In the Supreme Court of Florida

ROBERT EARL LEE CRAFT,

Appellant,

v. CASE NO.: SC2023-1501
CAPITAL CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

The record on appeal will be referred to as "IPC" for initial postconviction proceedings, followed by the appropriate page number. The record on appeal of the direct appeal will be referred to as "DAR" for direct appeal record, followed by the appropriate page number. Appellant, ROBERT CRAFT, the defendant in the trial court, will be referred to as appellant, the defendant, or by his last name. The initials "IB" refers to the initial brief, followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

This Court typically conducts an oral argument in the appeal of the denial of the initial postconviction motion in a capital case.

INTRODUCTION

This is an appeal of a summary denial of an initial postconviction motion in a capital case. The first claim was affirmatively waived and is legally insufficient under United States Supreme Court precedent. The remaining claims are procedurally barred as well as legally insufficient under controlling precedent. Because ***all*** of the claims are meritless as a matter of law, the postconviction court properly declined to conduct an evidentiary hearing.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an inmate murder where the capital defendant actively sought a death sentence to be housed on death row instead of being housed in the general population. He entered a guilty plea, waived a penalty phase jury, and presented only limited mitigation at the bench penalty phase.

Facts of the crimes

On May 16, 2018, Craft strangled and beat to death his cellmate, Darren W. Shira, at Columbia Correctional Institution. *Craft v. State*, 312 So.3d 45, 47 (Fla. 2020). Craft confessed multiple times. Craft confessed in two recorded statements to Special Agent Terrance Tyler of the Florida Department of Law Enforcement (FDLE). *Id.* at 47. He also confessed in letters addressed to the State Attorney's Office and to the trial court. *Id.* He admitted to torturing the victim "on purpose" over a 30-minute time span until there was blood coming out of the victim's nose and the victim's eyes were bulging. *Id.* Craft admitted that he planned the murder, started the altercation, and that the victim did not pose any threat to him. *Id.* at 47-48. He planned to murder the victim after learning that the victim was in prison for molesting children. *Id.* at 48. He told FDLE Special Agent Tyler that he wanted the murder to be considered "CCP" and asked if it would be considered a hate crime because the victim was a Jewish, gay, child molester. *Id.* at 48.

Procedural history

On October 1, 2018, Craft was indicted for first-degree premeditated murder. *Craft*, 312 So.3d at 48. He expressed the desire to quickly end his case, plead guilty, waive a penalty phase jury, waive the presentation of mitigation, and receive the death penalty—both in letters to the state attorney's office and in a pro se motion filed in the trial court in January of 2019. *Id.* at 48.

The trial court appointed two mental health experts to determine his competency to proceed. *Craft*, 312 So.3d at 49. On March 25, 2019, the two experts, Dr. Chris P. Robison and Dr. Salvatore M. Blandino, submitted reports finding Craft competent to stand trial. *Id.* at 49 (quoting the experts's findings).

On March 27, 2019, the trial court, based on the experts' reports, orally found Craft to be competent, conducted a *Faretta* inquiry[1], ruled that Craft could waive counsel and represent himself, and appointed Craft's current counsel as standby counsel. *Craft*, 312 So.3d at 49.

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

The trial court then, on the same day, conducted a plea colloquy based on the colloquy outline in *Lynch v. State*, 841 So.2d 362, 376-77 (Fla. 2003). *Craft*, 312 So.3d at 49. The prosecutor recited the factual basis for the plea during the plea colloquy. *Id.* at 49 (quoting the factual basis for the murder charge). The trial court determined that the guilt plea was "freely, voluntarily, knowingly, and intelligently" entered. *Id.* at 50.

On the same day as the plea colloquy, the trial court also conducted a colloquy regarding the waiver of a penalty phase jury. *Craft*, 312 So.3d at 50. The trial court provided the defendant with a "detailed explanation" of the penalty phase and informed him about a bench penalty phase. *Id.* at 50. Craft stated that he understood and that he had "already gone over that with his prior attorney." *Id.* at 50.

The trial court ordered a PSI. *Craft*, 312 So.3d at 50.

On May 13, 2019, the trial court conducted a bench penalty phase. *Craft*, 312 So.3d at 50. Craft maintained his waiver of counsel, his waiver of a penalty phase jury and his waiver of mitigation during the bench penalty phase. *Id.* at 50. The State presented the testimony of

FDLE Agent Tyler, during which Craft's two unredacted recorded confessions were played for the judge. The State admitted photographs of the crime scene. The State also presented the testimony of the medical examiner who performed the autopsy of the victim. The State also admitted photographs and x-rays of the victim's body. The medical examiner testified that the cause of death was strangulation and blunt force trauma to the head. The M.E. explained that when a person is strangled, "it takes four or five minutes of constant pressure blocking the blood flow to the brain to start to cause lethal brain injury." *Id.* at 50. The State introduced a certified copy of Craft's 2015 convictions for aggravated battery with a deadly weapon, aggravated assault with a deadly weapon, and armed false imprisonment to establish the prior violent felony aggravator. The State also introduced three letters that Craft had sent to the State Attorney's Office, one of which was a letter that Craft had sent to the trial court. The letters included admissions by Craft that he had killed the victim and threats to continue to kill in the future.

Despite his prior waiver of mitigation, Craft presented the testimony of four family members, of whom testified about Craft's background, including his traumatic childhood at the bench penalty phase. *Craft*, 312 So.3d at 50. Craft also made a statement during which he admitted to killing the victim. *Id*. at 50-51. He stated that he wanted a death sentence but that he was sorry that his actions had made his family suffer. *Id*. at 50-51.

The prosecutor stated that he was not expecting Craft's family members to testify, due to the prior waiver of mitigation, but urged the trial court to consider any mitigation present in the PSI, the two mental health evaluations, and the court file. *Craft*, 312 So.3d at 51. The State argued that the trial court should find the prior-violent-felony aggravator, the under-sentence-of-imprisonment aggravator, the heinous, atrocious, and cruel (HAC) aggravator, and the cold, calculated, and premeditated (CCP) aggravator. *Id*. at 51.

On June 7, 2019, the trial court held a joint *Spencer*[2] and sentencing hearing. *Craft*, 312 So.3d at 51. Craft again reaffirmed his waiver of counsel. The trial court also made two letters that Craft had written to the judge, which included threats to continue killing while in prison, part of the record, after verifying the letters with Craft. *Id.* at 51. The trial court then sentenced Craft to death.

In the sentencing order, the trial court found four statutory aggravating factors: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation, which it gave great weight; (2) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, which it gave great weight; (3) the capital felony was especially heinous, atrocious, or cruel, which it gave very great weight; and (4) the murder was committed in a cold, calculated, and premeditated manner, which it gave very great weight. *Craft*, 312

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[2] *Spencer v. State*, 615 So.2d 688 (Fla. 1993). As an aside, a *Spencer* hearing should not be required if the penalty phase is a bench penalty phase.

So.3d at 51. The trial court considered but did not find any statutory mitigating circumstances. *Id.* at 51. The trial court found four nonstatutory mitigating circumstances: (1) childhood trauma which it gave little weight; (2) close family ties which it gave slight weight; (3) mental health mitigation, which it gave some weight; and (4) good behavior during trial, which it gave little weight. *Id.* at 51. The trial court found that the aggravating factors "clearly, convincingly, and beyond a reasonable doubt outweigh the mitigating factors." *Id.* at 52. The trial court observed that the mitigating evidence was "minimal and does not come close to outweighing the aggravating factors." *Id.* at 52.

Direct appeal

In the direct appeal to this Court, Craft, represented by Assistant Public Defender Richard M. Bracey, III, raised seven issues: (1) the trial court erred in accepting his waiver of the right to present mitigation; (2) the trial court abused its discretion in assigning little weight to the mitigating circumstance of childhood trauma, which was the same weight assigned to the mitigating circumstance of good behavior during trial; (3) the trial court abused its discretion in

imposing the death penalty without requiring the State to present all mitigating evidence in its possession and without calling mitigating witnesses or appointing special counsel; (4) the trial court abused its discretion by failing to consider all believable and uncontroverted mitigation in the record; and (5) the trial court's errors regarding the mitigation, considered cumulatively, entitled Craft to a life sentence; (6) the trial court fundamentally erred by failing to determine beyond a reasonable doubt that the aggravating factors were sufficient to justify the death penalty; and (7) the trial court's failure to enter a written order finding him competent to proceed requires a remand for entry of a written order. *Craft v. State*, 312 So.3d 45, 52 (Fla. 2020) (SC2020-0953).

This Court also addressed the validity of the guilty plea, as part of the Court's "mandatory sufficiency review." *Id.* at 52 (citing Fla. R. App. P. 9.142(a)(5)).[3] The Florida Supreme Court affirmed the

[3] The Florida Supreme Court did not address the proportionality of the death sentence in the direct appeal based on its recent decision in *Lawrence v. State*, 308 So.3d 544, 546 (Fla. 2020), abolishing proportionality review. *Craft*, 312 So.3d at 52, n.3.

conviction for first-degree murder and the death sentence. *Id.* at 47,58.

On July 31, 2021, Craft, represented by Assistant Public Defender Barbara Busharis, filed a petition for a writ of certiorari in the United States Supreme Court raising a claim based on *Hurst v. Florida*, 577 U.S. 92 (2016), asserting that the jury is required to perform the weighing in a capital case, at the beyond a reasonable doubt standard of proof. The State filed a brief in opposition to the petition relying on *McKinney v. Arizona*, 589 U.S. 139 (2020). Craft filed a reply. On November 15, 2021, the United States Supreme Court denied review. *Craft v. Florida*, 142 S.Ct. 490 (2021) (No. 21-5280).

Initial postconviction proceedings

Judge Paul S. Bryan presided over the original trial proceedings. Judge Melissa Olin, however, presided over the initial postconviction proceedings.

On November 15, 2022, Craft, represented by Capital Collateral Regional Counsel - North (CCRC-N), filed an initial Rule 3.851 motion

for postconviction relief. (IPC at 202-233). The postconviction motion recited the procedural history of the case. (IPC at 203-206). The postconviction motion also detailed the mitigation that Craft had waived including the additional mitigation that postconviction counsel had uncovered. (IPC at 207-209). While the postconviction motion purported to raise only six claims, many of the claims contained subclaims. The postconviction motion, in fact, raised nine claims: (1) a claim of trial court error for not placing Craft under oath prior to the plea colloquy; (2) a claim of ineffectiveness of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), for not having the defendant evaluated by a neuropsychologist prior to the *Faretta*[4] and plea colloquies; (3) a claim of ineffectiveness of trial counsel for not reviewing the discovery material before allowing the defendant to enter a guilty plea and asserting that, if he had the discovery regarding the statements from the victim's prior cellmate, he would not have entered a guilty plea; (4) a claim of prosecutorial misconduct for placing Craft in a cell with a cellmate given his history of threatening and

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

attempting to harm his cellmates; (5) a claim of entrapment for placing Craft in a cell with a cellmate given his prior threats and history; (6) a claim that the prosecutor violated *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), by failing to advise the sentencing court of the guards' role in the victim's death as a mitigating factor; (7) a claim that the prosecutor violated *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), by arguing there was "no pretense of moral justification" regarding the CCP aggravating factor; (8) a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and (9) a claim of cumulative error asserting the errors in the "guilt phase and penalty phase" should be considered "as a whole."[5]

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[5] The initial postconviction motion violated Florida Rule of Criminal Procedural Rule 3.851(e)(1), which requires that each claim "shall be separately pled." *Brown v. State*, 304 So.3d 243, 272 & n.4 (Fla. 2020) (finding a postconviction claim was not properly before this Court because it was not separately pled, as required by Rule 3.851(e)(1)). For example, the first claim in the postconviction motion raised both a claim of ineffectiveness and a claim challenging the validity of the plea, which was not separately pled. CCRC-N routinely ignores Rule 3.851(e)(1). *Brown v. State*, No. SC16-358, 2016 WL 3474843, at *1 (Fla. June 24, 2016) (denying review of a postconviction court's order striking a postconviction motion for noncompliance with rule 3.851(e)(1) filed by CCRC-N). CCRC-N was

On January 17, 2023, the State filed an answer to the postconviction motion. (IPC at 392-425). The State asserted that there was no basis for postconviction relief and explicitly stated, within each claim, that the particular claim should be summarily denied. But the State observed that "further evidentiary development may be necessary" as "to some claims" without identifying any particular claim warranting further evidentiary development. (IPC at 408-409).

On July 6, 2023, the postconviction court, held a case management conference, as required by Rule 3.851(f)(5)(A), commonly referred to as a *Huff* hearing.[6] (IPC at 468-521). At the *Huff* hearing, CCRC-N argued that there is a presumption in favor of evidentiary hearings relying on *Hojan v. State*, 212 So.3d 982, 988-89 (Fla. 2017).

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the attorney of record in both *Brown* appeals. Yet CCRC-N continues to violate the separately-pled requirement of rule 3.851(e)(1), just as it did in this case and as it recently did in *State v. Kenneth Hartley*, 1991-CF-8144 (Duval Cnty June 2, 2023). Months of delay result when postconviction courts enforce the rule and strike the original postconviction motion and then order CCRC-N to file an amended postconviction motion in compliance with the rule. This improper practice is employed by CCRC-N to intentionally cause such delays.

[6] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

(IPC at 470). Postconviction counsel noted that the postconviction court must take all of the facts alleged in the motion as true. (IPC at 470). Postconviction counsel withdrew claim 5, the claim of intellectual disability under *Atkins*, due to Craft's "non-cooperation." (IPC at 471;515-16). Postconviction counsel argued for an evidentiary hearing regarding the remaining claims asserting those claims were not conclusively rebutted by the record. (IPC at 472).

The postconviction court reserved ruling to review her notes on the *Huff* hearing and the case file. (IPC at 516). The postconviction court invited proposed orders. (IPC at 516). Both parties declined to submit proposed orders. (IPC at 516-517).

After the *Huff* hearing, on August 8, 2023, CCRC-N filed a notice of filing of a mental health expert's report. (IPC at 522-527). The expert report, which was dated June 6, 2023, was from Barry M. Crown, a neuropsychologist. (IPC at 523). Dr. Crown examined Craft on June 6, 2023. Dr. Crown used several tests to evaluate Craft, including the Repeatable Battery for the Assessment of Neuropsychological Status (RBANS). (IPC at 525-526). Craft's results

on the RBANS showed significant impairment "consistent with organic brain damage." (IPC at 526). Dr. Crown, using the Test of General Reasoning Ability (TOGRA), reported Craft as likely to be intellectually disabled because he fell within the percentile rank of .5 (IPC at 525). Dr. Crown recommended IQ testing to rule out an intellectual disability. (IPC at 526). He also "strongly" recommended a "DTI-fMRI resting brain scan" which is a type of MRI, be performed. (IPC at 527). Dr. Crown reported neuropsychological impairment to the "frontal lobe and executive function areas." (IPC at 526). His opinion was that the brain damage occurred during early adolescence due to Craft's alcohol and substance abuse. (IPC at 527). Dr. Crown diagnosed Craft with "Major Neurocognitive Disorder Due to Multiple Etiologies, with behavioral disturbance." (IPC at 526).

On September 22, 2023, the postconviction court entered an order declining to conduct an evidentiary hearing on any of the postconviction claims. (IPC at 531-32). The postconviction court concluded "the Defendant did not raise a facially sufficient claim that requires a factual determination, and therefore, an evidentiary hearing

is not required." (IPC at 531). The lower court stated that a detailed order addressing each of the remaining claims would follow. (IPC at 531).

A few days later, on September 26, 2023, the postconviction court entered an order summarily denying the initial postconviction motion. (IPC at 533-553). The postconviction court attached the original experts' reports finding Craft to be competent to stand trial to the order summarily denying the postconviction motion. (IPC at 554-561). The expert report from Chris R. Robison, dated March 26, 2019, as well as the expert report from Salvatore M. Blandino, dated March 26, 2019, were both attached to the final order. *Id*.

