IN THE SUPREME COURT OF FLORIDA

JOHN SEXTON,

Appellant,

v. **CASE NO. SC23-79**
L.T. No. 2010-CF-06284

STATE OF FLORIDA, **DEATH PENALTY CASE**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA

AMENDED[1] ANSWER BRIEF OF APPELLEE

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[1] *Record citations throughout the brief have been updated to conform to the second corrected record on appeal as well as the separately filed sentencing hearing transcripts and additional minor corrections have been made.*

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal concerning the resentencing proceedings shall be referred to as "RES. __" followed by the appropriate page number, and this citation refers specifically to the second corrected record on appeal. Transcripts from the resentencing hearings[2] were filed separately, and will be referenced as RES. T __, with the appropriate page number.

[2] Please note that the sentencing hearing transcript is contained within the second corrected record on appeal rather than the separately filed transcripts.

STATEMENT OF THE CASE AND FACTS

John Sexton was convicted of first-degree murder and sentenced to death for the 2010 murder of 94-year-old A.P. *Sexton v. State*, 221 So. 3d 547 (Fla. 2017). A.P.'s body was discovered in her home by her close friend. Her naked body was partially covered with a white sheet. *Sexton*, 221 So. 3d at 550. Her face was bludgeoned to the point of being unrecognizable. *Id.* Her right breast had been removed, and a prosthetic breast pad had been placed over the incision. *Id.* Her excised right breast was near her head. *Id.* A foreign object later determined to be a ceramic vase protruded from her rectum. *Id.*

The victim died from blunt trauma to the face and head; her cheek bones were crushed; the bones around her eyes had been broken; she had brain bruising; and her spine had been dislocated. *Id.* She had vaginal tearing that was sustained while she was alive and was consistent with forcible sexual battery. *Id.* After sexually battering A.P. and murdering her by bludgeoning her to death, Sexton continued to inflict postmortem injuries to her body to include tearing her rectum, removing her breast, burning her vaginal area, and stabbing her. *Id.*

Sexton worked for A.P. by maintaining her yard and cutting her grass. Neighbors observed Sexton through a window in A.P.'s home during the evening that the murder occurred, and they saw his truck parked in her driveway. *Sexton*, 221 So. 3d at 551. They recognized Sexton because they had seen him cutting A.P.'s grass in the past. Sexton had also approached them on several occasions to ask if they were interested in using his lawn care services. *Id.*

They recorded his license plate number because they found it odd for Sexton to be inside A.P.'s house so late. *Id.* Upon learning that A.P. was deceased, the neighbors advised law enforcement they had seen Sexton the night before and they provided the license plate number they had recorded. *Id.* Law enforcement determined that the vehicle was registered to Sexton, and they went to his home. *Id.* Sexton was still wearing the same outfit from the evening before. *Id.* at 552. Sexton's clothing had blood stains on it that were determined through forensic testing to be the victim's blood. *Id.*

After hearing this evidence along with additional evidence of Sexton's guilt, the jury found Sexton guilty of first-degree murder. *Id.* at 553. A penalty-phase was conducted, and the jury recommended that the court impose a sentence of death by a ten-to-two vote. *Id.*

Sexton was sentenced to death for the murder of A.P. *Sexton*, 221 So. 3d at 553.

This Court affirmed Sexton's conviction on direct appeal but vacated his death sentence and remanded the case back to the trial court for a resentencing pursuant to *Hurst v. Florida*, 577 U.S. 92 (2016). *Sexton v. State*, 221 So. 3d 547, 559 (Fla. 2017). Resentencing proceedings occurred before the Honorable Mary Handsel on January 9 and 10, 2023. Sexton was sentenced to death on January 12, 2023.

After Sexton's case was remanded for resentencing pursuant to *Hurst*, Sexton expressed his desire to waive his penalty-phase jury against the advice of counsel. (RES. 1186). The court conducted a colloquy with Sexton and made a finding that Sexton's waiver was voluntary. (RES.1190-1193, 1203, 1233). Sexton later changed his mind and requested a jury, and at a pretrial conference, he relayed his desire to waive his right to a jury again. (RES. 1233). The judge kept the jury panel that was selected so that an in-person colloquy could be conducted with Sexton. (RES. 1234-35).

On the day of Sexton's scheduled resentencing hearing, Sexton, while under oath, affirmed his request to waive his penalty-phase jury. (RES. T. 18-24). The court found that Sexton "properly waived

his right to a jury trial" and it released the jurors pursuant to Sexton's request. (RES. T. 24).

The State presented the testimony of the District Six Medical Examiner, Jon Russell Thogmartin, Sergeant Hatcher with the Pasco County Sheriff's Office, and the victim's friend Dorina Cifelli.

Dr. Thogmartin testified about A.P.'s injuries. (RES. T. 47-48). He indicated that the injuries to A.P.'s head were major—her jaw was dislocated; her upper jaw was fractured; her nose was fractured; her eyes were displaced into the head; and one eye was actually above her orbital roof into her cranial cavity; she had lacerations and bruising around her brows and eyes; and she had bleeding around her brain. (RES. T. 47-48). Her fractures were significant and caused by repeated blows with a relatively heavier weighted object. (RES. T. 48). She also had a dislocation of her neck that caused compression of her spinal cord. (RES. T. 50). Her neck injuries were caused either by blows to the head resulting in twisting or turning of the head, or being physically grasped by the head followed by a twisting of the head. (RES. T. 50).

He believed that by the time her cranial cavity was intruded upon, she probably was no longer conscious. (RES. T. 51). Dr.

Thogmartin opined that injuries to A.P.'s head and neck would have taken a minimum of four blows in his very conservative estimation, with no maximum estimate. He explained "it could be 20, 40, 60, 80. I can't really put a top number on it." (RES. T. 52).

She sustained several lacerations to her vagina. (RES. T. 61). One laceration was six centimeters long with hemorrhaging caused by over-stretching and tearing from an object being inserted into her vagina. (RES. T. 61-62). The hemorrhage indicated that the injury occurred while she was alive. (RES. T. 62). Her vaginal injury would have been extremely traumatic and painful and consistent with nonconsensual sexual activity. (RES. T. 63-64).

Dr. Thogmartin testified that the cause of death was blunt force trauma and the manner of death was homicide. (RES. T. 49, 65). Furthermore, the stab wound to her upper abdomen, the removal of her right breast, the trauma to her anus, and the thermal injuries were inflicted postmortem. (RES. T. 55).

Sergeant Hatcher testified that he arrived at the scene and learned that A.P.'s neighbors had relevant information. (RES. T. 73-74). They heard a noise outside around 12:30 a.m. and observed Sexton inside the victim's kitchen. (RES. T. 74-75). They wrote down

the tag number of a blue pickup truck that was backed into A.P.'s driveway, and law enforcement later determined it was registered to Sexton. (RES. T. 75).

Sergeant Hatcher went to Sexton's home and noticed a blue pickup truck in the driveway with the same tag number. (RES. T. 77). Sexton had what appeared to be diluted blood stains on his shirt and shorts. (RES. T. 77). Sexton indicated that he was wearing the same clothes he had worn the night before. (RES. T. 79). FDLE tested the stains and determined they matched A.P.'s DNA. (RES. T. 102).

Sergeant Hatcher used the exhibits from Sexton's guilt phase of trial to explain the crime scene. (RES. T. 83-89, 92-101, 110-116). He testified that the blood droplets near the front door were indicative of a struggle occurring in that area. (RES. T. 83-84). A bloodstained chair was also leaning over to the side. (RES. T. 86). He testified that the attack by the door continued and moved into the living room where A.P.'s body was discovered. (RES. T. 119). He found the state of the victim's socks being pulled away from her feet notable, as it was indicative of her being dragged. (RES. T. 96).

Dorina Cifelli knew A.P. from church and went to her house twice a week to help her. (RES. T. 122-23, 125). She testified that

A.P. was 94 years old. A photograph of the victim's driver's license confirmed she was born November 30, 1915. (RES. T. 90).

A.P. was petite; she stooped over when she stood because of her age; and she had arthritis in her hands. (RES. T. 124-25). Cifelli was at A.P.'s home the day before A.P. was murdered, and Cifelli cleaned the house that day. (RES. T. 126). "Everything was straightened up and nice." (RES. T. 127).

Cifelli found A.P.'s body around 12:15 the day after she was murdered. (RES. T. 129). As Cifelli approached A.P.'s house, she noticed things were "terribly" abnormal. (RES. T. 128-29). A.P.'s chair was moved out of the way, and Cifelli saw a dolly and A.P.'s cane. (RES. T. 129). The living room was "a wreck and there was stuff all over the place." (RES. T. 129, 131). Stuff was "pulled out of the drawers and laying all over the place." (RES. T. 131).

