v. Ruiz*, 863 So. 2d 1205, 1209 (Fla. 2003) (stating that a statutory amendment to the burglary statute nullified a previous Florida Supreme Court holding interpreting that statute).

In the instant case, the trial court orally sentenced Appellant to death on January 30, 2020, immediately following Appellant's *Spencer* hearing. (R. 1770). Approximately twelve days later, on February 11, 2020, the trial court rendered its written sentencing order. (R. 2019-40). Accordingly, the trial court did not violate section 921.141(4) because the court's written sentencing order was rendered within thirty days of the court's oral pronouncement of Appellant's judgment and sentence. Appellant acknowledges as much in his initial brief when he admits that the trial court followed the current statute's requirements. (IB. 53).

Appellant lastly contends that if this Court finds that error occurred, it must vacate his sentence and remand the case with instructions for the trial court to impose a

mandatory sentence of life in prison without the possibility of parole. This argument is flawed because, as stated above, this Courts holdings in *Grossman*, *Hernandez*, and *Perez* have been nullified by the legislature's amendment to section 921.141.

This Court's previous holdings were based on an interpretation of the following operative language in the prior iteration of section 921.141(3):

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the [aggravating and mitigating circumstances] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment....

Perez, 648 So. 2d at 719 n.11.

This Court interpreted that portion of the previous statute to require a trial court imposing a death sentence to render a written sentencing order at the same time it made the oral pronouncement. As stated above, the legislature's decision to add a thirty-day time limit to the requirement that a trial court render a written sentencing order after rendition of a defendant's judgment and sentence nullified this Court's holdings interpreting the prior iteration of the statute because the operative language in the statute is no longer valid.

Accordingly, if this Court finds that the trial court erred by pronouncing Appellant's sentence before it rendered a written sentencing order, this Court is not required to remand the case with directions for the imposition of a life sentence. In fact, such a ruling would directly contradict the timeliness requirements now imposed by the amended version of section 921.141(4). Rather, the appropriate remedy would be to remand the case with instructions for the trial court to hold a sentencing hearing during which it would, after additional contemplation, impose a sentence and file a written sentencing order.

Such an outcome would be a waste of judicial time and resources for both this Court and the trial court as there is no reversible error present in the trial court's sentencing order.

The trial court did not err in pronouncing Appellant's sentence before rendering the written sentencing order because defense counsel acquiesced to the trial court's decision, defense counsel did not present any additional evidence or argument that would require additional contemplation by the trial court, and the trial court's actions did not violate any statutory or constitutional provision. This Court should thus affirm Appellant's death sentence.

ISSUE V: THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY

Appellant argues that the trial committed fundamental error when it instructed the jury that it could impose the death penalty without making two findings beyond a reasonable doubt: (1) the aggravating factors found beyond a reasonable doubt were sufficient to impose the death penalty; and (2) the aggravating factors outweighed the mitigating circumstances. Appellant's argument is contrary to law; he conflates the statutory steps required to impose the death penalty under section 921.141, Florida Statutes, with the constitutional requirements to impose the death penalty under the Sixth Amendment to the United States Constitution. Here, the trial court did not err when it instructed the jury on the findings it was required to make in order to sentence Appellant to death, much less commit fundamental error.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…." The United States Supreme Court has interpreted the right to an impartial jury, in conjunction with the Fourteenth Amendment's right to due process, to

"entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Stated another way, in a criminal case the Sixth Amendment requires a jury, or a trial court if the defendant elects for a bench trial, to find all of the facts necessary to constitute a statutory offense and those facts must be proven beyond a reasonable doubt. *Id.* at 483-84; *see also Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

The United States Supreme Court has applied this framework to death penalty cases and concluded the Sixth Amendment requires a jury to find the existence of aggravating factors beyond a reasonable doubt before a trial court may sentence a defendant to death. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury."). Importantly though, the Sixth Amendment's requirements are limited to facts that must be found by a jury in order to impose the death penalty. *Id.* at 612-13 (Scalia, J., concurring) ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.").

The United States Supreme Court further articulated this in *Hurst v. Florida*, 136 S. Ct. 616 (2016), when the Court found that a defendant's death sentence violated the Sixth Amendment because Florida law required a trial court, rather than a jury, to find the *fact* that an aggravating factor existed before the court could sentence the defendant to death.