Dr. Robison and Dr. Blandino examined Craft together for approximately an hour and a half at Florida State Prison on March 26 2019. (IPC at 554,559). According to Dr. Robison, Craft stated that he was going to represent himself, plead guilty, and waive the presentation of mitigation "with the expressed desire of securing for himself the death penalty." (IPC at 554). Craft stated that he wanted a death sentence to be placed on death row because he liked "being

alone" and having "his privacy." (IPC at 555). He observed that it's "crazy in general population;" "K2 is everywhere;" "People shanking and cutting each other." (IPC at 555). Craft asserted that he wanted to "go to death row to be comfortable." *Id.* Craft noted that the average stay on death row "is 25 years" before a warrant is signed. (IPC at 556). Craft stated that he would "rather be comfortable than do life in prison." (IPC at 556). He threatened to kill again if he was put back in the general population. *Id.*

Dr. Robison reported that Craft was not paranoid or delusional. (IPC at 555). Craft "was alert" and "fully oriented to person, place, date and situation." *Id.* His attention and concentration were mildly impaired. *Id.* His short-term memory was "mildly impaired" but his "long-term memory was intact." *Id.* Dr. Robison noted he had a history of Attention Deficit/Hyperactivity Disorder (ADHD) as a child. *Id.* Craft also "exhibited Conduct Disorder from a young age." *Id.* Dr. Robison diagnosed him with "Antisocial Personality Disorder" and described him "as a prototypical psychopath." (IPC at 555). He functioned "at or near the average range of general intelligence." (IPC

at 555). Craft did not "suffer from any formal thought or mood disorder." (IPC at 555).

Dr. Robison found Craft competent to proceed. (IPC at 555). Craft had a "rational appreciation of his present charge" of first-degree murder for which he may be sentenced to death or life in prison. *Id.* He had "rational appreciation of the range and nature of penalties he faces." *Id.* Dr. Robison found Craft understood the legal process including the role of defense counsel and the right against self-incrimination. (IPC at 556). Dr. Robison found Craft's memory was "intact" and that he was capable of disclosing pertinent facts to his defense attorney and that he had the capacity to testify relevantly. (IPC at 557). Dr. Robison concluded that Craft has a sufficient present ability to consult with counsel with a reasonable degree of rational understanding and has a rational, as well as a factual understanding of the pending proceedings. (IPC at 558).

Dr. Blandino interviewed Craft and reviewed DOC's classification and medical records. (IPC at 271).[7] The report described Craft's family

[7] There are pages missing from Dr. Blandino's report that was attached to the final order but the record contains a complete version

background, educational background, and employment history. (IPC at 271-272). The report recounts Craft's medical history including a serious car accident as a teenager requiring orbital surgery and months of rehabilitation resulting in frontal lobe problems. (IPC at 272). He was supposed to go to a neurologist but didn't. *Id.* He was diagnosed with ADHD which was treated with Adderall, Ritalin, and Seroquel. *Id.* He reported being diagnosed with "Bipolar Manic Depression" which was treated with Remeron and Wellbutrin. (IPC at 272). He was also diagnosed with Antisocial Personality Disorder and sociopathy. (IPC at 272). Dr. Blandino recounted the diagnoses in the DOC records, "ranging from No Diagnosis, Deferred Diagnosis, Adjustment Disorder with Mixed Anxiety and Depressed Mood, Antisocial Personality Disorder and Stimulant Use Disorder" but did not include Bipolar. (IPC at 273). The medical records also contained an incident where Craft admitted he made up a threat of self-harm. *Id.* Dr. Blandino found Craft was oriented as to person, place, date, and time. (IPC at 274). While his short-term memory was impaired, his

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of that same report. (IPC at 559-60); (IPC at 271-277).

long-term memory was intact. Craft's thought processes were also intact. Dr. Blandino found Craft to be competent. (IPC at 274-276).

Dr. Blandino reported that Craft sought to be placed on death row "to be out of the general prison population" and the "desire to be comfortable." (IPC at 276). Craft stated that he would kill again if necessary to get a death sentence. *Id*.

The final order also contained Dr. Barry M. Crown's mental health report. (IPC at 562-566).

On October 31, 2023, Craft, represented by CCRC-N, filed a notice of appeal. (IPC at 664-665). This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I

Craft asserts the postconviction court improperly summarily denied the claim of ineffectiveness for failing to delay the colloquy required by *Faretta v. California*, 422 U.S. 806 (1975), to obtain neuropsychological testing to determine brain damage. There was no deficient performance because any motion to continue the *Faretta* hearing based on *Indiana v. Edwards*, 554 U.S. 164 (2008), would be meritless and counsel is not deficient for not filing meritless motions. Nor was counsel deficient for not consulting with a third mental health expert regarding neuropsychological testing after two mental experts had found his client was competent to waive counsel and enter a guilty plea. Counsel is entitled to rely on the opinion of qualified experts. As the postconviction court properly concluded, defense counsel was not ineffective because there was "no basis to request the court delay the *Faretta* hearing."

There was also no prejudice because Craft's brain damage, unless severe, would not have affected the outcome. Craft, who had been

found to be competent would still have been entitled to enter a plea under *Godinez v. Moran*, 509 U.S. 389 (1993), with or without counsel. The decision to enter a guilty plea is a personal decision of the defendant's that counsel cannot prevent or delay.

Craft also asserts his guilty plea was unknowingly entered due to some of the discovery being inaccessible. But any claim of the plea being unknowing due to the inaccessible discovery was waived. Moreover, any claim challenging the guilty plea is procedurally barred by the law-of-the-case doctrine. On the merits, the plea was voluntary regardless of discovery under *United States v. Ruiz*, 536 U.S. 622 (2002). A plea certainly is not rendered unknowingly entered because the proper equipment to access the recording provided in discovery was not available to a pro se defendant. Craft's guilty plea was voluntary, knowingly, and intelligently entered, regardless of any discovery. The postconviction court properly summarily denied this claim of ineffectiveness of counsel for not delaying the proceedings and the knowing challenge to the guilty plea.

ISSUE II

Craft asserts the postconviction court improperly summarily denied the Due Process claim of prosecutorial misconduct for failing to investigate, prior to the guilty plea, a possible affirmative defense of objective entrapment. Craft claims that the guards entrapped him into committing murder by placing him in the same cell as the victim. A prosecutor has no duty under the due process clause to investigate a defendant's affirmative defense for him. A prosecutor only has a due process obligation to disclose exculpatory and impeaching information he collects in the course of his own investigation. Due process does not mandate a prosecutor investigate anything solely for the benefit of the defense. Alternatively, there is no valid defense of entrapment. Guards placing the defendant in the same cell as another inmate, regardless of that other inmate's history, is not entrapment. Craft admitted that he planned the murder, started the altercation, and that the victim did not pose any threat to him. Craft's assertion that he would not have entered a guilty plea if he had known more about the victim and the guards is conclusively rebutted by the record of his

own statements regarding his reason for entering a guilty plea. The postconviction court properly summarily denied the claim of prosecutorial misconduct for failing to fully investigate an entrapment defense.

ISSUE III

Craft asserts that the postconviction court improperly summarily denied the claim of a violation of *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), based on the prosecutor's failure to identify the guard's conduct of housing the defendant with the victim as possible mitigation to the sentencing court. But *Muhammad* does not apply to this case, as this Court has already held. *Craft v. State*, 312 So.3d 45, 53 (Fla. 2020). While Craft originally waived the presentation of mitigation, he ultimately presented four family members as mitigation witnesses. *Muhammad* only applies to cases involving a complete waiver of mitigation. Alternatively, even if *Muhammad* applied, that decision only requires the prosecutor to place into the record the mitigation already in its possession. *Muhammad* does not require the

prosecutor to investigate additional mitigation for the benefit of a defendant. Nor does *Muhammad* require a prosecutor to identify or propose particular mitigation to the sentencing court or to argue for the defense in mitigation. As the postconviction court properly found the prosecutor fulfilled any obligation regarding mitigation (which was none because *Muhammad* does not apply to this case). Because there is no legal basis for the claim, the postconviction court properly summarily denied the claim.

ISSUE IV

Craft asserts that the postconviction court improperly summarily denied the claim that the prosecutor's closing argument of the penalty phase violated *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959). He argues that the prosecutor's omission of the word "pretense" from the phrase "without any pretense of moral or legal justification" and the prosecutor misstating the evidence regarding the victim, in the closing argument of a bench penalty phase, was a due process violation. But this due process

claim is procedurally barred because it should have been raised in the direct appeal. Neither *Giglio* nor *Napue* apply to prosecutor comments claims. Rather, it is *Darden v. Wainwright*, 477 U.S. 168 (1986), that governs such due process claims. There was no violation of due process from the prosecutor's comments. It was Craft's responsibility to argue that the cold, calculated, and premeditated (CCP) aggravating factor did not apply by asserting his pretense of a justification for the murder in his closing argument, rather than the prosecutor's. Moreover, a prosecutor's misstatement of the evidence or omission certainly cannot violate due process at a bench penalty phase where the argument is being made solely to the judge who knows the evidence presented and the law regarding the CCP aggravator. The postconviction court properly summarily denied the due process claim regarding the prosecutor's comments.

ISSUE V

Craft asserts that the postconviction court improperly summarily denied the claim of cumulative error. IB at 47. But claims of

cumulative error regarding trial court errors are not cognizable in postconviction litigation. Claims of cumulative error in postconviction proceedings are limited to collective consideration of postconviction claims. Alternatively, the claim of cumulative error regarding trial court errors is procedurally barred in postconviction litigation because such claims should have been raised in the direct appeal. On the merits, the postconviction court properly found each of the postconviction claims was either "procedurally barred, conclusively refuted by the record, or without merit" and therefore, properly concluded that the claim of cumulative error failed. The postconviction court properly summarily denied the claim of cumulative error.

ARGUMENT

ISSUE I

Whether the Postconviction Court Properly Summarily Denied the Claim of Ineffectiveness of Trial Counsel for Failing to Delay the *Faretta* Colloquy to Obtain Neuropsychological Testing and that the Guilty Plea was Unknowingly Entered Due to Some of the Discovery being Inaccessible? (Restated)

Craft asserts the postconviction court improperly summarily denied the claim of ineffectiveness of trial counsel for failing to delay the colloquy required by *Faretta v. California*, 422 U.S. 806 (1975), to obtain neuropsychological testing. IB at 20. Postconviction counsel seems to be invoking *Indiana v. Edwards*, 554 U.S. 164 (2008), to argue that, while Craft was sufficiently competent to stand trial, he was not sufficiently competent to represent himself due to his brain damage. But *Edwards* does not apply to guilty pleas. Defense counsel was not deficient for not attempting to invoke *Edwards* because any motion to continue the *Faretta* hearing based on *Edwards* would be meritless and counsel is not deficient for not filing meritless motions. Nor was counsel deficient for not consulting with a third mental health expert after two mental experts had found his

client was competent to waive counsel and enter a guilty plea. Counsel is entitled to rely on the opinion of qualified experts. As the postconviction court properly concluded, defense counsel was not ineffective because there was "no basis to request the court delay the *Faretta* hearing." (IPC at 539).

There was also no prejudice because Craft's brain damage, unless severe, would not have affected the outcome. Craft, who had been found to be competent would still have been entitled to enter a plea under *Godinez v. Moran*, 509 U.S. 389 (1993), with or without counsel. The decision to enter a guilty plea is a personal decision of the defendant's that counsel cannot prevent or even "delay."

Craft also asserts his guilty plea was unknowingly entered due to some of the discovery being inaccessible. IB at 28. Any claim of the plea being unknowing due to incomplete discovery was waived. During the plea colloquy, the trial court specifically asked Craft if he wanted to wait to enter a plea until the discovery issue was resolved but Craft stated that he wanted to enter the guilty plea regardless of the discovery issue. Moreover, any claim challenging the guilty plea

is procedurally barred by the law-of-the-case doctrine. This Court has already found that the plea was "knowing, intelligent, and voluntary" entered in the direct appeal. *Craft v. State*, 312 So.3d 45, 58 (Fla. 2020). On the merits, the plea was voluntary regardless of discovery. The United States Supreme Court held that a plea is still valid and knowingly entered, regardless of a defendant not having complete information in *United States v. Ruiz*, 536 U.S. 622 (2002). A plea certainly is not rendered unknowingly entered because the proper equipment to access the recordings provided in discovery was not available to a pro se defendant. Craft's guilty plea was voluntary, knowingly, and intelligently entered, regardless of the incomplete discovery.

The postconviction court properly summarily denied this claim of ineffectiveness of counsel for not delaying the proceedings and the knowing challenge to the guilty plea.

Summary denials of postconviction claims

A postconviction claim may be summarily denied if it is conclusively rebutted by the existing record. Fla. R. Crim. P.

3.851(f)(5)(B). But it is also proper for a postconviction court to summarily deny postconviction claims on the grounds of being not retroactive, untimely, procedurally barred, legally insufficient, meritless as a matter of law under controlling precedent, or for not being cognizable at all.

This Court has affirmed the summary denial of a successive postconviction claim on nonretroactivity grounds. *Bogle v. State*, 288 So.3d 1065, 1069 (Fla. 2019). This Court has held, in an active warrant case, that the lower court properly summarily denied the successive postconviction claim as untimely citing Fla. R. Crim. P. 3.851(e)(2). *Owen v. State*, 364 So.3d 1017, 1023 (Fla. 2023); *Dailey v. State*, 329 So.3d 1280, 1287 (Fla. 2021) (affirming the summary denial of a successive postconviction claim as untimely), *cert. denied*, *Dailey v. Florida*, 143 S.Ct. 272 (2022). This Court has also held that the lower court may properly summarily deny a postconviction claim that is procedurally barred. *Owen v. State*, 364 So.3d 1017, 1025 (Fla. 2023) (citing *Matthews v. State*, 288 So.3d 1050, 1060 (Fla. 2019)); *Gaskin v. State*, 361 So.3d 300, 306 (Fla. 2023) (holding, in an active

warrant case, that the lower court properly summarily denied a successive postconviction claim regarding omitted mitigation as being procedurally barred because a similar claim was raised in the initial postconviction motion), *cert. denied*, *Gaskin v. Florida*, 143 S.Ct. 1102 (2023). This Court has also affirmed the summary denial of postconviciton claims that are "legally insufficient" or are meritless as a matter of law. *Hutchinson v. State*, 343 So.3d 50, 53 (Fla. 2022) (affirming the summary denial of a successive postconviction claim of newly discovered evidence as being "legally insufficient" because the claim did not meet the legal test of *Jones v. State*, 709 So.2d 512 (Fla. 1998)), *cert. denied*, *Hutchinson v. Florida*, 143 S.Ct. 601 (2023); *Valentine v. State*, 339 So.3d 311, 313 (Fla. 2022) (stating a postconviction court may summarily deny a claim that is legally insufficient citing *McDonald v. State*, 296 So.3d 382, 383 n.2 (Fla. 2020)), *cert. denied*, *Valentine v. Florida*, 143 S.Ct. 378 (2022); *Morris v. State*, 317 So.3d 1054, 1071 (Fla. 2021) (affirming the summary denial of a successive postconviction claim of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), as being "legally insufficient" because

the claim did not meet the legal test to establish a *Brady* violation); *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (affirming the summary denial of a postconviction claim that was a purely legal claim which was meritless under the controlling precedent); *Zack v. State*, 2018 WL 4784204 (Fla. Oct. 4, 2018) (affirming the summary denial of a successive postconviction claim as being meritless as a "matter of law" under the controlling Florida Supreme Court precedent); *Zack v. State*, 371 So.3d 335, 348 (Fla. 2023) (explaining that because Florida courts lack the authority to extend *Atkins v. Virginia*, 536 U.S. 304 (2002), to other types of diagnoses under the state constitution, the postconviction court properly summarily denied the claim as "meritless"), *cert. denied*, *Zack v. Florida*, 144 S.Ct. 274 (2023). Postconviction claims that are not cognizable are also properly summarily denied. *Sweet v. State*, 293 So.3d 448, 453 (Fla. 2020) (affirming the summary denial of a successive postconviction claim because claims of ineffectiveness of postconviction counsel are not cognizable), *cert. denied*, *Sweet v. Florida*, 141 S.Ct. 909 (2020).