Cifelli noticed A.P.'s feet first and then saw A.P.'s body covered with a sheet. (RES. T. 131). Cifelli lifted up a corner of the sheet and then called law enforcement on A.P.'s house phone. (RES. T. 131).

According to Cifelli, A.P. talked frequently about Sexton and had described him as a hardworking man. (RES. T. 133-34). A.P. was

impressed with Sexton and his knowledge of plants and gardening. (RES. T. 134).

Next, the defense presented the testimony of Roland McAndrew, Belinda Lister, Madison Setzer, and Lorena Smith. McAndrew was formerly warden of Florida State Prison and Central Florida Reception Center, and he also ran the Orange County Jail as interim director. (RES. T. 139). He served as city councilman and later became an expert witness. (RES. T. 139). He worked on nearly six hundred cases. (RES. T. 139). He was retained by Sexton's attorneys to review Sexton's prison records and to opine about his prison adjustment. (RES. T. 139-40).

McAndrew reviewed all Sexton's classification records, and Sexton's overall inmate record was moved into evidence without objection. (RES. T. 140). During Sexton's twelve-year prison stay, he only had one very minor infraction. (RES. T. 141). McAndrew opined that was a strong indication of adjustment to the rules, regulations, and routines within the Florida Department of Corrections. (RES. T. 141). In addition, Sexton had outside support from family and friends, which generally incentives good behavior in that it prevents inmates from having their visitation taken away. (RES. T. 142). A

sentence to life in prison would mean that Sexton would be housed in a secure cell with one other inmate, and there would be a lot of opportunities for him to work within the Department of Corrections. (RES. T. 142-43).

Sexton's sister Belinda Lister lived in Fairfield Bay, Arkansas, and she testified about Sexton's family. (RES. T. 147-148). According to Lister, the family moved from Indiana to Arkansas when Sexton was a baby because he had severe asthma and needed to be in a warmer climate. (RES. T. 148). As a young boy, Sexton enjoyed helping people around the community. (RES. T. 148-49). He did a lot of yardwork and errands for neighbors. (RES T. 149). He helped get eggs from the chickens and took care of pigs and chickens. (RES. T. 149). Their parents started a bricklaying business and Sexton helped out with that. (RES. T. 150-51).

While studying journalism, Sexton became a sportswriter and a freelance photographer. (RES. T. 151-52). Sexton was also skilled at drawing and painting, and he continued his artwork while incarcerated. (RES. T. 152). She loves Sexton and communicates with him. (RES. T. 152-53). Sexton provides support and encouragement to her. (RES. T. 154-55).

Sexton's daughter, Madison Setzer, testified as well. (RES. T. 160). At the time of her testimony, she had four children. (RES. T. 161). Setzer resided with Sexton when she was a child, and Sexton, rather than her mother, had custody of her. (RES. T. 161-62). Her relationship with Sexton when she was growing up was "wonderful." (RES. T. 162). "Any time he could get an opportunity to teach us anything, he was there teaching with a twinkle in his eye. It was great." (RES. T. 162-63). Setzer described Sexton as "super patient" and a good teacher. (RES. T. 163).

He coached their sports teams and was "always there." (RES. T. 163). Sexton helped them with their schoolwork and took them to Sylvin Learning Center to give them extra assistance. (RES. T. 165). Sexton was her "Knight in Shining Armor" and "best friend." (RES. T. 166-67). Setzer's mother eventually got custody of her, but she moved back in with Sexton briefly when she was older. (RES. T. 166-68).

Setzer communicated with Sexton during his incarceration. (RES. T. 169-70). He sent her paintings and cards, some of which she kept on display in her home. (RES. T. 170). Two of Sexton's paintings were admitted into evidence without objection. (RES. T. 171).

Lorena Smith met Sexton when they volunteered for a local public cable access station in Oregon. (RES. T. 178). Sexton had a show about musicians where he would record them performing live music. (RES. T. 179). When she met Sexton, he was married and had kids. (RES. T. 180). Eventually, the marriage ended and Sexton got custody of the children. (RES. T. 180). Smith and Sexton lived together and raised the children. (RES. T. 180-81). Sexton was really involved in the children's lives and was attentive to them. (RES. T. 181). Sexton attended all their events and coached the children as well. (RES. T. 181). Smith and Sexton started a waterproofing business together. (RES. T. 183).

The children's mother gained custody of the children and things fell apart for Sexton. (RES. T. 184). According to Smith, Sexton went on a "downhill decline." (RES. T. 184). Smith puts money in Sexton's account so he can use the phone, and she will continue communicating with Sexton if he receives a life sentence. (RES. T. 185).

After the defense rested, the judge asked Sexton if there was anything else that he wanted to present to the court. (RES. T. 186). Sexton stated, "No, I'm quite satisfied with what we've done." (RES.

T. 186). The following day at the sentencing hearing, the judge asked Sexton again whether there was an additional mitigation he wished to present, and he stated there was not. (RES. T. 197-98). He affirmed on the record that he was waiving any further presentation of mitigating evidence. (RES. T.198).

The judge acknowledged that *Muhammad*[3] did not control because Sexton presented some mitigation, and he had the right to decide which mitigation he wanted to present. (RES. T. 199). She explained, however, that "[i]t is not within Mr. Sexton's right to refuse the Court's right to look at all mitigation that exists." (RES. T. 200). The judge believed that the best course of action was for her to order a PSI or to call the mitigation expert because she was in court. (RES. T. 200). "I can order a PSI, and then all mitigation that was determined to exist by the Defense will be presented to the Department of Corrections…or since I have the mitigation expert here, the Court can call the mitigation expert this morning…and have her summarize the mitigation that she's found." (RES. T. 200). Sexton personally objected because "mitigation is concessionary by nature."

[3] *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001).

(RES. T. 205). He stated, "anything they present that I did not approve goes towards conceding the guilt of the crime that I did not commit." (RES. T. 205).

The court noted Sexton's objection and called the mitigation specialist as a court witness. (RES. T. 206). Kate O'Shea testified that Lister's testimony was very limited due to Sexton's wishes. (RES. T. 209). Had her testimony not been restricted, Lister would have testified about Sexton's dysfunctional family dynamic and abusive parents. (RES. T. 209). Lorena Smith would have talked about Sexton's drinking and would have testified more about how Sexton fell apart after losing custody of the children. (RES. T. 210). Christoper Ferguson would have been called as a witness—Ferguson was Sexton's friend and they coached little league together. (RES. T. 210). Ferguson would have described Sexton as a loving and devoted father who became unstable while drinking. (RES. T. 210-211). Ferguson thought Sexton had a mental illness. (RES. T. 211). Madison Setzer would have testified about Sexton having explosive episodes. (RES. T. 212).

Dr. Ouaou, a neuropsychologist, would have testified regarding Sexton's high average to superior range IQ scores. (RES. T. 212-213).

Sexton had some processing speed and memory impairment that he believed was related to long-term alcohol exposure or exposure to cleaning solvents or chemicals. (RES. T. 213). Dr. Maher, a psychiatrist, would have expanded on Sexton's cognitive impairments with testimony about how chemicals affect a person's brain. (RES. T. 213). Dr. Holmes, a psychologist, diagnosed Sexton with bipolar disorder and would have testified as to Sexton's history and the escalation prior to the murder. (RES. T. 214). The experts would have opined that Sexton was currently stable in a structured environment. (RES. T. 215-16). No other witness was called by the court.

The court did take judicial notice of Sexton's guilt-phase trial transcripts and evidence admitted as well as the penalty-phase testimony and evidence. The issue of judicial notice arose prior to the sentencing hearing when the State filed a request for the court to take judicial notice of Sexton's trial testimony and exhibits, specifically requesting jury trial transcripts Volumes 3 through 9, and trial exhibits 1 through 144. (RES. 734).

At the beginning of the resentencing hearing, the court heard argument on the State's request for judicial notice and granted the

State's request. (RES. T. 6-14). The judge explained that she would not review anything that was not permissible during the first trial. (RES. T. 12).

The court later reiterated that it did not review any depositions in the court file while taking judicial notice. (RES. 832). "The only thing I used in my review for the sentencing was the trial transcript and the sentencing transcript of the original trial [.]" (RES. 832). The court explained, "I looked at the testimony of Dr. Thogmartin originally and reviewed my notes from the testimony he gave in the new sentencing. Also Sergeant Hatcher and Ms. Cifelli, again I used both the trial transcript from the original trial and their testimony here." (RES. 832). With regard to additional mitigation, the court clarified "I used Ms. O'Shea's mitigation testimony as additional backup or if you want to say additional information that wasn't given to me in the original trial, but I did rereview the PSI, which also contains a lot of the same things." (RES. 832-33). The court wanted it to be clear that "the only parts of the original file … that I've reviewed is anything that I felt was necessary from the original trial…I also went back and rereviewed Dr. McClain's testimony, which I had used in my original order, and some other things that had to do with

mitigation in this matter, because I think it's necessary that I do so." (RES. 833).