The United States Supreme Court has never held that the sufficiency of the aggravating factors, the weighing of the aggravating factors and mitigating circumstances, or the jury recommendation are elements that must be proven beyond a reasonable doubt under the Sixth Amendment before a trial court may impose the death penalty on a criminal defendant. In fact, the Court has expressly rejected such contentions:

> Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this Court carefully avoided any suggestion that "it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Id.*, at 481, 120 S. Ct. 2348. And in the death penalty context, as Justice Scalia, joined by Justice THOMAS, explained in his concurrence in *Ring*, the decision in *Ring* "has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed." 536 U.S. at 612, 122 S. Ct. 2428; see also *Kansas v. Carr*, 577 U.S. —, — - —, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016) (slip op., at 9-11). Therefore, as Justice Scalia explained, the "States that leave the ultimate life-or-death decision to the judge may continue to do so." *Ring*, 536 U.S. at 612, 122 S. Ct. 2428.
>
> In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances, and *Ring* and *Hurst* did not overrule *Clemons* so as to prohibit appellate reweighing of aggravating and mitigating circumstances.

McKinney, 140 S. Ct. at 707-08.

Accordingly, Appellant's entire argument is predicated on an erroneous interpretation of the Sixth Amendment's requirements. The Sixth Amendment only requires that the *facts* which make a criminal defendant eligible for the death penalty be found beyond a reasonable doubt. Neither the sufficiency of the aggravating factors, nor the weighing of the aggravating factors and mitigating circumstances are facts, as explained by the United States Supreme Court. *McKinney*, 140 S. Ct. at 707-08.

Florida's new death penalty statute sets out specific steps the jury must take before recommending a death sentence for a criminal defendant. If the jury:

> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

§ 921.141(2)(b), Fla. Stat. (2019).

The statute's requirements thus differ from the Sixth Amendment's requirements because the statute requires the jury to make non-factual selection findings before recommending a death sentence. The statute's text reflects this as it identifies the unanimous finding of at least one aggravating factor as the eligibility requirement for the imposition of the death penalty. Put another way, the statute identifies the existence of an aggravating factor as a fact that must be unanimously found by the jury before the death

penalty may be imposed. The additional statutory requirements, sufficiency and weighing, are selection findings that pertain to the jury recommendation, not the Sixth Amendment.

Appellant's argument conflates the selection findings under section 921.141 with the factual findings required by the Sixth Amendment in an effort to convince this Court to adopt a position expressly rejected by the United States Supreme Court in *McKinney*, 140 S. Ct. at 707-08. As such, Appellant's argument is clearly without any legal merit.

In this case, the jury found that the State had proven the existence of five aggravating circumstances beyond a reasonable doubt. (R. 2000-2010). Under a correct Sixth Amendment analysis, such as the one this Court adopted in *State v. Poole*, 2020 WL 3116597 (Fla. Jan. 23, 2020), the jury's verdict is devoid of error. Furthermore, this Court has explicitly, and correctly, rejected Appellant's argument that the sufficiency and weight of the aggravating factors are determinations that must be made beyond a reasonable doubt. *Santiago-Gonzalez v. State*, 2020 WL 3456751 (Fla. June 25, 2020) (quoting *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019)).

In *Santiago-Gonzalez*, the defendant argued that his death sentence was invalid because the trial court did not find that the aggravating factors outweighed the mitigating circumstances beyond a reasonable doubt. *Id.* at *15. This Court found the defendant's argument without merit because "we already have receded from the holding that the additional *Hurst v. State* findings are elements." *Id.* quoting *Poole*, 2020 WL 3116597.

Accordingly, because the jury here found that the State had proven five statutory aggravators beyond a reasonable doubt, the aggravating factors were sufficient to impose the death penalty, and the aggravating factors outweighed the mitigating circumstances,

Appellant's death sentence is not constitutionally deficient and Appellant is not entitled to relief.

ISSUE VI: THE TRIAL COURT DID NOT ERR WHEN IT DECLINED TO CONSIDER APPELLANT'S MOTION BASED ON NEWLY DISCOVERED EVIDENCE BEFORE PROCEEDING WITH APPELLANT'S SECOND PENALTY PHASE

Appellant lastly contends that the trial court reversibly erred by failing to consider his postconviction motion based on newly discovered evidence prior to commencing with his second penalty phase. He further contends that this Court should reverse and remand the case with instructions for the trial court to hold an evidentiary hearing on Appellant's newly discovered evidence claim.