Evidentiary hearings

Evidentiary hearings are held to establish the historical facts and to resolve factual disputes. *Truehill v. State*, 358 So.3d 1167, 1186 (Fla. 2022) (affirming the summary denial of a fair cross-section postconviction claim where the defendant failed "to assert what factual dispute would be resolved at an evidentiary hearing"); *Rogers v. State*, 327 So.3d 784, 787 (Fla. 2021) (stating that a postconviction court should hold an evidentiary hearing whenever the movant makes "a facially sufficient claim that requires a factual determination" quoting *Pardo v. State*, 108 So.3d 558, 560 (Fla. 2012), and *Parker v. State*, 89 So.3d 844, 855 (Fla. 2011)). But opposing counsel fails to identify any factual disputes regarding any of the claims.

It is also proper for a postconviction court to refuse to conduct an evidentiary hearing where the legal basis for the claim was not established. *Truehill*, 358 So.3d at 1186 (affirming the summary denial of a claim of ineffectiveness for failing to move for a change of venue when the brief provided "no legal basis or explanation as to why a change-of-venue motion would have been granted" which was "legally insufficient to show why an evidentiary hearing was

warranted"); *Rogers*, 327 So.3d at 787 (requiring a "a facially sufficient claim" be made for an evidentiary hearing).

Here, it simply does not matter what facts Craft could establish at an evidentiary hearing regarding inmate Bullet's statements to FDLE Agent Tyler regarding the DOC guards' animus toward the victim. Opposing counsel openly admits that all the other postconviction claims relate back to this core claim. IB at 48. But the guards' conduct is legally irrelevant. Indeed, their conduct is legally irrelevant twice over. It is irrelevant to the validity of Craft's guilty plea as a matter of law, as will be explained in greater detail. *United States v. Ruiz*, 536 U.S. 622 (2002). And, alternatively, it would not provide an affirmative defense to first-degree murder or a means of negating any aggravating factor, including the CCP aggravator. No version of the guards' conduct would entitle Craft to any postconviction relief. As the postconviction court properly determined the guards did not encourage Craft to murder the victim and, even if guards had done so, Craft could have just declined to do so. Postconviction courts are not

required to conduct evidentiary hearings to establish facts that are legally of no moment.

Craft relies on *Hojan v. State*, 212 So.3d 982, 988-89 (Fla. 2017), to assert he was entitled to an evidentiary hearing. IB at 16. This Court, in *Hogan*, noted the established rule that a capital defendant is "presumptively entitled to a postconviction evidentiary hearing" in initial postconviction proceedings. *Id.* at 988. "An evidentiary hearing must be held on an initial 3.851 motion whenever the movant makes a facially sufficient claim that requires factual determination." *Id.* at 988.

But Craft has not made a legally sufficient postconviction claim that requires a factual determination. None of the postconviction claims was legally viable. As the postconviction court properly determined, all of the claims were either "procedurally barred, conclusively refuted by the record, or without merit." *Hojan* does not apply.

Opposing counsel also relies on the State's answer filed in the lower court which she interprets as a concession that an evidentiary

hearing must be held. Nearly every one of the issues raised in the initial brief filed in this Court begins with a quote from the State's answer that an evidentiary hearing may be necessary. IB at 20, 32, 39 & 44. The State explicitly averred, however, in its answer, that each of the six postconviction claims "should be summarily denied." (IPC at 414; 416; 419; 421; 423; 423). The State asserted that, while there was no basis for postconviction relief, "further evidentiary development may be necessary to fully refute the Defendant's arguments as to some of the claims" without identifying any particular claim that required an evidentiary hearing. (IPC at 408).

Even if the State had explicitly agreed to an evidentiary hearing as to a particular claim, such an agreement is not a concession of error on appeal. The State often agrees to an evidentiary hearing on postconviction claims simply in an abundance of caution. For example, the State often agrees to an evidentiary hearing on claims of ineffectiveness in initial postconviction motions to obtain testimony regarding trial counsel's strategy, especially if trial counsel is going to be testifying regarding another claim of ineffectiveness. It is also

beneficial to hold an evidentiary hearing on postconviction claims in state court due to the extraordinarily high deference paid to the state courts' rulings in federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), if a hearing on the matter is held in state court. Moreover, it is better for the State to agree to an evidentiary hearing on more postconviction claims rather than less postconviction claims to prevent the delays that occur if this Court disagrees about the necessity for an evidentiary hearing and remands the case for an evidentiary hearing on a postconviction motion that was originally summarily denied, which can result in years of delay.[8] None of that amounts to a concession of error.

Nor does the Assistant Attorney General answering the postconviction motion being prudent and agreeing to an evidentiary hearing regarding a postconviction claim amount to some form of judicial estoppel, as opposing counsel would have it. The doctrine of

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[8] There was, for example, a seven-year delay in *Rivera*. *Rivera v. State*, 995 So.2d 191 (Fla. 2008) (remanding for an evidentiary hearing on postconviction motion that was originally summarily denied); *Rivera v. State*, 187 So.3d 822 (Fla. 2015) (affirming denial of postconviction relief following the remand).

judicial estoppel does not apply to such a situation. Indeed, the doctrine may not even apply to the State in a criminal case.

But even applying the doctrine, under judicial estoppel, a party must take a position that is "clearly inconsistent" with its earlier position. *Zedner v. United States*, 547 U.S. 489, 504 (2006) (noting judicial estoppel requires a party's later position must be "clearly inconsistent" with its earlier position). Here, the State did not take inconsistent positions. The State asserted that every one of the claims should be summarily denied in its answer filed in the lower court and that is the State's position on appeal as well. So, judicial estoppel does not apply.

But, to the extent that the State's one sentence statement in its answer that an evidentiary hearing may be necessary on some unidentified claims can be viewed as actually taking a position on the matter of whether an evidentiary hearing should be held, the doctrine would still not apply. The doctrine requires that the court adopt the party's position. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (stating that absent success in a prior proceeding, "a party's

later inconsistent position introduces no risk of inconsistent court determinations," and "thus poses little threat to judicial integrity"); *see also Stephens v. Tolbert*, 471 F.3d 1173, 1177 (11th Cir. 2006) (concluding that judicial estoppel did not apply both because the positions taken were not inconsistent and because the party had not persuaded the magistrate judge to accept that position). Here, the lower court did not adopt the view that an evidentiary hearing was required, so again the doctrine does not apply. Even if the State takes a strong position in its answer in the lower court that an evidentiary hearing should be held on a particular claim, which the postconviction court rejects and refuses to conduct an evidentiary hearing on that claim, because that is a rejection of the State's position, the State is *not* estopped from defending the trial court's decision not to conduct an evidentiary hearing on that claim on appeal before this Court.

Opposing counsel's attempt to invoke the doctrine of judicial estoppel fails and will likewise fail in every similar case. The State may defend the postconviction court's decision to summarily deny the postconviction motion on appeal.

The postconviction court properly determined that no evidentiary hearing was required on any of the postconviction claims.

The postconviction court's ruling

The postconviction court summarily denied the claim. (IPC at 535-43). The postconviction court found the claim of ineffectiveness for failing to delay the proceedings to be "without merit." (IPC at 537). The postconviction court discussed Dr. Crown's neuropsychological evaluation which essentially indicated that Craft had brain damage. (IPC at 538). The postconviction court observed, however, that brain damage does not "equate with mental incompetence." (IPC at 538). The lower court noted that Craft had been evaluated by two mental health experts who had found him to be competent before the plea hearing. (IPC at 538). The postconviction court concluded that counsel was not ineffective because "counsel had no basis to request the court delay the *Faretta* hearing" or to override the defendant's express desire to represent himself. (IPC at 539).

The postconviction court also concluded standby counsel was not ineffective for not requesting the court delay the plea hearing for the defendant to review the State's discovery including the interview with inmate Bullett. (IPC at 539). The postconviction court noted that during the plea colloquy when the trial court asked Craft if he wanted to continue the plea hearing to be able to review all of the discovery before entering any plea, Craft told the trial court that he wanted to enter a plea regardless of the missing discovery material. (IPC at 539 citing 2019 plea hearing at 65-67). There was "no basis for standby counsel to seek to override" the defendant's wish to enter a guilty plea regardless of the issues with the discovery of the recorded interview and availability of the equipment. (IPC at 539).

The postconviction court noted that during the *Huff* hearing, postconviction counsel acknowledged that Craft was competent. (IPC at 539). The lower court concluded the challenge to the guilty plea was barred by the law-of-the-case doctrine. (IPC at 539-540 citing *Thompson v. State*, 341 So.3d 303, 306 (Fla. 2022), *cert. denied Thompson v. Florida*, 143 S.Ct. 592 (2023)). The postconviciton court

noted the two month delay between the request to proceed *pro se* and the *Faretta* colloquy and the plea colloquy. (IPC at 540). (IPC at *). (IPC at 540). The postconviction court concluded based on the two mental health experts' reports and the plea colloquy itself that Craft's decision to enter a guilty plea was not impulsive or uninformed. (IPC at 540-541). The lower court noted that Craft had "specific, rational reasons for pleading guilty and requesting the death penalty." (IPC at 540). The lower court noted that according to Craft himself he had been thinking about entering a guilty plea for approximately ten months. (IPC at 540). The postconviction court concluded that there was no reasonable probability the outcome of the proceedings would have been different. (IPC at 541).

The postconviction court rejected Craft's assertion that he would not have entered a guilty plea if he had known about the interview with inmate Bullet contained in the inaccessible discovery. (IPC at 542 citing *Long v. State*, 183 So.3d 342, 345 (Fla. 2016); *Grosvenor v. State*, 874 So.2d 1176 (Fla. 2004)); *Griffin v. State*, 114 So.3d 890, 899 (Fla. 2013)). The lower court explained that to determine whether a

reasonable probability exists that a defendant would have insisted on going to trial rather than entering a plea, a court should consider whether a particular defense was likely to succeed at trial. (IPC at 542 citing *Griffin*, 114 So.3d at 899, *Grosvenor*, 874 So.2d at 1181, and *Long*, 183 So.3d at 345-46). The postconviction court found that there was "no reasonable probability that, had the Defendant known the contents of the State's interview with inmate Bullett, he would not have pled guilty" and instead insisted on going to trial. (IPC at 542). The lower court noted Craft gave a "detailed confession" and "repeatedly stated he would continue killing while in prison to ensure he received the death penalty, because he believed he would be more comfortable on death row." (IPC at 542).

Standard of review

The standard of review of a summary denial of a postconviction motion is de novo. The decision of a trial court of whether to grant an evidentiary hearing is ultimately based on written materials and its ruling is essentially a pure question of law, subject to de novo review.

Dailey v. State, 329 So.3d 1280, 1284 (Fla. 2021) (citing *Grossman v. State*, 29 So.3d 1034, 1042 (Fla. 2010)); *Reynolds v. State*, 99 So.3d 459, 471 (Fla. 2012). This Court accepts the factual allegations as true to the extent that they are not refuted by the record. *Cannon v. State*, 310 So.3d 1259, 1264 (Fla. 2020) (citing *Troy v. State*, 57 So.3d 828, 834 (Fla. 2011)).[9]

Waiver

Any claim regarding the voluntariness of the plea based on the lack of discovery information regarding inmate Bullett's statements about the guards and the victim or the victim's background was waived.

Craft requested that his current attorney, Assistant Public Defender Nathan Marshburn, become standby counsel. (DAR 45). Following a full *Faretta* colloquy, Craft was permitted to represent himself. (DAR at 20, 40-45).

[9] In the interest of brevity, the State will not repeat the standard of review for each issue because the same de novo standard of review governs all the issues raised in this appeal.

During the *Faretta* colloquy, Craft told the trial court that serving time on death row was more comfortable and that there was "more peace" on death row and you had your "own space" and "own time." (DAR at 29). He explained that this would be his third incarceration and he refused to serve a life sentence in prison. (DAR at 29). These were his stated reasons for entering a guilty plea.

During the plea colloquy, Craft was representing himself. Craft had filed a demand for discovery. (DAR 65). Craft explained that he went over the index of the discovery and observed that certain items in the discovery were missing. (DAR 65). The trial court asked Craft if he wanted to wait until he had all of the discovery to enter a guilty plea but Craft told the trial court that he wanted to enter the plea regardless of the discovery issue. (DAR 65). Craft stated that he just wanted the discovery for his own records later. (DAR 65).

At the start of the bench penalty phase, the prosecutor informed the trial court that Craft had written a letter to the court stating that DOC had not permitted him to have the equipment to review the discovery regarding the interview between FDLE Agent Tyler and

inmate Bullett. (DAR 10). Craft told the trial court that he wanted to proceed, including with his waiver of counsel and his waiver of mitigation, regardless of the discovery issue. (DAR 10).

Craft may not now assert his plea was invalid due to the missing discovery. Craft personally and affirmatively waived any claim that his plea was involuntary on the basis of lack of knowledge regarding the interview or the inaccessibility of some of the discovery. The claim of involuntariness of the plea for being unknowingly entered was waived.[10]

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[10] This waiver argument was not made below in the State's answer. But, under the "tipsy coachman" principle, as the appellee who has prevailed below, the State, may make any argument in support of the postconviction court's ruling that is supported by the record. *State v. Hankerson*, 65 So.3d 502, 505 (Fla. 2011) (citing *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644-45 (Fla. 1999)); *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1269, n.6 (11th Cir. 2008) (explaining the origin of the name of the rule is from a poem and observing Georgia has had the rule since 1879 and Florida has had the rule since 1963). The federal courts employ the same reasoning as the "tipsy coachman" principle but refer to this long standing appellate principle by its alternative name of the right-for-the-wrong-reason principle. *Wong Doo v. United States*, 265 U.S. 239, 241 (1924) (explaining that the "judgment was right, although a wrong reason was given for it" and affirming); *United States v. Brown*, 2023 WL 4398497, at *4 (10th Cir. July 7, 2023) (noting the longstanding principle that appellate courts do not reverse trial judges when they reach the right result for the wrong legal reason and

Merits

A defendant who represents himself may not raise claims of ineffectiveness. Craft was representing himself at the time he entered the guilty plea.

Claims of ineffectiveness and *Strickland*

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established the standard for effective assistance of counsel. A defendant must establish both deficient performance by counsel and prejudice to him. A defendant has the burden to establish both deficient performance and prejudice. *Sheppard v. State*, 338 So.3d 803, 816 (Fla. 2022). There is a strong presumption that trial counsel's performance was not deficient. *Sheppard*, 338 So.3d at 816 (citing *Strickland*, 466 U.S. at 669). To establish prejudice, the

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observing that the reason for the principle is "obvious" — it "would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground" quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). The State is not limited to the reasons given by the postconviction court in its arguments on appeal before this Court to those arguments made below.

defendant must show that there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. It is not sufficient to allege some conceivable effect regarding the prejudice prong. *Strickland*, 466 U.S. at 693. Rather, the likelihood of a different result must be "substantial, not just conceivable." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011), and *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

Ineffectiveness and self-representation

A defendant who represents himself may not raise claims of ineffectiveness. In the words of the United States Supreme Court, a "defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Faretta v. California*, 422 U.S. 806, 834, n.46 (1975). This Court has long rejected claims of ineffectiveness raised by defendants who represented themselves. *Bundy v. State*, 497 So.2d 1209, 1210 (Fla. 1986) (rejecting a claim of ineffectiveness where the defendant represented himself quoting *Faretta*, 422 U.S. at 834, n.46);

Jones v. State, 449 So.2d 253, 258-59 (Fla. 1984) (same). The Eleventh Circuit limits any claims of ineffectiveness from a defendant who represented himself to the points in the case, if any, where counsel was representing the defendant. *United States v. Roggio*, 863 F.2d 41, 43 (11th Cir. 1989) (limiting the claim of ineffectiveness to the pre-trial proceedings where the defendant was represented by counsel quoting *Faretta*, 422 U.S. at 834, n.46); *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 762 (11th Cir. 2010) (limiting the claim of ineffectiveness to the *Spencer* hearing where the defendant was represented by counsel quoting *Faretta*, 422 U.S. at 834, n.46). Craft may not raise any claims of ineffectiveness of counsel regarding the guilty plea because he was representing himself at that point.