The court outlined in its sentencing order that it had taken judicial notice "of the entire court file, which includes transcripts of testimony from the original trial held on April 15, 2013, through May 7, 2013[.]" (RES. 774). The court further "reviewed its own extensive trial notes taken during all proceedings." (RES. 774).

The court found that the State had established the following aggravating factors: the victim was vulnerable due to her advanced age (great weight); the capital felony was committed during the course of the defendant committing sexual battery (great weight); and the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight). (RES. 778-80).

The court recognized that Sexton waived much of his mitigation. (RES. 780). The court noted that the only factor listed under the "catch-all" provision was that the defendant was amenable to rehabilitation and a productive life in prison. (RES. 783). While recognizing that was the only mitigation requested by Sexton, the court determined that there was additional mitigation in the record: the defendant had no significant history of prior criminal activity; the

capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (RES. 783). The court determined Sexton's mitigation as follows: no significant criminal history (moderate weight); the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (little weight); the capacity of the defendant to conform his conduct to the requirements of the law (little weight), and the defendant is amendable to rehabilitation and a productive life in prison (little weight). (RES. 783-85). The court found that despite the existence of mitigating factors and the weight assigned to each by the court, "the nature and quality of the mitigation pales in comparison to the weighty aggravating factors proved beyond a reasonable doubt." (RES. 785). The court thereby sentenced Sexton to death.

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I: The lower court properly exercised its discretion in denying Sexton's funding requests for travel, a PET scan, and an expert to interpret the scan where Sexton failed to demonstrate a need for his requests. Sexton did not establish a particularized need for the travel when the mitigation specialist had already communicated with the witnesses by phone, and Sexton did not show that travel would yield any additional mitigating evidence. Sexton further did not make a particularized showing of need for a PET scan when there was no assertion that such testing was necessary for the experts to render their opinions. Lastly, Sexton failed to show prejudice where he waived most of his mitigation, and therefore, he would not have presented any additional mitigation at issue even if it had been established through travel and testing.

Issue II: The lower court properly exercised its discretion by calling the mitigation specialist as a court witness after Sexton had waived the majority of his mitigation. The court called the mitigation specialist as a court witness to document what additional mitigation was available but not presented so that the court could consider all the potential mitigation in determining Sexton's sentence. Even if the

court somehow erred, any error was harmless where there was no jury and the court ultimately found the existence of additional mitigating circumstances through the court's review of the records.

Issue III: Sexton received a de novo resentencing proceeding and it was entirely proper for the court to take judicial notice of Sexton's court file in the instant case. Sexton failed to establish that the court abused its direction by noticing records from Sexton's guilt-phase trial and previous penalty phase of trial, especially given that court clearly articulated what noticed records it had referenced. Any alleged error under this section would be, at its worst, harmless error where the judicially noticed records were used to find additional mitigating circumstances.

Issue IV: Sexton challenges the denial of his motion to recuse the judge, although he previously raised this very issue in a petition for writ of prohibition. The petition was denied, the same judge remained on the case, and Sexton should not get a second bite at the apple now on appeal. Nevertheless, Sexton is not entitled to relief because his motion did not demonstrate a well-founded basis of undue bias or prejudice when the judge merely responded to defense counsel's improper remark. The judge's disapproval of the defense

counsel's comment regarding the State hanging Sexton from the nearest tree was entirely warranted and did not show actual bias. Accordingly, the motion to disqualify was properly denied.

ISSUE V: Sexton failed to preserve any challenge to a perceived comment on his right to silence contained in the sentencing order where Sexton neither contemporaneously objected during the reading of the sentencing order nor filed anything after receiving the sentencing order. Sexton further failed to establish fundamental error.

ISSUE VI: The court committed no error in its analysis of mitigating circumstances where the only mitigation requested by Sexton was that he was amenable to rehabilitation and a productive life in prison, and the court found additional mitigation not requested by Sexton. Sexton failed to show that he would not have received a death sentence had the court considered the positive mitigation from his family.

ISSUE VII: The court understood its role in sentencing and understood that it had the authority and discretion to sentence Sexton to life in prison. The court's statement that it was "compelled

by law" to impose the ultimate penalty just meant that the court determined that death was the appropriate sentence in this case.

ISSUE VIII: This Court has consistently rejected similar challenges to revisit its decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), and the Court should again do so here.

ARGUMENT

ISSUE I

The Lower Court Properly Exercised Its Discretion In Denying Sexton's Funding Requests For Travel And A PET Scan Where Sexton Failed To Demonstrate A Particularized Need For His Requests, And Sexton Failed To Establish Prejudice Where He Waived This Line Of Mitigation.

In his first issue, Sexton claims that the court violated his constitutional rights by denying additional funding to his lawyers for travel and for Sexton to have a PET scan. Sexton argues that his requests were reasonable and necessary for his attorneys to be effective. As will be shown, Sexton is not entitled to relief.

A trial court's decision to deny a defendant's motion for funds for testing and travel associated with mitigation will not be disturbed absent an abuse of discretion. *Rogers v. State,* 783 So. 2d 980, 998 (Fla. 2001); *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997). In evaluating whether a trial court abused its discretion, courts apply a two-part test to consider: (1) whether the defendant made a particularized showing of need; and (2) whether the defendant was prejudiced by the court's denial of the motion. *San Martin*, 705 So. 2d at 1347.

Here, Sexton failed to establish that the trial court abused its discretion in denying his requests. First, with regard to Sexton's motions for travel, Sexton filed a bare-bones request. (RES. 209-210, 214-15). His motions merely stated that his mitigation specialist "needs to travel to Portland, Oregon" and to "Pangburn, Arkansas and surrounding areas" because various witnesses and Sexton's family members live in those areas and "have relevant sentencing information." (RES. 209, 214). The motions added that it "is critical for the mitigation specialist to interview Mr. Sexton's family members [and Mr. Sexton's witnesses]." (RES. 209, 214). No other information was provided to show a particularized need for the travel.

During the hearing on the travel motion, Sexton's counsel indicated that the mitigation specialist had already communicated with Sexton's out-of-state family and friends over the telephone. (RES. 1374-75). Sexton's counsel expressed a preference that the mitigation specialist "sit down with them and talk with them so we can find out if there are hidden secrets." (RES. 1375).

When the judge inquired about the type of mitigation that some members of Sexton's family could offer, Sexton's counsel relayed that it could be positive mitigation regarding the contact and relationship

they had with Sexton. (RES. 1376-77). Counsel offered no other details regarding "hidden secrets" and what information was expected to be gained by the sit-down meetings.

In denying the motion, the judge explained that the specialist had already spoken to the family members and witnesses who could potentially offer mitigation based on the broad relevance permissible during a penalty phase hearing. "And I don't think the protections provided by the constitution either under the due process clause or under some effective assistance of counsel interpretation include a requirement that the Court fund travel to speak to these witnesses." (RES. 1380).

After the judge indicated that the motion was being denied, Sexton's counsel argued that it was important for the mitigation specialist to travel to those locations to determine if Sexton had been physically or sexually abused. (RES. 1382). The court urged counsel to "point to some evidence" suggesting that an out-of-state witness is going to provide testimony to justify the travel. (RES. 1387-39). No other information was provided, and the court denied the motions.

In a motion for reconsideration, Sexton's counsel added that travel was necessary for the mitigation specialist to meet with

Sexton's family members to discuss various topics regarding Sexton's upbringing, including allegations of abuse that cannot meaningfully be addressed by telephone. (RES. 275).

The court subsequently entered a written order denying Sexton's motions, explaining that they "contained no specific facts in support of the general assertion of need." (RES. 287). The court considered the additional arguments made during the hearing and in the motion for reconsideration and ultimately concluded that the request for funds was not supported by adequate facts. (RES. 287). The order further reflected that the court had carefully considered numerous funding requests and had authorized nearly $60,000 to the defense for experts, investigations, and mitigation related expenses. (RES. 288). It concluded that there "is simply no basis for the requested funds." (RES. 288).