Appellant is correct that this Court has instructed trial courts to consider postconviction claims of newly discovered evidence prior to commencing with new penalty phases in capital cases. *Farina v. State*, 191 So. 3d 454, 457 (Fla. 2016). However, there are three reasons why this Court should not reverse the instant case with directions for the trial court to rule on Appellant's postconviction motion: (1) *Farina* was decided incorrectly and has resulted in a severely confusing misstatement of the law; (2) Appellant could not properly file the motion under Florida Rule of Criminal Procedure 3.851(b)(6) because he filed his motion pro se; and (3) even if Appellant's motion was considered by the trial court, it is wholly without merit and will not afford him relief.

In *Farina*, this Court held that a defendant who was granted a new penalty phase proceeding is entitled to first have a trial court adjudicate all postconviction claims of newly discovered evidence. Farina, 191 So. 3d at 457. In reaching that conclusion, the majority of the Court ignored, and violated, the plain language of Florida Rule of Criminal Procedure 3.851. *Id.* at 459 (Canady, J., dissenting).

Rule 3.851(a) clearly states that it governs all postconviction proceedings in which a defendant "has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal." Based on this clear language alone, Rule 3.851 motions cannot be filed prior to the rendition of a death sentence and this Court's affirmance of that sentence on direct appeal. Accordingly, a trial court that complies with *Farina* will violate the plain language of Florida Rule of Criminal Procedure 3.851.

Moreover, the holding in *Farina* is predicated on a misreading of Rule 3.851. *Farina* intimated that postconviction claims based on newly discovered evidence must be brought within a year of a defendant learning of the newly discovered evidence or else such claims will be deemed time barred. Farina, 191 So. 3d at 456. This assertion misreads the rule, which states, in relevant part:

> (1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final.
>
> …
>
> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence….

Fla. R. Crim. P. 3.851(d).

In context, the rule states that any motion, including one alleging newly discovered evidence, must be filed within one year of a defendant's judgment and sentence becoming final. The rule goes on to assert an exception to this requirement; a defendant may file a motion for postconviction relief based on newly discovered evidence outside of the standard time limitation, provided that the defendant files the motion within a year of

learning of said newly discovered evidence. Accordingly, there is no possibility that a defendant who has been granted a new penalty phase will be time barred from filing a postconviction motion based on newly discovered evidence because the defendant will have the opportunity to file said motion within a year of his new sentence becoming final.

Farina thus unnecessarily requires trial courts to violate the plain text of Rule 3.851 in order to protect against a harm that does not exist within the text of the rule. Such a requirement also causes unnecessary delays in the defendant's resentencing and confusion with respect to a defendant's resentencing and the appointment of counsel. If a trial court is required to evaluate a postconviction motion based on newly discovered evidence prior to proceeding with the defendant's new penalty phase, the new penalty phase could be delayed for an extended period of time (factoring in a defendant's right to appeal a trial court's ruling on the motion and a defendant's right to petition the United States Supreme Court to review said ruling). Additionally, criminal defendants are not permitted to represent themselves in capital postconviction proceedings. Fla. R. Crim. P. 3.851(b)(6). But postconviction counsel is not appointed under Rule 3.851 until this Court has affirmed a defendant's death sentence. Fla. R. Crim. P. 3.851(b)(1). Accordingly, trial courts are again put into an impossible position of having to appoint counsel to represent a defendant for postconviction matters in violation of Rule 3.851 while simultaneously appointing counsel to prepare for a defendant's new penalty phase.

The result of the holding in *Farina* is a procedural rule that requires trial courts to unnecessarily and confusingly violate multiple provisions of another procedural rule. This Court should therefore recede from *Farina* as it is both contrary to law and there is no legal or rational basis to re-affirm its holding. Additionally, there is no valid reason why

this Court should not recede from its holding as no defendant would be prejudiced if this Court affirmed its commitment to following the procedure set forth in Rule 3.851. *Cf. State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020) (holding that once this Court determines a prior judicial decision is erroneous, it must then evaluate whether there is a reliance interest sufficient to warrant upholding the erroneous decision).