This prohibition on pro se defendants raising claims of ineffectiveness against themselves includes any investigation that should have been conducted prior to the entry of the guilty plea. Once Craft decided to represent himself it was his personal duty to investigate any affirmative defenses to the charges of murder before entering a guilty plea.

Ineffectiveness and standby counsel

At the time the plea was entered, A.P.D. Marshburn was standby counsel, not counsel of record. The extensive *Faretta* colloquy conducted by the trial court occurred prior to the plea colloquy; the guilty plea was entered later after a break. So, Craft was representing himself when he entered the guilty plea.

There is no such claim as a claim of ineffectiveness of standby counsel. While the postconviction court analyzed the claim of ineffectiveness of standby counsel, because the law is clear that there is no such claim, the State will not analyze this claim any further. As explained previously, under the "tipsy coachman" principle, the appellee may make any argument in support of the postconviction court's ruling that is supported by the record regardless of the lower court's actual ruling. *Hankerson*, 65 So.3d at 505; *Radio Station WQBA*, 731 So.2d at 644-45; *Wong Doo*, 265 U.S. at 241); *Chenery Corp.*, 318 U.S. at 88 (1943).

While a trial court may appoint standby counsel, it is not constitutionally required to do so. *Faretta v. California*, 422 U.S. 806, 834, n.46 (1975) (noting a court may appoint standby counsel to be

available to represent the accused in the event that termination of the defendant's self-representation is necessary); *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) (explaining the role of standby counsel including assisting the defendant). There is no Sixth Amendment right to standby counsel and therefore, no right to the effective assistance of standby counsel. *Jones v. State*, 449 So.2d 253, 258 (Fla. 1984) (noting the appointment of standby counsel is not constitutionally required); *United States v. Cohen*, 888 F.3d 667, 680 (4th Cir. 2018) (observing that it is settled that a defendant has no right to the appointment of standby counsel).

Standby counsel is appointed for the convenience of the court. "The purpose of standby counsel is to assist the court in conducting orderly and timely proceedings." *Behr v. Bell*, 665 So.2d 1055, 1056 (Fla. 1996) (citing *Jones v. State*, 449 So.2d 253, 258 (Fla. 1984)). This Court has explained "it is prudent of the court to appoint standby counsel" to observe the trial to be prepared "to represent defendant in the event" it becomes "necessary to restrict or terminate self-representation." *Behr*, 665 So.2d at 1056 (citing *Jones*, 449 So.2d

at 258). "Standby counsel does not represent the defendant." *United States v. Taylor*, 933 F.2d 307, 313 (5th Cir. 1991). Standby counsel is basically acting as counsel for the court, not second-chair or part-time counsel for the defendant. *Cf. Mosley v. State*, 349 So.3d 861, 870 (Fla. 2022) (noting there is no constitutional right to hybrid representation quoting *Mora v. State*, 814 So.2d 322, 328 (Fla. 2002), and citing *Sheppard v. State*, 17 So.3d 275, 279 (Fla. 2009)), *cert. denied*, *Mosley v. Florida*, 143 S.Ct. 1028 (2023). Indeed, standby counsel is prohibited from taking too large a role in the proceedings when a defendant is appearing pro se. In the words of the United States Supreme Court, a "pro se defendant must be allowed to control the organization and content of his own defense" in relation to standby counsel. *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). The primary focus is on "whether the defendant had a fair chance to present his case in his own way" without "unsolicited and excessively intrusive participation by standby counsel." *Wiggins*, 465 U.S. at 177-78. Bottom line, a defendant who represents himself may not raise a

claim of ineffectiveness regarding the conduct of an attorney that he fired.[14]

Personal right to enter a plea

Alternatively, even if A.P.D. Marshburn had still been representing Craft before the plea colloquy, counsel could not be found to be ineffective because the right to enter a plea is personal to the defendant. *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018) (observing that some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's

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[14] *State v. Gunther*, 768 N.W.2d 453 (Neb. 2009) (holding there is no federal or state right to the effective assistance of standby counsel and affirming the summary denial of claims of ineffectiveness of standby counsel); *Commonwealth v. Bryant*, 855 A.2d 726, 737 (Pa. 2004) (concluding that claims of ineffective assistance of standby counsel are not cognizable unless the defendant requested that standby counsel take over as trial counsel); *United States v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998) (stating that a defendant is not entitled to relief for the ineffectiveness of standby counsel citing *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997)); *United States v. Oliver*, 630 F.3d 397, 414 (5th Cir. 2011) (explaining that a defendant is not entitled to relief on a claim of ineffectiveness of standby counsel); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006) (stating that the inadequacy of standby counsel cannot give rise to an ineffective assistance of counsel claim).

own behalf, and forgo an appeal citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)); *Puglisi v. State*, 112 So.3d 1196, 1203 (Fla. 2013) (quoting *Jones v. Barnes* and *United States v. Burke*, 257 F.3d 1321 (11th Cir. 2001)). So, even if A.P.D. Marshburn had still been counsel of record at the time of the plea colloquy, instead of being standby counsel by that point, he could not have prevented Craft from entering a guilty plea. Counsel had no ability to prevent Craft from entering a guilty plea under the law. Counsel cannot do the impossible. *United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984). Either way, with or without counsel, Craft would have entered a guilty plea, as is his personal right to decide to do, regardless of his counsel's viewpoint.

Counsel's performance was not deficient for respecting his client's desire to represent himself or to enter a guilty plea, even if that desire is based on his client's wish not to spend the rest of his life in the general prison population.[15] Competent Sixth Amendment counsel

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[15] *Wickham v. State*, 124 So.3d 841, 860 (Fla. 2013) (concluding a *Strickland* ineffectiveness claim was "without merit because trial counsel was following his client's wishes" to waive any requirement for immediate written findings regarding the death penalty and to proceed directly with sentencing); *Brown v. State*, 894 So.2d 137, 146 (Fla. 2004) (stating an "attorney will not be deemed ineffective for honoring

is not required to take steps to attempt to undermine his client's desire to represent himself, to enter a guilty plea, or even his desire to seek a death sentence. *McCoy v. Louisiana*, 584 U.S. 414, 422-23 (2018) (holding the defendant had the right to insist his attorney did not concede his guilt to the triple homicide even though his counsel reasonably believed it was the best chance to avoid a death sentence because the defendant's objectives, including that a life in prison is not worth living, should prevail over the attorney's).

Competency to enter a guilty plea

Postconviction counsel asserts that trial counsel was ineffective for not delaying the *Faretta* colloquy until after neuropsychological testing was done to attempt to establish Craft suffered from frontal lobe

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his client's wishes" citing *Waterhouse v. State*, 792 So.2d 1176, 1183 (Fla. 2001), and *Sims v. State*, 602 So.2d 1253, 1257-58 (Fla.1992)); *Clark v. Att'y. Gen. of Fla.*, 821 F.3d 1270, 1285 (11th Cir. 2016) (concluding counsel did not render deficient performance when he followed his client's clear and explicit instructions not to present mitigation citing *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1244 (11th Cir. 2010)).

damage. IB at 24. The claim is both factually rebutted by the record and legally insufficient.

The claim is rebutted by the record and no factual dispute was established by the pleadings. Postconviction counsel did not allege in the motion itself or attach any expert report with neuropsychological testing finding any brain damage to the Rule 3.851 postconviction motion. At the *Huff* hearing, the State argued that the claim was conclusively rebutted by the existing record based on the two experts' reports finding Craft was competent prior to his entering the guilty plea (at that point there was no expert opinion alleging brain damage to contradict the two prior experts' finding that Craft was competent). It was weeks after the *Huff* hearing, that postconviction counsel provided the court with Dr. Crown's report expressing his opinion that Craft had brain damage. (IPC at 522-527).

But postconviction counsel may not wait eight months after the State files its answer asserting that a claim should be summarily denied because the claim was conclusively rebutted by the existing record with no factual dispute alleged as well as weeks after the *Huff*

hearing to allege that an expert is available to testify that Craft suffers from brain damage. *Sparre v. State*, 289 So.3d 839, 849 (Fla. 2019) (concluding a postconviction claim of ineffectiveness was not preserved because the facts supporting the claim were not pointed out to the postconviction court until the post-evidentiary hearing memorandum when "it was too late for the State to respond" which violated the fairness aspect of the preservation requirement). Support for a postconviction claim must be alleged in the postconviction motion or in an attachment to the postconviction motion.

Alternatively, even if the postconviction expert's report had been timely filed, the claim is legally insufficient. Mild or moderate brain damage is not a basis for a finding of incompetency under *Dusky v. United States*, 362 U.S. 402 (1960), or Florida Rule of Criminal Procedure 3.211. *Woodbury v. State*, 320 So.3d 631, 644 (Fla. 2021) (observing, in a capital case, where the capital defendant had bipolar disorder that not "every manifestation of mental illness" rises to the level of incompetency required by *Dusky*, citing *Barnes v. State*, 124 So.3d 904, 913 (Fla. 2013)); *Sparre v. State*, 289 So.3d 839, 847 (Fla.

2019) (observing that not every manifestation of a mental illness demonstrates incompetence to stand trial). Defendants who suffer from mental illness or brain damage often are still competent to stand trial or enter a guilty plea. As this Court has observed, the possibility of organic brain damage does not necessarily establish incompetency because "diminished capacity is not equivalent to being incompetent to stand trial." *James v. State*, 489 So.2d 737, 738-39 (Fla. 1986); *see also Bush v. Wainwright*, 505 So.2d 409, 411 (Fla. 1987) (stating that numerous psychological problems, such as learning disabilities and "diffuse organic brain damage," when taken together, were not sufficient to raise a valid question regarding competency to stand trial). A defendant, who was examined by two mental health experts before trial and found competent, does not create a "real, substantial and legitimate doubt" as to his competence to stand trial simply by finding other experts in the postconviction stage who now diagnoses him with brain damage. *Johnston v. Singletary*, 162 F.3d 630, 637-38 (11th Cir. 1998).

Opposing counsel seems to be attempting to create a higher standard for competency where a defendant cannot represent himself even though he is competent. Basically, she seeks to apply *Indiana v. Edwards*, 554 U.S. 164, 178 (2008), to guilty pleas and to defendants who do ***not*** suffer from a severe major mental illness.[16]

But *Edwards* only applies to trials, not to pleas or bench penalty phases. The *Edwards* Court limited *Godinez v. Moran*, 509 U.S. 389 (1993), to its facts which involved a plea, not a trial. *Edwards*, 554 U.S. at 171-173. The *Edwards* Court limited its prior decision in *Godinez v. Moran* to pleas. The *Edwards* Court created a higher standard of competency for defendants who suffer from "severe" mental illness who want to represent themselves at a ***trial***. *Id.* at 173; *see also Wall v. State*, 238 So.3d 127, 140-41 (Fla. 2018) (explaining that the competency standard for pleading guilty or waiving the right to counsel is the typical *Dusky* competency standard but the competency standard for representing oneself at trial "is a heightened

[16] Opposing counsel did not rely on *Edwards* below or in the initial brief but because that is the only proper analytical framework for such a claim, the State will do so.

competency standard" under *Edwards v. Indiana*); Fla. R. Crim. P. 3.111(d)(3) (adopting *Edwards*). So, a State ***may***, but is not required to, force an attorney on a defendant, who suffers from a "severe" mental illness, if he goes to trial. *State v. Barnes*, 753 S.E.2d 545, 550 (S.C. 2014) (refusing to adopt *Edwards*). *Edwards* applies to trials and jury penalty phases but not to pleas or bench penalty phases.[17]

This Court has already rejected arguments attempting to apply a higher standard than the *Dusky* standard to guilty pleas. *Noetzel v. State*, 328 So.3d 933, 946 (Fla. 2021) (stating, in a capital case, that the *Dusky* standard is the standard of competence required to plead guilty citing *Godinez v. Moran*, 509 U.S. 389, 391, 398, 402 (1993)).

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[17] *Godinez v. Moran* involved a bench penalty phase. A three-judge panel presided at Moran's penalty hearing. *Moran v. State*, 734 P.2d 712, 713 (Nev. 1987). Moran, like Craft, represented himself at the sentencing and waived the presentation of mitigation with the goal of being sentenced to death. *State v. Hessler*, 807 N.W.2d 504, 516 (Neb. 2011). This Court, however, has declined to resolve the open question of whether rule 3.111(d)(3) applies to capital cases where the defendant represents himself, with standby counsel, during the penalty phase. *Noetzel v. State*, 328 So.3d 933, 949-50 (Fla. 2021) (concluding, "even assuming rule 3.111(d)(3) applies, the trial court did not abuse its discretion by failing to find that Noetzel suffered from severe mental illness to the point of being incompetent to conduct the penalty-phase proceedings by himself").

Postconviction counsel may not invoke *Edwards* or its logic to attack the guilty plea in this case.

Nor does *Edwards* apply to mental conditions that do not amount to "severe" mental illnesses or its equivalent. *Edwards*, 554 U.S. at 176, 178 (holding the Constitution permits States to force an attorney on a criminal defendant who is "competent enough to stand trial under *Dusky* but who still suffer from '*severe*' mental illness to the point where they are not competent to conduct trial proceedings by themselves."). Edwards, for example, suffered from schizophrenia and had to be hospitalized to restore his competency to stand trial. *Id.* at 168-169. Unless a defendant's brain damage is extensive enough to amount to the functional equivalent of a "severe" mental illness, neither *Edwards* nor Rule 3.111(d)(3) can be invoked to prevent him from representing himself, even at a trial.

Craft's brain damage, if any, was not severe. Both mental health experts, who evaluated Craft prior to his entering the guilty plea, found that he did not suffer from any major mental illness, much less a "severe" mental illness. Both experts found he was alert and

appropriately oriented as to time and place. Craft's brain damage, whatever its actual extent, was not severe enough for either expert to comment upon it or to recommend neuropsychological testing.

And, here, as in *Noetzel*, there was no manifestation of severe impairment during the plea or bench penalty phase. *Noetzel*, 328 So.3d at 950 (observing that Noetzel's case was "not even close" because there was no erratic behavior and there was "nothing in the record to indicate that Noetzel's mental illness manifested in a way that would have precluded him from conducting trial proceedings by himself within the meaning of rule 3.111(d)(3)" and stating to the contrary, the record showed Noetzel filed and argued various pro se motions). Similarly, in this case, postconviction counsel points to nothing in the direct appeal transcript showing any manifestation of severe brain damage in Craft's communication or conduct during either the plea colloquy or the bench penalty phase that would warrant applying rule 3.111(d)(3) to Craft.

The existing record of the two experts reports and the direct appeal transcript rebuts any claim that Craft's brain damage was severe

enough for *Edwards* to apply, even if *Edwards* applied to pleas, which it does not.

Edwards does not apply as a matter of law twice over. It does not apply to pleas or to defendants who do not have severe mental impairments. The claim is legally insufficient.

Ineffectiveness for not delaying the proceedings

Craft asserts that his attorney (soon to be standby counsel) was ineffective for failing to delay the *Faretta* colloquy for neuropsychological testing for brain damage and for failing to delay the plea colloquy until all of the discovery was available.

The claim for ineffectiveness regarding delaying the plea colloquy until discovery was complete is not cognizable because Craft was representing himself by that point. This claim of ineffectiveness is limited to a claim of ineffectiveness for not delaying the *Faretta* colloquy.