Sexton has altogether failed to establish that the court abused its discretion in denying the funding for travel. Sexton never established a particularized need for the travel to Portland, Oregon and Pangburn, Arkansas and surrounding areas when the mitigation specialist had already successfully communicated over the phone with Sexton's family and connections there. Although Sexton's

counsel indicated that an in-person meeting may reveal "hidden secrets," counsel failed to offer any other details as to what information may be obtained and how it would be relevant to Sexton's mitigation.

When further pressed, counsel relayed that Sexton's out-of-state family witnesses were meant to provide positive mitigation regarding the relationship they had with Sexton. Counsel never explained why information regarding Sexton's meaningful relationship with his family, including his grandchildren, required travel for an in-person conversation, especially given that telephonic conversations had already occurred. By the same token, after the court denied the motion and Sexton claimed there were allegations of abuse, counsel never explained how the travel was expected to reveal such information.

In addition to failing to establish a particularized need for travel, Sexton also failed to establish any prejudice from the court's denial of his motions. During a subsequent hearing, Sexton's counsel indicated that Sexton's sister disclosed Sexton's childhood abuse during telephonic conversations with the mitigation specialist. (RES. 614). Therefore, the information was ultimately obtained without the

necessity of travel. Moreover, the court granted Sexton's different request for the mitigation specialist to travel to Texas to interview Sexton's other sister who was not forthcoming during the phone interviews. (RES. 614-615).

The fact that Sexton waived much of his mitigation also dispels any notion of prejudice. Sexton made it clear that he did not want to offer any mitigation that was "concessionary in nature" that attempted to show why the crime was committed, as he did not want his lawyers to "confess that I did a crime." (RES. T. 205). Thus, any mitigation regarding abuse that Sexton potentially suffered as a child would have fallen under this category, and therefore, would not have been presented during Sexton's penalty phase.

While Sexton's appellate counsel insists that Sexton could not have made an informed decision on what mitigation to present when that mitigation was never discovered, the record establishes that Sexton knew of the abuse, as it was self-reported. (RES. 1382). Indeed, during the hearing on the motion for travel, Sexton's counsel indicated that the defense team had "evidence of [abuse] based on some self-reporting" but that they wanted to speak to the individuals around Sexton while he was growing up to "substantiate" Sexton's

allegations. (RES. 1382). And Sexton's counsel confirmed during a subsequent hearing that Sexton's sister had corroborated the abuse. (RES. 614). Clearly, Sexton was aware of the allegations, and Sexton knowingly waived that line of mitigation.

On top of that, Sexton's sister from Arkansas, Belinda Lister, testified during Sexton's penalty phase, and she did not testify regarding any allegations of abuse. Her testimony was very limited due to Sexton's specific instructions to counsel. (RES. T. 209). After Sexton's witnesses testified, the court asked Sexton if there was anything else he would like to present to the court. (RES. T. 186). Sexton indicated, "No. I'm quite satisfied with what we've done." (RES. T. 186). Sexton suffered no prejudice.

In light of Sexton's waiver of any mitigation that could be perceived as conceding to the crime or attempting to explain why the crime was committed, Sexton suffered no prejudice by the court's denial of his request for funding relating to a PET scan and the appointment of Dr. Wu to interpret the scan. Regardless of the results of the scan, Sexton made it clear he would not have presented such evidence. (RES. T. 205-206). Accordingly, Sexton cannot meet his burden of showing entitlement to relief.

Sexton further failed to establish a particularized need. "[A] particularized showing of necessity is the polestar for whether any diagnostic test should be authorized by the trial court." *Rogers v. State*, 783 So. 2d 980, 999 (Fla. 2001). Here, defense counsel wanted Sexton to have a PET scan based on the testimony that Dr. Maher gave in Sexton's initial penalty-phase hearing, and for Dr. Wu to be appointed to interpret the scan. (RES. 576-77). In Sexton's initial sentencing hearing, the court found the existence of the substantial impairment statutory mitigation without the PET scan. (RES. 578-79).

Sexton did not show why the scan and additional expert was necessary when the statutory mitigation was found without it. Nor did Sexton establish that the scan was necessary in order for an expert to opine in this case. There was no evidence (or even a proffer) that an expert required the scan in order to reach his or her expert opinion in this case. Clearly the scan was not necessary given that Dr. Maher testified previously without the scan, and the mitigation was found. *See, e.g., Rogers v. State*, 783 So. 2d 980, 999 (Fla. 2001) (no abuse of discretion in denying request for a PET scan when the doctor testified that the PET scan would have value as corroboration,

but doctor did not testify that it was necessary to complete his medical opinion); *Robinson v. State*, 761 So. 2d 269, 275–76 (Fla. 1999) (the trial court did not abuse its discretion in denying a request for a SPECT scan when the doctors merely testified that the test would be helpful, rather than necessary, to complete their medical opinions). In addition to Dr. Maher, Sexton retained another expert during his resentencing proceedings and both experts determined that Sexton had impairment from long-term alcohol or chemical exposure, and those opinions were obtained without the use of a PET scan. (RES. T. 213). Accordingly, the court did not abuse its discretion in denying Sexton's motions for funding.

To the extent that Sexton claims that the denial of funds resulted in a violation under *Ake v. Oklahoma*, 470 U.S. 68 (1985), he is entirely incorrect. *Ake* requires that a defendant have access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. Sexton was examined by Dr. Maher, a psychiatrist, Dr. Ouaou, a neuropsychologist, and Dr. Holmes, a psychologist. (RES. T. 212-215). Sexton does not argue that he was denied access to a psychiatrist or that his mental health

professionals failed to conduct appropriate examinations. *Ake* is inapplicable here.

Sexton complains that he should have been granted more money for additional testing and the hiring of another expert, Dr. Wu. There is no constitutional right for a defendant to have a specific mental health expert. *Walls v. State*, 926 So. 2d 1156, 1177 (Fla. 2006). Sexton's contention that *Ake* requires brain imaging to include a PET scan as well as the appointment of a specialized expert to interpret the scan is altogether unsupported by any reasonable interpretation of *Ake* and its progeny.

Lastly, to the extent that Sexton challenges his rights under the Equal Protection Clause and Florida's funding structure in place for defendants using registry counsel, these arguments have not been preserved for appellate review. *See San Martin v. State*, 705 So. 2d 1337, 1346 (Fla. 1997) (equal protection claim was not cognizable on appeal where it was never raised below).

Even if Sexton had preserved his equal protection argument, he would not be entitled to relief because his reasoning is misguided. Every counsel representing an indigent defendant must obtain funding approval for travel requests and brain scans. Indigent

defendants do not have limitless access to state funds, and all indigent defendants have a procedure in place for requesting and obtaining such funds. That funding is approved or denied either internally, through administrative procedures in place with the Public Defender's Office or Regional Counsel's Office, or in the case of registry counsel, through a judge. "To be entitled to public funds for the appointment of an expert an indigent defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Andrews v. State*, 243 So. 3d 899, 901 (Fla. 2018) (cleaned up).

Sexton has failed to meet his burden of establishing that the lower court abused its discretion in denying the requested funds. No relief is warranted.

ISSUE II

The Lower Court Properly Exercised Its Discretion By Calling The Mitigation Specialist As A Court Witness After Sexton Waived The Majority Of His Mitigation.

In this issue, Sexton challenges the trial court's decision to independently call the defense's mitigation specialist as a court witness as a result of Sexton waiving the presentation of nearly all

his mitigating evidence. This Court reviews a trial court's consideration of mitigation evidence as well as a trial court's decision to call its own witness for an abuse of discretion. *Bell v. State,* 336 So. 3d 211, 216 (Fla. 2022); *Shere v. State*, 579 So. 2d 86, 90 (Fla. 1991).

Sexton presents this issue as a violation of his Sixth Amendment Right to Counsel and a violation of the right to control his defense; however, neither of those rights have been violated. The lower court's decision to call the mitigation specialist as a court witness in no way violated Sexton's right to counsel, nor did it impact the defense's presentation of evidence during the penalty phase. Sexton was represented by counsel throughout the penalty phase; there was never a period where Sexton was unrepresented. Sexton exercised control over what mitigation his counsel presented, and the mitigation that Sexton chose to present was presented. While Sexton did not waive his mitigation outright, he elected to present very minimal mitigation and to avoid presenting nearly all of the plethora of mitigation that his defense team found.