Even if this Court declines to recede from *Farina*, the instant case is distinguishable and does not require reversal. In *Farina*, the defendant's death sentence was vacated by the Eleventh Circuit on federal habeas review after the defendant had undergone state postconviction proceedings and was, by rule, represented by postconviction counsel. *Farina*, 191 So. 3d at 455. While preparing for his new penalty phase, the defendant filed a postconviction motion based on newly discovered evidence, which the trial court denied as premature because the defendant's sentence was not yet final. *Id.* at 455-56. The defendant filed a petition in this Court seeking review of the trial court's denial of his postconviction motion and this Court ultimately granted relief after converting the defendant's petition into an appeal from a final order. *Id.* at 455.

In the instant case, Appellant repeatedly filed a pro se postconviction motion based on newly discovered evidence after this Court vacated Appellant's death sentence for a new penalty phase. Each time Appellant brought the motion to the trial court's attention, the court denied the motion as premature or improper as Appellant was represented by counsel preparing for his new penalty phase and counsel did not adopt Appellant's postconviction motion. (R. 392-93).

After this Court vacated Appellant's sentence and remanded his case for a new penalty phase, Appellant was ineligible for the appointment of postconviction counsel

under Rule 3.851(b)(1). Moreover, the trial court properly denied Appellant's pro se motion as unauthorized. Rule 3.851(b)(6) states "A defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court. The only bases for a defendant to seek to dismiss postconviction counsel in state court shall be pursuant to statute due to actual conflict or subdivision (i) of this rule."

The trial court's order dismissing Appellant's motion as unauthorized was correct, as this Court similarly held that Appellant was not authorized to represent himself before this Court when he attempted to appeal the trial court's order denying his postconviction motion. *See Mosley v. State*, SC19-2169, 2020 WL 479061, at *1 (Fla. Jan. 29, 2020).

Accordingly, *Farina* does not govern this case because Appellant was not represented by postconviction counsel when he filed his postconviction motion based on newly discovered evidence. Appellant's appointed counsel did not, and could not, adopt Appellant's postconviction motion any more than his appointed counsel could show cause why Appellant's appeal of the trial court's order denying his motion was authorized under Florida law. As such, this Court should affirm the trial court's order denying Appellant's postconviction motion as unauthorized under Rule 3.851.

Finally, this Court should affirm the trial court's order because even if Appellant's motion was considered by the trial court, the court would deny the motion on the merits and Appellant would not be afforded relief. Appellant's motion argues that he is entitled to a new guilt phase proceeding because the State failed to disclose that Dr. Maragarita Arruza, the medical examiner who testified at Appellant's first trial, suffered from Alzheimer's at the time she testified during Appellant's trial. Specifically, Appellant contends that Dr. Arruza altered her testimony from her initial report to reflect that Lynda

Wilkes died from strangulation as opposed to an undetermined cause of death and that Jay-Quan Mosley died from suffocation despite the inability of the State to find Jay-Quan's body. (R. 31-33).

This Court has articulated the requirements for a defendant to prevail on a claim of newly discovered evidence:

> (1) "the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of the evidence] by the use of diligence"; and (2) the evidence "must be of such nature that it would probably produce an acquittal on retrial." [*Mungin v. State*, 79 So. 3d 726, 738 (Fla. 2011)] (quoting *Jones*[*v. State*], 709 So. 2d [512,] 521 [(Fla. 1998)]).

Mosley II, 209 So. 3d at 1259.

In his motion, Appellant attached several news articles offered as evidence that Dr. Arruza suffered from Alzheimer's disease and her cognitive decline began as early as 2008 or 2009. (R. 48-65). Appellant committed the murders of Lynda Wilkes and Jay-Quan Mosley in 2004 and he was convicted and sentenced in November 2005. (R. 1). Accordingly, Appellant has failed to make any allegations that Dr. Arruza suffered from cognitive decline when the victims were murdered or during Appellant's trial. In actuality, Appellant's "newly discovered evidence" is not evidence of anything that affected the validity of his trial. His motion was therefore without merit and even if the trial court had considered it, he would not be entitled to relief. This Court, therefore, should affirm the trial court's order denying Appellant's motion.

CONCLUSION

In conclusion, the State respectfully requests that this Court affirm Appellant's convictions and sentence of death.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ William David Chappell
William David Chappell
Assistant Attorney General
Florida Bar No. 120449
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: (850)414-3567
Facsimile: (850)414-0997
capapp@myfloridalegal.com
William.Chappell@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 23rd day of February, 2021, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to Counsel for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Arial and the contents are under 25,000 words in compliance with Fla. R. App. P. 9.210(a)(2)(C).

/s/ William David Chappell
William David Chappell
COUNSEL FOR APPELLEE