But the claim of ineffectiveness for failing to "delay" the *Faretta* colloquy is meritless as a matter of law. Counsel's performance was not deficient for failing to seek a third mental health expert to perform

neuropsychological testing to determine brain damage prior to the *Faretta* colloquy.

First, defense counsel was not deficient for not attempting to invoke *Edwards*. As explained above, *Edwards* does not apply twice over. Counsel is not deficient for failing to move for a continuance of the *Faretta* hearing on a meritless ground, such as *Edwards*.[18]

Second, counsel knew from the two experts reports that he reviewed that Craft did not suffer from any mental illness, much less a major mental illness of the magnitude to render him incompetent under *Dusky*. Counsel is entitled to rely on the opinions of qualified experts. *Brown v. State*, 304 So.3d 243, 268 (Fla. 2020) (stating that

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[18] *Smith v. State*, 310 So.3d 366, 371-72 (Fla. 2020) (stating that counsel "cannot be deficient for failing to file a meritless motion" quoting *Patrick v. State*, 246 So.3d 253, 260 (Fla. 2018)); *Sanchez-Torres v. State*, 322 So.3d 15, 22 (Fla. 2020) (stating "an attorney cannot be constitutionally deficient by failing to file a meritless motion" citing *Johnston v. State*, 63 So.3d 730, 740 (Fla. 2011)); *Preston v. Sec'y, Dep't of Corr.*, 2018 WL 8061783, at *6 (11th Cir. Nov. 16, 2018) (stating counsel could not be deemed ineffective for failing to make a meritless motion citing *Cave v. Sec'y, Fla. Dep't of Corr.*, 638 F.3d 739, 755 (11th Cir. 2011)); *United States v. Curbelo*, 726 F.3d 1260, 1267 (11th Cir. 2013) (observing that it "goes without saying that counsel is not ineffective for failing to file a meritless suppression motion").

"defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts" quoting *Darling v. State*, 966 So.2d 366, 377 (Fla. 2007)); *see also Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1262 (11th Cir. 2011) (holding that trial counsel's performance was not deficient for trusting his expert's opinion and for not seeking a more thorough mental health evaluation, despite red flags). In this case, there were ***two*** experts who both found Craft competent. Moreover, neither of the two experts recommended neuropsychological testing. *Brown v. State*, 304 So.3d 243, 268 (Fla. 2020) (concluding that counsel was not deficient for failing to hire additional mental health experts about the combined effects of polysubstance abuse, childhood trauma, and mental illness on her brain because the expert that counsel consulted did not recommend consulting with an additional expert); *State v. Mullens*, 352 So.3d 1229, 1241 (Fla. 2022) (explaining that attorneys are not required to second-guess their experts to be effective). Defense attorneys not required to go expert shopping to be considered effective advocates. *Allred v. State*, 186 So.3d 530, 538 (Fla. 2016) (rejecting a claim that

defense counsel was ineffective for not going expert shopping for a second opinion after counsel consulted with one mental health expert); *Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137, 1160 (11th Cir. 2017) (quoting *Elledge v. Dugger*, 823 F.2d 1439, 1447 n.17 (11th Cir. 1987), and other circuit cases).

Third, just because postconviction counsel is able to find a new mental health expert in postconviction proceedings who disagrees with the previous mental health experts findings before trial, does not amount to deficient performance. *State v. Mullens*, 352 So.3d 1229, 1237 (Fla. 2022) (stating that trial counsel is not deficient because the defendant is able to find postconviction experts that reach different and more favorable conclusions than the experts consulted by trial counsel quoting *Brant v. State*, 197 So.3d 1051, 1069 (Fla. 2016), and citing *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016)). Counsel was not required to delay the proceeding for neuropsychological testing when neither expert recommended such testing and both had found Craft competent without any such testing. There was no deficient performance.

Nor would there be any prejudice from counsel not consulting a third expert about the possibility of brain damage. Unless Craft's brain damage rose to the level of incompetency under *Dusky*, the trial court could not prevent Craft from waiving counsel and then entering a guilty plea. The outcome would be the same even if counsel had somehow managed to have a third expert appointed and that expert made similar findings as Dr. Crown. Craft still would have been found competent to waive counsel and enter a guilty plea. There was no prejudice.

A.P.D. Marshburn was not ineffective for not delaying the *Faretta* colloquy to hire a third expert to conduct neuropsychological testing for brain damage.

Voluntariness of the plea

Any claim regarding whether Craft's plea was knowingly, intelligently, and voluntarily entered due to the incomplete discovery was waived, as explained above. Craft may not enter a guilty plea when the inaccessible discovery issue was not solved, against the

judge's advice, and then in postconviction attack that plea as being unknowingly entered due to that incomplete discovery.

Additionally, any challenge to the guilty plea is procedurally barred by the law-of-the-case doctrine, as the postconviction court properly concluded. *Douglas v. State*, 141 So.3d 107, 127 (Fla. 2012) (concluding a postconviction claim was procedurally barred "because it was raised and decided adversely" to the defendant on direct appeal). This Court already determined that the guilty plea was valid in the direct appeal. *Craft v. State*, 312 So.3d 45, 52 (Fla. 2020) (SC2020-0953). This Court held the plea was voluntary, as part of the Court's "mandatory sufficiency review." *Id.* at 52 (citing Fla. R. App. P. 9.142(a)(5)). The two mental health experts' reports were in the record on appeal during the direct appeal.

The claim is also meritless. Craft is asserting that his guilty plea was unknowingly entered because he did not have the complete discovery from the prosecution regarding inmate Bullet and the guards before he entered the guilty plea. He argues that without his having complete knowledge of the State's evidence against him, his

plea was unknowingly entered. But the United States Supreme Court has directly held to the contrary. A plea is not unknowing simply because the defendant does not have *Brady* material from the prosecution before entering the plea.

In *United States v. Ruiz*, 536 U.S. 622 (2002), the United States Supreme Court held that the Government had no duty to disclose *Brady* information prior to a plea. The Constitution does not require the Government to disclose either impeachment evidence or evidence of affirmative defenses during plea bargaining prior to entry of a plea. *Id*. at 633. Such information relates to "the fairness of a trial," not to whether a plea is voluntarily and knowingly entered. *Id*. at 629. The Constitution "does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *Id*. at 630. The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the

circumstances." *Id.* at 629; *see also Figueroa-Sanabria v. State*, 366 So.3d 1035, 1054 (Fla. 2023) (citing *Ruiz*, 536 U.S. at 629). The High Court reasoned that requiring the disclose of *Brady* material before a plea "could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants," and undermine "the efficient administration of justice." *Id.* at 631. Creating such a disclosure requirement would "require the Government to devote substantially more resources" to investigation and trial preparation in plea cases, which would deprive "the plea-bargaining process of its main resource-saving advantages." *Id.* at 632. The State is not required to disclose either impeachment evidence or affirmative defenses prior to a plea. *Ruiz*, 536 U.S. at 625, 633. The *Ruiz* Court held a fast-track plea made without any *Brady* material having been disclosed was still knowingly entered.[19]

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[19] The question of whether evidence of actual factual innocence must be disclosed prior to a fast-track plea remains open. *Ruiz*, 536 U.S. at 623 (noting the Government provides evidence of factual innocence during plea negotiations prior to any fast-track plea); *Compare United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009), *with McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003). But there is no actual innocence claim possible in this case because Craft was the sole person alone with the victim at the time of the

Ruiz "makes good sense" because when a defendant chooses to admit his guilt, "*Brady* concerns subside." *United States v. Coates*, 483 Fed. Appx. 488, 499 (10th Cir. 2012); *United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) (same). And that is true of discovery material required by state law as well. *Brady* material and discovery information required by state law are provided to help the defense prepare for trial but with a defendant enters a guilty plea, his admission of guilt and waiver of a trial nullifies that rationale.

So, information in the prosecutor's possession that would support an affirmative defense, such as entrapment, is not required to be disclosed prior to a plea and any such plea remains valid regardless of the non-disclosure, even ignoring Craft's waiver of complete discovery against the judge's advice. And here the information about inmate Bullet and the guards is not even an affirmative defense as will be explained. Craft's plea was knowingly entered, as a matter of law, regardless of his lack of having complete information regarding inmate Bullet and the guards.

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murder and confessed in detail to the murder to a law enforcement officer in a recorded statement.

The postconviction court properly summarily denied the claim of ineffectiveness of standby counsel.

ISSUE II

Whether the Postconviction Court Properly Summarily Denied the Due Process Claim of Prosecutorial Misconduct for Failing to Investigate the Affirmative Defense of Entrapment? (Restated)

Craft asserts the postconviction court improperly summarily denied the Due Process claim of prosecutorial misconduct for failing to investigate, prior to the guilty plea, a possible affirmative defense of objective entrapment. IB at 32. Craft claims that the guards entrapped him into committing murder by placing him in the same cell as the victim. A prosecutor has no duty under the due process clause to investigate a defendant's affirmative defense for him. A prosecutor only has a due process obligation to disclose exculpatory and impeaching information he collects in the course of his own investigation. Due process does not mandate a prosecutor investigate anything solely for the benefit of the defense. Alternatively, there is no valid defense of entrapment. Guards placing the defendant in the same cell as another inmate, regardless of that other inmate's history, is not entrapment. Craft admitted that he planned the murder, started the altercation, and that the victim did not pose any threat to

him. Craft's assertion that he would not have entered a guilty plea if he had known more about the victim and the guards is conclusively rebutted by the record of his own statements regarding his reason for entering a guilty plea. The postconviction court properly summarily denied the claim of prosecutorial misconduct for failing to fully investigate an entrapment defense.

The postconviction court's ruling

The postconviction court summarily denied the prosecutorial misconduct claim for failing to investigate the victim and the DOC guards. (IPC at 543-548). The postconviction court found the claim of prosecutorial misconduct to be procedurally barred because it should have been raised in the direct appeal. (IPC at 544 citing *Bogle v. State*, 213 So.3d 833, 852 (Fla. 2017) (citing *Spencer v. State*, 842 So.2d 52, 60 (Fla. 2003)). The postconviction court rejected the argument that it was the State's burden to investigate an entrapment defense. (IPC at 545). "Because entrapment is an affirmative defense, the Defendant has the burden." (IPC at 545 citing *Herrera v. State*,

594 So.2d 275 (Fla.1992)). The postconviction court rejected the claim of prosecutorial misconduct for not investigating an affirmative defense reasoning that the claim was "without merit" because the prosecutor was not required to provide Craft with evidence to support an affirmative defense. (IPC at 545). The postconviction court also observed that the victim's prior criminal history was not exculpatory and would not support any affirmative defense or an argument that he had a good reason to kill the victim. (IPC at 545).

The postconviction court concluded that Craft could not establish that if the State had investigated the guard's conduct that he would not have entered a guilty plea. (IPC at 545). The postconviction court also concluded any claim of objective entrapment was "without merit" because Craft did not allege the guards did anything other than place the victim in the same cell, after saying "I got somebody for you," which, Craft admitted, "they always say." (IPC at 545-547). Craft admitted that the victim was not a threat to him and that the guards did not ask him to harm the victim. (IPC at 547). Therefore, Craft

cannot possibly establish he was objectively entrapped into killing the victim. (IPC at 548).

Procedural bar

Claims asserting either prosecutorial misconduct or objective entrapment should be raised in the direct appeal. *Panagiotakis v. State*, 619 So.2d 345, 346 (Fla. 2d DCA 1993) (concluding a claim of objective entrapment was procedurally barred because it could have been raised in the direct appeal); *Bogle v. State*, 213 So.3d 833, 852 (Fla. 2017) (citing *Spencer v. State*, 842 So.2d 52, 60 (Fla. 2003)).

Craft failed to investigate, present, and argue the evidence regarding inmate Bullett and the guard at trial. Craft had the obligation to investigate inmate Bullett, not the prosecutor. A defendant who represents himself may not use his own ineffectiveness for failing to investigate an affirmative defense as a means of evading a procedural bar. As the postconviction court properly found, this claim is procedurally barred.

Merits

A prosecutor only has a due process obligation to disclose exculpatory and impeaching information he collects in the course of his own investigation. Due process does not mandate a prosecutor investigate possible affirmative defenses, such as entrapment, for the benefit of the defense. Alternatively, there is no valid defense of entrapment.

Due process and prosecutorial misconduct

Due process and the related concept of prosecutorial misconduct does not apply. The federal constitutional requirement of disclosure, *Brady v. Maryland*, 373 U.S. 83 (1963), is limited to exculpatory and impeaching evidence only and does not even require complete disclosure of the prosecutor's files. *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (stating that there is no constitutional requirement that the prosecution "make a complete and detailed accounting to the defense of all police investigatory work on an case"); *United States v. Agurs*, 427 U.S. 97, 111 (1976) (noting the prosecutor has no constitutional duty to routinely deliver his entire file to defense counsel). A

prosecutor is not required to investigate an affirmative defense for a defendant. *Hall v. Mays*, 7 F.4th 433, 440 (6th Cir. 2021) (rejecting a claim that a prosecutor had a duty to investigate, discover, and obtain, under due process and *Brady*, the mental health records of the State's key witness, who was an inmate), *cert. denied*, 142 S.Ct 2655 (2022).[20]

And, even if the victim was a pedophile, that is not exculpatory. There is no exception to the first-degree murder statute for pedophiles. The victim's criminal history, whatever it may be, is not an affirmative defense. A prosecutor does not have any obligation

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[20] *See also United States v. Faller*, 675 Fed. Appx. 557, 560 (6th Cir. 2017) (holding the Government had no due process duty to discover the whereabouts of a computer containing exculpatory evidence because it never possessed the computer, citing *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007)); *United States v. Robinson*, 272 Fed. Appx. 421, 434 (6th Cir. 2007) (explaining that *Brady* does not impose a duty upon the government to discover information which it does not possess, citing *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007)); *United States v. Jones*, 34 F.3d 596, 599 (8th Cir. 1994) (noting the Government has no affirmative duty to discover information which it does not possess, citing *United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991), and *United States v. Dunn*, 851 F.2d 1099, 1101 (8th Cir. 1988)); *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) (holding that federal prosecutors had no duty to discover and disclose evidence in an unrelated state investigation).

under due process to investigate possible defenses for the defendant. *Brady* requires a prosecutor to disclose exculpatory or impeaching evidence in his possession, not to investigate or obtain evidence to support a defense either before or after a guilty plea.

Not an affirmative defense

The victim's history with children, if any, is not itself *Brady* material because it is not exculpatory or impeaching. That the victim is a child molester is not a defense to first-degree premeditated murder. "If there is no bona fide defense to the charge, counsel cannot create one." *United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984). And neither can the prosecutor. The victim being a possible child molester is not exculpatory. Nor is it impeaching.

And it was Craft's duty, who was representing himself before the plea was entered, to investigate the victim's background and inmate Bullett's interactions with the victim and the guards and then to raise any objective entrapment defense with the Court by filing a motion to dismiss the charges. It was Craft's responsibility, not the prosecutor's. Prosecutors are not required to investigate affirmative

defenses for the benefit of the defense. There is no version of due process that requires a prosecutor to file a motion to dismiss the charges for the defense based on an entrapment theory.

Objective entrapment

Any claim of objective entrapment is totally meritless. Objective entrapment is a matter for the court. *Dippolito v. State*, 275 So.3d 653, 659 (Fla. 4th DCA 2019) (citing *Cruz v. State*, 465 So.2d 516, 521 (Fla. 1985)). A judge, not a jury, decides the issue of objective entrapment. A judge would not dismiss the first-degree murder charges based on an objective entrapment defense.

Under Florida law, objective entrapment is law enforcement conduct that "so offends decency or a sense of justice that judicial power may not be exercised to obtain a conviction." *Dippolito v. State*, 275 So.3d 653, 658 (Fla. 4th DCA 2019). The types of conduct which have led to a finding of objective entrapment by this Court are "relatively limited" and usually involved a judicial finding that law enforcement created or manufactured crime rather than properly detected crime. *Dippolito*, 275 So.3d at 658 (discussing *State v.*

Williams, 623 So.2d 462 (Fla. 1993), *State v. Glosson*, 462 So.2d 1082 (Fla. 1985), and *State v. Hunter*, 586 So.2d 319 (Fla. 1991)).