The trial court did not force Sexton's counsel to present the additional mitigation that Sexton waived, and the defense rested

when Sexton instructed that they do so. *See Figueroa-Sanabria v. State*, 366 So. 3d 1035, 1054 (Fla. 2023) ("a defendant cannot be forced to present mitigating evidence during the penalty phase of the trial"). Given that there was substantial mitigation, including mental health mitigation, that was not presented, the trial court was not required to be oblivious to the existence of such mitigation that could potentially have supported a life sentence. "[A] capital defendant's mitigation waiver does not eliminate the court's responsibility to consider mitigating evidence in the record." *Fletcher v. State*, 343 So. 3d 55, 58 (Fla. 2022) (cleaned up). Under *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), when defendant elects not to present mitigation, the trial court is required to order a comprehensive presentence investigation report (PSI) that includes information such as previous mental health problems, school records, and relevant family background. *Fletcher*, 343 So. 3d at 58. Moreover, the trial court has the discretion to appoint special counsel. *Id.*; *Marquardt v. State*, 156 So. 3d 464, 491 (Fla. 2015); *Robertson v. State*, 187 So. 3d 1207, 1214 (Fla. 2016).

This Court has further explained that when the records alert the trial court to the probability of significant mitigation, the court

has discretion to "call its own witnesses." *Marquardt*, 156 So. 3d at 491; *Sparre v. State*, 164 So. 3d 1183, 1193 (Fla. 2015). That is precisely what the court did in the instant case. The court did not force Sexton to call his mitigation expert as a witness, rather, the court called the mitigation as its own witness—a court witness. *See, e.g., Barnes v. State*, 29 So. 3d 1010, 1023 (Fla. 2010) (finding that the trial court acted properly by "appointing independent court counsel, who did not represent Barnes but was directed to assist the court by investigating and presenting mitigation."). This Court has repeatedly recognized the court's ability to call its own witnesses. *Muhammad*, 782 So. 2d at 364; *Marquardt*, 156 So. 3d at 491; *Russ v. State*, 73 So. 3d 178, 191 (Fla. 2011); *Sparre*, 164 So. 3d at 1193; *see also Shere*, 579 So. 2d at 92 ("As the Court said more than one hundred years ago, trial courts may call and examine witnesses of the court's own accord "when the interests of justice demand it[.]").

As Sexton points out, when a defendant does not waive the right to present all mitigation, *Muhammad's* investigative procedures do not apply. *Bell*, 336 So. 3d at 217. However, just because the trial court was not *required* to employ the procedures outlined in *Muhammad* and expounded in *Marquardt*, does not mean that a court

automatically abuses its discretion in following the principles when not required to do so. The procedure of allowing a court to call its own witness or to appoint independent counsel helps continue to "ensure that every death sentence in this state is…imposed in accordance with all constitutional and statutory directives[.]" *Marquardt*, 156 So. 3d at 49. The death penalty is "different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Barnes v. State*, 29 So. 3d 1010, 1025 (Fla. 2010).

The procedures in *Muhammad* are meant to protect defendants as well as assist courts in imposing sentences of life or death. *See Muhammad*, 782 So. 2d at 363; *Barnes*, 29 So. 3d at 1023. In *Bell*, this Court specifically found that the trial court did not abuse its discretion by failing to follow *Muhammad's* investigative mitigation procedures when *Bell* did not waive the presentation of mitigating evidence. *Bell*, 336 So. 3d at 217. Here, as in *Bell*, Sexton did not waive the presentation of all mitigating evidence. In this case, however, the lower court took extra precautions by electing to call the mitigation specialist as a court witness. This practice was not prohibited by this Court in the scenario in *Bell* when a defendant

does not entirely waive mitigation, nor was it endorsed. The trial court in this case was merely exercising its discretion and authority by calling its own witness.

The court was doing so to protect Sexton so that it could explore additional un-presented mitigation to have a complete picture of the available mitigation when determining Sexton's sentence.[4] *Cf. Barnes,* 29 So. 3d at 1025 ("Appointment of mitigation counsel in this case, where Barnes essentially refused to provide any mitigation evidence, was intended to provide such a safeguard and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which she could make a reasoned decision concerning the applicability of the death penalty."). There has been no showing that the trial court engaged in actions that were arbitrary, fanciful, or unreasonable with regard to its procedure and judgment. Certainly, it cannot be said that no person would take the view adopted by the trial court. Sexton has proved neither a violation of his constitutional rights nor an abuse of the trial court's discretion.

[4] The PSI that was previously ordered before Sexton's initial sentencing hearing documented Sexton's statement that he would rather die than spend the rest of his life in prison. (RES. 764).

However, even if the lower court had somehow abused its discretion by calling the mitigation specialist as a court witness, the alleged error must be deemed harmless. This Court has recognized that a trial court's error in calling a court witness can be harmless. *See, e.g., Shere*, 579 So. 2d 86 (finding the trial court's error in calling a court witness based on the witness being hostile was harmless). Given that Sexton waived his penalty-phase jury, there was no harm of the jury potentially placing more emphasis on the mitigation specialist's testimony because she was a court witness. *See, e.g., Barnes*, 29 So. 3d at 1024 (dispelling any "concern" that the independent counsel's presentation might portray an aura of superiority over the evidence presented by the prosecution and the defense when "Barnes waived an advisory jury.").

Moreover, while the trial court acknowledged the mitigation specialist's testimony in the factual portion of the court's mitigation evidence section of the sentencing order, the court did not rely on that evidence in finding any mitigating circumstances. (RES. 783-85). Nor did the court use the testimony to find any aggravating factors. (RES. 778-89). Thus, any error in calling the witness could not have been harmful to Sexton.

Of final note, the State suggests that any potential error may even be considered invited by defense counsel. After the trial court acknowledged that Sexton had the right to control the presentation of mitigation, Sexton's counsel argued that there was a contradiction between the *Muhammad* line of cases and the ABA guidelines. (RES. T. 31-32). Counsel concluded, "And if we're truly going to follow the ABA guideline…then, in us doing our job, we have to be able to present all of the mitigation that we think is warranted." (RES. T. 32). Given that Sexton made it very clear that he did not want his attorneys to present mitigation, and forcing such mitigation would have violated Sexton's right to control his defense and may have even resulted in him representing himself, the trial court's decision to call the mitigation specialist as a court witness afforded the most protection to Sexton.

Sexton personally objected to the court calling the mitigation specialist; however, Sexton's counsel did not voice an objection. The court advised the defense that if they objected, the court would order a new PSI instead of calling the mitigation specialist. Sexton's attorneys voiced no objection to the court's procedure. (RES. T 198-205). The court specifically advised, "I just want you to know, if you

don't think she can [testify], I'll order a PSI." (RES. T. 202). Sexton's counsel expressed agreement with having the mitigation specialist read the list of mitigation she had prepared to the court. (RES. T. 202-205). Counsel never requested a new PSI. Based on the foregoing, Sexton is not entitled to relief.

ISSUE III

Sexton Received A De Novo Resentencing Proceeding And It Was Entirely Proper For The Court To Take Judicial Notice Of Sexton's Court File In The Instant Case.

In his third issue, Sexton alleges that the court did not conduct a de novo sentencing phase, and that the court improperly took judicial notice of testimony from the prior proceedings, reopened the case, and relied on facts not in evidence. Sexton's arguments within this claim are specifically centered on the lower court's consideration of the transcripts and evidence adduced during Sexton's trial and original sentencing hearing. As such, the trial court's actions should be reviewed for an abuse of discretion. *See Dailey v. State,* 279 So. 3d 1208, 1218 (Fla. 2019) ("Judicial notice is reviewed for an abuse of discretion."); *Williams v. State*, 967 So. 2d 735, 747–48 (Fla. 2007) (A trial court's ruling on the admissibility of evidence will generally be

upheld absent an abuse of discretion). Sexton has failed to establish that the court abused its discretion in considering the evidence.

Pursuant to section 90.202, Florida Statutes, a court may take notice of records "of any court of this state[.]" "The effect of judicial notice is to dispense with introduction of evidence of matters that need none." Charles W. Ehrhardt, *Ehrhardt's Florida Evidence* § 206.1, at 116 (2023 ed. Thomson Reuters). This Court has recognized that even though a court may take judicial notice of court records, "the fact that a record may be judicial noticed does not render all that is in the record admissible." *Dufour v. State*, 69 So. 3d 235, 253 (Fla. 2011). "[T]he court's authority to take judicial notice of records cannot be used to justify the wholesale admission of hearsay statements within those court files, such as through police reports or letters." *Dufour*, 69 So. 3d at 253; *see also Stoll v. State*, 762 So. 2d 870, 876 (Fla. 2000) ("We have never held that such otherwise inadmissible documents are automatically admissible just because they were included in a judicially noticed court file.").

In this case, the trial court took judicial notice of the hearing transcripts from Sexton's trial and previous penalty-phase hearing. Sexton was provided notice of the request for judicial notice; the court

heard argument on the matter from both parties; the court granted the request for notice; the court reiterated its intention to take judicial notice throughout the resentencing hearing; and the court specifically outlined in its sentencing order what the court reviewed. Sexton has failed to show any abuse of discretion.

The State's request for the court to take judicial notice was filed prior to Sexton's resentencing hearing, and it specifically requested that the court take notice of the trial testimony and exhibits from Sexton's trial, to include jury trial transcripts Volumes 3 through 9, and trial exhibits 1 through 144. (RES. 734). Sexton filed a written objection, arguing that the records were inadmissible in a resentencing hearing because it is a new proceeding. (RES. 741).

The court heard argument on the matter at the beginning of the resentencing hearing. When the hearing began, the State clarified that the request for judicial notice was for all the trial testimony and trial exhibits. (RES. T. 6-7). The defense argued that its objections were based on the records containing hearsay as well as the resentencing being a de novo proceeding. (RES. T. 7).

In response to the hearsay objection, the court responded that the judicial notice was related to trial testimony taken under oath,

not the entire court file that would contain hearsay. (RES. T. 10-11). The court subsequently granted the request for judicial notice. (RES. T. 11).

In doing so, the court announced that it would take judicial notice of the prior trial transcript to include all evidence admitted and witness testimony taken under oath and subject to cross examination. (RES. T. 12). "So you're not going to recall all the witnesses. You're just going to put those witnesses in, and that was – that's available to both sides. That transcript is in the record." (RES. T. 12).

The court properly exercised its discretion in granting the State's request for judicial notice. The court was certainly permitted to take judicial notice of the sworn testimony contained within Sexton's own court file. Sexton, however, claims that the act of taking judicial notice somehow transformed his proceeding so that it was no longer a de novo hearing. Sexton is incorrect. Sexton was afforded an entirely new resentencing proceeding. The court explained as much to him, stating, "We're going to redo this whole thing. You have new lawyers. New state attorneys over there. We're going to basically do this from scratch with the sentencing and the Court has an open

mind of…what I'm going to hear or what I'm going to do, but the outcome may be the same." (RES. T. 20).

Notably, the State did not rely entirely on the transcripts from Sexton's trial. During the resentencing hearing, the State presented the testimony of Dr. Thogmartin, the medical examiner, Sergeant Jason Hatcher with the Pasco County Sheriff's Office, and the victim's friend, Dorinda Cirelli. (RES. T. 43-135). The defense presented the testimony of prison expert Ronald McAndrew, Sexton's sister Belinda Lister; his daughter, Madison Setzer; and his former partner, Lorena Smith. (RES. T. 136-185). And as addressed in the preceding issue, the court also called the mitigation specialist as a court witness. Sexton received a de novo sentencing hearing, and the trial court entered a new order sentencing Sexton to death as a result of his resentencing hearing.

Sexton further complains that the trial court improperly reopened the State's case to accept evidence. After the parties rested their cases, the court reiterated that it had allowed the entire transcript of the previous trial into the record. (RES. T. 201). The court called the mitigation specialist as a court witness, scheduled the sentencing hearing, and asked if the parties formally waived

closing argument. (RES. T. 225-27). Upon the court asking if there was "anything else," defense counsel stated that the court indicated that it was taking judicial notice of the court file, but during the proceedings, the State rested its case and never asked for the admission of the transcripts into evidence. (RES. T. 227-28). "So my position is, since none of that has been admitted into evidence, the only thing the Court can consider is the testimony that was presented from the State here yesterday." (RES. T. 228).

The judge responded by asking the State what specific testimony it wanted the court to review, and the prosecutor requested the testimony of Mr. Finley, who was deceased, as well as Devlynn Saunders, David Carlin, and Patrick Grattan, to include pages 491 through 550 of Volume III regarding Sexton's vehicle without a trailer. (RES. T. 228-30). The prosecutor further requested the court to review the exhibits that were referenced during Sergeant Hatcher's testimony. (RES. T. 230). The court explained, "I will note for the record that the Defense is objecting, but I will allow the State to reopen their case just to put on the record what part of the transcript they're asking me to review." (RES. T. 230).

Here, the court's actions were appropriate under the circumstances and were a direct result of Sexton's counsel's complaint that the State had not specified what portions of the record that it requested for the court to review. Notably, at this point, the State had requested judicial notice in a written form, the court heard argument, the court ruled on the issue, and the court reiterated its ruling numerous times and indicated its intent to review the transcripts from Sexton's guilt phase and previous penalty phase. Sexton was in no way blindsided by the court's actions. The court did not abuse its discretion in having the State specify again on the record which portions of the transcripts it was relying on.

Sexton's contention that the lower court relied on facts not in evidence in sentencing him is entirely incorrect. The sentencing order was based on testimony and evidence adduced during Sexton's resentencing hearing as well as from Sexton's trial. Pursuant to Florida law, the court was required to consider the records of the trial and the sentencing proceedings in entering its written order in this case. *See* § 921.141 (4), Fla. Stat. (2022) ("In each case in which the court imposes a sentence of death, the court shall, considering the

records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection…").

Sexton's comparison of his case to *Cruz v. State,* 320 So. 3d 695 (Fla. 2021), is unavailing. In that case, Cruz was tried separately from his codefendant, but the trial court referenced the codefendant's trial in Cruz's sentencing order. In doing so, the court relied on facts not in evidence in Cruz's guilt phase. *Cruz*, 320 So. 3d at 725. Specifically, the court relied on evidence from the codefendant's trial about the firearm and the shooter to sentence Cruz to death, and this Court highlighted that it could not "determine what weight the trial judge gave to the finding that Cruz was the shooter or what part the non-record evidence from codefendant Charles' trial played in Cruz's sentence." *Id.* Accordingly, this Court remanded the case for resentencing and a new sentencing order. *Id.*

Here, the lower court was not relying on facts from another person's trial to sentence Sexton. Nor was the court looking at evidence from another case file. The court's findings were based on facts that were in evidence; the evidence came directly from Sexton's resentencing proceeding and his trial. The court relied entirely on

testimony contained within Sexton's case file, and the court clearly conveyed what portion of Sexton's trial it was relying on.

In its sentencing order, the court outlined that it had taken judicial notice "of the entire court file, which includes transcripts of testimony from the original trial held on April 15, 2013, through May 7, 2013[.]" (RES. 774). During the resentencing hearing, the court clarified that it did not review any depositions in the court file while taking judicial notice. (RES. 832). "With regard to additional mitigation, the court clarified, "I used Ms. O'Shea's mitigation testimony as additional backup or if you want to say additional information that wasn't given to me in the original trial, but I did rereview the PSI, which also contains a lot of the same things." (RES. 832-33).

It is the State's contention that Sexton has failed to establish any error under this claim. Nevertheless, any potential error would be considered at its worst, harmless error. *See Morton v. State*, 995 So. 2d 233, 244–45 (Fla. 2008) (finding any error in the trial court's ruling on judicial notice to be harmless); *Schwab v. State*, 969 So. 2d 318, 323 (Fla. 2007) (holding that the court's error in failing to take judicial notice of the hearing testimony from a different capital

defendant's case); *see also Gilliam v. State*, 582 So. 2d 610, 612 (Fla. 1991) (error to admit a hearsay report during the penalty phase was harmless where it was not presented to the jury and was not used to aggravate the defendant's sentence). Based on the foregoing, this claim should be denied.

ISSUE IV

The Lower Court Properly Denied Sexton's Motion For Recusal Where Sexton Failed To Show Actual Bias By The Judge's Warranted Reaction To Defense Counsel's Comment Regarding Hanging Sexton From The Nearest Tree. The Judge Was Merely Exercising Judicial Responsibility And Sexton Failed To Show True Bias.

Next, Sexton challenges the trial court's denial of the motion to recuse the trial judge. Appellate review of a denial of a disqualification order can be done either via a petition for writ of prohibition or raised on plenary appeal. *People Against Tax Revenue Mismanagement, Inc. v. Reynolds*, 571 So. 2d 493, 496 (Fla. 1st DCA 1990)*; see also* Philip J. Padovano, 5 Florida Practice, Civil Practice § 5:3 (2023 ed. Thomson Reuters) ("An order granting or denying a motion for disqualification can be reviewed on appeal from the final judgment. However, most such orders are reviewed before the trial or hearing on the merits by filing a petition for extraordinary relief."). This Court

has recognized that prohibition is "the proper avenue for immediate review of whether a motion to disqualify a trial judge has been correctly denied." *Sutton v. State*, 975 So. 2d 1073, 1076 (Fla. 2008). Notably, Sexton previously sought review of this issue by filing a petition for writ of prohibition in the Second District Court of Appeal. (*See Sexton v. State,* 2D19-221). The Second District issued an order denying his petition for writ of prohibition. *Sexton v. State*, 270 So. 3d 1219 (Fla. 2d DCA 2019).