Federal law requires that a defendant establish that he was not predisposed to commit the crime prior to any contact by law enforcement to raise an entrapment defense. *Jacobson v. United States*, 503 U.S. 540 (1992); *United States v. Harris*, 7 F.4th 1276, 1289-90 (11th Cir. 2021) (stating that entrapment is an affirmative defense that requires (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant to commit the crime before the inducement."). Federal law also requires that any claim of entrapment be "patently clear or obvious evidence." *Harris*, 7 F.4th at 1290 (quoting *United States v. Groessel*, 440 F.2d 602, 606 (5th Cir. 1971)).[21]

[21] Craft certainly cannot establish that he was not predisposed to commit the murder of the victim. Craft threatened to kill any inmate housed with him, without any reference to the other inmate's criminal history. That is beyond being predisposed to commit a crime. Indeed, it is beyond being ready, willing, and able to commit murder — it is planning on committing future murders if necessary to achieve the goal of being placed on death row. This claim of entrapment would automatically fail under *Jacobson*.

Florida law requires a lack of any predisposition to commit the crime to raise a subjective entrapment defense but does not consider predisposition for objective entrapment. *Blanco v. State*, 218 So.3d 939, 943 (Fla. 3d DCA 2017); *see also Jones v. State*, 114 So.3d 1123, 1126 (Fla. 1st DCA 2013). "A due process violation occurs regardless of a defendant's predisposition to commit the crime," if objective entrapment is at issue. *Blanco*, 218 So.3d at 943.

The guard's conduct of merely placing Craft in the same cell as another inmate cannot amount to objective entrapment. The guard did not create or manufacture this murder. A guard placing another inmate in a cell is not "outrageous conduct" on the part of law enforcement. Rather, it is routine conduct in prisons. As the postconviction court properly found, the guard simply moved another inmate into a cell with Craft. The guard did not tell Craft the victim was a child molester or encourage Craft to kill him. And, even if the guard had told Craft to kill the victim, Craft could have declined, just as inmate Bullett allegedly had done. (IPC at 549).

Even inmate Bullett's version of his interactions with the guards would still not amount to objective entrapment. It provides no reason for Craft to murder the victim. Far from it, it shows that Craft could have declined any invitation to harm the victim, just as inmate Bullett did.

Furthermore, Craft's own statements would rebut any defense of entrapment. Craft admitted that he planned the murder, started the altercation, and that the victim did not pose any threat to him. *Craft*, 312 So.3d at 47-48. Craft committed this murder because he wanted the isolation, comfort, and privileges of being on death row rather than being in the general population, not because he was entrapped by the guard. Indeed, Craft told the mental health experts that he would kill again to get on death row for his own peace and comfort. Craft's threats to kill again totally negate any claim to an entrapment defense. A court would not dismiss the first-degree charges in this case based on an objective entrapment theory.

Not entering a guilty plea

Any assertion that Craft would not have entered a guilty plea if he had received all the discovery or if the prosecutor had investigated an entrapment defense is conclusively rebutted by the record. Even ignoring Craft's waiver of the discovery against the judge's advice, the record conclusively rebuts Craft's claim that he would not have entered a guilty plea, if he had known more about inmate Bullett's prior interactions with the guards and the victim's background.

Craft told the mental health experts that his reason for wanting to enter a guilty plea was to get out of general population and be placed on death row for his privacy and comfort. Indeed, he stated he wanted to represent himself, plead guilty, and waive mitigation to get on death row as quickly as possible. Craft told the experts that his desire to be on death row was not a death wish. Craft pointed out to the experts that most capital inmates spend over 25 years on death row before being executed. None of these motivations for entering a guilty plea have anything to do with the victim's past or inmate Bullet's interview. Indeed, Craft stated motivations override any investigation into the victim's history or the guards' conduct, regardless of the scope of the

investigation. The record conclusively rebuts any allegation by Craft that he would not have entered a guilty plea, if he had known more. As the postconviction court properly found, Craft would have entered a guilty plea regardless of any investigation.

The postconviction court properly summarily denied the claim of prosecutorial misconduct for failing to investigate an objective entrapment defense.

ISSUE III

Whether the Postconviction Court Properly Summarily Denied the Claim of a Violation of *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), from the Prosecutor's Failure to Propose the Guard's Role as Possible Mitigation? (Restated)

Craft asserts that the postconviction court improperly summarily denied the claim of a violation of *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), based on the prosecutor's failure to identify the guard's conduct of housing the defendant with the victim as possible mitigation to the sentencing court. But *Muhammad* does not apply to this case, as this Court has already held. *Craft v. State*, 312 So.3d 45, 53 (Fla. 2020). While Craft originally waived the presentation of mitigation, he ultimately presented four family members as mitigation witnesses. *Muhammad* only applies to cases involving a complete waiver of mitigation. Alternatively, even if *Muhammad* applied, that decision only requires the prosecutor to place into the record the mitigation already in its possession. *Muhammad* does not require the prosecutor to investigate additional mitigation for the benefit of a defendant. Nor does *Muhammad* require a prosecutor to identify or

propose particular mitigation to the sentencing court or to argue for the defense in mitigation. As the postconviction court properly found the prosecutor fulfilled any obligation regarding mitigation (which was none because *Muhammad* does not apply to this case). Because there is no legal basis for the claim, the postconviction court properly summarily denied the claim.

The postconviction court's ruling

The postconviction court summarily denied this claim of prosecutorial misconduct for not investigating the guard's possible role and failing to investigate, identify, and then argue additional mitigation to the sentencing court. (IPC at 548-550). The lower court found the claim was procedurally barred because it should have been raised in the direct appeal. (IPC at 548-549 citing *Conahan v. State*, 118 So.3d 718, 732 (Fla. 2013)).

The postconviction court concluded that the prosecutor fulfilled any obligation he had to disclose mitigation to the sentencing court. (IPC at 549). The postconviction court first noted that this Court

observed that Craft presented mitigation at the penalty phase and because he presented mitigation, "the State was not required to present mitigation on his behalf." (IPC at 549 citing *Craft v. State*, 312 So.3d 45, 53 (Fla. 2020)). The postconviction court then reasoned that Craft, who represented himself and knew about the guards, could have presented that information as mitigation and argued it in rebuttal to the prosecutor's argument regarding the CCP aggravator "but chose not to do so." (IPC at 549). The postconviction court concluded that although the State was not required to present mitigation, the State "presented all mitigating evidence it possessed" and therefore, the "State fulfilled any obligation it had." (IPC at 549).

Alternatively, the postconviction court concluded that the evidence regarding the guards would not have been given any weight as mitigation, even if it had been presented. (IPC at 549). The postconviction court noted that during the recorded interview between Craft and FDLE Agent Tyler, which was played for the sentencing court during the bench penalty phase as part of the State case in aggravation, Craft stated that Sergeant Bell, when he moved the victim

into the cell, said I've "got someone for you" but Craft admitted that the guards always say that. (IPC at 549). Craft also admitted that the guard "didn't tell me to kill" the victim. (IPC at 549). As the postconviction court observed, postconviction counsel admitted that the guard did not tell Craft the victim was a child molester or tell Craft to kill the victim. (IPC at 549). The postconviction court concluded, the only thing the guard did was move another inmate into the cell with Craft, which was not mitigating. (IPC at 549). The postconviction court reasoned that, even if the guard had told Craft to kill the other inmate, Craft could have declined to kill him, so even that scenario would not be mitigating. (IPC at 549). The postconviction court reasoned that even if the guard's statement was considered as mitigation, it would not result in a life sentence, given Craft's own statement that he would kill again and the "substantial aggravation" in the case. (IPC 550 citing *Craft*, 312 So.3d at 56 (reasoning that in light of the "substantial aggravation," including the HAC, CCP, and prior-violent-felony aggravators, there is no reasonable possibility that the trial court's failure to consider the additional mitigation

contributed to the death sentence). The postconviction court summarily denied the *Muhammad* claim. (IPC 550).

Procedural bar

Claims asserting violations of *Muhammad* should be raised in the direct appeal. *Hojan v. State*, 212 So.3d 982, 994 (Fla. 2017) (affirming the summary denial of an initial postconviction claim regarding the waiver of mitigation as procedurally barred because the waiver issue was litigated in the direct appeal).

Craft failed to develop, present, and argue the evidence regarding inmate Bullet and the guards even though, as the postconviction court found, Craft knew of at least some of the guard's conduct before the penalty phase, such as the guard placing him in the same cell as the victim, despite Craft's previous attack on another inmate and Sergeant Bell's statement to Craft when moving the victim into the cell.

And Craft would have known of the FDLE agent's conversation with inmate Bullett if he continued the plea hearing until the discovery

problem was solved, as the trial court had urged him to do. A defendant cannot engage in willful ignorance against the judge's advice and then use his own willful ignorance as a basis to escape a procedural bar. Nor may a defendant who represents himself use his own ineffectiveness for failing to investigate additional mitigation as a means to evade a procedural bar. As the postconviction court properly found, this claim is procedurally barred.

Merits

Muhammad does not apply and even if it did, *Muhammad* does not require the prosecutor to investigate additional mitigation or to identify particular mitigating circumstances. *Muhammad* only requires disclosure to the sentencing court the mitigation already in the prosecutor's possession; it does not require that the prosecutor develop additional mitigation for the defense or act as special mitigation counsel by arguing for mitigation.[22]

[22] Postconviction counsel did not rely on *Muhammad* below or in the initial brief, but because that is what this claim actually amounts to, the State will analyze the claim using the proper legal framework.

Waiver of mitigation

This Court in *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), addressed the procedures to be followed when a capital defendant waives the presentation of mitigation at a penalty phase. This Court mandated that in such cases, the trial court order a "comprehensive" presentence investigation report (PSI) and also mandated that the prosecutor "place into the record all evidence of a mitigating nature that the State has in its possession." *Marquardt v. State*, 156 So.3d 464, 491 (Fla. 2015). This Court has repeatedly held that a capital defendant's waiver of mitigation "does not eliminate the court's responsibility to consider mitigating evidence in the record." *Fletcher v. State*, 343 So.3d 55, 58 (Fla. 2022) (quoting *Bell v. State*, 336 So.3d 211, 217 (Fla. 2022), and *Sparre v. State*, 164 So.3d 1183, 1196 (Fla. 2015)). So, under state law, if a defendant waives mitigation, the prosecutor has an obligation to "place" into the record all mitigation in the State's "possession." *Woodbury v. State*, 320 So.3d 631, 651 (Fla. 2021) (citing *Marquardt v. State*, 156 So.3d 464, 491 (Fla. 2015)); *Bell v. State*, 336 So.3d 211, 217 (Fla. 2022) (explaining that when a capital defendant waives the right to present mitigating evidence,

under *Muhammad*, the trial court "must order the preparation of a comprehensive PSI and require the State to put into the record any mitigating evidence in its possession")), *cert. denied*, *Bell v. Florida*, 143 S.Ct. 184 (2022); *see also Woodbury v. State*, 320 So.3d 631, 645-649 & 651-55 (Fla. 2021) (rejecting a *Muhammad* challenge in a capital case where the capital defendant both represented himself and waived mitigation).[23]

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[23] The continuing viability of *Muhammad* and *Marquardt* in the wake of *McCoy v. Louisiana*, 584 U.S. 414 (2018), is questionable. It is unclear exactly how *McCoy* applies to the penalty phase of a capital case. *Fields v. Jordan*, 86 F.4th 218, 246 (6th Cir. 2023) (observing the Supreme Court has yet to decide whether an attorney or a client decides whether to present mitigation in a capital case), *pet. for cert. filed*, *Fields v. Plappert*, No. 23-6912 (March 6, 2024). It seems unlikely that *McCoy* would prevent a trial court from ordering a more detailed PSI in waiver-of-mitigation cases, but *McCoy*, in all likelihood, will prevent courts from taking extraordinary measures, such as the appointment of special mitigation counsel to present mitigation, against a defendant's wishes, as suggested by *Marquardt* and *Barnes v. State*, 29 So.3d 1010, 1022-26 (Fla. 2010). But this Court need not address that issue, because, as this Court has already determined, *Muhammad* does not apply to this case at all. *Craft*, 312 So.3d at 53.

Muhammad **does not apply**

Muhammad only applies to cases where there is "a complete waiver of all mitigation." *Eaglin v. State*, 19 So.3d 935, 945-46 (Fla. 2009). *Muhammad* does not apply to cases where limited mitigation is ultimately presented. *Bell v. State*, 336 So.3d 211, 217 (Fla. 2022) (holding *Muhammad* did not apply because the defendant's testimony at the penalty phase included mitigation and he also introduced his competency evaluation containing mitigation citing cases, including *Craft v. State*, 312 So.3d 45, 53-54 (Fla. 2020)), *cert. denied*, *Bell v. Florida*, 143 S.Ct. 184 (2022). *Muhammad* does not apply in a case where the defendant presents at least some mitigation.

While Craft originally intended to waive mitigation, Craft ultimately presented four family members to testify regarding his deprived childhood at the bench penalty phase. Craft presented two of his sisters, his brother, and his aunt to testify in mitigation. This Court has already decided that this case is not a waiver of mitigation case. *Craft*, 312 So.3d at 53 (refusing to find a waiver of the right to present mitigation in a case where the defendant actually presented mitigation). "Craft's case does not involve a waiver of the right to

present mitigation because Craft presented the testimony of four family members and also made his own statement during the penalty-phase proceeding." *Id*. at 52-53. Although the presentation of mitigation was "limited," in this Court's words, mitigation, in fact, was presented. *Id*. at 53. *Muhammad* does not apply to this case, as this Court has already determined in the direct appeal. So, in this case, the prosecutor had <u>no</u> obligation whatsoever to place anything in the record. This claim fails on the merits as a matter of law on that basis alone.

Muhammad **only requires disclosure to the court**

Even if *Muhammad* applied, that decision only requires the prosecutor to disclose to the court the mitigation already in the State's "possession." *Woodbury*, 320 So.3d at 651 (citing *Marquardt*, 156 So.3d at 491); *Bell v. State*, 336 So.3d at 217 (explaining *Muhammad* requires the State to put into the record any mitigating evidence in its possession"). *Muhammad* certainly does <u>not</u> require that the prosecutor investigate and develop additional mitigation, as opposing

counsel is suggesting. *Muhammad* only requires disclosure to the court of mitigation already in the prosecutor's possession.

Opposing counsel cites no case from this Court expanding *Muhammad* to require the prosecutor to investigate additional mitigating evidence, such as conducting a more thorough investigation of inmate Bullet's allegations regarding his interactions with the guards. And, as a practical matter, once Craft entered a guilty plea, the prosecution had no reason whatsoever to investigate anything regarding the conviction even for the prosecution's own sake.

Additionally, *Muhammad* certainly does not mandate that the prosecutor become a special mitigation counsel and argue in mitigation for the defense, as opposing counsel seems to be asserting. Moreover, *Muhammad* has never been applied to require a prosecutor to identify particular mitigating circumstances to the sentencing court, much less to argue particular mitigating circumstances to the sentencing court or to argue against the State's own case in aggravation. Opposing counsel would have the prosecutor first argue for an aggravating factor, such as the CCP aggravator, and then argue

against that aggravator during the State's closing argument of the penalty phase. The prosecutor is the attorney for the State, not special mitigation counsel. *Muhammad* does not require that the prosecutor identify or argue mitigation. The prosecutor's sole obligation under *Muhammad* is to "place" possible mitigation in its possession into the record for the sentencing court.