In that case, the State had argued that the petition for writ of prohibition should be denied on the merits; there was no procedural argument or a request that the petition be dismissed. The Second District Court of Appeal addressed the issue and denied the petition on the merits rather than dismissing it. However, the Second District Court's order merely stated, "Petitioner's petition for writ of prohibition is denied." *Sexton v. State*, 270 So. 3d 1219 (Fla. 2d DCA 2019).

This Court has held that unelaborated orders denying relief in extraordinary writ cases shall not be deemed denials on the merits that would later bar a litigant from re-raising the claim under the doctrines of res judicata or collateral estoppel unless the order cites

authority or includes another statement that clearly shows that the issue was considered by the court on the merits and relief was denied. *Topps v. State*, 865 So. 2d 1253, 1258 (Fla. 2004).

It is the State's position that Sexton should not be able to raise the exact same issue in an extraordinary writ and then again during his direct appeal. "Generally, a party does not get the proverbial "second bite at the apple" when it fails to satisfy a legal obligation the first time around." *Richards v. State*, 288 So. 3d 574, 576 (Fla. 2020). In this case, the parties relied on the Second District's denial of Sexton's petition and the same judge remained assigned to his case and presided over his resentencing hearing. After such reliance, it is now inequitable for Sexton to get another bite at the apple by re-raising this claim. *Cf. Sutton*, 975 So. 2d at 1077 (recognizing that prohibition is a proper remedy to seek review of the denial of a motion to disqualify and "serves a function similar to a direct appeal"); *Hoswell v. State*, 896 So. 2d 813, 813 (Fla. 4th DCA 2005) (rejecting argument that second petition could not be deemed successive because first petition was not denied on the merits where the court denied a petition for writ of habeas corpus without citation and

without indicating that denial was on the merits or with prejudice, and successive petition was summarily denied).

Nevertheless, Sexton is not entitled to relief on appeal. Sexton claims that the trial court erred in denying his motion to disqualify. The standard of review of a trial judge's determination on a motion to disqualify is de novo, and whether the motion is legally sufficient is a question of law. *Mansfield v. State*, 911 So. 2d 1160, 1170 (Fla. 2005).

A motion to disqualify a judge "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." *Gregory v. State*, 118 So. 3d 770, 778 (Fla. 2013). A subjective fear of bias will not be legally sufficient to warrant disqualification; rather, "the fear must be objectively reasonable." *Id.* Merely receiving adverse rulings is not a ground for recusal. *Gilliam v. State*, 582 So. 2d 610, 611 (Fla. 1991). If a motion for disqualification is legally insufficient, an order denying the motion "shall immediately be entered." Rule 2.330(h), Fla. R. Gen. Prac. & Jud. Admin. (2021).

In this case, the trial court properly denied Sexton's motion for disqualification because it was legally insufficient. The motion to

disqualify was based on alleged bias of the judge when she told Sexton's counsel to stop and warned counsel of contempt in response to Sexton's counsel statement, "And perhaps consistent with the State's position, we should just go out to the nearest tree and hang Mr. Sexton." (RES. 176). Sexton failed to show an objectively reasonable fear of bias.

A judge's exercise of judicial responsibility to take corrective action is not a ground to support judicial disqualification, and even reporting of perceived attorney misconduct to The Florida Bar is not necessarily a ground for disqualification. *Birotte v. State,* 795 So. 2d 112, 113 (Fla. 4th DCA 2001); *see also Asay v. State*, 769 So. 2d 974, 979–80 (Fla. 2000) (where the trial judge's comments were insufficient to show actual bias). Even extreme expressions of judicial criticism of counsel do not justify disqualification. *Thomas v. The Chase Manhattan Bank*, 857 So. 2d 989 (Fla. 4th DCA 2003), receded from on other grounds, *Santa Catalina Townhomes, Inc. v. Mirza*, 942 So. 2d 462 (Fla. 4th DCA 2006).

The judge's disapproval of the defense counsel's comment regarding the State hanging Sexton from the nearest tree was entirely warranted and did not show any undue bias or prejudice against

Sexton. Sexton has not alleged any facts that "would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial," *Rodriguez v. State*, 919 So. 2d 1252, 1274 (Fla. 2005). As such, Sexton's motion to disqualify was legally insufficient and properly denied by the trial court. *Fields v. Klein*, 946 So. 2d 119, 121 (Fla. 4th DCA 2007) (holding that a motion for recusal based on expressions of dissatisfaction with counsel's behavior are legally insufficient); *see also Mansfield v. State*, 911 So. 2d 1160, 1171 (Fla. 2005) (finding no basis to reverse the judge's denial of the motion to disqualify when the motion failed to provide a basis for disqualification of the trial judge on the ground that defendant had a well-founded fear that he would not receive a fair trial); *Asay*, 769 So. 2d at 979–80 (where the trial judge's comments were insufficient to show actual bias).

Finally, Sexton's assertion that the trial court took an adversarial posture is not supported by the record. Defense counsel advised the judge that he was filing a motion to disqualify the judge based on her conduct, and if the court denied it, he would file a writ. (RES. 183). The court responded with, "Okay, no problem." (RES. 183). After defense counsel asked if the judge was paying to have the

hearing transcribed, [5] the judge indicated that the defense would have to get the transcripts. (RES. 183). The judge stated, "There's nothing that I've said or done that, as far as I can see, would lead me to recuse myself, but I haven't seen it in writing and so I'll wait for that." (RES. 183-84). Once the motion was filed, the court denied it without making any factual findings and without addressing the truth or falsity of the allegations in Sexton's motion. (RES. 110). Sexton has, for the second time, failed to establish that the court erred in denying the motion to disqualify.

[5] Sexton also argues that the court denied his request for transcripts; however, the record shows that counsel did not follow the proper procedure for requesting a transcript. (RES. 183-84).

ISSUE V

Sexton Failed To Preserve Any Challenge To A Perceived Comment On His Right To Silence Contained Within The Sentencing Order Where Sexton Neither Contemporaneously Objected During The Reading Of The Sentencing Order Nor Filed A Motion Challenging The Order Or His Sentence Based On The Comment At Issue. Sexton Further Failed To Establish Fundamental Error Where There Was No Comment Made During His Resentencing Proceeding And No Jury That Could Have Been Influenced By The Comment.

In his fifth issue, Sexton claims that the trial court violated his constitutional rights by commenting on his silence in the sentencing order. Sexton has not established any error, much less fundamental error in this case.

The challenged portion of the sentencing order at issue arose from the trial court's consideration of the "committed during the course of a sexual battery" aggravator. In analyzing the aggravating factor, the court found that the evidence showed that the penetrations of the victim's vagina occurred while the victim was alive. (RES. 779). The court noted that it was likely that the victim was awake and alert, rather than unconscious, when the sexual battery occurred. (RES. 779). The court then explained, however, that there was no way for the State to definitively prove that the victim

was alert during the sexual battery absent the Defendant's testimony. "The Defendant has denied his involvement in the death of Mrs. [A.P.], so there is no way for the State to even prove that a sexual battery occurred while the victim was alert unless the Defendant testifies." (RES. 779). Sexton claims that that statement constituted an improper comment on his right to remain silent.

Challenges to an improper comment on silence are typically preserved by a contemporaneous objection during the trial. *Bright v. State*, 90 So. 3d 249, 259 (Fla. 2012); *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990). "To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978); *see also Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Here, Sexton takes issue with the wording in the trial court's sentencing order. Yet, Sexton never filed any motion after receiving the order challenging his sentence or the phrasing contained in the

order. In fact, the court read the order to the parties during the sentencing hearing, and Sexton never objected. (RES. 846). Sexton altogether failed to raise the issue with the trial court. Thus, Sexton has not adequately preserved this issue for appellate review.

Sexton further has not established fundamental error given that the statement at issue was contained solely in a sentencing order. The comment merely explained that while the evidence showed that the sexual battery occurred when the victim was alive, there was no way to know whether it occurred while the victim was alert without the defendant testifying. Even if this statement were erroneous, Sexton has not shown that the statement amounted to fundamental error, or even harmless error for that matter.

Pursuant to Article I, section 9, of the Florida Constitution, no person shall be compelled in any criminal matter to be a witness against oneself. Moreover, the Florida Rules of Criminal Procedure prohibit a defendant from being compelled to give testimony against himself, and the rule further forbids a prosecuting attorney from commenting on the failure of the defendant to testify in his own behalf. Fla. R. Crim. P. 3.250. The rule against compulsory self-incrimination "was designed to protect the defendant in a criminal

case from having the jury consider his failure to take the witness stand in his own behalf as even the slightest suggestion of guilt." *State v. Kinchen*, 490 So. 2d 21, 23 (Fla. 1985) (concurrence in part) (quoting *Way v. State*, 67 So. 2d 321, 323 (Fla.1953)).

Thus, comments on a defendant's right to remain silent are generally deemed improper due to the effect that it can have on a jury. *Id*; *see also De Luna v. United States*, 308 F. 2d 140, 152 (5th Cir. 1962) (explaining that "If comment on an accused's silence is improper for judge and prosecutor, it is because of the effect on the jury, not just because the comment comes from representatives of the State. Indeed, the effect on the jury of comment by a co-defendant's attorney might be more harmful than if it comes from judge or prosecutor."). Comments on a person's post-arrest silence are "high risk errors, based on the substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict." *Sharp v. State*, 605 So. 2d 146, 148 (Fla. 1st DCA 1992); (citing *DiGuilio*, 491 So. 2d at 1136–37). Generally, the standard of review for challenged testimony considers whether the comment is "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify. *State v. Thornton*, 491

So. 2d 1143, 1144 (Fla. 1986); *State v. Kinchen*, 490 So. 2d 21 (Fla. 1985).

Here, Sexton's guilt was not at issue. The only issue before the court was Sexton's sentence, and had Sexton waived his right to have a penalty-phase jury. The main reason why comments on silence are deemed improper is because of the effect they can have on the jury. Because Sexton had no jury, there was no possibility of improper influence. Sexton has failed to meet his burden of showing entitlement to relief under the fundamental error standard or even the harmless error standard. *See Jones v. State*, 748 So.2d 1012, 1021 (Fla. 1999); *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986) (Improper comments on a defendant's right to remain silent that are properly preserved are subject to the harmless error analysis). For all these reasons, this claim must be denied.

ISSUE VI

The Court Committed No Error In Its Analysis Of Mitigating Circumstances Where The Only Mitigation Requested By Sexton Was That He Was Amenable To Rehabilitation And A Productive Life In Prison, And The Court Found Additional Mitigation Not Requested By Sexton.

In this issue, Sexton claims that the trial court's sentencing order fails to consider the positive mitigation testimony from Belinda Lister, Madison Setzer, and Lorena Smith. "Under Florida law, when addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." *Davis v. State*, 2 So. 3d 952 (Fla. 2008) (cleaned up).

"[A] defendant must raise a proposed nonstatutory mitigating circumstance before the trial court in order to challenge on appeal the trial court's decision about that nonstatutory mitigating factor." *Ault v. State,* 53 So. 3d 175, 191 (Fla. 2010) (internal citations omitted.) Indeed, because "nonstatutory mitigating evidence is so

individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." *Lucas v. State*, 568 So. 2d 18, 24 (Fla. 1990).

Here, while Sexton argues that the order does not consider the positive mitigation from Lister, Setzer, and Smith, Sexton fails to list what the proposed mitigation was. In fact, it does not appear that Sexton ever outlined what mitigation he was seeking from these witnesses. The sentencing order indicates that Sexton sought mitigation under the catch-all provision, and "The only other factor listed for this subsection is: The Defendant is amendable to rehabilitation and a productive life in prison." (RES. 783). Given that Sexton did not specifically request the mitigation at issue, he cannot now challenge the trial court's failure to consider those mitigating circumstances. *Ault,* 53 So. 3d at 191. By the same token, this Court cannot conduct a meaningful review of this claim when Sexton has not alleged what specific mitigating circumstances the trial court failed to consider.

Even if the court had somehow erred in its consideration of the mitigation, Sexton cannot establish fundamental error. The sentencing order directly states that the court reviewed "The

testimony of […] **Belinda Lister, Madison Setzer, and Lorena Smith** […]" (RES. 774) (emphasis added).

The judge conducted a careful and comprehensive review of Sexton's case to consider every potential mitigating circumstance to the benefit of Sexton, and the court found additional mitigation that was not requested by Sexton. This additional unrequested mitigation included Sexton's lack of criminal history, which was given moderate weight; extreme mental or emotional disturbance, afforded little weight; and substantial impairment, given little weight. Any additional mitigation regarding Sexton's family would have been minimal. The failure of the court to consider this mitigation certainly does not reach down into the validity of the resentencing proceeding itself to the extent that Sexton's death sentence could not have been obtained without the alleged error. *Cf. Card v. State*, 803 So. 2d 613, 627 (Fla. 2001) (finding harmless error for the trial court's failure to find and weigh evidence that the defendant had the support of his family and friends). Sexton's sentence requires affirmance.

ISSUE VII

The Court Understood That It Had The Authority And Discretion To Sentence Sexton To Life In Prison; However, The Court Properly Determined That A Sentence Of Death Was Warranted.

In this claim, Sexton argues that the trial judge misunderstood her role in sentencing, including her discretion to impose a life sentence. In support of his argument, Sexton cites the trial court's assertion that she was "compelled by law" to impose the ultimate penalty in this case." Initial Brief at 115.

When a defendant waives his right to jury sentencing, as Sexton did here, "the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death." § 921.141 (3)(b)(b), Fla. Stat. Thus, the judge has authority to impose either life or death, and the judge chose death in this case. The judge's order did not violate her statutory authority.

The judge clearly understood that she had the discretion to impose a life sentence. When speaking about setting a trial date and selecting a big enough jury panel, the judge explained, "They didn't overturn his guilty verdict. So it's just a matter of…does he get death

again? Does he get life again? Does he get death and then I resentence him to death or I give him life?" (RES. 1063).

After Sexton waived his penalty-phase jury, the judge explained to him, "We're going to redo this whole thing. You have new lawyers. New state attorneys over there. We're going to basically do this from scratch with the sentencing and the Court has an open mind of…what I'm going to hear or what I'm going to do, but the outcome may be the same." (RES. T. 20).

This was a heavily aggravated case due to Sexton's brutal murder and sexual battery of a 94-year-old woman, and the court found the HAC aggravator along with the vulnerable victim and sexual battery aggravators. The court determined that the "nature and quality of the mitigation pales in comparison to the weighty aggravating factors proved beyond a reasonable doubt." (RES. 785). The court sentenced Sexton to death because it found that death was the appropriate sentence for him. No relief is warranted.

ISSUE VIII

The Court's Abandonment Of Proportionality Review Of Death Sentences In No Way Violates Sexton's Eighth Amendment Rights.

In his final claim, Sexton challenges this Court's decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), to eliminate proportionality review of death sentences. In *Lawrence*, this Court held that it lacks constitutional or statutory authority to perform comparative proportionality review.

The conformity clause of the Florida Constitution requires the prohibition against cruel or unusual punishment to be construed in conformity with Eighth Amendment precedent from the United States Supreme Court. Art. 1 § 17, Fla. Const. In *Pulley v. Harris,* 465 U.S. 37, 50-51 (1984), the Supreme Court held that comparative proportionality review of death sentences is not required by the Eighth Amendment.

Therefore, in *Lawrence*, this Court properly recognized that the Florida Constitution's conformity clause "forbids this Court from analyzing death sentences for comparative proportionality in the absence of a statute establishing that review." *Lawrence,* 308 So. 3d at 545.

Since issuing the *Lawrence* opinion, this Court has consistently rejected arguments similar to the ones Sexton makes here. *See, e.g., Wells v. State*, 364 So. 3d 1005, 1015 (Fla. 2023) (concluding that the abandonment of proportionality review does not bolster the defendant's Eighth Amendment challenge); *Sievers v. State*, 355 So. 3d 871, 887 (Fla. 2022) (declining to revisit *Lawrence*); *Truehill v. State*, 358 So. 3d 1167, 1186 (Fla. 2022) (declining to revisit precedent established by *Lawrence*). Sexton's Eighth Amendment challenge and request for this court to revisit *Lawrence* should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, the State of Florida respectfully requests that this Honorable Court deny Sexton's requested relief and affirm his sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October 2023, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal system which will send a notice of electronic filing to the following: Karen M, Kinney, Assistant Public Defender, Office of the Public Defender Tenth Judicial Circuit, Post Office Box 9000-Drawer PD, Bartow, Florida 33831, **kkinney@pd10.org**; **appealfilings@pd10.org; kstockman@pd10.org**.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND TYPE-STYLE REQUIREMENTS

I HEREBY CERTIFY that this document complies with the typeface requirements of Fla. R. App. P. 9.045 because this document contains 13,343 words and has been prepared in a proportionally

spaced typeface using Microsoft Word 10 in 14-point Bookman Old Style.

/s/ Christina Z. Pacheco
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