All of the mitigation that opposing counsel points to in the initial brief regarding Craft's brain damage and deprived childhood, either was, or should have been, presented by Craft at the bench penalty phase. IB at 40-42. And all of that mitigation should have been argued in mitigation by Craft himself during his closing argument. IB at 40-42. It was Craft's decision not to make a closing argument and also his decision to limit the mitigation to the four family members, who wanted to testify at the bench penalty phase, despite his prior waiver of all mitigation.

A prosecutor has no obligation under *Muhammad* or due process to develop additional mitigation or to argue in mitigation for the defendant. As the postconviction court properly concluded, the

prosecutor fulfilled any obligation he had to place mitigation in the record under the state law of *Muhammad* (which was none because *Muhammad* does not apply to this case, as this Court already determined in the direct appeal).[24]

The postconviction court properly summarily denied this misguided *Muhammad* claim because it is both procedurally barred by the law-of-the-case doctrine due to this Court's decision in the direct appeal and meritless as a matter of state law.

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[24] Again, due process and the related concept of prosecutorial misconduct do not apply at all. The federal constitutional requirement of disclosure, *Brady v. Maryland*, 373 U.S. 83 (1963), is limited to exculpatory and impeaching evidence only and does not require complete disclosure of the prosecutor's files. *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (stating that there is no constitutional requirement that the prosecution "make a complete and detailed accounting to the defense of all police investigatory work" on a case); *United States v. Agurs*, 427 U.S. 97, 111 (1976) (noting the prosecutor has no constitutional duty to routinely deliver his entire file to defense counsel). Any assertion that the prosecutor has a due process obligation to develop additional mitigation or develop evidence to rebut the State's aggravation is a non-starter. The prosecutor has no such due process obligation. Any obligation the prosecutor has regarding a defendant who waives mitigation is a matter of state law only under *Muhammad*.

ISSUE IV

Whether the Postconviction Court Properly Summarily Denied the Claim that the Prosecutor Violated *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959), by Arguing that Craft had No Pretense of Moral Justification Regarding the Cold, Calculated, and Premeditated Aggravating Factor? (Restated)

Craft asserts that the postconviction court improperly summarily denied the claim that the prosecutor's closing argument of the penalty phase violated *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959). IB at 44. He argues that the prosecutor's omission of the word "pretense" from the phrase "without any pretense of moral or legal justification" and the prosecutor misstating the evidence regarding the victim, in the closing argument of a bench penalty phase, was a due process violation. But this due process claim is procedurally barred because it should have been raised in the direct appeal. Neither *Giglio* nor *Napue* apply to prosecutor comments claims. Rather, it is *Darden v. Wainwright*, 477 U.S. 168 (1986), that governs such due process claims. There was no violation of due process from the prosecutor's comments. It was

Craft's responsibility to argue that the cold, calculated, and premeditated (CCP) aggravating factor did not apply by asserting his pretense of a justification for the murder in his closing argument, rather than the prosecutor's. Moreover, a prosecutor's misstatement of the evidence or omission certainly cannot violate due process at a bench penalty phase where the argument is being made solely to the judge who knows the evidence presented and the law regarding the CCP aggravator. The postconviction court properly summarily denied the due process claim regarding the prosecutor's comments.

Plea colloquy

During the March 27, 2019, plea colloquy in front of Judge Paul S. Bryan, Craft asserted that he killed his cellmate because the victim told Craft that he "was a child molester." (DAR at 29).[25] Craft stated that he wrote his sister telling her he "was going to catch a body." (DAR at 29). Craft stated that he had asked the victim what he was in prison for and the victim responded that being in the Navy had

[25] This is a citation to the direct appeal record and to the page on the upper right.

"messed up" his head and he had "done something" that he was "not proud of." (DAR at 30). Craft stated that he had "no remorse, no regrets, nothing. He deserved it." (DAR at 30). He stated that he wanted to torture the victim "on purpose" and also stated that he wanted to hurt the victim, if he had hurt a child. (DAR at 32). The judge asked about when he had developed this philosophy or "mission" to kill child molesters? (DAR at 32). Craft said he had told the victim you don't deserved to live and that it was his last meal. (DAR at 33). Craft said the victim told him that was a resource officer in Cleveland, Ohio, and Craft stated that he was supposed to protect the kids but he was hurting them instead. (DAR at 36). Craft stated that "he's dead and I'm guilty" which he said "with a smile." (DAR at 36). The judge inquired what would happen next time if he was put in a cell with a child molester and Craft responded that he would kill again. (DAR at 36). Craft stated that if they placed him around anybody who was a child molester he would kill again. (DAR at 37). Craft stated that it was his mission because he hated people who prey on the weak. (DAR at 37). Craft stated that if they put me around

another one, he would do it again because "they deserve it." (DAR at 43). Craft thought that child molesters received a short sentence and then would go home and do it again. (DAR at 43). Craft, who was representing himself at that point, then entered a guilty plea. (DAR at 45, 51, 61-70). Craft stated that he also wanted to waive a penalty phase jury. (DAR at 54-60). The trial court then found his plea to be freely, voluntarily, knowingly and intelligently entered. (DAR at 69-70).

Bench penalty phase

The bench penalty phase was conducted on May 13, 2019. Craft represented himself with standby counsel, A.P.D. Marshburn. (DAR at 3). Craft represented himself to "speed my case up, to be able to be active in it myself." (DAR at 4). After the trial court informed the defendant that a jury recommendation for death had to be unanimous, Craft reaffirmed his prior waiver of a penalty phase jury. (DAR at 4).

Craft waived the presentation of mitigation at the bench penalty phase. *Craft*, 312 So.3d at 50 (noting Craft, who was representing

himself, "indicated that he did not intend to present mitigation"); (DAR at 10). Neither the State nor Craft made opening statements at the bench penalty phase. (DAR at 13). During the State's case in aggravation, inmate Bullett was referred to regarding a conversation with Craft about killing the victim. (DAR at 63-65). Fifteen counts of child molestation made him a "good target to kill." (DAR at 64). Craft asked no questions on cross-examination of either of the State's witnesses. (DAR at 68,77).

After the State rested, Craft stated he wanted to waive mitigation. (DAR at 82). Craft, however, presented the testimony of four family members in mitigation, "all of whom testified about Craft's background, including his traumatic childhood, and their love for him." *Craft*, 312 So.3d at 50. Craft presented his sister, Jessica Craft. (DAR at 83). She testified that the defendant had been "messed with when he was younger" which caused "flashbacks." (DAR at 84). She opined that they "set him up" by housing him with a child molester. (DAR at 84, 87). She also testified that Craft had told the guards to get the victim out of the cell. (DAR at 87). She testified that the victim

bragged about molesting children and got what he deserved. (DAR at 87). She later read an email she had written to Probation Officer Roberts for the PSI, which referred to the victim's bragging about what he did to kids which gave her brother flashbacks. (DAR at 110-113; 112) She blamed the guards stating her view that they knew what "was going to happen" if they put the victim "in a cell with someone else." (DAR at 112) His brother, Jessie Chapple also referred to the victim as being a child molester. (DAR at 89,92). He thought the victim was trying to rape his brother and that the killing was self-defense. (DAR at 89). Another sister, Destiny Chapple, testified that when they took the victim out of the cell, one of the guards said "one less child molester." (DAR at 95). His aunt, Michele Griggs, also testified in mitigation. (DAR at 114-116).

Craft then made a statement expressing his "love for his family" and that "he was sorry that his actions had made them suffer." *Craft*, 312 So.3d at 50-51; (DAR at 97-98). He stated that he did these things out of boredom. (DAR at 98). He stated that the victim did ***not*** try to rape him. (DAR at 98). He stated that he sought the death

penalty because it would be "torture" and "miserable" to spend the rest of his life in prison "around people with chaos." (DAR at 99). He also stated that he preferred the isolation and privileges of death row. (DAR at 99).

The State was not anticipating any mitigation witnesses due to the prior waiver of mitigation. The prosecutor listed eight proposed mitigators for the court to consider which the prosecutor had gleaned from the PSI, the mental health experts' reports, and the court file. (DAR at 101-103). The prosecutor referred to possible physical or sexual abuse of Craft as a child. (DAR at 101).

The State "presented argument as to why the trial court should find the prior-violent-felony, under-sentence-of-imprisonment, HAC, and CCP aggravators." *Craft*, 312 So.3d at 51. The prosecutor made closing argument in support of the four aggravators. (DAR at 103-108). The prosecutor argued the CCP aggravator. (DAR at 104-105, 106-107). The prosecutor, in the closing argument of the bench penalty phase, argued:

> And any pretense of moral or legal justification, this wasn't an accident, misfortune, or self-defense. At best, it's Mr. Craft's

> idea that killing someone who harmed a child, which has not been proven before this Court, its been stated by people through Mr. Craft that that was why he did it, but there is *no evidence* before this Court or in the records that Shira [the victim] was, in fact, a child molester. *And, even if that was true, that's not a moral or legal justification for what he did* and I would submit to the Court that the CCP aggavator is also proven and should weigh strong.

(DAR at 107). Craft did *not* present any closing arguments in rebuttal to the prosecutor's closing argument, despite the trial court inviting the defendant to reply to the four aggravators the State was seeking. (DAR at 108-109;116).

The postconviction court's ruling

The postconviction court summarily denied this due process claim regarding the prosecutor's comments in the closing argument of the bench penalty phase. (IPC at 550-552). The postconviction court found the due process claim to be procedurally barred reasoning that it should have been raised in the direct appeal. (IPC at 551 citing *Whitton v. State*, 161 So.3d 314, 325-26 (Fla. 2014)). The postconviction court additionally found the due process claim to be conclusively rebutted by the record relying on statements made by

postconviction counsel during the *Huff* hearing admitting that the prosecutor's comments were technically true, which negated any claim that the prosecutor's comments were false. (IPC at 551).

The postconviction court also rejected the *Giglio*/*Napue* claim on the merits because the claim was not based on the presentation of false testimony, as required by *Giglio*. (IPC at 551). The postconviction court noted that postconviction counsel had not pointed to any "false testimony of any kind." (IPC at 551).

The postconviction court also addressed the pretense of a moral justification for the murder based on the victim possibly being a child molester which could negate the CCP aggravator. (IPC at 552). The postconviction court concluded that, even if it had been established that the victim was a child molester, that would not have established a pretense to negate the CCP aggravating factor. (IPC at 552). The postconviction court relied on *Nelson v. State*, 748 So.2d 237, 245 (Fla. 1999), where this Court rejected a challenge to the CCP aggravator based on the pretense of a justification due to the stepfather's sexual abuse of the defendant. (IPC at 552). The

postconviction court also relied on the defendant's statements to the court and the mental health experts that he committed the murder to get a death sentence because he sought the privileges available on death row. (IPC at 552). Even accepting Craft being a child sexual abuse victim and the murdered victim being a child molester, the postconviction court concluded that Craft could not "establish he had a pretense of moral justification." (IPC at 552).

Procedural bar

Any due process claim regarding the prosecutor's closing argument is procedurally barred. Claims that the prosecutor's closing argument violate due process must be raised in the direct appeal. *Martin v. State*, 311 So.3d 778, 811 (Fla. 2020) (finding a state habeas claim regarding the prosecutor's argument improperly tapping into racial stereotypes was procedurally barred because it should have be raised in the direct appeal citing *Jennings v. State*, 123 So.3d 1101, 1121-22 (Fla. 2013)); *Melton v. State*, 949 So.2d 994, 1009 (Fla. 2006) (agreeing that a postconviction claim regarding improper argument by the State was

procedurally barred because it should have been raised on direct appeal citing *Knight v. State*, 923 So.2d 387, 393 n. 6 (Fla. 2005), and *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla.1995)).

Typically, the way such a claim is raised in postconviction litigation is via a claim that defense counsel was ineffective for failing to object to the prosecutor's closing argument under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Bell v. State*, 965 So.2d 48, 60 (Fla. 2007) (explaining that, while prosecutor's comments are direct appeal issues, claims that trial counsel was ineffective for failing to object to the prosecutor's comments are properly raised in postconviction proceedings). But that path is closed to Craft because he represented himself at the penalty phase. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) (stating a "defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel"); *McKenzie v. State*, 153 So.3d 867, 884 (Fla. 2014) (explaining that a defendant who represents himself has "the entire responsibility for his own defense" and "cannot thereafter complain that the quality of his

defense was a denial of effective assistance of counsel" quoting *Behr v. Bell*, 665 So.2d 1055, 1056-57 (Fla. 1996)). A defendant who represent himself forgoes any remedy under the paradigm of *Strickland*. *United States v. Hung Thien Ly*, 646 F.3d 1307, 1314 (11th Cir. 2011) (citing *Faretta*, 422 U.S. at 834 n. 46). Craft may not raise his own ineffectiveness for not objecting to the prosecutor's omission of the word "pretense" in the closing argument. Craft may not evade the prohibition on a defendant who represents himself from raising claims of his own ineffectiveness by attempting to turn this direct appeal *Darden* claim into a *Giglio* violation. *Giglio* and *Napue* do not apply to arguments of counsel, as will be explained further.

Moreover, if Craft wanted to present evidence that the victim was, in fact, a child molester and argue to the trial court that the CCP aggravator should not be found because he had a "pretense" of justification for the murder on that basis, he needed to do so at during the bench penalty phase. A capital defendant has the burden to rebut any aggravator at the preponderance standard of proof. Craft, who was representing himself at the bench penalty phase, had the burden

to establish that the victim was, in fact, a convicted child molester. Opposing counsel is improperly attempting to shift this burden to the State to investigate inmate Bullet's allegations. IB at 46. Craft also had the obligation to make the argument to the trial court that the CCP aggravator should not be found because he had a "pretense" of justification for the murder during his own closing argument. He may not attempt to cure his own oversights, in either lack of proof or failure to argue, later in postconviction litigation by seeking an evidentiary hearing in the postconviction proceedings to attempt to prove the victim was a child molester or to argue against the CCP aggravator based on a pretense of moral justification at this late a date.

Opposing counsel asserts that this claim could not be raised in the direct appeal because the information regarding inmate Bullet's statements were not known at that time. IB at 45. But the prosecutor's statement that there was no evidence that the victim was a child molester in the State's closing argument of the bench penalty phase was obvious from the direct appeal transcripts. And the

prosecutor's omission of the word "pretense" in closing argument was also obvious from the transcripts of the bench penalty phase. And Craft's statements that the victim told him he was a child molester during the plea colloquy were also obvious from the transcripts. The due process claim based on the prosecutor's alleged misstatement of the evidence and omission during the penalty phase closing argument could have, and should have, been raised during the direct appeal. The issue would have been unpreserved but the fault for the lack of any contemporaneous objection to the prosecutor's comments lies at Craft's own feet for representing himself. As the postconviction court properly found, this due process claim regarding the prosecutor's closing argument is procedurally barred.

Merits

There was no violation of due process from the prosecutor's statement regarding there being no evidence that the victim was a child molester or from the prosecutor's omission of the word "pretense" in the closing argument of the bench penalty phase.

Due process and prosecutor's comments

A prosecutor can violate due process and the defendant's right to a fair trial with improper comments in closing argument. While prosecutors may prosecute cases with earnestness and vigor, they are not at liberty to strike "foul blows." *Gore v. State*, 719 So.2d 1197, 1202 (Fla. 1998) (reversing for a new trial based in part on the prosecutor's comments in closing argument quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). But the prosecutor's comment must so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

In *Darden*, the United States Supreme Court held that the prosecutor's closing argument did not amount to a due process violation even though the prosecutor called the petitioner a "vicious animal" that should be on a "leash" and stated that he wished someone had blown the defendant's head off. *Darden*, 477 U.S. at 180 n.12, 181.

In *Smith v. State*, 320 So.3d 20, 33 & n.5 (Fla. 2021), this Court found, using the five *Darden* factors, found that no due process

violation occurred from the prosecutor's comment. This Court reasoned that the defense had an opportunity to rebut the prosecutor's comments in closing argument, but waived closing statement instead.

That is exactly what occurred in this case. Craft himself waived closing argument. Craft had an opportunity to rebut the prosecutor's comments in his closing argument. It was Craft's responsibility to argue that the cold, calculated, and premeditated aggravating factor did not apply because he had a pretense of a justification for the murder based on the victim's statement to him about being a child molester. Here, as in *Smith*, there was no due process violation.

And Craft also had the responsibility to establish the factual foundation for this claim of pretense by establishing the victim's history of child molestation or by pointing out any omission in testimony of FDLE Agent Terrance Tyler at the bench penalty phase regarding the matter or even pointing to his sister's testimony during the bench penalty phase as evidentiary support. Craft did none of that. Craft himself had the obligation to establish the facts and then

argue against the CCP aggravator. The prosecutor's comments did not violate due process.

Bench penalty phases and prosecutor's comments

A prosecutor's misstatement of the evidence or omission of a word in closing argument certainly cannot violate due process at a bench penalty phase where the argument is being made solely to the judge who knows the evidence that was presented and the law regarding the CCP aggravator. Most of the concern regarding prosecutor's comments arises from the prosecutor misleading the jury about the evidence or the law but that concern is not present in a proceeding presided over by a judge alone, such as a bench penalty phase. Both federal and state courts presume the judge disregards improper arguments or comments made by the prosecutor during bench trials. *State v. Roy D. L.*, 262 A.3d 712, 732-33 (Conn. 2021) (citing both state and federal cases).

Moreover, the sentencing judge knew that Craft was asserting that the victim had told him that he had molested children from the start of the case from Craft's statement during the plea colloquy. The

sentencing judge heard that claim again from the sister's testimony at the bench penalty phase. The sentencing judge was aware of Craft's view that he was justified in killing the victim because he may have been a child molester from the plea colloquy. There was no violation of due process from the prosecutor's comments regarding the CCP aggravator in the closing argument of the bench penalty phase.

***Napue* and *Giglio* do not apply**

Napue and *Giglio* do not apply. *Giglio* is the legal paradigm that applies when a prosecutor knowingly presents, or fails to correct, false *testimony*. This Court has explained that *Giglio* requires that the defendant demonstrate that a State witness gave false or misleading testimony at trial. *Hutchinson v. State*, 343 So.3d 50, 54 (Fla. 2022) (affirming the summary denial of a *Giglio* claim as legally insufficient because it failed to identify any false or misleading testimony by a State witness citing *Jimenez v. State*, 265 So.3d 462, 479 (Fla. 2018)), *cert. denied*, *Hutchinson v. Florida*, 143 S.Ct. 601 (2023). Closing arguments simply cannot form the basis for a *Giglio*/*Napue* claim because the arguments of counsel are not evidence or testimony.

Special v. W. Boca Med. Ctr., 160 So.3d 1251, 1260 (Fla. 2014) (noting that the closing arguments of counsel are not evidence citing *Braddy v. State*, 111 So.3d 810, 843 (Fla. 2012)). A prosecutor's misstatement of the evidence or omission of a word in closing argument is not the equivalent of a prosecutor knowingly presenting false testimony. As the postconviction court properly concluded, this is not a valid *Giglio*/*Napue* claim because the claim was not based on the presentation of false testimony, as required by *Giglio*. (IPC at 551). The postconviction court noted that postconviction counsel had not pointed to any "false testimony of any kind." (IPC at 551).

Giglio and *Napue* do not apply. It is *Darden*, not *Giglio*, that applies to prosecutor's comments. And this due process claim regarding the prosecutor's closing argument during the penalty phase fails under *Darden* and *Smith*.

CCP aggravating factor and pretense

The victim's status as a possible child molester is not a sufficient pretense of legal or moral justification to negate the CCP aggravating factor. A pretense of moral or legal justification requires "believable

factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." *Joseph v. State*, 336 So.3d 218, 240 (Fla. 2022) (quoting *Campbell v. State*, 159 So.3d 814, 831 (Fla. 2015), and *Nelson v. State*, 748 So.2d 237, 245 (Fla. 1999)), *cert. denied*, *Joseph v. Florida*, 143 S.Ct. 183 (2022). That the victim possibly being a child molester is not an incomplete excuse, justification, or defense.

In *Christian v. State*, 550 So.2d 450 (Fla.1989), this Court concluded that the defendant had a pretense of moral justification for the murder because the victim had previously attempted to kill him and therefore, the CCP aggravating factor did not apply. The defendant and the victim were both inmates at Florida State Prison. *Id.* at 450. They were playing cards and Christian was winning, when the victim attempted to cheat but Christian caught him and took the wager. Later that day, the victim smashed a forty-pound curling iron into Christian's head. *Id.* at 451. Christian was rendered unconscious and suffered a deep head wound. For weeks afterwards, the victim repeatedly threatened to kill Christian and also threatened

to kill Christian's parents when he was released from prison. These threats continued up until the day of the murder. The victim was being escorted in handcuffs by two unarmed guards when Christian attacked the victim with a knife and then pushed him off a third-floor deck. *Id*. at 451. The victim died of multiple stab wounds and blunt trauma head injuries. The jury convicted Christian of first-degree murder but recommended a life sentence. The trial court found four aggravating factors including the CCP aggravator and sentenced the defendant to death.

On appeal, Christian argued that the CCP aggravator did not apply because he had a "pretense of moral or legal justification" based on the victim's prior attack on him and the victim's continuing threats to him and his family. *Christian*, 550 So.2d at 451. This Court relied on its prior decisions in *Cannady v. State*, 427 So.2d 723 (Fla. 1983), and *Banda v. State*, 536 So.2d 221 (Fla.1988), both of which involved claims of self-defense. The Court also discussed its prior decision in *Williamson v. State*, 511 So.2d 289 (Fla.1987), rejecting a claim of having a "pretense of moral or legal justification," where there was no

evidence the victim had engaged in threatening acts against the defendant. *Id.* at 453.[26] The *Christian* Court found "ample" evidence of a pretense of moral or legal justification based on self-defense and the victim's violent history and concluded the trial court erred in finding the CCP aggravator. *Christian*, 550 So.2d at 452. The *Christian* Court then vacated the death sentence based on *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

The postconviction court relied on this Court's decision in *Nelson v. State*, 748 So.2d 237, 245 (Fla. 1999). This Court rejected the defendant's challenge to the CCP aggravator based on a claim of pretense due to Nelson's stepfather's past sexual abuse of him and that on the day of the murder, Nelson was told to leave home by his mother after he resisted sexual advances by his stepfather. *Id.* at 245. This Court concluded that even prior abuse by the victim toward that

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[26] Williamson argued that he had a pretense of a justification for the murder because if he had not killed the victim, the victim would have killed a third inmate. *Williamson*, 511 So.2d at 293. This Court rejected that argument based on lack of evidence. There was no evidence of any threatening acts by the victim prior to the murder or of any plan made by the victim to attack either the defendant or the third inmate. This Court affirmed the finding of the CCP aggravator in *Williamson*.

defendant "still would not constitute an excuse, justification, or defense to the homicide." This Court stated that "no one may take the life of another indiscriminately, regardless of what that person may perceive as justification." *Id.* at 245 (quoting *Dougan v. State*, 595 So.2d 1, 6 (Fla.1992)). This Court in *Nelson* affirmed the finding of the CCP aggravator.

But here, the claim of pretense is not based on a claim of self-defense or the defense of others. Rather, the proposed pretense in this case is that the victim may have been a child molester. Craft is asserting that the CCP aggravator may never be found if the victim has perpetrated certain types of particularly reprehensible crimes, such as child molestation. But this Court has never found a pretense of a justification in any prior cases based on the victim's alleged criminal history.

Moreover, Craft's own statements negate this claim of pretense. Craft openly stated during the bench penalty phase that the victim did not attempt to rape him. Craft repeatedly stated he committed the murder because he sought the isolation and privileges of death row

compared to being in general population and threatened to kill again unless given a death sentence. Craft's own statements to the trial court and to the mental health experts rebut his claim to a pretense of a moral or legal justification for the murder.

The postconviction court properly summarily denied the due process claim based on the prosecutor's comments regarding the CCP aggravator.

ISSUE V

Whether the Postconviction Court Properly Summarily Denied the Claim of Cumulative Error Mainly Focused on Trial Court Errors? (Restated)

Craft asserts that the postconviction court improperly summarily denied the claim of cumulative error. IB at 47. But claims of cumulative error regarding trial court errors are not cognizable in postconviction litigation. Claims of cumulative error in postconviction proceedings are limited to collective consideration of postconviction claims. Alternatively, the claim of cumulative error regarding trial court errors is procedurally barred in postconviction litigation because such claims should have been raised in the direct appeal. On the merits, the postconviction court properly found each of the postconviction claims was either "procedurally barred, conclusively refuted by the record, or without merit" and therefore, properly concluded that the claim of cumulative error failed. The postconviction court properly summarily denied the claim of cumulative error.

The postconviction court's ruling

Craft, in the postconviction motion, asserted that he did not receive a "fundamentally fair trial." (IPC at 231). He also argued in the motion that the "series of errors" in the guilt phase and the penalty phase were not harmless error citing the direct appeal cases of *Chapman v. California*, 386 U.S. 18, (1967), and *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986). (IPC at 231).

The postconviction court denied the cumulative error claim. (IPC at 552-553). The postconviction court observed that when the individual errors are "either procedurally barred or without merit, the claim of cumulative error also necessarily fails." (IPC at 552 quoting *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009) and other cases). The postconviction court found each of the postconviction claims was either "procedurally barred, conclusively refuted by the record, or without merit" and therefore, concluded that the claim of cumulative error failed. (IPC at 553).

Not cognizable

A claim of cumulative error that focuses mainly on trial court errors is not cognizable in postconviction proceedings. While claims of cumulative error regarding postconviction claims are properly raised in postconviction proceedings, claims of cumulative error regarding trial errors are not proper in postconviction proceedings. For example, in postconviction, it is proper to raise a claim of cumulative error regarding multiple claims of ineffectiveness of trial counsel under *Strickland*, where the prejudice from multiple errors of counsel are considered cumulatively. *Sparre v. State*, 289 So.3d 839, 847 (Fla. 2019) (explaining that where trial counsel's performance is deficient in more than one area, the reviewing court must consider the impact of these errors cumulatively to determine whether the defendant has established prejudice).[27] It is also proper to raise a

[27] *See also Rogers v. Dzurenda*, 25 F.4th 1171, 1190-91 (9th Cir. 2022) (explaining that when an attorney has made a series of errors, "it is appropriate to consider the cumulative impact of the errors in assessing prejudice" quoting *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998); *United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021) (stating: "we have long held that the prejudice inquiry under *Strickland* can be a cumulative one as to the effect of all of counsel's slipups that satisfy the deficient-performance prong — meaning that

claim of cumulative error regarding multiple *Brady* violations. *Kyles v. Whitley*, 514 U.S. 419, 440-41 (1995) (explaining that the cumulative effect of all suppressed evidence must be considered together citing *United States v. Bagley*, 473 U.S. 667 (1985)). But it is not proper to mix direct appeal claims with postconviction claims in a postconviction cumulative error claim.

Indeed, postconviction counsel is raising a claim of cumulative errors regarding mainly trial court errors in this postconviction appeal. Craft argued below in the postconviction motion for relief based on a "series of errors" in the guilt phase and the penalty phase, despite there being no guilt phase due to the plea. The focus in the

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a defendant need show it more likely than not that the several blunders, even if not prejudicial on their own, prejudiced him when taken together."); *Myers v. Neal*, 975 F.3d 611, 623 (7th Cir. 2020) (explaining that when there was more than one instance of deficient performance, the Sixth Amendment requires that a court approach the prejudice inquiry by focusing on the cumulative effect of trial counsel's shortcomings because *Strickland* itself directs a reviewing court to "consider the totality of the evidence" citing *Strickland*, 466 U.S. at 695); *Wood v. Carpenter*, 907 F.3d 1279, 1302 (10th Cir. 2018) (stating that reviewing courts only need to consider the cumulative prejudicial effect of counsel's alleged errors if they first conclude counsel performed deficiently in numerous ways citing *Ellis v. Raemisch*, 872 F.3d 1064, 1090 (10th Cir. 2017)).

initial brief in this postconviction appeal is on the validity of the guilty plea. Opposing counsel openly admits "all his other remaining claims relate back to that deficit in his knowledge prior to pleading guilty." IB at 48. It is the guilty plea that is the core of the claim of cumulative error. So, this claim of cumulative errors is not cognizable in the postconviction appeal.

Harmlessness in direct appeals

There is another problem with allowing postconviction claims of cumulative error to included direct appeal claims. There is a difference in the test for harmless error in a direct appeal versus in postconviction litigation. The postconviction motion argued that the "series of errors" in the guilt phase and the penalty phase were not harmless error relying on the direct appeal harmless error test cases of *Chapman v. California*, 386 U.S. 18, (1967), and *State v. DiGuilio*, 491 So.2d 1129, 1134-35 (Fla. 1986) (citing *Chapman*). But *Chapman* does not apply in postconviction litigation. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In collateral review, the harmless error standard is

"more favorable and less onerous" to the State than the *Chapman* direct appeal harmless error standard. *Brecht*, 507 U.S. at 637.

Florida, like the federal habeas courts, has higher standards in postconviction proceedings in the interest of finality. *See, e.g.*, *Martin v. State*, 322 So.3d 25, 37 (Fla. 2021) (concluding that the direct appeal standard was "far too lenient for the postconviction context"); *Weaver v. Massachusetts*, 582 U.S. 286, 302-03 (2017) (adopting a higher standard for relief in postconviciton proceedings than the direct appeal standard in the interest of finality). Usually postconviction claims have their own measure of harm already woven into the test, such as the prejudice prong of *Strickland* or the materiality prong of *Brady*. So, the *Chapman* and *DiGuilio* tests do not apply in the postconviction context. These different tests is yet another reason why claims of cumulative direct appeal errors should not be cognizable in postconviction litigation.

Procedural bar

Any cumulative error claim regarding any trial errors is procedurally barred. This type of cumulative error regarding trial errors should have been raised in the direct appeal. *Covington v. State*, 348 So.3d 456, 471 (Fla. 2022) (concluding a claim that qEEG evidence was improperly excluded in the penalty phase was procedurally barred in postconviction litigation because the "claim should have been raised on direct appeal" citing *Dailey v. State*, 283 So.3d 782, 793 (Fla. 2019)). It is not proper to raise trial court errors, including claims of cumulative trial court errors, in postconviction litigation. This type of claim of cumulative error is procedurally barred.

Merits

This Court reviews the cumulative effect of all the direct appal errors, if a claim of cumulative error is raised. This Court has explained that, even though each of the errors, standing alone, could be considered harmless, the cumulative effect of the errors may

amount to the denial of a fair and impartial trial. *Smith v. State*, 320 So.3d 20, 33 (Fla. 2021) (citing *McDuffie v. State*, 970 So.2d 312, 328 (Fla. 2007)); *Cruz v. State*, 320 So.3d 695, 717 (Fla. 2021). But relief is not warranted unless there is a "reasonable probability" that the cumulative effect of the errors affected the defendant's right to a fair trial or to a fair penalty phase. *Smith*, 320 So.3d at 33; *Cruz*, 320 So.3d at 717. But where this Court finds no error occurred, "no cumulative error can exist." *Smith*, 320 So.3d at 33.

There is no error in any of these postconviction claims, so there can be no cumulative error. Zero plus zero equals zero and five zeros added together still equal zero. Here, as postconviction court properly concluded, because all of these claims were "without merit," the claim of cumulative postconviction error necessarily fails. The postconviction court properly summarily denied the claim of cumulative error.

Accordingly, this Court should affirm the summary denial of the postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the summary denial of the initial postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to has been furnished via the e-portal to **ALICE B. COPEK**, Assistant CCRC-North, 1004 DeSoto Park, Tallahassee, FL 32301; phone: (850) 487-0922 ext 129; email: Alice. copek@ccrc-north.org this 9th day of May, 2024.

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